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DEVELOPMENTS IN INTERNATIONAL JUDICIAL AND QUASI-JUDICIAL PRACTICE RELEVANT TO THE SERBIAN ASYLUM SYSTEM: A LEGAL REVIEW

Serbia came into the international spotlight during the worst refugee crisis since World War II that escalated in Europe in 2015 and 2016.[1] At the time, the Serbian authorities met the wave of refugees and migrants from the Middle East and North Africa with apparent tolerance and hospitality which drew much praise from other states and major stakeholders such as the European Commission. The Serbian approach stood out as even more positive in light of the attitude adopted by some neighbouring countries, which was at times openly hostile towards the increasing number of arrivals.

While the treatment of refugees and migrants in transit by the authorities in Serbia was certainly commendable, the praise heaped upon them often overlooked significant difficulties that had plagued the Serbian asylum system since its inception and that were never properly dealt with, even at the height of the refugee influx. Throughout the situation, Serbia remained a "transit country" which was never perceived as a safe country of asylum for most refugees and other forced migrants, and only few actually decided to apply for asylum.[2] The rest of them accepted the provisional shelter the authorities provided before making their way towards those Central European countries that could provide them with long-term protection. While the help provided by Serbia to transiting refugees was

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1 UNHCR, *UN Secretary General says more help needed for Syrian refugees*, March 2016.

2 In Serbia, out of a total of 590,816 persons who "expressed the intention to seek asylum" in 2015 and 2016, a mere 1,157 (0,2%) submitted a formal application (statistical data provided by the Serbian Ministry of the Interior).

considerable, no significant efforts were made towards actually establishing durable solutions in the country.[3]

It is not the purpose of the present summary to review standing practical and legislative challenges that prevent Serbia from becoming a genuine country of asylum.[4] It is sufficient to say that asylum-seekers who wish to receive international protection[5] in Serbia continue to face difficulties at all stages of the asylum procedure, including access to asylum and integration for persons who have been recognized as refugees under the 1951 Convention relating to the Status of Refugees[6] or granted subsidiary protection as persons who may not be subjected to forced return based on the provisions of human rights law. These deficiencies of the Serbian asylum system have direct implications for the livelihoods of individual asylum-seekers and may result in violations of relevant legal instruments to which Serbia is a party to, notably the aforementioned Refugee Convention, but also the International Covenant on Civil and Political Rights,[7] the Convention against Torture,[8] the Convention on the Rights of the Child[9] and the European Convention on Human Rights.[10]

In order to paint a full picture of the existing state of affairs and find adequate ways of improving it, beyond the reports of credible human rights organizations, it is necessary to consider recent developments in international jurisprudence relevant to the asylum system of Serbia. This

3 The United Nations High Commissioner for Refugees (UNHCR) defines three types of durable solution as part of its core mandate: voluntary repatriation, local integration and resettlement. See UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern*, May 2003.

4 For more information, see UNHCR, *Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia,* August 2012, and Lena Petrović (ed.), *Right to Asylum in the Republic of Serbia 2016,* BCHR, 2017.

5 The term "international protection" is broader than the definition of refugee under the 1951 Convention and includes persons who benefit from additional protection mechanisms under regional or human rights instruments. See UNHCR, *Persons in need of international protection,* June 2017.

6 Convention Relating to the Status of Refugees of 28 July 1951, 189 UNTS 150, entered into force on 22 April 1954.

7 International Covenant on Civil and Political Rights of 16 December 1966, 999 UNTS 171, entered into force on 23 March 1976.

8 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 85, entered into force on 26 June 1987.

9 Convention on the Rights of the Child of 20 November 1989, 1577 UNTS 3, entered into force on 2 September 1990.

10 European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS 5, entered into force on 3 September 1953.

jurisprudence includes the deliberation on the situation of human rights in Serbia by quasi-judicial treaty monitoring bodies at the United Nations level, and of course the judicial practice of the European Court of Human Rights; the latter body has not yet adjudicated a case against Serbia relating to asylum-seekers, but it has delivered verdicts against neighbouring countries such as Hungary and Bulgaria, some of which make explicit reference to the asylum system of Serbia and all of which are binding upon Council of Europe member states.

The European Court made two very important rulings in 2017 which are relevant for Serbia as a country of asylum. In March, the Court found violations of the right of liberty and security of person, the prohibition of torture or inhuman or degrading treatment or punishment and the right to an effective remedy by Hungary in the case of *Ilias and Ahmed v. Hungary.*[11] The applicants were two Bangladeshi nationals who entered Hungary from Serbia and applied for asylum in the transit zone at Röszke on 15 September 2015. They received a hearing and were rejected that very same day on the basis that they had come from Serbia, which Hungary considers to be a safe third country.[12] Following a series of hearings and unsuccessful appeals involving the Szeged Administrative Court, they were returned to Serbia on 8 October 2015, having spent more than twenty days deprived of liberty in the border zone. Considering their application, the European Court determined that the detention was unlawful because it occurred *de facto,* "as a matter of practical arrangement," and was not followed by a legal decision of any kind;[13] it was also not followed by any form of judicial review (the deliberations of the court in Szeged only concerned the application for asylum and did not concern the legality of the applicants' deprivation of liberty).[14] The applicants were also not provided with an effective legal remedy to complain about the standards of detention in the transit zone,[15] which the court otherwise found to have been adequate.[16] Finally, a major aspect of the case involved the applicants' forced return to Serbia based on the safe third country concept:

