

---

# SERBIA AS A SAFE THIRD COUNTRY: A WRONG PRESUMPTION

---

Report based on the Hungarian Helsinki  
Committee's field mission to Serbia (8-10  
June 2011)

September 2011

---

Written by: Anikó Bakonyi, Júlia Iván,  
Gruša Matevžič and Tudor Roșu

[www.helsinki.hu](http://www.helsinki.hu)

---



Hungarian Helsinki Committee

## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY</b> .....	1
<b>I. INTRODUCTION</b> .....	3
<b>II. METHODOLOGY</b> .....	4
<b>III. FINDINGS OF THE MISSION</b> .....	5
III.1 Statistics.....	5
III.2 Capacity of the Asylum Office.....	5
III.3 The decision making procedure .....	6
III.4 Assistance and reception conditions.....	8
III.5. Integration prospects.....	11
<b>IV. MAIN CONCERNS</b> .....	12
IV.1. Limited access to protection.....	12
IV.2. Dangers of chain refoulement.....	13
IV.3. The destitution of asylum seekers.....	14
<b>V. AN ANALYSIS OF THE <i>M.S.S.</i> CASE IN LIGHT OF THE RETURNS TO SERBIA</b> .....	15
<b>VI. CONCLUSIONS</b> .....	18
<b>ANNEX 1 – LIST OF SAFE THIRD COUNTRIES AND SAFE COUNTRIES OF ORIGIN</b> .....	19
<b>ANNEX 2 – UNHCR POSITION PAPER ON SERBIA</b> .....	20

## EXECUTIVE SUMMARY

### Background

The writing of this report was triggered by a significant increase in the number of asylum seekers returned by the Hungarian authorities to Serbia in 2011. Hungary modified its Asylum Act in December 2010 and introduced the concept of a safe third country among the criteria examined in the admissibility procedure. The result of this amendment is that asylum seekers arriving in Hungary through Serbia can be returned to Serbia without an in-merit examination of their claim. As the application of this concept concerns a significant number of asylum seekers in Hungary, the Hungarian Helsinki Committee (HHC) decided to **examine whether the utilisation of the safe third country concept in relation to Serbia is justified.**

The report was compiled by using **various sources**: internet research, a three-day field mission to the Republic of Serbia, participation in a conference in Belgrade and discussions with governmental, non-governmental and international stakeholders.

### Findings

**There is limited access to protection in Serbia.**

#### Access to a fair and efficient procedure

- In 2010, 522 persons expressed their intention to seek asylum and among them **only 215 managed to submit a written application form** later (a condition for the initiation of the actual asylum procedure). Between January and June 2011, the number of people expressing their intention to seek asylum **grew to 1413.**
- Only at the Belgrade airport **1500 persons were denied entry** in 2009-2010, with **not a single asylum application registered** (based on Hungary's and other European countries' experience it is presumed that a number of persons in need of international protection arrive in an irregular manner at international airports).
- Despite the growing number of asylum seekers in Serbia, the **capacity of the Asylum Office did not increase.** The two-stage administrative decision making procedure is heavily **understaffed**: hundreds of asylum claims (see above) are dealt with by **only two administrative officers** at the first instance.
- There is **no state-funded free legal aid and interpretation available**, although these services would be indispensable to conduct an efficient and fair asylum procedure. The whole procedure relies heavily on the support of the UNHCR which covers the costs of legal assistance and interpretation.

#### Access to protection

- Despite the fact that asylum seekers come mainly from countries affected by war or widespread violence (e.g. Afghanistan, Iraq) **Serbia has not yet granted refugee status to anyone**, and only **four persons** enjoy a **complementary form of protection.**
- There are **no avenues for integration** for persons granted protection. No "integration houses" or other suitable accommodation possibilities exist, nor does the state budget allocate any means for integration. The Serbian government has not developed an integration mechanism so far.

**Asylum seekers returned to Serbia face a real danger of chain *refoulement*.**

- When Hungary (or any other country) sends an asylum seeker back to Serbia, without having his claim examined on the merits, there is a risk of chain *refoulement*, in the following two cases:
  - the asylum seeker comes from a country of origin or a third country that Serbia considers as safe; and/or
  - the asylum seeker asked for asylum in another country before entering Serbia.
- Serbia has a **list of safe third countries** that encompasses **all neighbouring states**, as well as **Greece and Turkey**, thus asylum seekers entering Serbia from any of these countries are to be **automatically returned** there without having their claim ever examined on the merits. In light of the grave deficiencies of some of the neighbouring countries' asylum systems (reference could be made for example to the 2011 *M.S.S.* judgment of the European Court of Human Rights), this practice gives rise to a serious risk of chain *refoulement*.
- Based on a provision of the Serbian Asylum Act, if an asylum seeker **has already asked for asylum in any other state party to the 1951 Refugee Convention**, his/her asylum claim will be **automatically rejected** in Serbia.
- Serbia's list **safe countries of origin** also includes states with **questionable human rights records** (e.g. Belarus, Russia, Turkey or Tunisia), the nationals of which are frequently recognised as refugees in European countries.

## Asylum seekers face destitution in Serbia.

- The **available assistance and reception conditions** do not meet the needs of asylum seekers. The existing reception facilities can only cater for **maximum 200 asylum seekers** and the rest are **left at their own devices** when it comes to finding shelter.
- **Legal and medical assistance** are only provided for those placed in the reception centres and only through the support of the UNHCR.
- The situation of **unaccompanied minors** is especially worrisome. In principle, they should be given priority when it comes to accommodation, but the lack of places and the inadequate procedure often prevent their access to shelter.

## Conclusions

**Based on the above findings Serbia cannot be regarded a safe third country for asylum seekers, and Hungarian asylum authorities wrongly consider it as such.**

The information gathered by the Hungarian Helsinki Committee from a variety of reliable sources demonstrate that the current Serbian asylum system is not sufficiently functional and is neither able to ensure the proper determination of international protection needs for an increasing number of asylum seekers, nor does it provide effective protection for those qualifying for refugee status. In light of this, **Hungarian asylum authorities wrongly consider Serbia as a safe third country in their daily practice and wrongly exclude asylum seekers arriving in Hungary through Serbia from an in-merit determination of their protection needs.**

**Hungary's practice of applying the safe third country concept for Serbia is in breach of the European Convention on Human Rights, namely of Article 3 by exposing asylum seekers to the risk of torture, inhuman or degrading treatment or punishment (through *refoulement*) and of Article 13 by failing to provide effective remedy.**

In light of the above findings, the potential violation of Hungary's international obligations under the European Convention on Human Rights (ECHR) should also be examined, in particular with regard to the 2011 ***M.S.S. v. Belgium and Greece judgment*** of the European Court of Human Rights. This judgment has consequences beyond the so-called "Dublin system" of the European Union and its conclusions have to be observed in cases of returning asylum seekers to presumably safe non-EU countries as well. The test under the ECHR regarding "safe third countries" is the following: Is there a real risk of exposure to ill-treatment, either in the state of proposed destination or through chain *refoulement*? If there is an arguable violation, is there an effective remedy?<sup>1</sup>

Practice shows that when establishing that Serbia is a safe third country for asylum seekers, Hungary does not go beyond the examination of the mere existence of Serbia's international obligations and legislative provisions and Hungarian authorities systematically **fail to check the actual practice** in that country. By disregarding Serbia's list of safe third countries and failing to examine the availability of an effective protection mechanism in Serbia, Hungary is in breach of **Article 3** of the ECHR by exposing asylum seekers to the **risk of *refoulement*** from Serbia to other unsafe countries.

The European Court of Human Rights also established in its jurisprudence that there must be an **effective remedy** against an expulsion order. Although in Hungary the request for judicial review against the rejection of an asylum claim on the safe third country ground has a suspensive effect, still it has several problematic aspects. In the HHC's view, the judicial review as performed by the Csongrád County Court is in breach of **Article 13** of the ECHR for following reasons:

- It does not examine the practice of the Serbian asylum authorities and it fails to verify whether asylum seekers returned to Serbia would actually have access to a fair and efficient asylum procedure;
- It systematically disregards the UNHCR's position on this matter, as well as other supportive evidence (such as country information); and
- It has so far automatically approved all related decisions brought by the Hungarian Office of Immigration and Nationality.

<sup>1</sup> Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights*, Council of Europe publishing editions, Strasbourg Cedex, 2010, p. 75

## I. INTRODUCTION

The writing of this report was triggered by a significant increase in the number of asylum seekers returned to Serbia in 2011. Returns from Hungary to Serbia increased due to the modifications introduced to the Hungarian asylum legislation on 24 December 2010. The amended Asylum Act in Section 51 (2) introduced the concept of a safe third country among the criteria examined in the admissibility procedure:

(2) An application is not admissible if

e) there exists a country in connection with the applicant which qualifies as a safe third country from asylum seeker's point of view.

Therefore, if an asylum seeker reached Hungary by travelling through Serbia then his/her claim can be rejected in the admissibility procedure, without being referred to the in-merit procedure, and the applicant can be returned to Serbia, as Serbia is regarded a safe third country by the Hungarian authorities.

According to the Hungarian Asylum Act<sup>2</sup> a safe third country is "any country in connection to which the refugee authority has ascertained that the applicant is treated in line with the following principles:

ia) his/her life and liberty are not jeopardised for racial or religious reasons or on account of his/her ethnicity/nationality, membership of a social group or political conviction and the applicant is not exposed to the risk of serious harm;

ib) the principle of *non-refoulement* is observed in accordance with the Geneva Convention;

ic) the rule of international law, according to which the applicant may not be expelled to the territory of a country where s/he would be exposed to death penalty, torture, cruel, inhuman or degrading treatment or punishment, is recognised and applied, and

id) the option to apply for recognition as a refugee is ensured, and in the event of recognition as a refugee, protection in conformance of the Geneva Convention is guaranteed."

As the application of this concept concerns a significant number of asylum seekers in Hungary, the Hungarian Helsinki Committee (HHC) decided to examine whether the application of the safe third country concept in the case of Serbia is justified.

