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Submission to the Human Rights Committee with reference to the report of the Republic of Macedonia under the Covenant on Civil and Political Rights

Issue of concern: Lack of effective legal remedy in accelerated asylum procedure

Summary: Absence of a lawsuit in accelerated asylum procedure constitutes a disrespect of the right to effective legal remedy under Article 2 para. 3 of the Covenant [ICCPR] and poses a threat to the exercise of asylum seekers' right under Article 7 of the ICCPR.

Articles 2 and 7

According to the Law on Asylum and Temporary Protection (LATP) of 2003, the asylum proceedings is [to be] conducted by the Ministry of Interior's Department (Section) for Asylum in first instance (Article 27 LATP) and the Governmental Appeals Commission (in charge of, *inter alia*, internal affairs) in second instance (Article 37 para. 3 LATP). Accelerated procedure is stipulated for manifestly unfounded cases (Article 35 LATP)¹, but *no lawsuit to the Supreme Court can be lodged following the second instance decision in an accelerated procedure* (Article 37 para. 4 LATP), in spite of the guarantee provided by Article 50 para. 2 of the Constitution: "Judicial protection of the legality of individual acts of state administration, as well as of other institutions carrying out public mandates, is guaranteed." It is worth mentioning that a substantial number of members of the Governmental Appeals Commission come from the Ministry of Interior and (even though the composition of this and other Governmental appeals commissions is not publicly disclosed) it is notorious that they usually have a higher ranking and less expertise compared to the first instance eligibility officers of the MoI's Section for Asylum. The involvement of officials of the same Ministry both in first and second instance decision-making is contrary to the legal principle *nemo iudex in causa sua*. No effective review on merits seems to exist in both instances in accelerated procedure, and there is not a further judicial review of the case or any remedy capable of preventing deportation.

¹ The asylum claim is unfounded if the fear of persecution is groundless, based on deception, if the claimant has arrived from a safe third country etc.

It is regrettable that even the Constitutional Court in its decision of 16 February 2005 refused to instigate a procedure for evaluation of constitutionality of Article 37 para. 4 of the LAMP, without providing solid reasons.²

We would like to emphasize the importance of the issue on the basis of experience accumulated from representing nearly 2,500 asylum seekers in the period 2001-2007, out of whom nearly 2,300 under the LAMP. In several cases processed under accelerated procedure we observed that the lack of entitlement of failed asylum seekers to lodge a lawsuit following completion of accelerated RSD procedure³ has deprived them of an opportunity to effectively challenge the findings of the administrative bodies, which rather formally conduct [and decide in] such procedures. Such legal gap has put some asylum seekers in a real and imminent risk of being removed to unsafe country, eventually jeopardizing their right under Article 7 of the ICCPR, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 3 of the European Convention on Human Rights (ECHR)⁴ and Article 11 of the Constitution of the Republic of Macedonia (the Constitution).

Article 2 para. 3 ICCPR reads as follows:

"3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

Article 7 ICCPR, *inter alia*, stipulates the following:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [..]"

CAT defines torture in its Article 1, engages a responsibility of State Parties to prevent acts of torture (Article 2), and provides a clear guarantee for asylum seekers (Article 3):

"1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

[..]."

Article 11 of the Constitution, *inter alia*, stipulates the following:

"[..] Any form of torture, inhuman or degrading treatment or punishment is prohibited [..]"

² №2/2004, published in the "Official Gazette of the Republic of Macedonia" №23/2005. The court, *inter alia*, considered that the guarantee of Article 50 para. 2 relates only to judicial protection of citizens of Macedonia. The latter conclusion gave rise to a dissenting opinion that: a) the referral to Article 50 of the Constitution (paragraphs 1 and 3 of which refer to "citizens") is groundless, because [Macedonian] citizens cannot possibly claim and enjoy the right to asylum and b) exclusion of foreign citizens from judicial protection is incompatible to the principle of rule of law!

³ For contrast, cases under regular procedures are reviewed by the Supreme Court in practice.

⁴ All aforementioned legal acts are a part of the domestic legal order (Article 118 of the Constitution).

Articles 3 and 13 of the ECHR contain basically the same guarantees like Articles 7 and 3 of ICCPR respectively. The European Court of Human Rights (ECtHR) has established in cases under Article 3 ECHR in conjunction with Article 13 that the legal remedy should be "effective" in practice as well as in law to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief,⁵ and ... the notion of effective remedy under Art. 13 requires independent and rigorous scrutiny of a claim ... [under Art. 3] ... and the possibility of suspending of the measure impugned.

In few cases the ECtHR considered our allegations that the lack of effective legal remedy in accelerated RSD cases posed a threat of ill-treatment of failed asylum seekers in a receiving country (Appl. № 8200/02, decision of 27 January 2005, and Appl. № 44922/04, interim measure of non-expulsion indicated to the state in the latter case). It is likely that we and other lawyers or organizations will continue to address the same issue before ECtHR in future until the State makes a proper legislative development in the relevant field, in accordance with its obligations under the ICCPR.

In particular, we invite the State to observe its obligations under the ICCPR, most notably the obligation under Article 2 para. 3, by providing judicial protection in accelerated asylum procedures as well. By doing so, the State would comply with the guarantee of Article 2 para. 1 to respect and ensure the rights under the ICCPR in a non-discriminatory manner.

Article 2 para. 1 ICCPR states the following:

"1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

We also rely on the General Comment No. 31 [80] of the Human Rights Committee, *The Nature of the General Obligation Imposed on State Parties to the Covenant* (2004)⁶, which reiterates that "[...] the enjoyment of Covenant rights is not limited to citizens of State Parties, but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees [...]" (para. 10). "Moreover, the article 2 obligation requiring that State Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed." (para 12). "Article 2, paragraph 2, requires that State Parties take the necessary steps to give effect to the Covenant rights in the domestic order ...". (para 13) "...A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State" (para. 14). Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights State parties must ensure that individuals also have accessible and effective remedies to vindicate those rights ..." (para. 15)

Executive Director

Suad Missini

⁵ *Hilal v. U.K.*, 2001, §75; *Jabari v. Turkey*, §50:

⁶ Adopted on 29 March 2004 on the 2187th meeting.