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BEST INTERESTS OF THE MIGRANT CHILDREN IN THE SYSTEM OF ASYLUM IN THE REPUBLIC OF SERBIA**

Abstract

In all the proceedings where the child appears as a party, the principle of the best interests of the child appears as the most general principle through which the child is protected. The following laws regulate the best interests of migrant children in the Republic of Serbia: Family Law, Law on Foreigners, Law on Asylum and Temporary Protection, and Law on Social Protection. One of the problems in practice is that an unaccompanied child, from entering the territory of Serbia until the submission of the asylum application, is assigned different persons as temporary guardians on several occasions. The major problem in the administrative procedure and the realization of the best interests of the child is reflected in the fact that police officers register unaccompanied and separated children and conduct official actions in the asylum procedure without the presence of a temporary guardian. Processing of asylum applications is not a priority, and the speed of decision-making depends on many factors, including the expediency of the acting official of the first instance body. The Asylum Office must take into account the best interests of the child at every stage of the asylum procedure,

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particularly when deciding on the child's asylum application, and must take into account the opinion of the guardianship authority and the opinion of the child, which is one of the basic elements of the principle of the best interests of the child.

Keywords: administrative proceeding, asylum, best interests of the child, child, migration

INTRODUCTION

In modern law, in all the proceedings where a child appears as a party, the principle of the best interests of the child should be given primary consideration. The Convention on the Rights of the Child (CRC) contains a number of substantial rights, where a holistic approach to the wellbeing and the best interest of the child is guaranteed under Article 3, which is the most widely ratified human rights instrument in the modern world (Convention on the Rights of the Child [CRC] 1989, Art. 3). Implementation of such international legal standard is guaranteed by the obligation of each state party to take all available measures to achieve the fulfillment and protection of all rights of the child – in the field of social protection, health, education, thus creating an environment in which children can realize their full potential. Therefore, each state has an obligation to intervene in order to secure the best interests of the child principle (Freeman 1997, 370).

The significance of this principle multiplies when it comes to the right to stay of migrant children or the right to the reunification of migrant children with their families. Seeking family members and a possibility to reunite with their family is certainly of paramount importance for an unaccompanied and separated child.[1] This right is also envisaged as part of the right to respect family life, within the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the right to family reunification. During this procedure, it is very important that the child stays in the least restrictive environment that is most similar to the family. The UN Guidelines for Alternative Care for Children (UNGACC) acknowledge such formal and informal care for

[1] Unaccompanied and separated children fall into the category of children on the move (see: Bogetić i Jugović 2019, 1293–1318).

children (small dormitory communities, shelters, or institutions) and community accommodation (Novaković 2016, 101).

As stated elsewhere, determining the best interests of the child is part of a formal procedure accompanied by stringent procedural guarantees based on the child's best interest assessment (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families [CMW] and Committee on the Rights of the Child [CRC], CMW/C/GC/3-CRC/C/GC/22, 7). In the Republic of Serbia (RS), such assessment is introduced by the general clause in the Family Law (2015) which imposes an obligation to courts and other administrative bodies to always be guided with the best interests of the child when deciding on the protection of the child's rights or exercising parental rights (Porodični zakon [PZ] 2015, čl. 266 i 268). To buttress the application of this principle, the Law on Asylum and Temporary Protection (LATP) reiterates its importance by mandating its strict enforcement within the asylum proceedings (Zakon o azilu i privremenoj zaštiti [ZAPZ] 2018, čl. 10). Therefore, the organizational unit of the Ministry of Interior Affairs, the Asylum Office, which is charged with the authority to grant or deny the right to asylum to the applicants, shall always act in accordance with the wellbeing, social development, and origin of the minor as well as the minor's opinion serving as main tools for assessment of the child's interest principle prescribed by the asylum regulation. Nevertheless, this also applies to the Asylum Commission, which stands as the second instance body, authorized to decide on appeals. As the last resort, where the applicant can seek redress for their encroached right to asylum, stands the Administrative Court, where all administrative decisions can be revoked or affirmed (čl. 20–22).