### The safe third country concept

In the EU, member states do not have to examine the merits of a claim for protection "where it can be reasonably assumed that another country would do the examination or provide sufficient protection".<sup>3</sup> The safe third country exception applies in case of a "connection between the person seeking asylum and the third country concerned based on which it would be reasonable for that person to go to that country."<sup>4</sup>

Safe third country procedures may create a risk of chain *refoulement*, and do not absolve a state of its duties under Article 3 of the European Convention on Human Rights (ECHR).<sup>5</sup> In light of the potential irreversible harm that may result (directly or indirectly) from returning an applicant to a third country, the question of whether a country can be considered safe for a particular applicant must be the subject of "rigorous scrutiny" and must be dealt with in a substantive determination procedure.<sup>6</sup> A rigorous scrutiny implies a "meaningful assessment of the applicant's claim".<sup>7</sup>

Effective protection from *refoulement* implies that the country will not expel an applicant to a third country unless it has established that the merits of his/her claim for protection will be examined in the third country.<sup>8</sup>

While applying the safe third country notion in practice, as recommended by the UNHCR, state authorities should meet the following conditions:<sup>9</sup>

- States should not apply the "safe third country" concept unilaterally;

<sup>2</sup> Article 2 (i) of Act LXXX of 2007 on Asylum

<sup>3</sup> Preamble recital 22 of Council Directive 2005/85/EC, on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, *Official Journal* L 326, 13/12/2005 (hereinafter Procedures Directive)

<sup>4</sup> Article 27 (2) (a) of Procedures Directive

<sup>5</sup> ECtHR, *T.I. v. U.K.*, Application No. 43844/98, Admissibility Decision of 7 March 2000 and *Abdolkhani and Karimnia v. Turkey*, § 88

<sup>6</sup> ECtHR, *Chahal v. UK*, Application No. 70/1995/576/662, 11 November 1996, § 96

<sup>7</sup> ECtHR, *Jabari v. Turkey*, Application No. 40035/98, 11 July 2000, §§ 39-40

<sup>8</sup> H. Battjes, *European Asylum Law and International Law*, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 400

<sup>9</sup> UN High Commissioner for Refugees, *Considerations on the "Safe Third Country" Concept*, July 1996, p 3, <http://www.unhcr.org/refworld/docid/3ae6b3268.html>

- Formal agreements among states could enhance the international protection of refugees by providing that the readmitted/removed asylum seeker would have effective access to the refugee status determination procedure (RSDP) in the receiving safe third country, which would be obliged to examine the asylum claims;
- In the absence of such formal agreements, states should only apply the safe third country concept if they have received, on a bilateral and individual basis, the explicit or implicit consent of the third State to take back the asylum-seeker and to grant him/her access to a fair asylum procedure, so as to ensure that the application will be examined on its merits; and
- When applying the safe third country notion states should consider any links that the asylum seeker has with the countries concerned, especially taking into account family links and cultural attachment.

Furthermore, "if it is known (or could reasonably become known) that the status determination procedure or understanding of the Convention refugee definition in the 'country of first arrival' or other designated state is deficient – in consequence of which there is a real chance of eventual *refoulement* – it follows that sending a refugee to that country is a breach of the duty to avoid the *refoulement* of a refugee 'in any manner whatsoever'. This duty cannot be avoided simply by asserting the existence of a responsibility-sharing agreement or the fact that the destination state is itself bound to honour duties under the Refugee Convention, as was made clear by the European Court of Human Rights (...)." <sup>10</sup>

In its position paper on the notion of the "safe third country" the European Council on Refugees and Exiles (ECRE) also emphasises the need for strict criteria for the designation of third countries as safe. These criteria should, at least, include: (1) ratification and implementation – without geographic limitation – of the Refugee Convention and other human rights treaties such as the Convention Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); (2) a *fair, efficient, and accessible asylum procedure*; (3) agreement to readmit the applicant and assess the claim; and (4) *willingness and ability to provide protection* for as long as the person remains a refugee.<sup>11</sup> The latter two conditions require a practical examination of the asylum system in place in the safe third country.

## II. METHODOLOGY

The current report was drafted in the framework of the Hungarian Helsinki Committee's "Border Monitoring project", funded by the UNHCR Regional Representation for Central Europe.<sup>12</sup> The information included in the report was collected and compiled by the Hungarian Helsinki Committee. The research process included the following steps:

- Internet research of publicly available relevant reports and materials on the Serbian asylum system;
- A three-day field mission (8-10 June 2011) in the Republic of Serbia, by a team of five staff members of the Hungarian Helsinki Committee. The locations visited were Belgrade and Banja Koviljača;
- Participation in the "Challenges to forced migration in Serbia" conference, held on 9 June 2011, in Belgrade (organised by Group 484 – a Serbian human rights NGO);<sup>13</sup> and
- Discussions with representatives of the UNHCR office in Belgrade, local NGOs (Group 484, Asylum Protection Centre,<sup>14</sup> Danish Refugee Council<sup>15</sup>), Miljan Vučković – head of the Serbian Asylum Office, Robert Lesmajster – manager of the asylum centre in Banja Koviljača.

An official request for information was sent to the Serbian Asylum Office, following the instructions given by the head of the unit, but it has remained unanswered by the time of publication of this report.

The research process also included a review of press articles dealing with the Serbian asylum system.

<sup>10</sup> J. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2005, p. 326

<sup>11</sup> ECRE, *Information Note Asylum Procedures Directive*, available at: <http://www.ecre.org/topics/areas-of-work/protection-in-europe/118.html>

<sup>12</sup> For more information on the project please see: [http://helsinki.hu/Menekultek\\_es\\_kulfoldiek/Projekttek/htmls/387](http://helsinki.hu/Menekultek_es_kulfoldiek/Projekttek/htmls/387)

<sup>13</sup> <http://www.grupa484.org.rs/index.php?lang=english>

<sup>14</sup> <http://www.apc-cza.org/en.html>

<sup>15</sup> <http://www.drc.dk/relief-work/where-we-work/eastern-europe/serbia/>

### III. FINDINGS OF THE MISSION

#### III.1 Statistics

Year	Number of asylum seekers that expressed the intention to seek asylum in Serbia <sup>16</sup>
2008	77
2009	275
2010	522
2011 (January-July)	1413

Detailed statistics for 2010:<sup>17</sup>

Expressed intentions to seek asylum	Submitted asylum applications	Interviews carried out by the Asylum Office	Decisions issued	Appeals lodged at the Asylum Commission	Decisions of the Asylum Commission
522	215	58	28 (all negative)	32	27 <ul style="list-style-type: none"><li>• 5 negative</li><li>• 21 first instance decisions quashed</li><li>• 1 subsidiary protection status granted</li></ul>

Government reports show that 1500 persons were denied entrance at the Belgrade airport (in 2009 and 2010),<sup>18</sup> yet none of them managed to submit an asylum claim.

#### III.2 Capacity of the Asylum Office

The Serbian Asylum Act<sup>19</sup> was adopted on 26 November 2007 and came into force on 1 April 2008. It appoints the Asylum Office<sup>20</sup> as the first-instance body deciding upon asylum applications lodged in the Republic of Serbia. The tasks of the Asylum Office are to register asylum seekers<sup>21</sup> upon their arrival in the asylum centres and to conduct the asylum procedure – this authority has not been formally established by the time of writing this report. Instead of a responsible (and independent) administrative body for asylum procedures, there is only a unit within the Department for Foreigners of the Border Police Directorate in the Ministry of the Interior (MoI) that deals with asylum cases (however, for the ease of reference this report will refer to this unit as the Asylum Office). Case workers at the Asylum Office are border police officers employed by the MoI.

According to the existing job classification, the Asylum Office is assigned to function with 11 staff members.<sup>22</sup> This number has been criticised by the UNHCR and the European Commission<sup>23</sup> who stated that the Asylum Office is understaffed to deal with the rising number of asylum claims lodged in the Republic of Serbia in recent years. According to a recent restructuring plan the Asylum Office would be separated from the Department of Foreigners and will function as a separate, independent unit. The plan also includes increasing the number of staff to 16.

<sup>16</sup> Statistics provided by the UNHCR.

<sup>17</sup> *Challenges of Forced Migration in Serbia*, Group 484, June 2011, pp. 109, 122-123

<http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf>

<sup>18</sup> Statistics provided by UNHCR.

<sup>19</sup> Law on Asylum, 26 November 2007, <http://www.unhcr.org/refworld/docid/47b46e2f9.html>

<sup>20</sup> Not yet established, currently working as an improvised unit within the Department for Foreigners of the Border Police Directorate, within the Ministry of Interior of the Republic of Serbia.

<sup>21</sup> Article 24 of the Asylum Act

<sup>22</sup> Report and conclusions from the conference "Challenges of Forced Migration in Serbia"

[http://www.grupa484.org.rs/index.php?option=com\\_content&task=view&id=483&Itemid=1](http://www.grupa484.org.rs/index.php?option=com_content&task=view&id=483&Itemid=1)

<sup>23</sup> European Commission, *Serbia 2010 Progress Report*, 9 November 2010, p. 51

[http://www.seio.gov.rs/upload/documents/Izvestaji/serbia\\_2010\\_progress\\_report.pdf](http://www.seio.gov.rs/upload/documents/Izvestaji/serbia_2010_progress_report.pdf)

There is contradicting information regarding the actual number of employees that presently work in the Asylum Office. While the current structure foresees 11 staff members, only 7 positions have been filled. Out of these 7 officers only 2 are currently carrying out refugee status determination according to UNHCR Serbia.

In most cases the registration of and interviews with the asylum seekers are conducted at the asylum centres in Banja Koviljača and Bogovađa.<sup>24</sup> It has been reported that so far the administrative deadline of two months for issuing a decision has been kept in practice. However, as the number of asylum claims in Serbia is on the rise and, if the capacity of the administrative body does not change accordingly, there is a real danger that a backlog of cases will start building.<sup>25</sup>

### **III.3 The decision making procedure**

Before the new Asylum Act entered into force, it was only the UNHCR that dealt with asylum cases in Serbia. The new Asylum Act of 2007 regulates procedural provisions that enable Serbian authorities to carry out asylum procedures.

The refugee status determination procedure is a two-instance administrative procedure, where the first instance proceedings consist of four stages:

- 1) entering the asylum seeker's intention to seek asylum into the records (in the presence of a Serbian police/border police officer);
- 2) registration (fingerprinting, issuing an ID card for asylum seekers);
- 3) interview; and
- 4) decision making.



#### **First instance administrative procedure**

The expression of the intention to seek asylum in Serbia is clearly differentiated from later phases of the proceedings, such as the registration of the asylum claim within 72 hours after the first expression of the need for international protection before Serbian authorities (which is most probably the Police or the Border Police). The above division of the procedure is also obvious from the statistics, 522 persons intended to seek asylum and 326 ID cards were issued for asylum seekers in the phase of registering the applications, whereas actually 215 persons submitted the asylum application.<sup>26</sup>

Persons who wish to lodge an asylum claim in Serbia have to do it in 72 hours after having expressed the wish to seek asylum. The asylum claim is usually officially registered in the reception centre and therefore the asylum seekers have to arrive there in time.

