# RODNA ANALIZA ZAKONA O AZILU

## Primena načela rodne ravnopravnosti u sistemu azila Republike Srbije

# ASYLUM ACT GENDER ANALYSIS

## Enforcement of the Gender Equality Principle in the Asylum System in the Republic of Serbia

Beogradski centar
za ljudska prava

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*Biblioteka*

Posebna izdanja

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# Sadržaj

# Uvod

Republika Srbija se od stupanja na snagu Zakona o azilu 2008, suočava sa velikim prilivom migranata na svojoj teritoriji, među kojima su tražioci azila i izbeglice koji svoju zemlju porekla napuštaju pre svega zbog rata, sukoba ili progona. Prema postojećim studijama i istraživanjima, žene ipak ne čine većinu u migratornim tokovima, pa tako tražioci azila u Srbiji većinski predstavljaju mušku populaciju. U 2014. godini, ukupno 16.490 ljudi je izrazilo nameru da traži azil, od čega 1.721 su žene; u 2015. godini, 577.995 ljudi je u Srbiji tražilo azil, od čega 153.476 su žene; i u 2016. godini zaključno sa avgustom mesecom, 8.003 ljudi je izrazilo nameru da traži azil, od čega 2.138 su osobe ženskog pola. Prema istraživanju *Mentalno zdravlje tražilaca azila u Srbiji* koje je realizovano tokom 2014. godine, od ukupnog broja ispitanika (226), 56 procenata ispitanika putuju sami, pri čemu treba napomenuti da je među muškarcima taj procenat veći (63), dok žene gotovo isključivo putuju sa nekim (93 procenta), najčešće sa svojim suprugom (52 procenta), decom (37 procenata) ili drugim članovima porodice.

Među izbeglicama i migrantima koji su prolazili ili boravili na teritoriji Srbije u poslednje tri godine, primetan je povećan broj ranjivih grupa, pre svega, porodica i žena koje putuju same sa decom. Tokom rada na terenu sa ženama koje putuju same sa decom, pravnici Beogradskog centra za ljudska prava prikupili su podatke koji govore da mnoge od njih prvi put putuju same ili prvi put borave van svoje države, što dodatno otežava njihov položaj. Velika većina Srbiju i dalje ne vidi kao zemlju destinacije, zadržavajući se samo dok grupa sa kojom putuju ili suprug ne stignu kako bi zajedno nastavili put. U pogledu zemlje porekla, skoro polovina tražilaca azila potiče iz Sirije, po brojnosti slede Somalija i Avganistan, dok su druge zemlje (Eritreja, Sudan, Al-

žir, Irak, Iran, Nigerija, Pakistan, Gana, Bangladeš, Egipat, Palestina i Etiopija) zastupljene sa manje od pet procenata od ukupnog broja tražilaca azila u Srbiji.

Međutim, tražiteljke azila kao i žene izbeglice, ipak predstavljaju posebno ranjivu grupu migranata upravo zbog pola i rodnih stereotipa, i upravo iz tog razloga, od suštinskog značaja za razvoj i sprovođenje mera i politika azila, moraju biti i programi usmereni na zaštitu i osnaživanje žena izbeglica. U tom cilju, države bi trebalo da prepoznaju njihove potrebe, i da u svoje politike i programe koji su namenjeni osnaživanju i zaštiti prava žena, uključe i žene tražiteljke azila i žene izbeglice.

UNHCR je u *Smernicama o međunarodnoj zaštiti žena izbeglica* istakao da žene predstavljaju visoko ugrožene grupe migranata i da zahtevaju brzu, koordinisanu i efikasnu zaštitu od država destinacija. Pojam žena izbeglica, podrazumeva sve žene (uključujući i neudate žene koje putuju same ili sa decom, trudnice i dojilje, adolescentkinje, devojčice bez pratnje, rano-udate devojke – ponekad sa novorođenim bebama, LGBT žene, kao i žene sa invaliditetom).

Jedan od razloga za ranjivost tražiteljki azila i žena izbeglica vezan je za poteškoće sa kojima se često suočavaju u dokazivanju svojih osnova za priznavanje izbegličkog statusa, jer žene često ne žele da se izjasne da su bile žrtve seksualnog nasilja, ili rodno zasnovanog progona, ili nemaju svest da su bile žrtve u svojoj zemlji porekla. Rodno zasnovano nasilje često je posledica nejednakih rodnih odnosa u zemlji porekla i često se koristi kao mehanizam za pretnju od strane muških članova porodice sa kojima žene putuju, ili može biti posledica prisilnih raseljavanja usled sukoba u zemlji porekla.

Rodna analiza Zakona o azilu koja je pred vama, nastala je kao rezultat projekta *Izbeglička i migrantska kriza na Zapadnom Balkanu* koji Beogradski centar za ljudska prava sprovodi u saradnji sa organizacijom Oxfam i UN Women.

Beogradski centar za ljudska prava od samog osnivanja posebnu pažnju posvećuje izdavačkoj delatnosti. Ideja je i u ovom

projektu bila da pripremimo i objavimo stručnu analizu o primeni načela rodne ravnopravnosti u sistemu azila u Srbiji sa preporukama za dalji razvoj i usklađivanje sa međunarodnim standardima.

Takođe, koliko je autorkama ove publikacije poznato, stručna literatura u Srbiji na ovu temu nedostaje, pre svega, profesionalcima koji se bave ovim pitanjem i ne samo njima, već svima koji podrobnije žele da se bave zaštitom prava žena u izbegličkom pravu.

Autorke su analizirale relevantne međunarodne standarde u izbegličkom pravu koji se odnose na zaštitu prava žena izbeglica, dok je fokus analize stavljen na relevantne odredbe važećeg Zakona o azilu Republike Srbije iz 2008. godine, sa posebnim osvrtom na rešenja koja su data u Nacrtu novog zakona o azilu, čije se usvajanje očekuje do kraja 2016. godine. Imajući u vidu stratešku opredeljnost naše zemlje da pristupi Evropskoj uniji, i da se intenzivno radi na evropskim integracijama poslednjih godina, pogotovo na otvaranju prvih poglavlja važnih za unapređivanje opšteg stanja ljudskih prava u zemlji, za nas posebno važno Poglavlje 24 – oblast migracija i azila, neophodno je što pre unaprediti institucionalni okvir politike azila kako bi se dostigli postavljeni standardi Evropske unije, pre svega oni koji se odnose na efikisan sistem azila i integraciju izbeglica.

Iz tog razloga, nadamo se da će ova analiza koristiti državnim organima i institucijama koje se u okviru svojih nadležnosti bave sistemom azila u Srbiji, i da će predložena rešenja koja su data u analizi, naći kao korisna za svoj dalji rad.

# I DEO

## 1. RODNA RAVNOPRAVNOST U IZBEGLIČKOM PRAVU

Kako bi se utvrdilo da li su žene izbeglice i u kojoj meri ravnopravne sa muškarcima ili su diskriminisane, odnosno stavljene u neravnopravan položaj u odnosu na njih, neophodnim se čini kontinuirano analiziranje i prikupljanje podataka o obimu, strukturi i karakteristikama položaja žena tražiteljki azila kao i žena izbeglica u sistemu izbegličkog prava, takođe i o svim institucionalnim mehanizmima podrške u društvu. Na taj način se obezbeđuje i vidljivost položaja žena i problema sa kojima se one suočavaju, a ujedno se postavljaju i osnovi za kreiranje adekvatne politike poboljšanja položaja žena izbeglica kako na zakonodavnom nivou tako i u praksi.