LAW ON FOREIGNERS

According to Article 6 of the Law on Foreigners (LF), a foreigner may enter and stay in the Republic of Serbia with a valid travel document in which a visa or residence permit has been granted, unless otherwise stated by law or an international agreement (Zakon o strancima [ZS] 2018). Article 3 of the said law defines the foreigner as any person situated at the territory of the Republic of Serbia that does not possess the citizenship of the Republic of Serbia (čl. 3). In accordance with Article 17, a foreigner may leave the Republic of Serbia freely, and only exceptionally, this right may be restricted if the foreigner does not have

a valid travel or other document used for crossing the state border, if he/she does not have a visa or if there is a justified suspicion that by leaving the RS he/she could avoid criminal or misdemeanor prosecution, serving a prison sentence, execution of a court order, deprivation of liberty or execution of property obligation, by order of a competent state body or court (čl. 17).

The competent authority, which is the Border Police, can refuse the entry of a foreigner into the Republic of Serbia. A positive novelty (Zakon o izmenama i dopunama Zakona o strancima 2019) in relation to the former LF (2018), according to which the refusal of entry was stated only in the travel document of a foreigner, is that the new law makes it obligatory to render a decision on refusal of entry printed on the prescribed form stating the reasons for refusal, which is issued both in Serbian and English. There is a possibility of filing an appeal against the said decision within 8 days following the date of the refusal of entry, which does not have the automatic suspension effect on the decision. The appeal is decided by the Ministry of the Interior of the Republic of Serbia (MI) and shall be submitted via Border Police station issuing refusal of entry or via diplomatic or consular mission of the Republic of Serbia abroad in accordance with the provisions of The Rulebook on the Form of the Decision on Refusal of Entry into the Republic of Serbia, the Form of the Decision on the Approval of Entry into the Republic of Serbia and the Manner of Entering Data on the Refusal of Entry into the Travel Document of the Foreigner (Pravilnik o izgledu obrasca o odbijanju ulaska u Republiku Srbiju, o izgledu obrasca o odobrenju ulaska u Republiku Srbiju i načinu unosa podataka o odbijanju ulaska u putnu ispravu stranca 2018). Article 83 of LF is of great importance, as it defines the prohibition of forcible removal of a foreigner to the territory where there is a risk that he/she will be subjected to the death penalty, torture, inhuman or degrading treatment or punishment, or where he/she is threatened with a serious violation of constitutional rights (non-refoulement) (ZS 2018, čl. 83).

Regarding the endorsing of the temporary residence, the foreigners who have established family, cultural or social ties with the RS in a certain period of time, or who can be considered to have achieved a certain degree of integration into Serbian society may be granted temporary residence for humanitarian reasons (ZS 2018, čl. 61). These certain types of temporary residence can only be issued in the period of at least 6 months up to 1 year at the most and can be prolonged if the

basis for such endorsement is still valid. The situation is slightly different when it comes to children born to foreign parents on the territory of the Republic of Serbia, where is mandatory for a parent, guardian, or legal representative of a child to submit a request for approval of temporary residence for the child within three months from the birth of the child (čl. 58). Temporary residence shall be permitted in the period until the expiry of the temporary residence of its parents or in a period of 1 year if the parent, guardian, or legal representative is a permanent resident (čl. 58).

Article 65 says that during decision-making on the temporary residence of the foreign child competent authority is guided with the solution that is in the best interest of such child (ZS 2018, čl. 65). Through this provision, the best interest of the child is elegantly introduced in the LF, and it diligently implies an assessment of all underlying elements that come into use and collision when deciding what is the best solution for the specific child at the specific point of time. Other uses of it refer to the procedure of returning the foreign child to his home country, or to the integration of the foreign child who is a victim of family violence, or in granting temporary residence to him, and such standards shall also be held in consideration during the residence of the child in the shelter. In all these situations, the child's best interest shall be assessed and considered before resorting to any form of decision.