Since the capacity of the Asylum Office has not increased since 2008 the constantly growing number of asylum applications lodged in Serbia seriously challenges the present system. As Mr. Miljan Vučković explained to the HHC mission, staff members of the Asylum Office are in a difficult situation, they are underpaid and their work is rather demanding, consequently, the turnover rate within the Asylum Office is quite high.<sup>27</sup> The report entitled "Challenges of Forced Migration in Serbia" corresponds to the statements of Mr. Vučković, namely that one of the most important obstacle of the effective/professional functioning of the Serbian asylum system is the lack of human resources.<sup>28</sup>

The UNHCR organised a number of specialised training for the original staff recruited for the Asylum Office. However the caseworkers recruited afterwards have not received any training. The lack of both human and financial resources affect the quality of decision making of the Asylum Office, e.g. the staff cannot rely on a separate and trained COI unit

<sup>24</sup> The new reception centre in Bogovađa opened in July 2010, after the field mission of the Hungarian Helsinki Committee took place.

<sup>25</sup> Interview with Radoš Đurović, the executive director of the Asylum Protection Centre, in Banja Koviljača, 10 June 2011

<sup>26</sup> *Challenges of Forced Migration in Serbia*, Group 484, June 2011, p. 124, <http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf>

<sup>27</sup> Discussions with Mr. Miljan Vučković, head of the Asylum Office within the MoI, during the conference "Challenges of Forced Migration in Serbia" held on 9 June 2011 in Belgrade

<sup>28</sup> *Challenges of Forced Migration in Serbia*, Group 484, June 2011, p. 102, <http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf>



and they have to carry out their research on their own, which may lead to shortcomings in COI research and deteriorate the quality of the decisions the Asylum Office issues. Since 2009, UNHCR funds a position within the Asylum Protection Centre of a lawyer primarily engaged in COI provision for 16 countries. These reports as well as UNHCR's position papers are regularly shared with the Asylum Office. However, according to the UNHCR Serbia, the issue is rather that the Asylum Office caseworkers prefer to use COI from certain sources designated by their management.

Additionally, as it was admitted by the Minister of Interior, Mr Ivica Dačić, it is only the UNHCR that provides funding for free legal aid (by contracting the Asylum Protection Centre) and interpretation. The Serbian government itself would not be able to cover these costs, which are all indispensable to conduct an efficient, professional and fair asylum procedure. UNHCR also provides funding for basic psycho-social and medical assistance for asylum seekers.<sup>29</sup>

## Second instance administrative procedure and appeal

The second phase of the administrative procedure takes place before the Asylum Commission (which is the second instance administrative body), an independent governmental body comprised of 9 members with a four-year term in office. The deadline to challenge the first instance decision is 15 days. The Asylum Commission does not currently have its own facilities. It uses the facilities of the Border Police Department (BDP) of the MoI, as well as the staff of the BPD for administrative tasks. According to the statistics shared by the UNHCR Office in Serbia, out of the 27 negative decisions issued by the Asylum Office in 2010, 21 were annulled by the Asylum Commission and only one appeal was rejected.<sup>30</sup> The Asylum Commission makes its decisions by a majority vote of its members. The members of the Asylum Commission are police officers or other government agents, but are not experts in asylum law.<sup>31</sup> There has been no refugee law training offered for the members of the Asylum Commission so far.

According to the official answers of the Serbian government to the questionnaire of the European Union from January 2011,<sup>32</sup> the decision of the Asylum Commission can be challenged before the Administrative Court as set out in the Act on Administrative Disputes.<sup>33</sup> The executive director of the Asylum Protection Centre (APC), Radoš Đurović, confirmed that the law allows administrative litigation in asylum cases since December 2010. However, he informed the HHC that administrative judges mostly rely on purely procedural provisions/norms when revising a first instance decision, despite the fact that the Administrative Court is entitled to examine the merits of the case as well. If the asylum seeker decides to challenge the administrative decision he/she has to explicitly request a personal hearing from the Administrative Court, otherwise no hearing is held.

The Administrative Court has recently issued its first judgement ruling on the merits of the challenged decision.<sup>34</sup> The case concerns an Uzbek national who came to Serbia through Russia and asked for asylum. The Asylum authority considered Russia as safe third country and rejected his asylum claim on this ground (Article 33 (6) of the Asylum Act). The UNHCR also intervened in this case. The court dismissed the complaint as unfounded and confirmed the decision reached by the Asylum Commission as lawful. The Court refused to hold an oral hearing, although it has been demanded by the applicant, noting that it was unnecessary for the subject matter. The Court confirmed that the safe third country concept, based on the list of safe third countries given by the Government, should be applied literally *without* examining whether the country from the list is really a safe third country for the person in a specific case. The Court ignored evidence of international organizations, governments, NGOs, and the media, which in this case, according to the Court, are only indicators of human rights and the conditions in these countries and therefore are not relevant for consideration. The Court emphasized the need of the party to adduce concrete evidence that specifically refer to the persecution of the concrete asylum seeker in his country of origin and safe third country in manner to establish a direct relationship between the person and the persecution.

According to Mr. Đurović, the Court confirmed the application of the safe third country concept in its "literal" sense, denying the right to asylum, disregarding the principle of *non-refoulement* and neglecting in this way the concept of a sovereign state and its obligation to decide on the claim submitted on its territory without relying on speculations and actions of third countries.

<sup>29</sup> Srbija se bori sa prilivom azilanata, 7 July 2011, Zoran Glavonjić, Radio Slobonda Europa, [http://www.slobodnaevropa.org/content/srbija\\_azil/24257602.html](http://www.slobodnaevropa.org/content/srbija_azil/24257602.html)

<sup>30</sup> UNHCR Office in Serbia, *Challenges of Forced Migration in Serbia*, Group 484, June 2011, p 109, <http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf>

<sup>31</sup> Decision on appointing chairman and members of the Asylum Commission, 17 April 2008, Official Gazette of the Republic of Serbia 24 No 119-643/2008, <http://www.apc-cza.org/en/rs-asylum-commission.html>

<sup>32</sup> Chapter 24 on Justice, freedom and security, p. 43, <http://www.seio.gov.rs/documents/national-documents.222.html>

<sup>33</sup> Official Gazette RS, No. 111/2009

<sup>34</sup> Administrative Court, 8 Y 3815/11, 7 July 2011

## Recognition rates

In 2010, out of 27 decisions made by the Asylum Office, none of the asylum seekers were recognised as refugees and only one person was granted subsidiary protection upon appeal to the Asylum Commission. 81% of the first instance decisions were quashed by the Asylum Commission. Group 484 concluded in its report "the reasons for initiating a new decision-making process include the shortcomings in both the procedures and the determination of the essential facts for bringing decisions, and those related to the explanation of the statement expressed in the court decisions."<sup>35</sup>

As for the recognition rates in 2011, the Serbian Minister of Interior, Mr. Ivica Dačić, stated on 7 July 2011 that "Serbia is now faced with an increasing number of asylum requests and said that 1413 people have expressed their intention to seek asylum since early 2011, 122 of whom submitted the necessary papers, but were all rejected. Mr. Dačić stated that asylum seekers mostly come from Afghanistan, Iraq, Pakistan and different African states."<sup>36</sup>

In 2008, altogether 77 persons were registered as asylum seekers in Serbia. None of them were granted international protection in 2008. The number of asylum applications rose to 275 in 2009. 4 persons were granted subsidiary protection in 2009; one Iraqi and three Ethiopian asylum seekers who lodged their applications in 2008.<sup>37</sup> In 2010, the number of asylum seekers increased to 522. The numbers for the first half of 2011 have already tripled the 2010 rates (See Chapter III.1).

Despite the increasing number of asylum seekers from third countries that have been (constantly) affected by war or widespread violence in recent years, the recognition rate of asylum seekers as refugees remained zero. Altogether, in more than three years, only 5 asylum seekers were granted subsidiary protection out of the 2287 applications lodged. The director of the Border Police, Nenad Banović, stated for the Radio Slobodna Europa that not even one refugee status was granted in 2011, and all these cases were rejected because asylum seekers did not present valid reasons for protection or were not found credible.<sup>38</sup>

Even without examining the individual cases, it may be concluded that as the recognition rates are extremely and unjustifiably low in Serbia (0% recognition as refugee in several years) effective protection for refugees remains illusory.

## III.4 Assistance and reception conditions

### Reception conditions at the Reception Centre in Banja Koviljača

Banja Koviljača is a small town situated in the Loznica municipality, located on the western border of Serbia, 137 kilometres from Belgrade. The population of the town is 6340 people (2002 census).<sup>39</sup> The Reception Centre is not easy to find as there are no signposts directing travellers. At the time of the HHC's visit, this was the only reception centre in the Republic of Serbia. The Centre is operated by the Serbian Commissariat for Refugees<sup>40</sup> and has the capacity to provide accommodation for 82 people.



The Centre was originally operated by the UNHCR and when the Commissariat took over its operation in 2008 it had only 37 inhabitants. Currently, the Centre's capacity is fully used and the funds for its operation are scarce.<sup>41</sup> The building has three floors. The first floor has two wings: one with bedrooms and another one with a dining room and a nicely decorated creative room for children. There is also a room for the interviews and the offices of the staff of the Centre. These common facilities look tidy and friendly with the exception of a warning sign on the door of the dining room, according to which stealing a fruit will lead to arrest and may result in deportation.