Temeljni princip ljudskih prava počiva na pretpostavci da su svi ljudi rođeni slobodni i jednaki u dostojanstvu i pravima i da prava i slobode pripadaju svakom bez ikakvih razlika, uključujući i razliku u pogledu pola i roda.[1] Načelo zabrane diskriminacije, uključujući i *zabranu diskriminacije po osnovu pola,* prihvaćena je danas u brojnim međunarodnim dokumentima univerzalnog i regionalnog karaktera, koje će se pojedinačno analizirati u posebnom odeljku. Na osnovu brojnih međunarodnih dokumenata, obaveza je država da unese princip rodne ravnopravnosti žena i muškaraca u nacionalno zakonodavstvo i da zakonskim ili drugim odgovarajućim merama, obezbedi praktičnu primenu ovog prinicipa.

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1 Saša Gajin (ur.), Tanja Drobnjak, Violeta Koćič Mitaček, Aleksandar Resanović, *Zabrana diskriminacije i uznemiravanja žena – Model izmena i dopuna Ustava Republike Srbije i pojedinih sistemskih zakona,* drugo izdanje, Beograd 2008, str. 7.

Zaštita tražilaca azila i izbeglica podrazumeva sve aktivnosti koje imaju za cilj ostvarivanje punog poštovanja prava žena u skladu sa relevantnim međunarodnim standardima i zakonima bez diskriminacije po bilo kom osnovu, u našem kontekstu pre svega na osnovu pola i roda. Zaštita je, pre svega, odgovornost koju pruža država, bilo da je u pitanju država porekla, tranzita ili država destinacije za izbeglice. Međutim, i svi drugi akteri kao što je civilno društvo, međunarodne organizacije i sami građani takođe imaju odgovornosti da svoje politike, programe i standarde usklade na način koji bi trebao da doprinese ostvarivanju jednakih prava žena i devojaka izbeglica. Rodna ravnopravnost je pre svega ljudsko pravo, i integrisanje rodne perspektive u sve naše politike i aktivnosti predstavlja važan aspekt izbegličkog prava.[2]

Danas okosnicu međunarodne zaštite izbeglice čini Konvencija Ujedinjenih nacija o statusu izbeglica iz 1951. godine i Protokol iz 1967. koji je donet uz ovu konvenciju. Ovim međunarodnim instrumentima određuju se pojam izbeglice, kao i prava i obaveze koje se priznaju izbeglicama. Konvencija o statusu izbeglica Ujedinjenih nacija usvojena je 1951. godine, a stupila je na snagu 1954. godine (u daljem tekstu: Konvencija iz 1951). Iako predstavlja najvažniji izvor prava u oblasti azila i izbegličkog prava, zanimljivo je da Konvencija ne definiše pojam azila niti postupak odobravanje azila, već se UNHCR zalaže za liberalnu politiku odobravanja azila u skladu sa Opštom deklaracijom o ljudskim pravima i Deklaracijom o teritorijalnom azilu, usvojenim od strane Ujedinjenih nacija. Dakle, ideja je da same države potpisnice konvencije svojim nacionalnim zakonodavstvom urede ova pitanja, dok Konvencija služi samo kao vodilja kroz najvažnije pojmove i standarde u oblasti izbegličkog prava.

Ono što Konvencija definiše jeste pojam izbeglice: izbeglicom se smatra lice koje bojeći se opravdano da će biti pro-

2 *Gender Handbook in Humanitarian Action – Women, girls, boys and women, different needs, equal opportunities*, Inter-Agency Standing Committee, decembar 2006. godine, str. 14.

gonjeno zbog svoje rase, vere, nacionalnosti, pripadnosti nekoj socijalnoj grupi ili političkih mišljenja, nađe izvan zemlje čije državljanstvo ono ima i koje ne želi ili, zbog toga straha, neće da traži zaštitu te zemlje; ili lice koje nema državljanstvo a nalazi se izvan zemlje u kojoj je imalo svoje stalno mesto boravka usled takvih događaja, ne može ili, zbog straha, ne želi da se u nju vrati.

S obzirom na vreme kada je doneta Konvencija, tradicionalno je tumačena kroz iskustva muškaraca. To znači da se povrede nastale u „privatnoj sferi" – na primer nasilje u porodici, genitalna mutilacija ili silovanje žena, nisu uvek priznavale i smatrale za progon, odnosno nisu uvek dovođene u vezu sa Konvecijom iz 1951. godine.[3] Kao posledica toga, čitav niz različitih načina na koji može da se manifestuje političko ili versko neslaganje žena, na primer određeni način ponašanja, pre nego samo direktno izražavanje otpora, nisu uvek bili dovoljno bitna činjenica prilikom utvrđivanja njihovog izbegličkog statusa.[4] Tek osamdesetih godina prošlog veka, počeli su u sve većoj meri da se priznaju različiti načini na koje rod podnosioca zahteva može da utiče na njen ili njegov zahtev za priznavanje izbegličkog statusa.

Za razliku od „**pola**" koji je biološka kategorija (muški ili ženski pol), „**rod**" se odnosi na socijalno ili kulturno definisane indentitete, statuse, uloge i odgovornosti koji su pojedincima dodeljeni na osnovu njihovog pola i na način na koji isti uslovljavaju odnose i podele moći između muškaraca i žena. Rod podnosioca zahteva može da uslovljava[5]:

- **Oblik progona** (na primer: seksualno nasilje nad muškarcima i ženama, silovanje muškaraca i žena, prisilan brak, genitalno sakaćenje žena, trgovina ljudima radi prisiljavanja na prostituciju ili seksualno iskorišćavanje,

3 *Utvrđivanje statusa izbeglice, identifikacija izbeglica – Modul za samostalni rad 2*, Predstavništvo UNHCR u Srbiji, Beograd, avgust 2008. godine, str. 42.

4 *Ibid.*

5 *Ibid.*

miraz i druge povrede po osnovu braka, kao i diskriminatorni zakoni ili prakse);

- **Razloge zbog kojih neko postaje žrtva progona** (na primer: homoseksualac može da postane žrtva nasilja ili ozbiljne diskriminacije zbog svoje seksualne orijentacije, ili žena može da bude žrtva kažnjavanja od strane članova svoje porodice ili zajednice zbog nepoštovanja kodeksa ponašanja koji joj je nametnut na osnovu njenog pola).

Nisu svi slučajevi progona u kojima su žrtve žene povezani sa rodom, i u velikom broju slučajeva, žene su izložene progonu na isti način i zbog istih razloga kao i muškarci. Takođe, jako je bitno naglasiti da žrtve progona na osnovu roda nisu samo žene, zahteve koji se odnose na progon po osnovu rodne pripadnosti podnose i ***muškarci i žene***.

## 2. RODNA RAVNOPRAVNOST U REPUBLICI SRBIJI

Rodna ravnopravnost podrazumeva jednake mogućnosti za žene i muškarce u ostvarivanju ljudskih prava, što je ključni preduslov za razvoj demokratizacije i ostvarivanje socijalne pravde. Rodna ravnopravnost se zasniva na opšteprihvaćenom načelu zabrane diskriminacije, čineći tako poseban vid zaštite i očuvanja jednakosti.[6]

Konvencija Ujedinjenih nacija o eliminisanju svih oblika diskriminacije žena (CEDAW),[7] izraz diskriminacija žena označava kao *svaku razliku, isključenje ili ograničenje u pogledu pola, što ima za posledicu ili cilj da ugrozi ili onemogući priznanje, ostvarenje ili vršenje od strane žena, ljudskih prava i osnovnih sloboda na političkom, ekonomskom, društvenom, kulturnom, građanskom ili drugom polju, bez obzira na njihovo bračno stanje, na osnovu ravnopravnosti muškaraca i žena*.

Pekinška deklaracija i Platforma za akciju iz 1995. godine je najprogresivniji i najopštiji politički okvir za unapređenje rodne ravnopravnosti na svetskom nivou. Njome se definiše 12 ključnih oblasti primene nacionalnih politika za uspostavljanje rodne ravnopravnosti, a to su: siromaštvo, obrazovanje, zdravlje, nasilje, oružani sukobi, ekonomija, odlučivanje, institucionalni mehanizmi, ljudska prava žena i devojčica, mediji i životna sredina.