THE LAW ON ASYLUM AND TEMPORARY PROTECTION

The Law on Asylum and Temporary Protection regulates the principles, conditions, and procedure for granting and terminating the right to asylum and temporary protection, and asylum seekers' and asylum holders' status, rights, and obligations, including other matters concerning asylum and temporary protection (ZAPZ 2018, čl. 1).[2] LATP stresses out that upon admission to the asylum center or other facility intended for accommodation of applicants, the individual has the right to reside in the RS, and during that time he/she can move freely on the territory of the RS unless there are reasons for restricting his/her movement as determined by law (čl. 49). Restrictions on the freedom of movement of asylum seekers may be determined in the form of a

[2] On the concept, origin, and procedure for obtaining asylum in the Republic of Serbia see: Đurić 2011, 31–48.

forbiddance to leave the asylum center or certain place or a certain space. Such a restriction can last for a maximum of three months, and this measure can be extended for another three months (čl. 78). Migrants who are granted the right to asylum have the right to obtain personal documents, including those intended and necessary for travel in and outside of the country. Migrants that are granted the right to asylum have the right to obtain personal documents, including ones intended and necessary for travel in and outside of the country. In concrete, the Asylum Office (AO) will upon an application filed by the asylum holder in RS, issue a travel document with a validity period of five years on the prescribed form (čl. 91). However, the MI has not yet adopted a form on the appearance and content of the travel document for refugees, due to lack of "technical conditions," as it has been explained. This practice leads to restricting the freedom of movement of these persons, which is contrary to the Constitution of the Republic of Serbia (SC), the ECHR, as well as the Convention Relating to the Status of the Refugees (Convention Relating to the Status of Refugees [CRSR] 1951).

A person who was afforded the right to asylum has the right to life and the upbringing of children in accordance with their religious beliefs. Needless to state, such a person is bestowed with the right of family reunification, which empowers the principle of family unity guaranteed in Article 9 of LATP (ZAPZ 2018, čl. 9).

There are several principles that permeate the LATP and direct the way the law shall be enforced and interpreted. Of great importance for this paper is the minor's best interest principle that reiterates the importance of the child's rights, interests, and wellbeing even within the asylum proceeding. The best interests of the child must be observed in civil, administrative, or criminal proceedings in which the child appears as a participant (UNHCR 2013). This principle comes as a protective umbrella for all the migrant children and especially those who are due to poverty and scarcity of resources, which makes them, on the one hand, socially excluded and, on the other, susceptible to exploitation and abuse. Therefore, persecution, conflict, and mass encroachment on human rights in the country of origin make them just more vulnerable (Udruženje Atina 2015, 19–20).[3]

[3] Therefore, the LATP prescribes that enforcement of any provision set forth shall include assessment and application of the best interests of minors. In support of such, Article 3, paragraph 1 of the Convention on the Rights of the Child states that

What is in the best interest of the minor is not left to be interpreted completely by the competent authority, but the law instead gives the elements that ought to be considered when assessing the minor's best interests. Especially, the recognition should be given to the special protection of the victims of human trafficking and family violence since these categories, in addition to the status of minors, are one of the most vulnerable and endangered groups of people and deserve immediate protection and intervention of the competent authorities. It is of utmost importance that children are not exposed to the possibility of being neglected, abused, or misused (UNICEF Beograd 2018, 33). Also, the LATP includes the major procedural principle of allowing each party to effectively participate in the proceeding, i.e., to state its opinion upon its age and maturity.[4] The Family Law singles out the right of the minor to state its opinion in every situation as the separate and independent privilege of each child (PZ 2015). This is, of course, conditioned upon the minor's capacity to form the opinion, and it also imposes the obligation of the others to timely and fully inform the minor to be able to conceive the opinion in the first place. In the judicial and administrative proceeding, the minor is allowed to state his opinion freely and seek the assistance of the court or other administrative body through other people and institutions if he turns the age of 10 (PZ 2015, čl. 65).

The procedure for determining the best interests is specified in the Rulebook on the organization, norms, and standards of work of the Center for Social Work (Pravilnik o organizaciji, normativima i standardima rada centra za socijalni rad 2025). In terms of the assessment of the best interests of children, from the first contact and the initial assessment, the children must be fully involved in the whole process, they must be presented with all the facts that can help them make a decision, and this must be done in a language they understand (The United Nations Refugee Agency [UNHCR], n.d., 7).

