



ИСТРАЖУВАЧКИ ЦЕНТАР
ЗА ГРАЃАНСКО ОПШТЕСТВО

11/2 Borka Taleski, Skopje MK-1000
Republic of Macedonia

Tel: +389.2.321.7940/Fax: +389.2.321.7940

**Submission to the Committee against Torture
with reference to the report of the Republic of Macedonia
under the Convention against Torture and Other Cruel, Inhuman, or
Degrading Treatment or Punishment (CAT)**

Issue of concern: Suspensive character of appeal/effectiveness (issue no. 8)

Summary: Lack of a lawsuit in accelerated asylum procedure is contrary to Article 3 CAT.

Article 3 CAT

1. According to the Law on Asylum and Temporary Protection (hereinafter: "LATP") of 2003, asylum proceedings is conducted by the Ministry of Interior's Section for Asylum (MoI-SfA) in first instance (Article 27 LATP) and the Governmental Appeals Commission in second instance (Article 37 para. 3 LATP), to which appeals can be submitted within 15 days from the day of delivery of the first instance decision (Article 32 para. 1 LATP). Lawsuits can be lodged against second instance decision within 30 days from the day of delivery of decision (Article 20 para. 1 of the Law on administrative disputes, hereinafter "LAD"). Appeals have suspensive effect (Article 37 para. 2 LATP), while lawsuit do not have such an effect. In practice, the lawyers of the Macedonian legal network, coordinated by the Civil Society Research Center (hereinafter: "CSRC") were submitting requests to the MoI-SfA to postpone deportation until completion of the respective administrative dispute before the competent court. In spite MoI-SfA has established a policy of accepting a number of such requests, the criteria guiding its decision-making in this respect are not clear and transparent.

2. The LATP stipulates accelerated procedure for manifestly unfounded cases (Article 35 LATP),¹ and *administrative decisions in accelerated procedure are not subject to judicial control* (Article 37 para. 4 LATP). Even though Article 50 paragraph 2 of the Constitution of the Republic of Macedonia (hereinafter: "the Constitution") provides that "judicial protection of legality of individual acts of state administration, as well as of other institutions carrying out public mandates, is guaranteed", 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 LATP,

¹ The asylum claim is unfounded if the fear of persecution is groundless or based on deception, if the claimant has arrived from a safe third country etc. (Art. 35 LATP)

without providing solid reasons for the refusal.² There are no any legal remedies capable of preventing deportation following dismissal of appeal in accelerated procedure.

3. CSRC and the Macedonian legal network (implementing partner of UNHCR) represented around 2,500 asylum seekers in the past eight years. As of 31 March 2008 there were 1,840 refugees and asylum seekers in the country, of which 1,123 persons are enjoying asylum on humanitarian ground (including those whose appeal against cessation of humanitarian protection is pending),³ and around 450 finally rejected asylum seekers are tolerated to stay. The rate of rejection of appeals amounts to around 99%, which is probably due to the following:

- The second instance Governmental Commission is not independent/impartial body (the Government establishes it by appointing officials from the ministries concerned, who have a higher rank than the MoI-SfA eligibility officers);
 - Its work is not quite transparent (though a limited practice of summoning complainants and their legal representative was established few years ago);
 - It is ineffective because of merely repeating the findings and the conclusions of the MoI-SfA, instead to pay a sufficient attention to the enclosed evidence and arguments;
 - Its members are lacking sufficient knowledge and relevant experience to deal with asylum issues due to the broad range of issues that fall within its competence (internal affairs, judiciary, local self-government, issues of religious character).
- ✓ *Therefore, the Commission should be either strengthened by external members who are knowledgeable in particular areas (asylum); or, eventually, replaced by independent and impartial appeal body, such as a Refugee appeal board.*⁴

4. In addition to the above shortcomings, the administrative practice in accelerated procedure has revealed lack of substantial consideration of asylum claims. In several cases processed under accelerated procedure CSRC observed that the lack of entitlement of failed asylum seekers to lodge a lawsuit has put some asylum seekers in a real and imminent risk of removal to unsafe country, contrary to Article 3 of the CAT, eventually jeopardizing their right not to be exposed upon return to ill-treatment described in Article 1 CAT, as well as by Art. 7 ICCPR⁵, Article ECHR⁶ and Article 11 of the Constitution.⁷ In one case the ECtHR considered our allegations that the lack of effective legal remedy⁸ in accelerated RSD cases posed a threat of ill-treatment of failed asylum seekers in a receiving country (Appl. № 44922/04, interim measure of non-expulsion indicated to the state and accepted).

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 Person under humanitarian protection (in compliance with Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) is an alien to whom the Republic of Macedonia shall grant the right of asylum on humanitarian grounds and give a permission to remain within its territory because he would be subjected to torture, inhuman or degrading treatment or punishment, in the state of his nationality, or in which, not having a nationality, he has a habitual place of residence. (Article 5 LATP, the text in the bracket is from Article 2 para 1/b LATP).

⁴ CSRC, Proposal for reform of the appeal system, 2004. For more detailed information about irregularities in second instance procedure, reference is given to the CSRC's paper "Analysis on the proceedings for determination of refugee status in the Republic of Macedonia", 2007.

⁵ Article 7 ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [...]"

⁶ Article 3 ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

⁷ "[...] Any form of torture, inhuman or degrading treatment or punishment is prohibited [...]"

⁸ Regarding the issue of effectiveness of remedy in conjunction with the prohibition of torture, the European Court of Human Rights (ECtHR) has established 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, 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.

5. Article 3 CAT reads as follows:

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.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

6. Regarding the "non-refoulement - effective remedy" nexus, reference is made to the General Comment No. 31 [80] of the Human Rights Committee, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004)"⁹, which reiterates that "[...] the enjoyment of Covenant rights is not limited to citizens of States 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 States 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 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 States 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 States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights ..." (para. 15)

7. CSRC welcomes the fact that the State does not return rejected asylum seekers to Kosovo, yet reminds on paragraph 16 of the Concluding Observations of the Human Rights Committee, issued on 3rd April 2008¹⁰ [advanced unedited version]:

"The Committee notes the State party's commitment not to forcibly return rejected asylum seekers to Kosovo and to fully cooperate with the Office of the UN High Commissioner for Refugees in order to ensure a return in safety and dignity, but remains concerned about the system of appeal regarding the independence of the appellate instance (arts. 7, 12, 13).

The State party should ensure that return is always fully voluntary and not enforced where return in safety and dignity¹¹ cannot be assured. To this end, the State party should particularly ensure that an effective system of appeal is in place."

8. CSRC is concerned from the fact that the appeal system in administrative procedures (including asylum ones) lacks effectiveness, and that asylum seekers rejected in accelerated procedures are *ex lege* deprived of judicial protection. Thus CSRC urges the State to introduce an effective appeal system (independent from the executive power) and to introduce a right to administrative dispute following dismissal of appeal in an accelerated procedure.

CSRC

6 May 2008

⁹ Adopted on 29 March 2004 on the 2187th meeting.

¹⁰ The Committee considered the State report under ICCPR on its 97th session from 17th March to 4th April 2008.

¹¹ Safe (as well as free) return of refugees is also envisaged by the UN SC Resolution 1244/99, S/RES/1244 (1999) of 10 June 1999. (reference mark added by CSRC)