Ustavom Republike Srbije članom 15 zagarantovana je ravnopravnost polova i razvijanje politike jednakih mogućnosti.

6 Vesna Nikolić Ristanović, Sanja Ćopić, Jasmina Nikolić, Bejan Šaćiri, *Diskriminacija žena na tržištu rada u Srbiji*, Viktimološko društvo Srbije, Beograd, 2012, str. 19.

7 *Službeni list SFRJ*, 11/81.

Ova ustavna odredba dodatno je konkretizovana usvajanjem Zakona o ravnopravnosti polova i Zakona o zabrani diskriminacije. Pored toga, brojnim zakonima i podzakonskim aktima regulisana su pitanja značajna za rodnu ravnopravnost poput onih u oblasti zdravstva, porodičnih odnosa, obrazovanja, radnih odnosa i zapošljavanja i slično.

Narodna skupština Republike Srbije je u oktobru 2013. godine ratifikovala Istanbulsku konvenciju Saveta Evrope o borbi protiv nasilja nad ženama.[8] Istanbulska konvencija je prvi i jedini pravno obavezujući instrument u oblasti nasilja nad ženama u Evropi. Prilikom ratifikacije Konvencije, Srbija je zadržala pravo da ne primenjuje odredbe koje se tiču naknade štete žrtvama, pitanja teritorijalne nadležnosti u situaciji kada počinilac ima stalno boravište na teritoriji Srbije, i nadležnosti u slučajevima seksualnog nasilja, i to dok ne izvrši usaglašavanje unutrašnjeg krivičnog zakonodavstva sa ovim odredbama Konvencije.

Vlada Republike Srbije je februara 2009. godine usvojila Nacionalnu strategiju za poboljšanje položaja žena i unapređivanje rodne ravnopravnosti za period 2010–2015. godine koja predstavlja prvi strateški dokument Republike Srbije u oblasti rodne ravnopravnosti. Nacionalnom strategijom za poboljšanje položaja žena utvrđuje se celovita politika države u cilju eliminisanja svih oblika diskriminacije žena, a prioriteti su ekonomija, obrazovanje, zdravlje, suzbijanje nasilja nad ženama, kao i pitanje rodnih stereotipa u medijima. Pored Nacionalne strategije za poboljšanje položaja žena, postoji još nekoliko važnih strateških dokumenata koji se odnose na unapređenje položaja žena, kao što su: novousvojena Strategija prevencije i zaštite protiv diskriminacije,[9] Nacionalna strategija za primenu Rezolucije Saveta bezbednosti UN 1325 „Žene, mir i bezbednost" (2010–2015) i Nacionalne strategija za sprečavanje i suzbijanje nasilja nad ženama u porodici i partnerskim odnosima (2010–2015).[10]

8 *Službeni glasnik RS – Međunarodni ugovori*, 12/13.

9 *Službeni glasnik RS,* 55/05, 71/05 – ispravka, 101/07, 65/08, 16/11, 68/12 – US i 72/12.

10 *Službeni glasnik RS,* 55/05, 71/05 – ispravka, 101/07, 65/08 i 16/11.

Strategijom prevencije i zaštite od diskriminacije iz 2013. godine[11] utvrđeno je da su diskriminaciji i diskriminatorskom postupanju više izložene osobe i grupe: po osnovu pripadnosti nacionalnim manjinama, žene, LGBTI osobe, osobe sa invaliditetom, starije osobe, deca, izbeglice, interno raseljena lica i druge ugrožene migrantske grupe, na osnovu verske pripadnosti i lica čije zdravstveno stanje može biti osnov diskriminacije. Strategija posebno brine o eliminisanju višestruke diskriminacije i poboljšanju položaja višestruko diskriminisanih žena (Romkinje, starije žene, žene sa invaliditetom, žene na selu, HIV pozitivne žene, pripadnice nacionalnih manjina, pripadnice seksualnih manjina, samohrane majke, žrtve rodno zasnovanog nasilja, raseljena lica, migrantkinje, siromašne žene...).[12] Posredni efekat koji svaki od definisanih strateških ciljeva treba da proizvede je sprečavanje višestruke diskriminacije i zaštita višestruko diskriminisanih osoba. Strategija je imala u vidu njihovu „nevidljivost" u društvu zbog visokog stepena socijalne distance koju ljudi iskazuju prema njima.

Politika jednakih mogućnosti prepoznata je kao jedno do glavnih političkih pitanja Evropske unije i predstavlja neophodan uslov za postizanje ciljeva EU koji se tiču njenog razvoja, zapošljavanja i socijalne kohezije. Princip ravnopravnosti polova, jednakog tretmana i jednakih mogućnosti za žene i muškarce je jedan od osnovnih pravnih principa Evropske unije sadržan u osnivačkom ugovoru EU. Unapređivanje rodne ravnopravnosti i položaja žena u svim oblastima političkog, ekonomskog i društvenog života javlja se kao jedan od neophodnih preduslova svih strategija i direktiva Evropske unije. S obzirom na zvaničnu opredeljenost Srbije da ide ka evropskim integracijama, jasno je da će se principi i standardi u oblasti rodne ravnopravnosti provlačiti kroz mnoga poglavlja tokom pregovora i da će sasvim sigurno biti deo akcionih planova za usklađivanje našeg zakonodavstva sa evropskim.

11 *Službeni glasnik RS*, 55/05, 71/05 – ispravka 101/07, 65/08, 16/11, 68/12 – US i 72/12.

12 *Ibid.*

# II DEO

## 1. OSNOVNI MEĐUNARODNI DOKUMENTI ZA ZAŠTITU PRAVA ŽENA IZBEGLICA

Ljudska prava doživela su svoj potpuni razvoj time što su dobila punu međunarodnu dimenziju i postala deo međunarodnog prava, a ta internacionalizacija je svoj puni zamah dostigla tek nakon Drugog svetskog rata, kao posledica uviđanja da kršenje ljudskih prava neminovno vodi u velike međunarodne poremećaje. Stoga je poštovanje ljudskih prava uneto u Povelju svetske međunarodne organizacije, Ujedinjenih nacija, kao jedno od njenih ciljeva. Ujedinjene nacije su najvažnija univerzalna međunarodna organizacija, koja danas ima 193 članice. Pod univerzalnim instrumentima u oblasti ljudskih prava podrazumeva se međunarodno običajno pravo u oblasti ljudskih prava, koje je sadržano u Univerzalnoj deklaracji o ljudskim pravima, i drugim rezolucijama Generalne skupštine, kao i u devet međunarodnih konvencija donetih pod okriljem UN. To su sledeće konvencije: Međunarodni pakt o građanskim pravima i slobodama, Međunarodni pakt o ekonomskim i socijalnim i kulturnim pravima, Konvencija o pravima deteta, Konvencija o zabrani mučenja i drugih svirepih, nehumanih i ponižavajućih postupanja i kažnjavanja, Konvencija o ukidanju svih oblika diskriminacije žena, Međunarodna konvencija o zaštiti svih prava radnika migranata i članova njihovih porodica, Međunarodna konvencija o zaštiti svih osoba od prisilnih nestanaka i Konvencija o pravima osoba sa invaliditetom.

Svaki od tih izvora međunarodnog prava ima direktan ili indirektan značaj za ostvarivanje prava i zaštite žena tražiteljke azila i žena izbeglica. U ovom odeljku posebnu pažnju

posvetićemo sledećim konvencijama: Univerzalnoj deklaraciji o ljudskim pravima, Konvenciji protiv mučenja, Međunarodnoj konvenciji o eliminaciji rasne diskriminacije, Konvenciji o eliminaciji diskriminacije žena, Konvenciji o pravima deteta i najvažnijem univerzalnom izvoru o oblasti izbegličkog prava, Konvenciji o statusu izbeglica iz 1951, kao i svim pratećim izvorima uz nju.