<sup>35</sup> *Challenges of Forced Migration in Serbia*, Group 484, June 2011, p. 109,

<http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf>

<sup>36</sup> The number of false asylum seekers from Serbia in the EU has significantly reduced, Michael Roberts, 07 July 2011, Balkans.com, <http://www.balkans.com/open-news.php?uniquenumber=111282>

<sup>37</sup> Chapter 24 on Justice, freedom and security, p. 52, <http://www.seio.gov.rs/documents/national-documents.222.html>

<sup>38</sup> Srbija se bori sa prlivom azilanata, 7 July 2011, Zoran Glavonjić, Radio Slobodna Europa, [http://www.slobodnaevropa.org/content/srbija\\_azil/24257602.html](http://www.slobodnaevropa.org/content/srbija_azil/24257602.html)

<sup>39</sup> Wikipedia - [http://en.wikipedia.org/wiki/Banja\\_Kovilja%C4%8Da](http://en.wikipedia.org/wiki/Banja_Kovilja%C4%8Da)

<sup>40</sup> The Commissariat for refugees is a special institution established by the Law on Refugees in 1992, <http://www.kirs.gov.rs/articles/onama.php?lang=ENG>

<sup>41</sup> Source: Vladimir Cucić, Commissioner for Refugees of the Republic of Serbia, Conference on the "Challenges of Forced Migration in Serbia" held on 9 June 2011 in Belgrade

Asylum seekers are accommodated in double and triple rooms on the first, second and third floor. As the manager of the Centre, Robert Lesmajster<sup>42</sup> told the delegation they try to allocate people by nationality in order to avoid conflicts. At the time of the HHC's visit the first floor was inhabited by people who spoke Slavic languages and Arabic. Afghans were placed on the second floor, while families were accommodated on the third floor. Families come mainly from Iraq and Afghanistan. In case of larger families, there is a possibility to connect adjacent rooms and create a contiguous space. Rooms are not equipped with a bathroom but on both wings of the corridor there is one bathroom with several showers and toilets. While the rooms visited looked decent, the bathroom on the first floor was in an unacceptable condition. Shower heads were missing and the general cleanliness of the whole bathroom raised serious concerns. There was a sizable pile of human faeces on the floor which had been disinfected by the manager of the Centre but had not been removed.



The Reception Centre has a small garden and there is also an unfinished construction. They were planning to build an extension to the Centre but due to the lack of funds it is not yet finished. Originally, the plan was to have a new wing that could be joined to the existing ones, but later they decided to erect only a wooden structure for people who have not gone through the initial medical screening. Currently, the fate of the building is not clear. The operation of the Centre is financed by the Serbian government and funds are scarce.<sup>43</sup>

### Lack of capacity

Those asylum-seekers who manage to get to Banja Koviljača within the prescribed 72-hour period will find an open reception centre with an average six-week waiting time to have a place allocated there. The Centre receives 19 new registrations every day. Every morning at 9 am people are queuing in front of the Centre holding their papers of intention to seek asylum, and wait for acceptance. The manager of the Centre registers them and, if there are open places, takes the first one from the waiting-list. At the time of the HHC's visit, 87 people were accommodated in the Centre and 140 were staying in private accommodation on their own cost.

A total of 979 asylum-seekers arrived in Serbia between January and June 2011 according to UNHCR Belgrade. There is indeed a rising trend and 2010-2011 figures indicate a striking difference between the available reception capacities and the number of asylum-seekers to be accommodated. Several inhabitants of the Centre have been to Hungary and are among those who have been returned to Serbia as a result of the readmission agreement between Hungary and the Republic of Serbia. According to the UNHCR's view this may not be the best moment to implement the readmission agreement with Hungary as there are no facilities and no efficient asylum system currently in Serbia.<sup>44</sup>

Asylum seekers are left to their own devices in finding shelter, food and their way through the Serbian system. Apart from registering them on a waiting list, nothing else is provided for them. They sleep in the streets, or if they have some money can rent rooms in the town. Not everybody can afford that, though. The executive director of Group 484 warns: "In the case of a massive influx of asylum seekers, the lack of capacity and current conditions would not satisfy their needs."<sup>45</sup>

Although, according to Serbian law<sup>46</sup> asylum seekers are entitled to receive social assistance if they are living in private accommodation, in practice it is tied to registering the private address at the police and waiting for an ID card containing that address. Asylum seekers cannot satisfy these conditions for various reasons. "From 2008, only two asylum-seekers were granted this form of social assistance, largely based on the particular circumstances in their cases. To conclude, in theory, monthly assistance allowance is a possibility, in reality it is not." – Dušan Aralica, associate protection officer of UNHCR Belgrade told the HHC delegation.

Following the HHC's visit, a new centre opened in Bogovađa with a capacity of receiving 120 people (on 20 June 2011). However, the opening of Bogovađa Centre will not solve the problem of accommodating asylum seekers. The

<sup>42</sup> Interview on 10 June 2011

<sup>43</sup> The functioning of the Centre in Banja Koviljača costs the Serbian Government around 20 000 000 Dinars per year and the operation of the new Centre in Bogovađa costs around 200 000 Dinars per day, source: Azilanti jedu budžet, 4 July 2011, V. Mijatović, B 92, [http://www.b92.net/info/vesti/pregled\\_stampe.php?yyyy=2011&mm=07&dd=04&nav\\_id=523062](http://www.b92.net/info/vesti/pregled_stampe.php?yyyy=2011&mm=07&dd=04&nav_id=523062)

<sup>44</sup> UNHCR Belgrade at the Conference on the "Challenges of Forced Migration in Serbia" held on 9 June 2011 in Belgrade

<sup>45</sup> Vladimir Petronijević, Executive Director of Group 484, meeting at the office of the Group 484, 8 June 2011

<sup>46</sup> Law on Asylum, Article 41 (2), Regulation on providing social assistance to asylum seekers

increased capacity will only provide shelter for a fraction of asylum seekers and the fate of hundreds of others will remain unchanged. Statistics show that the number of asylum seekers tripled in 2011: between January and July 1431 asylum seekers arrived in Serbia. The capacity of the two asylum centres in Serbia is 200 persons total, which is clearly insufficient.

Mr. Dačić stated: "The influx of asylum seekers is certainly a financial burden for our country. The UNHCR helped us a lot, we have opened the centres for asylum together. But the total funding for all these questions is likely to need donations, whether from domestic entities or international organisations."<sup>47</sup>

### Legal and medical assistance

The Asylum Protection Centre (APC), an implementing partner of the UNHCR, provides legal assistance, representation and psychological assistance to the asylum seekers in Banja Koviljača. They visit the Centre four times a week. The director of the APC informed the HHC that they will extend their services also to the asylum centre in Bogovađa, once it opens.<sup>48</sup> Their programme is funded by the UNHCR.

Asylum seekers can receive medical assistance in the Banja Koviljača health clinic. In case they need to see a specialist, the general doctor will refer them to the Loznica hospital. The manager of the Asylum Centre takes care of the organisation of the transport to Loznica. The UNHCR pays for the medicines and the arrangement is that asylum seekers can get free medicine, only at the state pharmacies of the Banja Koviljača health clinic or at the Loznica hospital. The asylum seekers, similarly to locals, have to pay for dental services.

The Danish Refugee Council, an implementing partner of the UNHCR, runs a project on medical assistance for refugees and IDPs in Serbia. Although asylum seekers do not form the main target group of the Danish Refugee Council, they can provide medical assistance to them upon request. The UNHCR is funding this medical programme, which provides access to basic health services and medicine.

### Unaccompanied minors

There is no legal regulation or specific protocol for age assessment in immigration proceedings in Serbia. Asylum seekers can declare that they are below 18 and then a guardian has to be appointed. Article 15 of the Asylum Act declares the principle of special care for asylum seekers with special needs, and that includes minors. Since April 2009, minor asylum seekers are hosted at the Centre for Accommodation of Under-age Aliens Unaccompanied by Parents or Custodians also known as the Vasa Stajić Centre.<sup>49</sup>

The Vasa Stajić Centre was opened in 2008 and has the capacity of hosting 12 minors, boys only. The Centre is open 24 hours a day and has housed over 200 minors since it opened. 70% of them were from Afghanistan, but the Centre hosted many Palestinians and Albanians as well. There are two rooms, one for eight 8 and one for 4 persons, plus there is a living room. Despite the fact that no additional resources have been allocated for the operation of the facility, they offer creative and sport programmes for the inhabitants. Users can move freely within the premises but if they wish to leave the building, they need to be accompanied either by their custodian or an employee of the Centre.

Between 8 April 2009 and 31 December 2010, the Vasa Stajić Centre hosted 159 minors. Between 1 January and 1 April 2011, the Centre received 15 minors. Despite its important role in the reception of unaccompanied asylum seekers, the Centre is rather understaffed and underfunded. They even had to reduce their capacity from 12 to 6 employees as of July 2011 due to the lack of funding. Meanwhile, at the time of the visit there were ten new Afghan asylum seekers waiting for accommodation.

The Centre for Social Work<sup>50</sup> appoints a social worker as the temporary guardian for the minors upon their arrival at the Centre. Health care is not provided by the Government for the minors despite the fact that they usually arrive in a poor health. The expenses related to the purchase of medicines, check-ups and medical treatment are covered by the Centre, but budget resources are not allocated for this.<sup>51</sup> The average stay for an asylum-seeking minor is 38 days in the Centre, but in 2011 the 15 minors stayed for about two and a half months. The reason for this is the lack of capacity in the Reception Centre in Banja Koviljača. The additional prolongation of their stay can also be explained by the inadequate procedure of the Centre in Banja Koviljača, which does not give reception priority to unaccompanied under-age persons.<sup>52</sup> Accommodation is the primary concern for this group as all actors agreed.<sup>53</sup> In 2011, 71

<sup>47</sup> Srbija se bori sa prilikom azilanata, 7 July 2011, Zoran Glavonjić, Radio Sloboda Europa, [http://www.slobodnaevropa.org/content/srbija\\_azil/24257602.html](http://www.slobodnaevropa.org/content/srbija_azil/24257602.html)

<sup>48</sup> Interview with Radoš Đurović, the Executive Director of Asylum Protection Centre, Banja Koviljača, 10 June 2011

<sup>49</sup> M. Jelačić, J. Zorić, R. Brajković and M. Savković, *Underaged asylum seekers in Serbia: At the verge of dignity*, 2011

<sup>50</sup> Falling under the authority of the Ministry of Labour and Social Policy

<sup>51</sup> M. Jelačić, J. Zorić, R. Brajković and M. Savković, *Underaged asylum seekers in Serbia: At the verge of dignity*, 2011, [http://www.ccmr-bg.org/upload/document/underaged\\_asylum\\_seekers\\_-\\_at\\_.pdf](http://www.ccmr-bg.org/upload/document/underaged_asylum_seekers_-_at_.pdf), p. 5

<sup>52</sup> Idem, p. 6

unaccompanied minors have been accommodated in Banja Koviljača according to the representative of the Asylum Protection Centre.<sup>54</sup> On the day of the HHC's visit, 20 unaccompanied minors were staying in Banja Koviljača and 13 more unaccompanied children were waiting to be accepted at the Centre. Mr. Lesmajster, the Manager of the Centre, told the delegation that he might be able to provide places for only five of them.