> The Court observes that the applicants were removed from Hungary on the strength of the Government Decree listing Serbia as a safe third country and establishing a presumption in this respect. The individualised assessment of their situation with regard to any risk they ran if

11 European Court of Human Rights (ECtHR), *Ilias and Ahmed v. Hungary,* 47287/15.
12 ECtHR, *Ilias and Ahmed v. Hungary,* 14 March 2017, para. 15.
13 ECtHR, *Ilias and Ahmed v. Hungary,* 14 March 2017, paras 67–69.
14 ECtHR, *Ilias and Ahmed v. Hungary,* 14 March 2017, para. 75.
15 ECtHR, *Ilias and Ahmed v. Hungary,* 14 March 2017, paras 98–101.
16 ECtHR, *Ilias and Ahmed v. Hungary,* 14 March 2017, paras 84–90.

> returned to Serbia took place in these legal circumstances. Indeed, it involved a reversal of the burden of proof to the applicants' detriment including the burden to prove the real risk of inhuman and degrading treatment in a chain-*refoulement* situation to Serbia and then the former Yugoslav Republic of Macedonia, eventually driving them to Greece. However, it is incumbent on the domestic authorities to carry out an assessment of that risk of their own motion when information about such a risk is ascertainable from a wide number of sources. Not only that the Hungarian authorities did not perform this assessment in the determination of the individual risks but they refused even to consider the merits of the information provided by the counsel, limiting their argument to the position of the Government Decree 191/2015.[17]

Further examining the assessment of Serbia as a safe third country in Hungarian legislation, the Court made the following observation:

> The Court observes that between January 2013 and July 2015 Serbia was not considered a safe third country by Hungary (...) This was so in accordance with reports of international institutions on the shortcomings of asylum proceedings in Serbia (...) However, the 2015 legislative change produced an abrupt change in the Hungarian stance on Serbia from the perspective of asylum proceedings (...) The altered position of the Hungarian authorities in this matter begs the question whether it reflects a substantive improvement of the guarantees afforded to asylum-seekers in Serbia. However, no convincing explanation or reasons have been adduced by the Government for this reversal of attitude, especially in light of the reservations of the UNHCR and respected international human rights organisations expressed as late as December 2016 (...) This is of particular concern to the Court, since the applicants arrived in Hungary through the former Yugoslav Republic of Macedonia, Serbia and Greece (...) The Court observes that in 2012 the UNHCR urged States not to return asylum-seekers to Serbia (...) because the country lacked a fair and efficient asylum procedure and there was a real risk that asylum seekers were summarily returned to the former Yugoslav Republic of Macedonia.[18]

With these circumstances in mind, the Court determined that the applicants' return to Serbia represented a violation of Article 3 of the European Convention on Human Rights. The Court essentially reprimanded Hungarian authorities for not taking into consideration credible reports by key stakeholders – such as UNHCR, which already in 2012 described the Serbian asylum system as dysfunctional[19] – and therefore exposed the applicants not only to a real risk of ill-treatment in Serbia, but also

17 ECtHR, *Ilias and Ahmed v. Hungary,* 14 March 2017, para. 118.

18 ECtHR, *Ilias and Ahmed v. Hungary,* 14 March 2017, paras 120–121.

19 UNHCR, *Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia,* August 2012.

at risk of chain return ("*refoulement*") to Greece, where the Court had already determined in 2011 that asylum-seekers face conditions which amount to inhuman or degrading treatment.[20] Therefore, it may be induced that the European Court is of the opinion that the Serbian asylum system is incapable of actually providing protection from treatment contrary to Article 3.

In December 2017, the European Court issued another relevant judgement in the case of *S. F. and Others v. Bulgaria.*[21] The case was brought against Bulgaria by an Iraqi family of fine who in August 2015 were arrested by Bulgarian border police officers as they tried to clandestinely reach Western Europe; the arrest took place a scant few metres away from the Serbian border.[22] Following their arrest, the family were detained in a facility in Vidin for about thirty-two hours before being transferred to Sofia. During this time, the family – which included three minor children – were kept in inhuman conditions, in a run-down and dirty cell, were not provided with food and drink for over twenty-four hours and were prevented from accessing the toilet, forcing them to urinate on the floor.[23] For these reasons, the Court determined that, in spite of the relatively brief time the applicants spent in detention in Vidin, the conditions of detention amounted to inhuman or degrading treatment, in particular when the presence of minors is taken into account. The applicants were later granted asylum in Switzerland.

This case is relevant from the perspective of Serbia as the forced return of refugees and migrants to Bulgaria has been well-documented, whether taking place in formal proceedings or reported in informal push-backs across the border.[24] If there were any doubts whether such returns were in line with human rights provisions, the European Court's recent case law has certainly laid them to rest.