## 1.1. Konvencije Ujedinjenih nacija

### 1.1.1. Univerzalna deklaracija o ljudskim pravima Ujedinjenih nacija

Univerzalna deklaracija o ljudskim pravima Ujedinjenih nacija ima ukupno 30 članova kojima se garantuje širok krug prava (političkih, građanskih, ekonomskih, socijalnih i kulturnih). Ona je ujedno i prvi univerzalni dokument za zaštitu ljudskih prava u kome se pominje pravo na azil:

> Član 14:
>
> 1. Svako ima pravo da traži i uživa u drugim zemljama azil od proganjanja.
> 2. Na ovo pravo se ne može pozvati u slučaju gonjenja koje se istinski odnosi na krivična dela nepolitičke prirode ili na postupke protivne ciljevima i načelima Ujedinjenih nacija.

Kao što se vidi iz formulacije ovog člana, pravo na azil izjednačava se sa pravom da se traži azil, a ne i pravo lica da azil i dobije. Drugim rečima, članom 14 štiti se proceduralni aspekt, odnosno pravo na proceduru azila.[13] Takva formulacija je nastala kao rezultat kompromisa između država koje su smatrale da je pitanje azila, pitanje njihove teritorijalne suverenosti i onih koje su insistirale na tome da se pravo na azil prizna kao individualno pravo koje će zahtevati angažman i odgovornost

13 Ivana Krstić, Marko Davinić, *Pravo na azil – Međunarodni i domaći standardi*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013, str. 24.

UN. Ipak je preovladao stav da je u pitanju privilegija koju dodeljuje konkretna država, čime se potvrđuje suvereno pravo da se pruži zaštita.[14] U stavu dva ovog člana, navodi se i ko ne uživa zaštitu. U pitanju su lica koja se gone za krivična dela nepolitičke prirode ili lica čiji su postupci protivni ciljevima i načelima UN. Iako je doneta u obliku rezolucije Generalne skupštine, odnosno kao pravno neobavezujući akt, smatra se da Univerzalna deklaracija danas predstavlja izvor međunarodnog običajnog prava.

### 1.1.2. Konvencija o eliminaciji diskriminacije žena

Konvencija o eliminaciji diskriminacije žena iz 1979. godine[15] predstavlja najvažniji dokument kada je reč o zaštiti i promociji ženskih ljudskih prava. Princip ravnopravnosti polova, jednakog postupanja za žene i muškarce, jedan je od osnovnih vrednosti međunarodnog prava, a njeni temelji postavljeni su ovom konvencijom. Iako u samom tekstu Konvencije nisu izričito spominjane žene tražiteljke azila i izbeglice, pojedine opšte preporuke sadrže značajna tumačenja njihovog položaja i obaveza koje proističu iz ovog međunarodnog ugovora. Do danas, Komitet UN za eliminaciju diskriminacije žena je doneo ukupno 29 opštih preporuka, od kojih se 26 odnosi na žene koje nisu državljanke, odnosno na žene radnice migrantkinje.[16] Tako se, na primer, u Opštoj preporuci 24, koja se odnosi na zdravlje žena, posebna pažnja posvećuje ženama koje dolaze iz posebno ranjivih grupa, kao što su žene izbeglice, migranti i raseljena lica.[17] U preporuci 27, koja se bavi starijim ženama, izričito se naglašava da se žene tražitejke azila i izbeglice češće suočavaju sa diskriminacijom, zlostavljanjem i da pate od posttraumatskih

14 *Ibid.*, str. 25.

15 *Službeni list SFRJ – Međunarodni ugovori,* 11/81.

16 *General Recommendation No. 26 on women migrant workers*, CEDAW/C/2009/WP.1/R, 5. decembar 2008.

17 *General Recommendation No. 24, women and health,* CEDAW A/54/38/Rev.1, 2. maj 1999.

stresova koji se često ne prepoznaju, pa se i ne tretiraju.[18] Dalje, preporuka broj 28, koja se tiče opštih obaveza država ugovornica, izričito naglašava da država ima obavezu da garantuje prava iz Konvencije, bez ikakve diskriminacije, državljanima i nedržavljanima, uključujući i žene izbeglice, tražioce azila, radnike migrante i apatride.[19]

Komitet UN za eliminaciju diskriminacije žena razmatrao je u julu 2013. godine drugi i treći periodični izveštaj Republike Srbije.[20] Komitet je izrazio zabrinutost zbog nedostatka državnog monitoringa nad uslovima života žena izbeglica, žena koje traže azil i interno raseljenih žena i zatražio od Republike Srbije da uspostavi mehanizam monitoringa nad ovom osetljivom kategorijom žena. U skladu sa preuzetim međunarodnim obavezama, Republika Srbija je dužna da razmotri Zaključna zapažanja CEDAW, pristupi njihovom sprovođenju i o tome izvesti pomenuti komitet u sledećem izveštajnom ciklusu. Prema stavu 45 Zaključnih zapažanja, sledeće dostavljanje i predstavljanje državnog izveštaja Republike Srbije pred ovim telom UN predviđeno je za jul 2017. godine.[21] Uprava za rodnu ravnopravnost Vlade Srbije pripremila je prvi periodični Izveštaj o prvom intervalu praćenja sprovođenja preporuka Komiteta UN koji obuhvata period do 25. marta 2014. godine. U Izveštaju Uprave se navodi da Komesarijat nije dostavio odgovarajuće podatke o ispunjenju ovih preporuka, te „da je neophodno obratiti mu se ponovo kada se bude izveštavalo u sledećem intervalu u vezi sa praćenjem primene Zaključnih zapažanja Komiteta UN za eliminaciju diskriminacije žena".

18 *General Recommendation No. 27 on older women and protection of their human rights*, CEDAW/C/GC/27, 16. decembar 2010.

19 *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16. decembar 2010.

20 Zaključna zapažanja UN Komiteta za eliminaciju svih oblika diskriminacije nad ženama o drugom i trećem periodičnom izveštaju RS, CEDAW/C/SRB/2–3, 25. jul 2013.

21 *Ibid.,* stav 45.

### 1.1.3. Konvencija o statusu izbeglica

Konvencija o statusu izbeglica iz 1951. godine[22] i Protokol o statusu izbeglica iz 1967,[23] usvojila je Konferencija ambasadora pri Ujedinjenim nacijama 28. jula 1951. godine, a stupila je na snagu 21. aprila 1954. godine.

Protokol o statusu izbeglica, pripremljen je nešto kasnije iz razloga što je Konvencija iz 1951. godine imala vremensko ograničenje, odnosno odnosila se na događaje koji su se dogodili do 1. januara 1951. godine. Pristupanjem Protokolu iz 1967. godine, države se obavezuju da će primenjivati odredbe sadržane u Konvenciji iz 1951. prema licima sa statusom izbeglice, shodno definiciji iz Konvencije ali bez vremenskog ograničenja na događaje koji su se odigrali pre 1951. godine. Oba dokumenta ne priznaju eksplicitno pravo na azil, ali sadrže niz prava i obaveza koji proističu iz prava na priznanje statusa izbeglice. Izbeglicom se prema Konvenciji smatra lice koje bojeći se opravdano da će biti progonjeno zbog svoje rase, vere, nacionalnosti, pripadnosti nekoj socijalnoj grupi ili političkih mišljenja, nađe izvan zemlje čije državljanstvo ono ima i koje ne želi ili, zbog straha, neće da traži zaštitu te zemlje; ili lice koje nema državljanstvo a nalazi se izvan zemlje u kojoj je imalo svoje stalno mesto boravka usled takvih događaja, ne može ili, zbog straha, ne želi da se u nju vrati.[24] Osnovni principi međunarodnog prava ljudskih prava pružaju širu zaštitu od Konvencije iz 1951. godine i primenjuju se na sva lica koja se nalaze na teritoriji jedne države, bez obzira na njihovo državljanstvo, pa samim tim i na iregularne migrante i tražioce azila. Država je dužna ne samo da se suzdržava od kršenja ljudskih prava, već i da obezbedi njihovo poštovanje i uživanje, u zakonima i u praksi, i da preduzme mere za sprečavanje kršenja prava od strane trećih lica.