The Centre for Social Work in Loznica is responsible for minors living in the reception centre. They are to assign a legal representative for them upon their arrival. This is a new task for them and, similarly to other asylum related tasks, the funding available for this purpose is scarce. There is no money for transportation to travel from Loznica to the Reception Centre in Banja Koviljača, therefore the only way for the social worker to visit the Centre is to join the representative of the Asylum Protection Centre when he/she goes there (by car) to provide legal assistance. There is only one guardian appointed for all minors living in the Centre.

In principle, children living in the Centre could attend school, but since they do not speak Serbian, they cannot do so in practice. Officially there are no language classes provided for them, it is done on a voluntary basis. In practice, education is realised within a project financed by the UNHCR and is implemented by the Danish Refugee Council (instead of the responsible state authorities). It is composed of three hours of teaching per day by a tutor coming especially for this purpose to the Asylum Centre, three times a week.<sup>55</sup>

### **III.5. Integration prospects**

The Serbian Asylum Act provides that the right to integration is guaranteed progressively, depending on the state's capacities.<sup>56</sup> This provision of the law has not been elaborated in more detail in other acts. At present, no "integration house" exists in Serbia, nor does budget allocate any means for the integration of persons who have been granted asylum.<sup>57</sup> According to the UNHCR, the Serbian government has not yet developed any integration mechanism for recognised refugees and beneficiaries of subsidiary protection.<sup>58</sup> Furthermore, it is not even defined which state body will be responsible for this.

#### **Accommodation and welfare benefits**

According to Article 44 of the Asylum Act, to persons whose right to refuge or subsidiary protection has been recognised, accommodation shall be provided commensurately with the capacities of the Republic of Serbia, but not for longer than one year from the final decision on status recognition. The right to accommodation, therefore, again depends on state capacities. However, since there are no integration support mechanisms in place, persons granted protection cannot actually leave the Asylum Centre in Banja Koviljača, the capacity of which is seriously limited (see Chapter III.4).

#### **No language classes or other services**

There are basically no services provided in order to facilitate the integration of persons with protection status into the Serbian society. There are no Serbian language classes and no cultural or social integration programmes at their disposal.

#### **Employment**

The Serbian Asylum Act only ensures the right to work to recognised refugees, and remains silent about the beneficiaries of subsidiary protection.<sup>59</sup> In order for a refugee to be employed, he/she is required to obtain an

---

<sup>53</sup> Conference on the "Challenges of Forced Migration in Serbia" held on 9 June 2011 in Belgrade

<sup>54</sup> Interview with Radoš Đurović, the Executive Director of Asylum Protection Centre Banja Koviljača, 10 June 2011

<sup>55</sup> *Challenges of forced migration in Serbia*, Group 484, June 2011, p. 120

<http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf>

<sup>56</sup> Article 46 of the Asylum Act: "The Republic of Serbia shall, commensurately with its capacities, create conditions for the inclusion of refugees in its social, cultural and economic life, and enable the naturalization of refugees."

<sup>57</sup> *Challenges of forced migration in Serbia*, Group 484, June 2011, p. 119

<http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf>

<sup>58</sup> Sve više stranaca traži azil u Srbiji, 8 June 2011, D. Vukosavljević, Politika Online, <http://www.politika.rs/rubrike/Drustvo/Sve-vise-stranaca-trazi-azil-u-Srbiji.lt.html>

<sup>59</sup> Article 43 (The rights of refugees equal to those of permanently residing aliens): "Persons whose right to refuge in the Republic of Serbia has been recognised shall have rights equal to those of permanently residing aliens with respect to the right to work and rights arising from employment, entrepreneurship, the right to permanent residence and freedom of movement, the right to movable and immovable property, and the right of association."

approval for permanent residence or temporary residence in the Republic of Serbia as well as a work permit.<sup>60</sup> As Robert Lesmajster, the manager of the Asylum Centre informed the HHC delegation that he does not consider it appropriate to register refugees at the address of the Centre, as this only a “temporary solution”. In practice, this means that until the Serbian authorities establish another accommodation for those with refugee status, they will not be able to work. This leaves people in a situation of idleness and insecurity and blocks any attempt to become self-reliant.

### Other rights

Non-discrimination provisions (if compared to Serbian citizens) are limited to refugees and fail to mention asylum seekers and beneficiaries of subsidiary protection.<sup>61</sup> Similarly, rights equal to those of Serbian citizens with respect to intellectual property rights, free access to courts of law, legal aid, exemption from the payment of court fees and other fees payable to state organs and the freedom of religion are only recognised for refugees, but not for the other two groups.<sup>62</sup>

## IV. MAIN CONCERNS

### IV.1. Limited access to protection

There are indications that access to the territory of Serbia is not fully guaranteed to asylum seekers. Even the Serbian government reported to the European Commission and the UNHCR Office in Belgrade that 1500 persons were denied entry at the Belgrade airport in 2009-2010, while none of them claimed asylum. Knowing that airports are also important locations for potential asylum seekers to express their need for international protection, this fact may give rise to concerns. In this respect, reference can be made to the experiences of the “border monitoring project” implemented by the HHC (with UNHCR funding and support) since 2007.

It is important to mention that the original hypothesis of the Hungarian border monitoring project was that a significant number of potential asylum seekers were unable to apply for asylum at the Budapest International Airport as they lacked the necessary information for doing so. Experience and statistics showed that after having launched the border monitoring programme in Hungary (which included regular monitoring visits at the short-term detention facility within the airport, as well as the continuous provision of information), the number of asylum applications increased. Therefore, the regular presence of the monitoring lawyer and the information provided appear to significantly improve the chances that persons in need of international protection are able to exercise their legal right to seek asylum.<sup>63</sup>

According to the UNHCR, there is no effective and independently controlled mechanism in place to ensure that asylum seekers are in fact referred to the asylum procedure and properly informed about their rights and entitlements in Serbia. The UNHCR held training sessions for the Border Police and organised six seminars in 2009 and 2010 (attended by 135 border guards), but so far there is no visible improvement.<sup>64</sup>

Furthermore, statistics show that only 41% of the foreigners (see statistics in chapter III.1.) registered as wishing to seek asylum in Serbia actually arrive in Banja Koviljača where their asylum procedure is officially initiated. Asylum seekers that are registered by the police are issued a certificate enabling them to travel to the reception centre (situated close to the Bosnian-Serbian border), but without any support or assistance in transportation.

Another probable reason why only few asylum seekers actually enter the procedure might be that – similarly to other states in the region – Serbia is still regarded as a transit country by most forced migrants, due to the lack of economic prosperity and an effective and inclusive integration strategy. All stakeholders and experts interviewed univocally stated that Serbia is mostly a transit country for asylum seekers coming from outside the ex-Yugoslavia.

---

<sup>60</sup> *Challenges of forced migration in Serbia*, Grupa 484, June 2011, p. 120

<http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf>

<sup>61</sup> *Human Rights in Serbia 2010, Legal provisions and practice compared to international human rights standards*, Belgrade Centre for Human Rights, 2011, p. 228

<http://english.bgcentar.org.rs/images/stories/Datoteke/human%20rights%20in%20serbia%202010.pdf>

<sup>62</sup> Article 42 of the Law on Asylum

<sup>63</sup> *Asylum Seekers' Access to Territory and to the Asylum Procedure in the Republic of Hungary*, Hungarian Helsinki Committee, p. 25, [http://helsinki.hu/dokumentum/Border\\_Monitoring\\_Report\\_2007\\_ENG\\_FINAL.pdf](http://helsinki.hu/dokumentum/Border_Monitoring_Report_2007_ENG_FINAL.pdf)

<sup>64</sup> *Challenges of Forced Migration in Serbia*, Grupa 484, June 2011, p 93

<http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf>

## IV.2. Dangers of chain *refoulement*

Safe third country procedures may create a risk of chain *refoulement*, and do not absolve a state of its duties under Article 3 of the European Convention on Human Rights.<sup>65</sup> If Hungary sends an asylum seeker back to Serbia, without having his claim examined on the merits, there is a risk of chain *refoulement*, in the following two situations:

- (1) the asylum seeker comes from a country of origin or a third country that Serbia considers as safe; and/or
- (2) the asylum seeker asked for asylum in another country before.

## Rules on “safe countries of origin” and “safe third countries” in the Serbian asylum procedure

According to Article 33 of the Serbian Asylum Act, The Asylum Office shall reject an asylum application without examining it on the merits if it has established that the asylum seeker can receive protection from a safe country of origin<sup>66</sup> or if the asylum seeker has come from a safe third country<sup>67</sup> unless he/she can prove that it is not safe for him/her. According to the representatives of the NGOs Group 484 and APC, interviewed during the fact-finding mission, the widely applied safe third country principle is the principal weakness of the Serbian asylum procedure that enables Serbian authorities to prevent most of the asylum seekers from being granted effective protection.<sup>68</sup>

The Asylum Act only provides that a safe third country has to observe the Geneva Convention and its Protocol. No other criteria (such as, for example, those established under the Procedures Directive<sup>69</sup>) exist to determine which country can be considered safe by the Serbian authorities.<sup>70</sup> Another problematic aspect of this provision is that the concept of a safe third country is based on the state’s unilateral decision to invoke the jurisdiction of a third state to decide on asylum applications instead of a bilateral agreement or with the explicit consent of the state to receive a particular asylum seeker’s application.<sup>71</sup>

Serbia’s lists of safe third countries and safe countries of origin<sup>72</sup> may give rise to concerns. Countries that figure among those that are considered safe include Belarus (the only European country that practices the death penalty and did not ratify the ECHR), Turkey and Greece (Greece violated Article 3 and 13 of the ECHR because of the failures in its asylum system – see the *M.S.S. v. Greece and Belgium* case). For the full list of countries see Annex 1.