"in all activities concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (CRC 1989, Art. 3).

4 In the Republic of Serbia, the age of a child is determined solely on the basis of its statement (see: Marković 2019, 47–64; Krasić, Milić, i Šahović 2017; Rakić i Bogdanić 2017, 137–148). In case of doubt as to whether the person being identified is a child, reasonable suspicion should be allowed and the person should be treated as such (see: Centar za prava deteta 2017).

THE RIGHT TO CITIZENSHIP AND THE LAW ON CITIZENSHIP

In addition to the right to know the origin, the right of the child to live with his/her parents and to grow up and develop in a family environment is one of the basic rights of the child. This right may be jeopardized if the child is in the territory of another state unaccompanied by the parent due to armed conflict or other natural disasters or circumstances. The absence of documents on the child's origin, as well as on his/her national status (citizenship), prevents the child from enjoying other rights that are conditioned by these rights: the right to education, health care, the right to a personal name, and social protection. Article 15 of the Universal Declaration of Human Rights (United Nations General Assembly [UNGA], A/RES/217 [lll] A, Art. 15) stipulates that everyone has the right to citizenship and the prohibition of arbitrary deprivation of citizenship and denial of the right to change citizenship. The Convention on the Rights of the Child prescribes the right of a child to citizenship and prohibits the occurrence of statelessness in children (CRC 1989, Art. 7). The manner and conditions of acquiring citizenship are regulated by the internal regulations of the state, but the international standard requires that no distinction is made between newborn children. The Convention Relating to the Status of Stateless Persons obliges states to apply to stateless persons the same regime that applies to foreigners in general (Convention Relating to the Status of Stateless Persons [CSSP] 1954, Art. 7), and the Convention on the Reduction of Statelessness provides that a state will grant citizenship to a person born in its territory if it would otherwise remain stateless (Convention on the Reduction of Statelessness [CRS] 1961, Art. 1).

The ECHR does not prescribe the right to citizenship as a special right, but indirectly, through the protection of other rights, protects the right to citizenship. The right to citizenship is not guaranteed in the Serbian Constitution, but Art. 38 stipulates that the acquisition and termination of citizenship of the RS are regulated by law and that a Serbian citizen cannot be expelled or deprived of citizenship or the right to change it and that a child born on Serbian territory has the right to citizenship if he/she cannot acquire the citizenship of another state (Ustav Republike Srbije 2006, čl. 38).

According to the Law on Citizenship (Zakon o državljanstvu Republike Srbije 2018), a child acquires citizenship by origin if both

parents are citizens of the RS at the time of its birth if one of the parents is a citizen of the RS at the time of its birth and the child is born on the territory of the RS if one parent is a citizen of Serbia at the time of its birth and the other is unknown, of unknown citizenship or stateless and the child is born abroad (čl. 7). If the child is born to one of the parents that is a citizen of the RS and the other is a foreign citizen, the child can acquire citizenship if the parent, citizen of the RS registers the child until it turns 18 before the competent diplomatic or consulate missions of the RS (čl. 9) or by its own request by the age of 23 (čl. 10). If the child was born or found in the territory of Serbia, it acquires the citizenship of Serbia if both parents are unknown or of unknown citizenship or stateless, or if the child is stateless, and may, at the request of the parents, lose his citizenship if it is determined that both of his parents are foreign nationals (čl. 13).

CHILD RIGHTS IN THE ASYLUM PROCEDURE

Regarding the decision on the asylum application, in its explanatory part, the circumstances in which the child finds itself need to be explicitly outlined. When the competent authority renders a decision that is unlike the child's opinion, it should clearly state the reasons behind such a discrepancy and why the rendered decision is in the best interest of the child. Even the child's best interest is the general principle introduced by the Family Law, and as such shall be applicable by each authority when the child is the subject matter of the proceeding. In practice, there were no cases of its application and use until the enactment of the LATP. Therefore, the previous valid Law on Asylum (2007), only prescribed in Article 15, that persons with special needs, including thereby minors, shall be taken into special consideration (Zakon o azilu 2007, čl. 15). The former case law was on the trace of recognizing this principle but far from what the new law and current judicial practice achieved. The closest the court reached in terms of the child's best interests principle is the Administrative Court Decision No. U. 15736/13 as of March 9, 2015 which recognized the special approach and due consideration to the categories underlined in Article 15 of LA including the minors, where the Administrative Court has concluded that Asylum Commission (AC) breached the rules of procedure when did not enforce and take into account this provision and as a result rescinded

its decision (Odluka Upravnog suda Republike Srbije [USRS], 21 U. 15736/13). In the contemporaneous practice of the AO, there is almost always a review of the best child's interest in accordance with the consultation of the Center for Social Work (CSW).