The European Court was not the only body to make statements relevant to Serbian asylum practice last year. Several UN treaty bodies have also published their concluding observations on reports submitted by Serbia, evaluating various aspects of the asylum system directly.

The first such body to publish its observations on Serbia in 2017 was the Committee on the Rights of the Child, monitoring the imple-

20 ECtHR, *M. S. S. v. Belgium and Greece,* 21 January 2011, 30696/09.

21 ECtHR, *S. F. and Others v. Bulgaria,* 7 December 2017, 8138/16.

22 ECtHR, *S. F. and Others v. Bulgaria,* 7 December 2017, para. 10.

23 ECtHR, *S. F. and Others v. Bulgaria,* 7 December 2017, paras 84–93.

24 Kovačević, N., *Asylum Information Database, Country Report: Serbia: 2016 Update,* ECRE, February 2017, pp. 15–16, (http://www.asylumineurope.org/sites/default/files/report-download/aida_sr_2016update.pdf).

mentation of the Convention of the Rights of the Child in Serbia. The Committee identified a number of problems related to ensuring respect for the rights of refugee and asylum-seeking children, including a poor legislative framework for their protection, the lack of a special procedure for unaccompanied minor asylum-seekers, inadequate reception conditions for refugee and asylum-seeking children, the fact that minors are subjected to forced return proceedings and may be exposed to a risk of statelessness.[25] The Committee also noted that this group of children is particularly in danger of becoming victims of human trafficking.[26] One month later, the Human Rights Committee reached similar conclusions,[27] based on the provisions of the International Covenant on Civil and Political Rights. Most recently, at the very beginning of 2018, the Committee on the Elimination of Racial Discrimination voiced its concern because of "reports that most asylum claims filed in the past two years have not been decided upon and that the safe third country principle was applied to the vast majority of asylum claims filed in 2016."[28] In this regard, the UN bodies all demonstrate consistency in their appreciation of the protection of refugees and other forced migrants in Serbia, echoing the findings of the Committee against Torture in 2015.[29]

A specific problem that deserves to be highlighted concerns the forced return proceedings in Serbia ("*prinudno udaljenje*"). Outside of the asylum procedure, the country still has not developed a proper procedure

25 CRC, *Concluding observations on the combined second and third periodic reports of Serbia*, CRC/C/SRB/CO/2–3, para. 56.

26 CRC, *Concluding observations on the combined second and third periodic reports of Serbia*, 7 March 2017, para. 62.

27 "While acknowledging the current challenges regarding refugees and appreciating the basic legal protections in place, the Committee is concerned about: (a) the existence of significant obstacles and delays in the process of registering, interviewing and providing identification for asylum seekers and the low number of asylum claims granted; (b) reported cases of efforts to deny access to Serbian territory and asylum procedures, of collective and violent expulsions and of the misapplication of the 'safe third country' principle, despite concerns regarding conditions in some of those countries; (c) inadequate conditions in reception centres, including when unaccompanied minors are placed with adults, and the absence of care for individuals outside of reception centres; (d) inadequate access for unaccompanied minors to guardians who make decisions in the best interest of the child; and (e) inadequate procedures to determine the age of unaccompanied minors (arts. 6–7, 13 and 24)." HRC, *Concluding observations on the third periodic report of Serbia*, 10 April 2017, CCPR/C/SRB/CO/3, para. 32.

28 CERD, *Concluding observations on the combined second to fifth periodic reports of Serbia*, 3 January 2018, CERD/C/SRB/CO/2–5, para. 26.

29 CAT, *Concluding observations on the second periodic report of Serbia*, 3 June 2015, CAT/C/SRB/CO/2*, paras 14–15.

for determining whether foreigners subjected to expulsion, deportation or extradition may be at risk of grave human rights violations in the country to which they are to be sent, in spite of the fact that this is strictly prohibited by the Serbian Law on Foreigners.[30] It is particularly troubling that refugees and migrants may not always be aware of the possibility to seek asylum, or may be afraid to do so.

Recent jurisprudence by international bodies demonstrates that the system of refugee and migrant protection in Serbia has not significantly improved even after the migrant crisis. Forced returns from Serbia to neighbouring states such as Bulgaria or Macedonia may lead to violations of human rights treaties to which Serbia is a party. The ongoing EU accession talks require significant reforms in the asylum system before Serbia may fulfil the conditions for membership,[31] however these reforms have so far been delayed by parliamentary elections and other events of national significance. It is important to recall that the rights of refugees and migrants must be respected regardless of the current state of European integration. The case law under review here clearly shows that these matters will remain an open question for Serbia in the coming years, and if the state wishes to avoid bodies such as the European Court examining applications against it, their regulation will be made a priority.

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30 Law on Foreigners, Art. 47. *Official Gazette of the Republic of Serbia*, No. 97/08.

31 See European Commission, *Serbia 2016 Report,* 9 November 2016, SWD (2016) 361 final, pp. 66–68.