It is important to note that all neighbouring countries around Serbia are included in the above mentioned list of safe countries, consequently all asylum applicants having transited through any of the neighbouring countries will be rejected without an in-merit examination of their asylum claims. According to Group 484, it remains unclear whether Serbian authorities get assurances from these countries that the application of this person will be considered in a fair procedure. Furthermore, it is questionable in which manner a person who wishes to be granted refugee status in Serbia can reach its territory without passing through some of the neighbouring safe third countries and thus, by applying the safe third country concept, making the foundations for rejecting his/her asylum application.<sup>73</sup>

---

<sup>65</sup> ECtHR, *T.I. v. U.K.*, Application No. 43844/98, Admissibility Decision of 7 March 2000 and *Abdolkhani and Karimnia v. Turkey*, §88

<sup>66</sup> “A safe country of origin shall be understood to mean a country from a list established by the Government whose national an asylum seeker is, and if the person concerned is stateless, a country where that person had previous habitual residence, which has ratified and applies international treaties on human rights and fundamental freedoms, where there is no danger of persecution for any reason which constitutes grounds for the recognition of the right to refuge or for granting subsidiary protection, whose citizens do not leave their country for those reasons, and which allows international bodies to monitor the observance of human rights” (Article 33 (4) of the Asylum Act)

<sup>67</sup> “A safe third country shall be understood to mean a country from a list established by the Government, which observes international principles pertaining to the protection of refugees contained in the 1951 Convention on the Status of Refugees and the 1967 Protocol on the Status of Refugees (hereinafter referred to as: the Geneva Convention and the Protocol), where an asylum seeker had resided, or through which he/she had passed, immediately before he/she arrived on the territory of the Republic of Serbia and where he/she had an opportunity to submit an asylum application, where he/she would not be subjected to persecution, torture, inhumane or degrading treatment, or sent back to a country where his/her life, safety or freedom would be threatened” (Article 33 (6) of the Asylum Act)

<sup>68</sup> Interviews with Vladimir Petronijević, executive director of Group 484 and Radoš Đurović, executive director of APC

<sup>69</sup> See also chapter V.1

<sup>70</sup> Dina Dobrković, *Pravo na Azil – Pravni Okvir u Republici Srbiji*, Komentar Zakona o azilu Srbije, Beogradski Centar za Ljudska Prava, p. 10

<http://bgcentar.org.rs/images/stories/Datoteke/komentar%20zakona%20o%20azilu.pdf>

<sup>71</sup> *Human Rights in Serbia 2010, Legal provisions and practice compared to international human rights standards*, Belgrade Centre for Human Rights, 2011, p. 227

<http://english.bgcentar.org.rs/images/stories/Datoteke/human%20rights%20in%20serbia%202010.pdf>

<sup>72</sup> Government decree on defining the list of safe countries of origin and safe third countries, Službeni glasnik RS, No. 67/2009, <http://www.apc-cza.org/en/liste-sigurnih-drava.html>

<sup>73</sup> *Challenges of forced migration in Serbia*, Group 484, June 2011, p. 119

<http://www.grupa484.org.rs/CHALLENGES%20OF%20FORCED%20MIGRATION%20IN%20SERBIA.pdf>

It is clear from both the interviews conducted during the field visit and the recommendations on the safe third country concept presented in Group 484's report, that the Serbian Asylum Office does not carry out a detailed examination of the relevant state practices in the field of asylum (or the functioning of the asylum system and access to protection) in the countries that figure on the list of safe countries.<sup>74</sup> The practice of the Serbian authorities also does not take into account the existence of the meaningful links between the asylum seeker and the country presumed safe. Even though the safeguard exists in the law, namely that an asylum seeker can prove that a certain country from the list is not safe for him/her, the presumption by the authorities that a certain country is safe increases the standard of proof and the burden of proof lies entirely on the applicant, since the decision on the rejection is made at the stage when the application is not thoroughly examined. As a consequence, the Serbian Asylum Office bases its decisions solely on the safe third country provision of the Asylum Act, but not on a real and meaningful assessment of all the circumstances in the country in consideration. Similarly, effective procedural safeguards in the country considered as "safe" and the access to effective protection are not examined in practice, which raises the question of chain *refoulement*.

According to the director of the APC, Radoš Đurović, the majority of asylum applications are rejected based on safe third country grounds, mainly with regard to Macedonia, since the most common migration route asylum seekers use is through Turkey to Greece, then to Macedonia and then they arrive in Serbia. As of mid-August, the Asylum Office passed 34 decisions and 32 of which were made without examining the merits.<sup>75</sup> The APC has brought several appeals regarding this type of rejection to the Administrative Court, which are still pending.

It may be concluded that there is a real risk that an asylum seeker who manages to get to Hungary is at risk of being *refouled* in the following way: Hungary-Serbia-Macedonia-Greece-Turkey and further on, without having his/her claim ever examined on the merits.

### **Rules applicable to asylum seekers who asked for asylum in another country before**

Many of the third countries to which asylum seekers are returned under the safe third country provisions are assumed to be safe because they are not likely to persecute the particular applicants and do not consciously *refoules* refugees to their persecutors. However, *refoulement* can also be the result when an inadequate asylum procedure and protection framework prevents an actual Convention refugee from acquiring a protection status and enjoying protection.

The Serbian Asylum Act contains an ambiguous provision in Article 33 (5), according to which the Asylum Office shall reject an asylum application without examining it on the merits, if the asylum seeker has already filed an asylum application in another country party to the Geneva Convention. Applying this provision in practice would mean that all asylum seekers whose asylum claim was rejected, for example in Hungary, based on the safe third country rule with regards to Serbia, would be also rejected in Serbia, without having their claims ever examined on the merits. This can lead to a situation where a genuine refugee's claim is not examined on the merits in *any* country and he/she is sent back to the country of origin where he/she faces persecution.

### **IV.3. The destitution of asylum seekers**

Asylum seekers find themselves in a rather difficult situation upon their arrival in Serbia. The reception capacity of the country is very limited compared to the number of asylum seekers it receives. The chances for an asylum seeker to have a place allocated in one of the reception centres are low. The average waiting time before being admitted to the Banja Koviljača Centre is about six weeks. Despite the fact that asylum seekers could apply for financial assistance if they cannot find shelter in one of the centres, in reality this is not a realistic option for most of them. This form of assistance presupposes the existence of an officially registered domicile and therefore an identity document: a practical obstacle for many. Asylum seekers are often left with no other choice than sleeping in the street. A significant portion of asylum seekers are not provided with shelter and/or financial assistance and consequently homelessness and inhuman living conditions.

The lack of reception capacity impacts vulnerable groups as well. Although unaccompanied minors and single women with children should be given priority when it comes to allocating places in the reception facilities, limited capacities prevent their prompt admission to these institutions. If they are not in the position to afford private accommodation, which is the case for many of them, they will also find themselves in the streets, cast aside.

Basic medical assistance, legal counselling and social assistance services exist only due to the generous support of the UNHCR. Asylum seekers have no access to state-funded legal aid, medical assistance or social care. Governmental funds only cover the basic operational costs of the centres. The Banja Koviljača and Vasa Stajić Centres are both understaffed and in desperate need of additional funding.

---

<sup>74</sup> *Idem*, p 106

<sup>75</sup> Source: UNHCR Serbia



## V. AN ANALYSIS OF THE *M.S.S.* CASE IN LIGHT OF THE RETURNS TO SERBIA

The facts of the *M.S.S.* case<sup>76</sup> concerned an Afghan asylum seeker who fled Kabul in 2008, entered the EU through Greece and travelled on to Belgium where he applied for asylum. According to the Dublin system, Greece was held to be responsible for the examination of his asylum application. Therefore, the Belgian authorities transferred him to Greece in June 2009, where he first faced detention in unacceptable conditions and afterwards he was living on the streets without any material support. Greece was found in violation of Article 3 of the ECHR (prohibition of inhuman or degrading treatment or punishment) on the basis of inhuman detention conditions and the asylum seeker's living conditions and in violation of Article 13 (the right to an effective remedy) taken in conjunction with Article 3, due to the shortcomings of the Greek asylum procedure. The Court ruled that Belgium was in violation of Article 3 for exposing the applicant to risks arising from the deficiencies of the asylum procedure in Greece, as well as exposing the applicant to the inhuman detention and living conditions there. With regard to the national appeal procedure in Belgium, the Court held that Belgium was in violation of Article 13 in conjunction with Article 3 because of the lack of an effective remedy against the expulsion order.

This principles laid down by this judgment have consequences beyond the Dublin system and can be applied in cases of returns to "safe third countries" as well. The test under the ECHR regarding "safe third countries" is the following: Is there a real risk of exposure to treatment contrary to Article 3 of the ECHR, either in the state of proposed destination or through chain *refoulement*? If there is an arguable violation, is there an effective remedy?<sup>77</sup>

### Regarding the presumption of safety

The *M.S.S.* case concerned the Dublin system, under which a presumption exists that all EU countries are equally safe for asylum seekers. However, according to the *M.S.S.* judgment, this automatic presumption can be rebutted in certain circumstances, if the applicant presents arguable grounds for a potential violation of Article 3 of the ECHR. In such a case, the burden of proof is shifted onto the state to ascertain the practices and conditions in the state where the asylum seeker is being transferred to. The Belgian government argued that the applicant had not sufficiently individualised, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back to his country of origin by the Greek authorities. The Court held that transferring states should not just "assume", but must actively "verify" that the other Member States will comply with their human rights obligations.<sup>78</sup>

In cases of returns to "safe third countries" outside the scope of application of the Dublin II Regulation, the presumption of safety does not exist at the EU level. The obligation to examine the actual situation in the receiving country therefore applies automatically in every single case, not only in case of "arguable grounds". This reasoning can be confirmed with the provisions on the "safe third country concept" from the Procedures Directive, which in Article 27 (1) clearly stipulates that "Member States may apply the safe third country concept *only where the competent authorities are satisfied* that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) the principle of *non-refoulement* in accordance with the Geneva Convention *is respected*;
- (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, *is respected*; and
- (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention." (emphasis added)

The wording of this provision clearly shows that the transferring states should actively examine and "verify" that the receiving country will comply with its human rights obligations and not just assume this because the country is formally bound by human rights legislation (for example, the principle of *non-refoulement* needs to be respected and not merely included in the law of the state).

The Hungarian authorities fail to fulfil the above obligations with regard to the qualification of Serbia as safe third country, when merely relying on statements such as "Serbia is party to the Geneva Convention" and that "it has adopted an Asylum Act in 2007 and there is an asylum procedure in place". Practice shows that in the application of

<sup>76</sup> *M.S.S. v. Belgium and Greece*, EctHR, Application No. 30696/09, 21 January 2011

<sup>77</sup> Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights*, Council of Europe publishing editions, Strasbourg Cedex, 2010, p. 75

<sup>78</sup> *M.S.S. v. Belgium and Greece*, EctHR, Application No. 30696/09, 21 January 2011, §359

the safe third country concept, Hungary does not go beyond the mere existence of international obligations and legislation in Serbia and Hungarian authorities systematically fail to check the actual practice in Serbia.