In Article 11 of the LATP, it is stated that the intention of minors to apply for asylum shall be expressed by the parent or guardian and the same shall apply in terms of lodging the request for obtaining the asylum (ZAPZ 2018, čl. 11). However, the law specifies the exemption when it comes to minor who turned the age of 16 and is married, mainly to refrain parents and guardians from interfering in the private and intimate sphere between spouses. Furthermore, the law specifically governs the procedural guarantees of unaccompanied minors and provides some effective legal means for the protection of their rights and interests. Before all, such is the right to be bestowed with the temporary guardian as soon as it is determined that the minor is unaccompanied, and at the latest before the submission of the request for asylum (see: Budimir 2020, 203–222).[5] In practice, this standard is mainly applied by the courts and administrative bodies when deciding on the child's rights; however, for the benefit of the unaccompanied child, even his legal representative must be guided by this principle. Remains the question whether the child can appeal or challenge the decision of the higher instance authorities or file a subsequent asylum application on the basis that the temporary guardian did not act in the best interest of the child. In the author's opinion, such shall be granted by the court or administrative authority due to the change of circumstances. In any case, CSW shall release the temporary guardian before the end of the proceeding when it determines he has ceased to conduct his duty, or he has abused his rights and harshly neglected his duties, or due to the emergence of some other facts that would prevent him from being appointed as a temporary guardian. Additionally, a temporary guardian should also be released when it conducts its duties recklessly or if it would be beneficial for the protégé to be assigned with another guardian

[5] When it comes to determining the temporary guardian of an unaccompanied child as a problem which has been observed in practice, the assignment of multiple temporary guardians to a child due to the mobility of the child (see: Ćopić i Ćopić 2019, 49–72). Also, it is not uncommon for one person to be appointed guardian of a large number of children. For example, in the reception centre in Obrenovac, one guardian was appointed to altogether 218 unaccompanied children staying there (see: Batrićević i Kubiček 2019, 349–377).

(PZ 2015, čl. 133). Also, LATP stipulates those proceedings initiated by the unaccompanied minor concerning the asylum shall have priority in rendering the decision (ZAPZ 2018, čl. 12). In practice, according to the experience of the Belgrade Centre for Human Rights (BCHR) in 2019, children were used to expressing the intention to seek asylum without the presence of a temporary guardian (Belgrade Centre for Human Rights [BCHR] 2020a). It is stated that in the best-case scenario, the temporary guardian just showed up to sign the registration form that affirms the child has expressed its intention to file for asylum. However, in the following report from 2020, BCHR stresses that in practice there are still ongoing situations that unaccompanied children are registered without the presence of a temporary guardian, but generally speaking the overall situation is getting to better, specifically singling out the example of CSW in Dimitrovgrad, where employees in the capacity of temporary guardians were always present during the registration (BCHR 2020b, 105).

Among the first decisions of the AO based on the enacted LATP that has granted the right of asylum to the minor is the AO Decision No. 26-2348/17 as of January 28, 2019, concerning P., a citizen of Iraq (Odluka KA, br. 26-2348/17). This decision in its rationale explicitly stated that it was guided by the best interest of the minor in accordance with Article 10 of LATP. Furthermore, having in mind that the minor was unaccompanied, it has diligently considered the report on the psychological assessment of the minor as well as the report of the temporary guardian assigned by the CSW. Moreover, the AO was also referring to the Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR 2019, 46), in which it is stated that in the case of an unaccompanied minor, it is necessary to consult an expert in the field of children's psychology, which was certainly performed, and it was a laudable act. It seems that a temporary guardian often is not the person equipped with in-depth knowledge and experience to handle specific types of issues that burden the unaccompanied minor. This is especially the case, like the present one, where the minor *inter alia* confessed that at some points during the ongoing process, they tried to commit suicide. Hereby, the author draws a conclusion that it is necessary to perform every method of examination to determine the minor's mental and physical state and provide an adequate response, which will usually be in the form of a decision on granting asylum and providing shelter.