Konvencija o statusu izbeglica iz 1951 ne predviđa eksplicitno progon po osnovu pola ili roda kao osnov izbegličke zaštite,

22 *Službeni list FNRJ – Međunarodni ugovori i drugi sporazumi*, 7/60.

23 *Službeni list FNRJ – Međunarodni ugovori i drugi sporazumi*, 15/67.

24 Član 1A(2) Konvencije o statusu izbeglica.

pripadnost određenoj društvenoj grupi, kao osnov progona, se veoma široko tumači, tako da se kroz taj osnov štite osobe od rodno zasnovanog progona. Tako *Smernice UNHCR o međunarodnoj zaštiti: Pripadnost određenoj društvenoj grupi u kontekstu člana 1A(2) Konvencije o statusu izbeglice iz 1951 i/ili njenog Protokola iz 1967 koji se odnosi na status izbeglice* od 7. maja 2002. godine daju kriterijume koje nadležni organi treba da uzmu u obzir prilikom utvrđivanja da li lice koje traži međunarodnu zaštitu pripada određenoj društvenoj grupi:

> [...] *3. Ne postoji „zatvorena lista" koje grupe mogu konstituisati „posebnu društvenu grupu" u smislu značenja čl. 1A(2). Konvencija ne sadrži posebnu listu društvenih grupa, niti istorija njene ratifikacije odražava stavove da postoji set identifikovanih grupa koje se mogu kvalifikovati pod ovaj osnov. Umesto toga, termin pripadnost određenoj društvenoj grupi trebao bi se tumačiti na evolucionaran način, otvoren ka raznovrsnoj i promenjivoj prirodi grupa u različitim društvima i evoluirajućim normama međunarodnog prava ljudskih prava*[...].[25]

### 1.1.4. Međunarodni pakt o građanskim i političkim pravima

Međunarodni pakt o građanskim i političkim pravima, usvojen 1966. godine,[26] sadrži katalog građanskih i političkih prava koja se garantuju svim licima koja se nalaze pod jurisdikcijom države ugovornice.[27] Komitet za ljudska prava koji nadzire izvršavanje obaveza na osnovu ovog pakta, naveo je u dva komentara broj 15 i 31,[28] da se navedena prava odnose na sva lica,

25 *Smernice o međunarodnoj zaštiti: „Pripadnost određenoj društvenoj grupi" u kontekstu člana 1A(2) Konvencije o statusu izbeglice iz 1951 i/ili njenog Protokola iz 1967 koji se odnosi na status izbeglice,* UNHCR, maj 2002, str. 2, paragraf 3, dostupno na *http://www.unhcr.org/3d58de2da.html.*

26 *Službeni list SFRJ*, 7/71.

27 Međunarodni pakt o građanskim i političkim pravima, član 2, stav 1.

28 *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11. april 1986, dostupno na: http://www.refworld.org/docid/45139acfc.html.

dakle i na tražioce azila, izbeglice, apatride, radnike migrante i druge. Iako se ovim paktom ne garantuje pravo na azil, za tražioce azila su značajni članovi kojima se garantuje sloboda kretanja (član 12) i proceduralne garancije koje se pružaju u slučaju proterivanja (član 13), kao i zabrana diskrimancije (član 26). Pakt je takođe značajan i sa stanovišta uživanja ekonomskih i socijalnih prava, iako se svega dva člana eksplicitno odnose na ekonomska i socijalna prava, i to član 8, koji u stavu 3 zabranjuje prinudni rad i u članu 22 gde garantuje pravo na udruživanje i osnivanje sindikata. Komitet za ljudska prava u svojim opštim komentarima osvrtao se i na uživanje i zaštitu ekonomskih i socijalnih prava, pa se tako osvrnuo i na pitanje dostupnosti pravnih lekova radnicima migrantima koji su bili žrtva diskriminacije ili eksploatacije na radu.[29] Međutim, mora se primetiti da Komitet za ljudska prava nije forum kojem se tražioci azila i izbeglice obraćaju radi zaštite svojih prava u nekom značajnijem obimu, posebno kada su žene u pitanju, najviše iz razloga što najčešće dolazi do kršenja prava koja spadaju pod jurisprudenciju drugih komiteta Ujedinjenih nacija.

U Opštem komentaru broj 4, u članu 3 govori se o jednakom pravu muškaraca i žena u uživanju svih građanskih i političkih prava. Član 3 Pakta, koji nalaže državama ugovornicama da osiguraju jednako pravo muškaraca i žena u uživanju svih građanskih i političkih prava iz Pakta, posvećena je nedovoljna pažnja u velikom broju izveštaja država ugovornica čime su otvorene brojne nejasnoće, od kojih bi dve mogle biti posebno važne. Prvo, član 3, kao i članovi 2, stav 1 i 26 koji su se do sada prvenstveno odnosili na sprečavanje diskriminacije po različitim osnovima, među kojima i po osnovu pola, nalaže ne samo mere zaštite već i *afirmativnu akciju* tako koncipiranu da osigura pozitivno uživanje prava. To se ne može postići jednostavnim donošenjem zakona. Stoga je traženo više informacija koje se odnose na položaj žena u praksi s naglaskom na utvrđivanje onih mera,

29 Ruth Rubio–Marin, *Human Rights and Immigration*, volume XXI/1, Oxford University Press, United Kingdom, 2014, str. 202. Komitet se na ovo pitanje osvrnuo prilikom razmatranja izveštaja Tajlanda i Južne Koreje.

kao dodatak čisto zakonskim merama zaštite, koje su bile preduzete ili se preduzimaju u cilju ispunjavanja preciznih i pozitivnih obaveza iz člana 3 i da se utvrdi kakav napredak je postignut ili koji faktori ili teškoće su uočene u vezi s tim. Drugo, pozitivna obaveza preduzeta od strane država ugovornica iz ovog člana može imati očigledan uticaj na zakonodavstvo ili administrativne mere posebno sačinjene radi regulisanja oblasti koje ne reguliše Pakt, ali koje mogu negativno uticati na prava garantovana Paktom. Između ostalog, jedan od primera je nivo do *koga imigracioni zakoni koji prave razliku između građana ženskog i muškog pola mogu ili ne mogu da utiču na obim prava žena na sklapanje braka s nedržavljanima ili da se bave javnim poslovima*. Komitet, stoga, smatra da može biti od pomoći državama ugovornicama ukoliko se posebna pažnja pruži nadzoru od strane posebno ustanovljenih tela ili institucija nad zakonima i merama koji uvode razliku između žena i muškaraca u onoj meri u kojoj ti zakoni i mere imaju negativan efekat na prava priznata Paktom, i drugo, da bi države ugovornice trebalo da obezbede posebne informacije u svojim izveštajima o svim merama, zakonskim ili drugim, preduzetim u cilju primene ovog člana. Komitet smatra da može biti od pomoći državama ugovornicama u primeni ove obaveze ukoliko bi se unapredila postojeća sredstva međunarodne saradnje u pogledu razmene iskustava i organizovanja pomoći u rešavanju praktičnih problema u obezbeđivanju jednakih prava žena i muškaraca.[30]

### 1.1.5. Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima

Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima[31] (PESK) je univerzalni međunarodni dokument koji je od velikog značaja za uživanje i zaštitu ekonomskih i socijal-

30 Preuzeto sa internet stranice: http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/04/Op%C5%A1ti-komentari-Komiteta-za-ljudska-prava.pdf.