### Potential violation of Article 3 by Hungary, by exposing asylum seekers to unacceptable reception conditions in Serbia

In the *M.S.S. case* the court found that, in Article 3 of the ECHR, the prohibition on inhuman and degrading treatment is also applicable to poor living conditions leading to destitution of asylum seekers and refugees. However, the Court did not deduct the obligation to guarantee an adequate standard of living from Article 3, but interpreted it in the light of the obligations of the Greek government resulting from both the Greek national legislation and the Reception Conditions Directive.<sup>79</sup> Only this interpretation made it possible to conclude that the treatment reached the threshold of severity required under the Article 3.<sup>80</sup> The Court ruled that Belgium was in violation of Article 3 for exposing the applicant to risks arising from the deficiencies of the asylum procedure in Greece, as well as exposing the applicant to inhuman detention and living conditions there.

The Geneva Convention does not contain any obligation to secure housing for asylum seekers, only to refugees lawfully staying in the country of asylum, and Serbia is not bound by the Reception Conditions Directive either. The Serbian Asylum Act provides in Article 39 that an asylum seeker shall have the right to reside in the Republic of Serbia for the duration of the procedure and, if necessary, he/she shall be entitled to accommodation in the Asylum Centre. However, according to the Ministry of Interior, it is only obliged to provide reception conditions to asylum seekers only within its capacities.<sup>81</sup> The Serbian government's argument might be justified with the notion of the progressive realisation of socio-economic rights, as contained in Article 11 of the Covenant on Economic, Social and Cultural rights. A new asylum centre has recently been opened in Bogovađa, but this undoubtedly positive development does not mean that reception capacities are now satisfactory. Basic services for asylum seekers, such as medicine, legal and psychological assistance, education, are provided by the NGOs (the APC and the Danish Refugee Council) and are exclusively financed by the UNHCR and not by the Serbian government.

As already mentioned, the ECtHR in the *M.S.S.* judgment did not go so far to conclude that a right to adequate living conditions can be derived directly from Article 3 of the ECHR. Serbian national and international obligations only require progressive realisation of the right to adequate living conditions and Hungary, although bound by the Reception Conditions Directive, is not prohibited from sending an asylum seeker to another non-EU country, where the requirements of the Reception Conditions Directive are not met.

### Potential violation of Article 3 regarding the risk of *refoulement*

The ECtHR in the *M.S.S.* judgment repeated that when the Member States apply the Dublin Regulation, they must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention.<sup>82</sup>

The Court has already applied the same reasoning in cases of return to safe third countries. The Court in *Abdolkhani and Karimnia v. Turkey* confirmed that the indirect removal of an alien to an intermediary country does "not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention".<sup>83</sup>

In the *M.S.S.* case, the UNHCR Guidelines on Afghanistan were treated as *prima facie* evidence that the applicant had arguable grounds to fear a risk of return to Afghanistan. The Court observed that Greece's legislation was not being applied in practice, as further evidenced by the "extremely low rate of asylum or subsidiary protection granted by Greek authorities compared with other European Union member states."<sup>84</sup> In the light of the foregoing, the Court considered that at the time of the applicant's expulsion, the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities.

As already shown in this report (in chapters IV.3 and V.2) there is a risk of *refoulement* from Serbia to other unsafe countries, due to the ineffective and insufficient Serbian asylum procedure and the list of safe third countries Serbia applies (see also Annex 1).

<sup>79</sup> Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, *Official Journal* L 031, 06/02/2003

<sup>80</sup> *M.S.S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, 21 January 2011, §249

<sup>81</sup> Source: intervention of Miljan Vučković, head of the Asylum Section, at the Conference Challenges of forced migration in Serbia, 10 June 2011

<sup>82</sup> *M.S.S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, 21 January 2011, §342

<sup>83</sup> *Abdolkhani & Karimnia v. Turkey*, ECtHR, Application No. 30471/08, 22 September 2008, §89

<sup>84</sup> *M.S.S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, 21 January 2011, §313

### Potential violation of Article 13

In the *MSS* case, the Court reaffirmed its position that “in cases concerning the expulsion of asylum seekers the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled (see, among other authorities, *T.I. v. the United Kingdom* (dec. no. 43844/98, ECHR 2000-III), and *Muslim*, cited above, §§ 72 to 76).”<sup>85</sup>

The Court further found that procedural obligations of States in asylum proceedings fall under the scope of Article 13 of ECHR. With regard to the national appeal procedure in Belgium, the Court held that Belgium was in violation of Article 13 in conjunction with Article 3 because of the lack of an effective remedy against the expulsion order. The Court reiterates that it is also established in its case law that any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny and that, subject to a certain margin of appreciation left to the States, in conformity with Article 13 requires that the competent body must be able to examine the substance of the complaint and afford proper reparation.<sup>86</sup> The Belgian government argued that the applicant had not sufficiently individualised, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back by the Greek authorities. The Court held, however, that it was in fact up to the Belgian authorities not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3.<sup>87</sup>

Although in Hungary the motion for judicial review against the rejection of an asylum claim on the “safe third country” ground has a suspensive effect on return measures, there are many other problematic aspects in this respect:

- The personal hearing before the court is not automatic. The law stipulates that in case of need, there shall be a hearing in the procedure but the judge is not obliged to hold a hearing. In practice, this means that applicants not having a legal representative are usually not aware of this right, since this information is not included in the information leaflet they receive from the asylum authority at the beginning of the asylum procedure;
- The deadline for the submission of the motion for judicial review is very short (3 days);
- In decisions of the Csongrád County Court (the Court that has so far decided in the majority of the cases on returns to Serbia as a safe third country), the court demanded a higher standard of proof than required by law. The court expected the applicants to prove the individual risk of being exposed to ill treatment in the scope of Article 3 of the ECHR. It is very difficult, if not impossible, for the applicant to demonstrate *in concreto* the irreparable nature of the damage done by the alleged potential violation. The Hungarian Asylum Act requires only that the applicant proves that he/she had no opportunity for effective protection;<sup>88</sup>
- In considering whether Serbia is a safe third country, the court automatically approved the OIN’s decisions. No practical aspects of the Serbian asylum system were taken into consideration. The only criteria that were accepted as sufficient were the fact that Serbia has its own asylum procedure established and the Asylum Act is in force, as well as the fact the Serbia ratified the Geneva Convention. In addition, the court gave credit to the reports of the Hungarian Ministry of Foreign Affairs, which stated that Serbia is a safe country in general; and
- The court failed to consider any other sources of country information (e.g. the UNHCR’s assessment of the situation of asylum seekers in Serbia or articles from the press), submitted by the applicants’ lawyer.

In the HHC’s view, the judicial review, as performed by the Csongrád County Court, is in breach of Article 13 of the ECHR as it does not examine the practice of the Serbian asylum authorities and it fails to verify if asylum seekers returned to Serbia would actually have access to a fair and efficient asylum procedure.

---

<sup>85</sup> *Idem*, §286

<sup>86</sup> *Idem*, §387

<sup>87</sup> *Idem*, §359

<sup>88</sup> Article 51 (4) of the Hungarian Asylum Act

## VI. CONCLUSIONS

- Despite the increasing number of asylum seekers in Serbia, the capacity of the Asylum Office remained unchanged. Recognition rates are close to zero, there is a lack of reception facilities (most asylum seekers have no other opportunities than living in the street) and there is no state-funded legal and medical assistance. There are no recognised refugees in Serbia and, for the very few enjoying a lower level of international protection, there are no avenues for integration. **Thus the current Serbian asylum system is not sufficiently functional and is neither unable to ensure the proper determination of international protection needs for an increasing number of asylum seekers, nor does it provide effective protection for those qualifying for refugee status.**
- The above being a pre-condition for considering a country as safe third country, **Serbia cannot be regarded as such.**
- In light of the above conclusions, **Hungarian asylum authorities wrongly consider Serbia as a safe third country in their daily practice and wrongly exclude asylum seekers arriving in Hungary through Serbia from an in-merit determination of their protection needs.**
- **Hungary's practice of applying the safe third country concept for Serbia is in breach of the European Convention on Human Rights**, namely of Article 3 by exposing asylum seekers to the risk of torture, inhuman or degrading treatment or punishment (through *refoulement*) and of Article 13 by failing to provide effective remedy.

## ANNEX 1 – LIST OF SAFE THIRD COUNTRIES AND SAFE COUNTRIES OF ORIGIN<sup>89</sup>

<b>Safe countries of origin:</b>	<b>Safe third countries:</b>
1. Austria	1. Austria
2. Belgium	2. Belgium
3. Bulgaria	3. Bulgaria
4. Cyprus	4. Cyprus
5. Czech Republic	5. Czech Republic
6. Denmark	6. Denmark
7. Estonia	7. Estonia
8. Finland	8. Finland
9. France	9. France
10. Germany	10. Germany
11. Greece	11. Greece
12. Hungary	12. Hungary
13. Ireland	13. Ireland
14. Italy	14. Italy
15. Latvia	15. Latvia
16. Lithuania	16. Lithuania
17. Luxembourg	17. Luxembourg
18. Malta	18. Malta
19. The Netherlands	19. The Netherlands
20. Poland	20. Poland
21. Portugal	21. Portugal
22. Romania	22. Romania
23. Slovakia	23. Slovakia
24. Slovenia	24. Slovenia
25. Spain	25. Spain
26. Sweden	26. Sweden
27. United Kingdom	27. United Kingdom
28. Bosnia and Herzegovina	28. Bosnia and Herzegovina
29. Croatia	29. Croatia
30. Former Yugoslav Republic of Macedonia	30. Macedonia
31. Montenegro	31. Montenegro
32. Norway	32. Norway
33. Iceland	33. Iceland
34. Liechtenstein	34. Liechtenstein
35. Switzerland	35. Switzerland
36. Monaco	36. Monaco
37. Russia	37. Australia
38. Belarus	38. New Zealand
39. Australia	39. Japan
40. New Zealand	40. Canada
41. Japan	41. United States
42. Canada	42. Turkey
43. United States	
44. Argentina	
45. Paraguay	
46. Uruguay	
47. Chile	
48. Costa Rica	
49. Mexico	
50. Seychelles	
51. Mauritius	
52. Kenya	
53. Tunisia	
54. Turkey	

<sup>89</sup> Government decree on defining the list of safe countries of origin and safe third countries, Službeni glasnik RS, No. 67/2009, <http://www.apc-cza.org/en/liste-sigurnih-drava.html>

## ANNEX 2 – UNHCR POSITION PAPER ON SERBIA<sup>90</sup>



UNHCR  
Regional Representation for Central Europe  
Felvinci út 27. Tel.: (+36-1) 336-3060  
H-1022 Budapest 336-3070  
Fax: 336-3080

30 August 2011

Our ref.: HUNBU/OIN/HCR/0099

Your ref.:

Re: **Can Serbia be considered a “Safe Third Country” for the purposes of the Hungarian refugee status determination procedure?**

Dear Madam Kovács,

With reference to your query as to whether Serbia should be considered a “safe third country,” kindly allow us to share the following assessment prepared in consultation with our Headquarters in Geneva, in lieu of a more comprehensive analysis of Serbia as an asylum country which is currently under consideration.<sup>1</sup> The information below does not constitute a comprehensive picture of all aspects the operation of the asylum system in Serbia including reception and access to services, but focuses on key concerns regarding the operation of the asylum procedure.