Furthermore, the AO in the Decision No. 26-652/16 as of June 17, 2016 granted the subsidiary protection to an Afghani national, S., mother of two children Afghani nationals, one of which was two and the other four years old at the time of the submission of the application (Odluka Kancelarije za azil [KA], 26-652/16In essence, the AO found that under Article 4, Section 2 of the LATP, no conditions were fulfilled for granting the right to asylum for all three applicants. Regardless of such decision-making, the AO has taken into account the current security situation in Afghanistan and that, in the event of their return, the applicants would be exposed to risk due to internal armed conflicts and their basic human rights would be breached. Interestingly, the AO never related to the best interests of the children nor assessed the requisite elements when rendering the decision. For the AO, only the current situation in the country of origin which was graded as highly risky and detrimental to their return mattered.

The issue of the inconsistent practice in asylum matters should be specifically addressed and underlined as a major setback for the exercise of the rights bestowed under the LATP. Concretely, the AO came to a completely opposite conclusion in the AO Decision 26-378/19 as of February 11, 2020, when it drew the conclusion that the situation in Afghanistan is safe for living according to the stance of UNHCR dating from 2002 (Odluka KA, br. 26-378/19). This can be described only as a blatant transgression of fundamental human rights and as such imposes the real encroachment of the *non-refoulement principle.*

The refoulement principle is introduced, in the Article 33 of the Convention Relating to the Status of Refugees where it says that "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (CRSR 1951).[6] Also, according to the Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: "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

[6] In order to determine whether a refugee's life and freedom are truly at risk, the competent authorities of the country of asylum should weigh all relevant facts, taking into account, where possible, whether there is a gross and widespread violation of fundamental political rights in that country (see: Pavlica 2005, 85–102).

being subjected to torture" (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CATOCIDTP] 1984). Paragraphs 27 and 28 of the CRC Committee's General Comment No. 6 (UNHCR 2005) further specify these provisions and stress that minors must not return to the countries if there is a possibility they can be recruited to fight in armed conflicts or where they would be irreparably harmed (also specified within: UNHCR 2018, part VIII).

Duration of the asylum procedure

The asylum proceeding, from its beginning when the asylum applicant expresses the intention to seek asylum until the decision becomes effective and enforceable, is equipped with precise and tight deadlines for each legal action as a procedural safeguard for the applicants. At first, the Family Law qualifies the procedure of assigning temporary guardians as urgent, requiring the CSW to render the decision on assigning the guardian immediately, or up to 30 days as of its discovery that the protégé is in need of a guardian (PZ 2015, čl. 332). Secondly, LATP recognizes the importance of the speedy resolution of the asylum matter and sets out exact deadlines in which the actions and certain parts of the procedure need to be completed, even though it does not attribute the proceeding as urgent (ZAPZ 2018). Anyhow, the principal provisions of the Family Law governing the judicial proceedings with minors shall strictly apply when deciding in asylum procedure on the rights of the minor. These provisions qualify such process as particularly urgent which means that the first hearing needs to be scheduled in a period of 8 days as of the receipt of the application, that second instance body must deliver the decision not later than 15 days as of receipt of the appeal and that whole proceeding shall be conducted in two hearings at the most (PZ 2015, čl. 204 i 268). Finally, LATP prescribes that those proceedings with unaccompanied children shall have priority over all others (ZAPZ 2018, čl. 12, para. 8).[7]

[7] Considering LATP, migrants who express the intention to seek asylum shall be immediately transferred to the place designated for accommodation, and within 15 days of their registration, must file an asylum application (ZAPZ 2018). If the officials at the AO hinder the applicant to do so, he can submit the application on his own by filling out the form and submitting it to the AO in the following 8 days as of the expiry of the previous deadline (čl. 36). Even though the legislator provided another deadline if the first is exceeded, it is still uncertain how the