31 *Službeni list SFRJ,* 7/71.

nih prava migranata i tražilaca azila.[32] Značaj Pakta ogleda se jednim delom u tome što ima veoma široku pokrivenost, jer je do pisanja ovog rada 160 zemalja ratifikovalo ovaj dokument, a drugim delom ogleda se kroz veoma bogatu praksu Komiteta za ekonomska, socijalna i kulturna prava koji je usvojio veliki broj tzv. opštih komentara (do danas ukupno 20) ali i redovnih izveštaja, koji imaju veliki značaj za ovu kategoriju lica. Već u članu 2 PESK kaže da se države članice ovog pakta obavezuju da garantuju da će sva prava koja su u njemu formulisana biti ostvarivana bez ikakve diskriminacije zasnovane na rasi, boji, polu, jeziku, veri, političkom mišljenju ili kakvom drugom mišljenju, nacionalnom ili socijalnom poreklu, imovinskom stanju, rođenju ili kakvoj drugoj okolnosti. U članu 3 PESK sve države članice ovog pakta obavezuju se da osiguraju jednako pravo muškarcima i ženama da uživaju sva ekonomska, socijalna i kulturna prava koja su nabrojana u ovom paktu.

U Opštem komentaru broj 19,[33] koji se bavi pravom na socijalnu bezbednost, predviđa se da država ima obavezu da obrati dužnu pažnju na pojedince i grupe koje se tradicionalno suočavaju sa problemima u ostvarivanju prava na socijalnu bezbednost, među kojima su posebno žene, izbeglice, tražioci azila, raseljena lica i povratnici. Ovaj komentar sadrži ceo odeljak koji se odnosi na strance, uključujući radnike migrante, izbeglice, tražioce azila i apatride, bez obzira na pol i rod. Tako, Komitet ističe da član 2, stav 2 PESK zabranjuje diskriminaciju po osnovu državljanstva, te iz toga proizlazi da ukoliko stranci doprinose razvoju sistema socijalne bezbednosti, oni treba i da imaju koristi od tog doprinosa ili da povrate nazad svoje doprinose ukoliko napuste zemlju.

U Opštem komentaru o nediskriminaciji broj 20,[34] Komitet za ekonomska, socijalna i kulturna prava, konstatovao je da je

32 Ruth Rubio–Marin, *Human Rights and Immigration*, volume XXI/1, Oxford University Press, United Kingdom, 2014, str. 196.

33 *General Comment No. 19, the right to social security (art. 9)*, dok. UN, E/C.12/GC/19, 4. februar 2008.

34 *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), dok. UN, E/C.12/GC/20 (2009).

pristup pravima garantovanih u PESK obezbeđen svima, misleći posebno i na žene, izbeglice, tražioce azila, raseljena lica, radnike migrante, žrtve trgovine ljudima i to bez obzira na pravni status i dokumentaciju koja ova lica poseduju.

### 1.1.6. Konvencija protiv mučenja i drugih surovih, nehumanih ili ponižavajućih kazni ili postupaka

Konvencija protiv mučenja i drugih surovih, nehumanih ili ponižavajućih kazni ili postupaka iz 1984. godine[35] definiše i zabranjuje tri oblika zlostavljanja: mučenje, nečovečno postupanje i kažnjavanje i ponižavajuće postupanje i kažnjavanje. Ona predviđa niz zakonskih, administrativnih, pravnih i drugih mera koje se tiču prevencije, vođenja istrage, kažnjavanje za akte zlostavljanja, kao i prava na dobijanje odštete koja pripada žrtvama mučenja koje se podjednako odnose i na žene i na muškarce.[36] Komitet protiv mučenja, nadzorno telo formirano ovom konvencijom, u Opštem komentaru broj 2 traži od država da zaštite manjine i marginalizovane grupe koje su posebno izložene riziku od mučenja, a naročito za tražioce azila i izbeglice. Veliki broj predmeta pred Komitetom odnosi se na zabranu proterivanja ili ekstradicije tražilaca azila i izbeglica, zbog ozbiljne sumnje da će biti izloženi mučenju.

### 1.1.7. Konvencija o eliminaciji rasne diskriminacije

Međunarodna konvencija o eliminaciji rasne diskriminacije iz 1965.[37] predstavlja glavni međunarodni dokument koji se bavi zabranom rasne diskriminacije. Prema Konvenciji termin „rasna diskriminacija" označava bilo kakvo pravljenje razlika, isključivanje, ograničavanje ili favorizovanje na osnovu rase, boje kože, porodičnog, nacionalnog ili etničkog porekla koji imaju svrhu ili efekat poništavanja ili umanjivanja priznanja, uživanja ili ostvari-

35 *Službeni list SFRJ – Međunarodni ugovori,* 9/91.

36 Ivana Krstić, Marko Davinić, *Pravo na azil – Međunarodni i domaći standardi*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013, str. 45.

37 *Službeni list SFRJ,* 1/67.

vanja, na jednakim osnovama, ljudskih prava i osnovnih sloboda u političkom, ekonomskom, socijalnom, kulturnom ili bilo kom drugom polju društvenog života.[38] Ono što predstavlja osnov principa zabrane diskriminacije su prava pripadnika rasnih, etničkih ili nacionalnih manjina na jednakost pred zakonom i jednaku zaštitu kroz zakone. U Konvenciji se izričito navodi da se ona ne primenjuje na „razlikovanja, isključivanja, ograničavanja ili davanja prvenstva koje sprovodi država ugovornica Konvencije između državljana i osoba koje nisu državljani".[39] Međutim, ovu odredbu treba posmatrati u kontekstu člana 5, koji nameće obavezu državama da zabrane i ukinu rasnu diskriminaciju u svim njenim vidovima, kao i da garantuju svim licima jednakost pred zakonom u odnosu na enumerativnu listu prava. Tu se, između ostalog, navodi i pravo lica da se slobodno kreće i izabere boravište u jednoj državi, kao i pravo lica da napusti svaku zemlju, podrazumevajući i sopstvenu, kao i pravo da se u nju vrati. Pomenuta prava iz člana 5 Konvencije imaju poseban značaj za tražioce azila.

Takvo tumačenje je dao i Komitet za eliminaciju rasne diskriminacije, koji bliže tumači odredbe iz Konvencije putem opštih preporuka, kojih ima ukupno 34.[40] Opšta preporuka 22 odnosi se na izbeglice i raseljena lica,[41] koji često ovaj status stiču usled etničkih konflikata u mnogim delovima sveta. U odnosu na obaveze država članica, Komitet naglašava da u pogledu nacionalnosti, državljanstva ili naturalizacije ne može biti razlikovanja između različitih grupa.[42] Država ima obavezu da suzbije rasnu diskriminaciju u uživanju građanskih, političkih, ekonomskih, socijalnih i kultrunih prava. Iako neka prava mogu biti

38 Član 1, stav 1 Konvencije o eliminaciji rasne diskriminacije.

39 Član 1, stav 2 Konvencije o eliminaciji rasne diskriminacije.

40 Ivana Krstić, Marko Davinić, *Pravo na azil – Međunarodni i domaći standardi*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013, str. 57.

41 *General Recommendation No. 22: Article 5 and refugees and displaced persons*, ICERD, 24. avgust 1996.

42 *General Recommendation No. 30, Discrimination against Non Citizens*, **CERD/C/64/Misc.11/rev.3,** 1. oktobar 2004.

rezervisana samo za državljane, kao na primer politička, uvek treba imati na umu da ljudska prava treba da uživaju i stranci.[43]

## 1.2. Standardi Saveta Evrope od značaja za zaštitu prava tražiteljki azila i žena izbeglica

Član 3 Statuta Saveta Evrope predviđa da svaka država ugovornica „mora prihvatiti principe vladavine prava i osnovnih sloboda svih lica koja se nalaze pod njenom jurisdikcijom". Drugim rečima, sva lica, bilo da su državljani ili stranci, moraju biti zaštićeni od kršenja osnovnih ljudskih prava. Prvi korak ka tome bilo je donošenje Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda 4. novembra 1950 godine,[44] koja i danas predstavlja okosnicu zaštite tražilaca azila u Evropi. Pored nje, usvojen je veliki broj konvencija koje štite različita ljudska prava, ali mi ćemo se za potrebe ove analize, koncentrisati samo na one, koje su od direktnog značaja za zaštitu prava tražiteljki azila i žena izbeglica.