### **Criteria for applying Safe Third Country notions in EU law**

Member States of the European Union considering applying the safe third country notion with regard to Serbia are bound by EU Council Directive 2005/85/EC of 1 December 2005 (Asylum Procedures Directive). UNHCR has commented on the strict requirements that must be met before an asylum-seeker can be returned to a country which is itself not an EU Member State before a substantive assessment of the claim is made. UNHCR maintains that a transfer of responsibility should be envisaged only between States with comparable protection systems, on the basis of an agreement which clearly outlines their respective responsibilities. By contrast, the “safe third country” notion, as defined in the Directive, rests on a unilateral decision by a State to invoke the responsibility of a third State to examine an asylum claim. The transfer of an asylum-seeker under this notion in itself runs the risk that asylum-seekers may fail to gain access to any effective asylum procedure for the substantive assessment of their claim. In the worst case scenario, it could lead to chain *refoulement* to the country of origin, if the receiving country is unable or unwilling to receive the applicant and determine the claim in substance. Rather than relying on the safe third country notion, UNHCR would favour multilateral agreements which ensure access to effective protection over “safe third country” procedures involving a unilateral decision to transfer responsibility to a third state to examine an asylum request. If Member States nevertheless wish to rely on the “safe third country” notion, certain

**Dr. Tímea Kovács lawyer  
Hungarian Helsinki Committee**

<sup>1</sup> For a comprehensive overview of the Asylum System in Serbia today, see Group 484, *Challenges of Forced Migration in Serbia Position of Refugees, Internally Displaced Persons, Returnees and Asylum Seekers*, June 2011.

<sup>90</sup> Issued in the case of *Ghafari v. Hungary*, Application no. 40773/11, European Court of Human Rights

requirements should be met.<sup>2</sup> If Member States nevertheless wish to rely on the “safe third country” notion, the following requirements should be met (1) The applicant should be protected against *refoulement*; (2) The applicant should have a genuine connection or close links with the third country; (3) The third country should expressly agree to admit the applicant to its territory and to consider the asylum claim substantively in a fair procedure; and (4) The provision should permit exceptions *inter alia* for separated children and other vulnerable persons.

### **Asylum in Serbia – overview and legal context**

The Republic of Serbia is a party to the UN 1951 Convention Relating to the Status of Refugees and its 1967 Additional Protocol. Article 57 of the Constitution of the Republic of Serbia<sup>3</sup> is the legal basis for the Law on Asylum. Serbia adopted the Law on Asylum in November 2007, and the Law came into force on 1 April 2008. At this time Serbia assumed full responsibility for refugee status determination. Serbia has a reception system for newly-arriving asylum-seekers that by and large meets minimum standards, although the large majority of asylum-seekers leave Serbia before a formal determination of their asylum claim can be made. For example since January 2011 to mid-August, some 2,010 asylum-seekers have been registered, but at any given time, there are no more than 300 asylum-seekers present in the country.

There is currently not sufficient accommodation in view of the recent surge of applicants. There are two reception centres: the one in Banja Koviljaca can accommodate a maximum of 84 people, while the other one in Bogovadja has a capacity of 120. It is unclear what happens if there are not sufficient places in this reception centre. Although asylum-seekers have an equal right to medical care with foreigners,<sup>4</sup> this is not free of charge. There is still no clear Ministry of Health instruction regarding the provision of health services to asylum-seekers and refugees. In the absence of the allocation of national financial resources to ensure such support to asylum-seekers, UNHCR, either directly or through its implementing partner, the Danish Refugee Council, is currently providing basic health services to asylum-seekers in need if they are accommodated in the reception centre. This relies on established close cooperation between UNHCR and its partner on the one hand and primary health facilities on the local level and the Ministry of Health on the other. Necessary medicines together with certain medical devices (such as eye glasses or crutches), as prescribed by local doctors, can be provided on an ad hoc basis to asylum-seekers through this UNHCR/DRC medical programme, but resources are limited. Given its isolated location, interpretation facilities to assist access to healthcare are also limited.

While the legislative framework and the national reception system are in place, it is our observation that Serbia’s national asylum system still falls significantly short of minimum international, and indeed European, standards of practice, notably with regard to the quality of asylum determination. These shortcomings are observed mainly, but not exclusively, in three areas: (i) the absence of a formally established Asylum Office; (ii) insufficient staffing of the

<sup>2</sup> UN High Commissioner for Refugees, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, available at: <http://www.unhcr.org/refworld/docid/42492b302.html>

<sup>3</sup> The 2006 Constitution, in Article 57(1) states “*any foreign national with reasonable fear of persecution based on his/her race, gender, language, creed, ethnic affiliation or affiliation with another group, or his/her political opinions, shall have the right to asylum in the Republic of Serbia.*” It further provides in paragraph 2 that the procedure for granting asylum shall be regulated by the law.

<sup>4</sup> Article 40 of the Law on Asylum stipulates that “an asylum seeker and person who has been granted asylum in the Republic of Serbia shall have equal right to health care in accordance with the regulation governing health care for aliens”.

Asylum Office; and (iii) the use of the concept of the safe third country which is not in line with international standards.

### **Main Issues of Concern**

Since the adoption of Law on Asylum of the Republic of Serbia in November 2007, the competent first-instance state body for refugee status determination, the Asylum Office, has not been officially established within the Ministry of Interior, although it has been operating on an *ad hoc* basis. One of the consequences is that there is no budget allocated to the *ad hoc* Asylum Office as such and essential services, for example expenses for interpretation in the asylum proceedings and free legal assistance to asylum applicants, continue to be covered by UNHCR. One non-governmental organization offers free legal aid to asylum-seekers (APC), with funding secured exclusively from UNHCR. The provision of such vital services by extra-governmental bodies should be considered temporary and non-sustainable, and is evidence of the lack of capacity on the part of the authorities to establish a properly-functioning system.

The *ad hoc* Asylum Office is staffed by professional police officers, not by asylum experts. Designating the police as the interviewing and determining authority may create issues of a potential conflict of professional interests. In addition, it is difficult for officers to make a neutral and unbiased assessment of international protection claims when they are working for an institution whose primary objectives are border control and criminal enforcement and do not receive sufficient support to document and evaluate cases.

Moreover, the number of staff at the *ad hoc* Asylum Office is not adequate to meet demand. The Office, which is under the Border Police Directorate of the Ministry of the Interior, currently has only two officers undertaking refugee status determination. Through mid-August 2011, the Ministry of the Interior reported registering some 2,010 asylum applications. During that time, the Asylum Office undertook 48 refugee status determination interviews and issued 34 decisions (which were all negative). Although the majority of asylum applicants leave Serbia soon after registration, two staff members are not sufficient to meet the demand of processing the growing number of asylum applications.

Article 19-2 of Serbian Law on Asylum stipulates that authorized officers conducting the asylum procedure in the Asylum Office shall be specially trained for performance of these tasks. However, UNHCR is not aware of any training provided to the officers currently in charge of performing refugee status determination since their recruitment to the Asylum Office. In addition, services such as interpretation and free legal assistance which may be needed are only provided to asylum-seekers through UNHCR, as the Serbian authorities have not thus far provided for this.

Since assuming responsibility for determining international protection needs in 2008, the authorities have not granted Convention refugee status to a single applicant, whereas five have received subsidiary protection. Through a broad application of the safe third country concept and on the basis of Article 33(6) of the Serbian Law on Asylum, in 2010 the *ad hoc* Asylum Office rejected all but one asylum application without looking at the merits of cases. Cases are rejected merely on the basis that they have arrived in Serbia through one of the safe third countries as set out on the government's list. Further safeguards for the application of the safe third country notion are not in place (e.g. effective link to the third country, guarantee of readmission, and access to fair and effective asylum procedures in the third country).

The Asylum Commission (second instance body) has not overturned any decisions made on this basis. While Serbia to date has not forcibly returned rejected asylum-seekers, 90% leave Serbia before a decision is made, as the prospects for a successful appeal are negligible.



UNHCR notes that the Head of the Asylum Commission (second instance) is also the Assistant of the Head of Directorate of Border Police and this may compromise the impartiality and independence of the asylum appeals body.<sup>5</sup>


Serbia's current list of safe third countries includes all neighbouring countries. In view of this practice, all asylum seekers arriving in Serbia by land are subject to having their claims rejected based on Safe Third Country notions. The list also includes Greece and Turkey. The latter is not bound by the 1951 Refugee Convention with regard to refugees originating from outside Europe. The former is considered not to be providing effective international protection to refugees, as ruled by several courts in Europe, including the European Court of Human Rights (see e.g. the *M.S.S. v. Belgium and Greece* of January 2011). If asylum-seekers were indeed to be returned to these transit countries, they would again find themselves in limbo without access to effective protection.


Although UNHCR has repeatedly raised these and other related issues with the relevant Serbian authorities, there has been no marked improvement, nor does it appear likely that the Government is planning any structural changes in the near future.

Even for recognized refugees the possibility to receive effective protection and integrate into Serbian society is limited: There is no clear division of responsibility among the state organs and line ministries as to who is competent for the integration of recognized refugees. Among the five persons granted subsidiary protection status, three departed Serbia soon after the status was granted. The two remaining cases have been accommodated in an Asylum Centre for the last two years and are still waiting for the Commissariat to provide for them with proper accommodation.

In light of the above, UNHCR does not consider Serbia to be a safe country of asylum, and therefore should not be considered a safe third country for the purposes of the Hungarian refugee status determination procedure.

Sincerely yours,

  
p.p. Gottfried Köfner  
Regional Representative



<sup>5</sup> To address the situation, UNHCR conducted a one-day seminar for members of the Asylum Commission on the application of the concept of safe third country in early March 2011. The practice however did not change.