Administrative Court in its Decision U 9284/20 as of December 17, 2020, concluded that officials have breached the applicant's right to aid since they conducted the proceeding without the translation and used the English language that the Afghan national did not comprehend, and eventually delivered the decision only in the Serbian language (Odluka USRS, U. 9284/20).[8]

In practice, significant discrepancies were noticed regarding strict deadlines and the urgency principle guaranteed by the law. BCHR states that in case No. 26-379/19, as of May 29, 2019, the minor waited for 6 months to be scheduled with a hearing, and more than a year from the application until receiving the first instance decision (BCHR 2020a, 111). In the same report, it is stated that all procedures initiated by the BCHR were unreasonably long and only one applicant received the notification that the procedure was going to be delayed (BCHR 2020a, 111).

These are a few examples where the deadlines were not respected, and where the migrant child stayed in the status quo, for which time the fear of return to the unsafe and dangerous country is multiplied by each day of uncertainty waiting for the decision to arrive. A conclusion is that hearings are often scheduled in up to three months and even longer in exceptional cases, which is certainly a long period due to the LATP provision that prescribes scheduling *in the shortest period.* The more concerning part is that the decisions are rendered by the first instance body after a year, and in administrative proceedings, this can last up to 3, 4, or more years, which causes the justice to be slow and inefficient.

migrant will be able to obtain, read, understand, and file the form on his own without the necessary help from the official (čl. 35–36). This is only well regulated if the minor is unaccompanied, and due to the fact that he would be assigned a temporary guardian who shall provide the required legal assistance. In practice, a common issue is that applicants were not served by a translator, which significantly aggravated their chances.

[8] Further, LATP states that the hearing shall be conducted in the shortest possible period and explicitly prescribes that the decision has to be rendered within a period of 3 months as of the submission of the application or subsequent application (ZAPZ 2018). The deadline can be prolonged for another 6 months if the application is based on a complex legal and factual background, or if a vast number of migrants are seeking asylum. Each delay in delivering the decision has to be notified, and the applicant should be aware of such circumstances (čl. 37 and 39).

CONCLUSION

All children, regardless of their legal status or the legal status of their parents, are entitled to the respect of the best interests of the child in all activities and to the use of their rights and privileges without discrimination. By analyzing the legal framework and the implementation of laws in practice, it is noted that even when the law secures a full corpus of minors' rights in terms of asylum, there are significant obstacles in practice to enforce such rights. Firstly, the children who are separated from their parents are among the most vulnerable groups exposed to the risk of abuse and exploitation.[9] Nevertheless, this also applies to children accompanied by their parents whose rights are collectively in breach by the official authorities or not guaranteed by the respective regulations. Finally, the situation of unaccompanied children who have not sought asylum and/or entered the territory of the RS illegally is especially difficult. These children have a much harder time exercising their basic rights, including their rights to education, health care, and social inclusion, which is practically unattainable since they are invisible to the legal system. Some of the problems the children encounter are lengthy proceedings, a lack of translators, legal uncertainty in terms of different interpretations of the current safety status of specific countries, and interpretations of third safe countries. Moreover, a certain number of unaccompanied children are placed in social protection institutions, which are neither competent nor specialized for the care of migrant children and lack translators, psychologists, medical staff, and other experts.

In terms of the amendments to the current law, the good practice of AS should be taken into consideration in light of supplementing the law to include the mandatory presence of the psychologist, medical staff, and other experts during the first encounter with the child migrant and further in case of needIn some cases, even readmission to the third safe country may be possible by the objective elements; however, it should be carefully considered whether such action will deteriorate the child's medical conditions and put him in an endangered position. Also, the bylaws on content and form of the travel document shall be immediately adopted by the MI since the passive stance of the competent ministry

[9] What dangers unaccompanied children can be exposed to (see: Kostić 2016, 391–412).

that neglects the rightful need of the asylum holders is nothing but the blatant encroachment of their basic human rights.