### 1.2.1. Konvencija Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici

Srbija je u oktobru 2013. godine ratifikovala Konvenciju Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici tzv. Istanbulsku konvenciju,[45] koja predstavlja prvi i jedini pravno obavezujući dokument na nivou Evrope kojim se reguliše oblast nasilja nad ženama. Konvencijom je predviđeno uspostavljanje nezavisnog ekspertskog mehanizma za nadgledanje i praćenje implementacije Konvencije na nacionalnom nivou (Komitet GREVIO). Srbija je, prilikom ratifikacije, zadržala pravo da ne primenjuje odredbe koje se tiču naknade štete žrtvama, pitanja teritorijalne nadležnosti u situaciji kada počinilac ima stalno boravište na teritoriji Srbije, i nadležnosti

43 *Ibid*., članovi 3 i 4.

44 *Službeni list SCG*, 9/03, 5/05 i 7/05 – ispr.

45 *Službeni glasnik RS – Međunarodni ugovori*, 12/13.

u slučajevima seksualnog nasilja, i to dok ne izvrši usaglašavanje unutrašnjeg krivičnog zakonodavstva sa ovim odredbama Konvencije.

Po prvi put na nivou Saveta Evrope, Konvencija predviđa vrlo jasno standarde kada su u pitanju žene tražiteljke azila, migrantkinje i žene izbeglice. Tako se cela glava VII Konvencije odnosi na migracije i azil, pa se u članu 59 reguliše pitanje boravišnog statusa žene migrantkinje. Konvencija predviđa da se u slučaju razvoda braka, odnosno veze i u smislu posebno teških okolnosti, države obavezuju da preduzmu neophodne zakonodavne ili druge mere i obezbede da žrtve, čiji boravišni status zavisi od supružnika, odnosno partnera u skladu sa njihovim nacionalnim zakonodavstvom, po sopstvenom zahtevu dobiju nezavisnu dozvolu boravka bez obzira na dužinu trajanja braka odnosno veze. Uslovi, koji se odnose na dodelu i trajanje nezavisne dozvole boravka utvrđuju se nacionalnim zakonodavstvom.[46] U stavu 4, država se takođe obavezuje da preduzme sve neophodne mere i obezbedi da žrtve prinudnog braka dovedene u drugu zemlju u svrhu venčanja, a koje su zbog toga izgubile boravišni status u zemlji u kojoj inače borave, mogu ponovo da ostvare taj status.

Konvencija takođe predviđa da postupak azila kao i procedure u postupku moraju da imaju rodni aspekt. Tako, prilikom podnošenje zahteva za azil, država se obavezuje da preduzme sve neophodne zakonodavne ili druge mere i da obezbedi da rodno zasnovano nasilje nad ženama može biti prepoznato kao oblik proganjanja u okviru značenja člana 1A(2) Konvencije o statusu izbeglica iz 1951. godine, a kao vid ozbiljnog ugrožavanja, koje zahteva komplementarnu, odnosno supsidijarnu zaštitu.[47] Država je dužna da obezbedi da se izvrši rodno osetljivo tumačenje po svakom osnovu Konvencije i, u slučajevima gde se utvrdi da postoji strah od proganjanja po jednom ili više tih osnova, podnosiocima zahteva odobri izbeglički status u skladu sa primenjivim relevantnim instrumentima (stav 2).

46 Član 59, stav 1 Istanbulske konvencije.

47 Član 60, stav 1.

Konvencija ide još dalje, te predviđa da je država dužna da uspostavi rodno osetljive procedure prijema i usluga podrške za lica, koja traže azil, kao i rodno osetljiva uputstva i procedure za azil, koje obuhvataju utvrđivanje izbegličkog statusa i zahtev za međunarodnom zaštitom (stav 3).

Istanbulska konvenija predviđa i poštovanje načela zabrane proterivanja (*non-refoulement*) u članu 61, po kome se države obavezuju da preduzmu sve neophodne mere i obezbede da žrtve nasilja, kojima je potrebna zaštita, nezavisno od njihovog statusa ili boravišta, ne budu ni pod kojim uslovima vraćene ni u jednu zemlju u kojoj bi im životi bili ugroženi, odnosno gde bi mogli da budu podvrgnuti mučenju ili nehumanom ili ponižavajućem postupanju ili kažnjavanju.

### 1.2.2. Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda

Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda (EKLJP),[48] predstavlja osnovni instrument Saveta Evrope kojim se štite ljudska prava, prevashodno građanska i politička. Prihvatile su je sve zemlje Evrope, osim Belorusije, i u tome leži njena posebna snaga. Uz Evropsku konvenciju, do danas je usvojeno još petnaest protokola, od kojih se neki bave proceduralnim pitanjima, dok neki uvećavaju katalog garantovanih ljudskih prava, uvođenjem novih materijalnih odredbi.[49]

Osnovna prava i slobode iz EKLJP koja se odnose na sva lica su: pravo na život (član 2), zabrana mučenja, nečovečnog i ponižavajućeg postupanja (član 3), zabrana ropskog ili prinudnog rada (član 4), pravo na slobodu i sigurnost (član 5), pravo na pravično suđenje (član 6), kažnjavanje samo na osnovu zakona (član 7), pravo na poštovanje privatnog i porodičnog života (član 8), sloboda misli, savesti i veroispovesti (član 9), sloboda

48 *Službeni list SCG – Međunarodni ugovori*, 9/03, 5/05, 7/05 – ispravka i *Službeni glasnik RS – Međunarodni ugovori*, 12/10.

49 Ivana Krstić, Marko Davinić, *Pravo na azil – Međunarodni i domaći standardi*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013, str. 121.

izražavanja (član 10), sloboda okupljanja i udruživanja (član 11), pravo na sklapanje braka (član 12), pravo na delotvroni pravni lek (član 13) i zabrana diskriminacije (član 14). Iz navedenog kataloga ljudskih prava koja se štite EKLJP proizlazi da nema izričite odredbe koja se odnosi na azil, te bi se moglo zaključiti da taj međunarodni dokument nema preveliki značaj za tražioce azila u Evropi. Međutim, Evropski sud je u svojim brojnim presudama ustanovio standarde postupanja prema tražiocima azila u pogledu najrazličitijih pitanja, poput zabrane proterivanja stranaca, ili prava na spajanje porodice, zabrane diskriminacije ovih lica, i slično, i pored toga što je Evropski sud naglašavao da pravo na politički azil nije garantovano Evropskom konvencijom i njenim protokolima.[50]

Tako npr. članom 4 Konvencije, kojim se garantuje zabrana prinudnog ili ropskog rada, u slučaju *Silijandin (Siladin) protiv Francuske*,[51] jasno se vidi na koji način sud kroz integrisani pristup štiti ekonomska i socijalna prava žena migrantkinja. Naime, u predmetu je odlučivano o (ne)adekvatnosti zaštite od ropstva, ropskog položaja i prinudnog rada adolescentkinje iz Togoa koja se obavezala da će obavljati kućne poslove u domaćinstvu „poslodavca", dok ne isplati cenu avionske karte koju joj je on prethodno kupio, nakon čega je poslodavac, u skladu sa dogovorom koji je imao sa njenim ocem, trebalo da se postara o njenom obrazovanju i dobijanju odobrenja za boravak u Francuskoj. Suprotno dogovoru, poslodavac je radnici oduzeo pasoš i zahtevao od nje da besplatno obavlja poslove u njegovom domaćinstvu, da bi je kasnije „uputio" na rad kod jednog bračnog para. Ona je za njih tri godine besplatno obavljala kućne poslove i starala se o njihovoj deci 15 sati svakog dana, stanujući u dečijoj sobi, uz pravo da napusti kuću samo radi odvođenja dece na časove ili druge aktivnosti. Evropski sud za ljudska prava je kvalifikovao ovaj rad kao prinudni rad, našavši da je radnica bila u situaciji ekvivalentnoj postojanju opasnosti od kazne, jer je kao