Finally, the long duration of the asylum proceedings concerning the minor asylum seekers shall be addressed accordingly. However, this is an everlasting issue and the main setback toward the judicial reforms and European integrations in the Republic of Serbia, and would require serious institutional endeavors to improve the current situation.

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НАЈБОЉИ ИНТЕРЕС ДЕЦЕ МИГРАНАТА У СИСТЕМУ АЗИЛА У РЕПУБЛИЦИ СРБИЈИ**

Резиме

Сва деца, без обзира на њихов или правни статус њихових родитеља, имају право на поштовање најбољих интереса у свим активностима и на коришћење својих права и привилегија без дискриминације. Анализом правног оквира и примене закона у пракси примећује се да, чак и када закон обезбеђује потпуни корпус права малолетника у погледу азила, у пракси постоје значајне препреке за њихово спровођење. Најбољи интерес деце мигранта у Републици Србији (РС) регулишу следећи закони: Породични закон, Закон о странцима, Закон о азилу и привременој заштити, Закон о социјалној заштити. Деца која су одвојена од родитеља спадају међу најрањивије групе изложене ризику од злостављања и експлоатације. Ипак, ово се односи и на децу у пратњи родитеља чија права колективно крше званичне власти или нису гарантована одговарајућим прописима. Коначно, посебно је тешка ситуација деце без пратње која нису тражила азил и/или нису илегално ушла на територију РС. Ова деца много теже остварују своја основна права, укључујући права на образовање, здравствену заштиту, а њихова социјална инклузија је практично недостижна, јер су невидљива за правни систем. Неки од проблема са којима се деца сусрећу су дуготрајни поступци, недостатак преводилаца, правна несигурност у смислу различитог тумачења тренутног безбедносног статуса

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појединих земаља и тумачења треће сигурне земље. Штавише, одређени број деце без пратње смештен је у установе социјалне заштите, које нису надлежне нити специјализоване за бригу о деци мигрантима и немају преводиоце, психологе, медицинско особље и друге стручњаке. Главни проблем у административном поступку и остваривању најбољег интереса детета огледа се у чињеници да полицијски службеници региструју децу без пратње и раздвојену децу и спроводе службене радње у поступку азила без присуства привременог старатеља. Број деце миграната у Републици Србији стално расте, а време које проводе на њеној територији се повећава, посебно због континуиране пандемијске ситуације. Стога је од највеће важности да се што пре успостави ефикасан систем заштите ове деце у складу са одговарајућим законским стандардима, посебно када је у питању здравство, социјална заштита, психолошка подршка, као и образовање. Пре свега, ово је одговорност и дужност Републике Србије, али укључивање цивилног сектора и невладиних организација не сме бити занемарено и изостављено у процесу због њихове подобности и капацитета да пруже и допринесу неизбежној помоћи систему за избеглице и азил у целини. Канцеларија за азил мора узети у обзир најбољи интерес детета у свакој фази поступка азила, посебно приликом одлучивања о захтеву детета за азил, и мора узети у обзир мишљење органа старатељства и мишљење детета, што је један од основних елемената принципа најбољег интереса детета. У погледу измена важећег закона, треба узети у обзир добру праксу Канцеларије за азил у светлу допуне закона како би се укључило обавезно присуство психолога, медицинског особља и других стручњака приликом првог сусрета са дететом мигрантом и даље по потреби. У неким случајевима, чак и поновни пријем у трећу сигурну земљу може бити могућ објективним елементима, али треба пажљиво размотрити да ли ће таква акција погоршати здравствено стање детета и довести га у угрожен положај. Такође, Министарство унутрашњих послова ће одмах усвојити подзаконске акте о садржају и облику путне исправе, јер пасивни став надлежног министарства, који занемарује оправдане потребе азиланата, није ништа друго до очигледно кршење њихових основних људских права. На крају, дуготрајност поступка азила у вези са малолетним тражиоцима азила мора се решити на одговарајући начин. Међутим, ово је вечни проблем и главна препрека ка правосудним реформама и европским интеграцијама у Републици Србији и захтевало би

озбиљне институционалне напоре како би се побољшала тренутна ситуација.

Кључне речи: управни поступак, азил, најбољи интерес детета, дете, миграција

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