50 *Ibid.*

51 Presuda Evropskog suda za ljudska prava u slučaju *Siladin protiv Francuske* od 6. jula 2005. godine, predstavka 73316/01, stav 118.

adolescentkinja koja nezakonito boravi u stranoj državi, živela u stalnom strahu od otkrivanja takvog statusa i hapšenja. Istovremeno, Sud je našao da je u ovom slučaju postojao i element prinudnog rada koji se tiče izostanka dobrovoljnog pristanka na rad, budući da radnica nije imala nikakvu mogućnost da bira da li će raditi za svog „poslodavca" ili ne.[52] Ovo naročito stoga što u slučaju napuštanja njegovog doma ne bi mogla da ostane u Francuskoj i pronađe bolji posao. Kao ilegalni migrant i radnik u domaćinstvu poslodavca, ona je bila izolovana od francuskog društva i nije mogla očekivati da će se njena situacija poboljšati, tim pre što je alternativa radu i životu u nehumanim uslovima bila njena verovatna deportacija u državu porekla, gde ju je očekivao život ispod granice siromaštva. Navedeni predmet, dakle, svedoči da element prinudnog rada koji se tiče pretnje kaznom može činiti i strah radnika od prijavljivanja policiji, hapšenja i deportacije, što, zajedno sa nedovoljnim poznavanjem prilika (i jezika) u državi prijema, pogoduje uspostavljanju, održavanju i produbljivanju zavisnosti od poslodavca. Ovaj slučaj, dakle, živo svedoči da je rad migranata zaposlenih u domaćinstvu skopčan sa ozbiljnim rizicima, jer koliko god da su loši uslovi u kojima rade i žive, radnici neće lako napustiti domaćinstvo poslodavca, jer ih strah od kažnjavanja i deportacije odvraća od pokretanja postupka protiv poslodavca.

Zanimljiv je i slučaj *Abdulazis, Cabales, Balkandali protiv Ujedinjenog Kraljevstva* pred Evropskim sudom za ljudska prava, koji je utvrdio da je Ujedinjeno Kraljevstvo povredilo zabranu diskriminacije po polu time što je njegovo zakonodavstvo pravilo razliku između stranih državljana, žena i muškaraca, koji već legalno borave u toj zemlji i žele da koriste prava vezana za porodicu, tj. ako traže dozvolu da im se pridruže bračni drugovi. Da su bile muškarci, trima tužiljama bi bilo mnogo lakše da do-

52 M. Ssenyonjo, *Economic, social and cultural rights in international law*, Oxford/Portland, Hart Publishing, 2009, str. 309. Navedeno prema: Ljubinka Kovačević, „Plaćeni rad u domaćinstvu poslodavca", *Radno i socijalno pravo*, broj 2/2013, str. 13.

vedu u Britaniju osobe sa kojima su verene ili u braku. Britanska vlada je ovo razlikovanje pravdala time što je reč o strancima i što ona tako štiti tržište rada od nezaposlenosti koji bi izazvali useljenici-muškarci. Ove argumente sud nije usvojio.[53]

U jurisprudenciji Evropskog suda postoji poveliki broj odluka koje se na posredan ili neposredan način odnose na zaštitu žena migrantkinja, tražiteljki azila ili žena izbeglica. Za potrebe ove analize izdvojeno je još nekoliko slučajeva koji su obrađeni u narednim odeljcima.

## 1.3. Zaštita prava tražiteljki azila i žena izbeglica u pravu Evropske unije

Poveljom iz Nice o fundamentalnim pravima u EU definisano je da se načelo ravnopravnosti polova uvodi u sva područja i aktivnosti evropskih politika (*gender mainstreaming*). Strateški dokument EU koji definiše politiku aktivnog delovanja u cilju rodne ravnopravnosti predstavlja Strategija Evropske unije za ravnopravnost između žena i muškaraca od 2010. do 2015. godine. Strategija jasno iskazuje nameru uspostavljanja ravnopravnosti polova u zemljama članicama EU i onim zemljama koje su u pretpristupnoj i pristupnoj fazi. U znak obeležavanja 15-godišnjice deklaracije i platforme za akciju, usvojene na Svetskoj konferenciji Ujedinjenih nacija (UN) o ženama u Pekingu, i 30-godišnjice Konvencije UN o eliminaciji svih oblika diskriminacije nad ženama, Evropska komisija je u martu 2010. godine usvojila Povelju o ženama kojom potvrđuje svoju posvećenost rodnoj ravnopravnosti i jačanju rodne perspektive u svim svojim politikama. Međutim, kada je reč o posebno ranjivoj grupi žena, tražiteljki azila i žena izbeglica, normativno uređenje u pravu Evropske unije prilično je skromno, te tako samo Direktiva o kvalifikaciji za korisnike međunarodne zaštite eksplicitno govori o njima, i uređuje detaljnije standarde zaštite.

53 *Abdulazis, Cabales, Balkandali protiv Ujedinjenog Kraljevstva,* predstavke 9214/80, 9473/81 i 9474/81.

### 1.3.1. Direktiva o kvalifikaciji za korisnike međunarodne zaštite

Direktiva 2011/95/EU Evropskog parlamenta i Saveta o standardima za kvalifikaciju državljana trećih zemalja ili osoba bez državljanstva za ostvarivanje međunarodne zaštite, za jedinstveni status izbeglice ili osoba koje ispunjavaju uslove za supsidijarnu zaštitu kao i sadržaj odobrene zaštite (preinačena), od 13. decembra 2011. godine.[54] Direktiva o kvalifikaciji smatra se jednim od temeljnih instrumenata evropskog sistema azila, pre svega zbog normi koje propisuju kriterijume za sticanje zaštite, odnosno uspostavljanje „klasifikacija – kriterijuma" ko može biti subjekat međunarodne zaštite. Pored toga, Direktiva reguliše još jedno, nama veoma bitno područije, a to su prava osoba pod zaštitom, odnosno prava tražilaca azila, izbeglica i lica sa supsidijarnom zaštitom – koje je do usvajanja ove direktive zavisilo od nacionalnih zakona i njihovoj interpretaciji međunarodnih standarda u oblasti zaštite izbeglica.[55] Direktiva dakle reguliše pitanja dodele i prestanka statusa, kao i prava izbeglica i lica kojima je dodeljena supsidijarna zaštita. Ova direktiva definiše minimalne standarde, dok države članice mogu uvesti ili zadržati povoljnije standarde za utvrđivanje osoba koje se kvalifikuju kao izbeglice ili kao osobe koje ispunjavaju uslove za dodelu supsidijarne zaštite.

U članu 9, stav (f) Direktive kao osnov progona predviđa se i pol, odnosno dela progona koja su specifično vezana za pol, ili dela koja su po prirodi specifično vezana za maloletnike. Direktiva ne ide dalje od ove definicije i ostavlja mogućnost državama

54 „Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted", *Official Journal L* 337/9.

55 Mogućnost različitog tretmana tražilaca azila, lica sa supsidijarnom zaštitom i izbegličkom zaštitom i dalje je ostala na snazi (član 29 Direktive 2011/95).

članicama da dalje urede ovo pitanje. Tako, na primer u Francuskoj, obrezivanje žena se često ne uzima u obzir kao osnov progona, već kao teška povreda ljudskih prava žena, i najčešće je osnov za dodeljivanje nižeg stepena zaštite, tzv. supsidijarne zaštite umesto izbegličke.[56]

56 Ruth Rubio–Marin, *Human Rights and Immigration*, volume XXI/1, Oxford University Press, United Kingdom, 2014, str. 158.

# III DEO

## 1. NACIONALNI IZVORI

Republika Srbija obavezana je brojnim međunarodnim ugovorima koji se tiču, posredno ili neposredno, pitanja azila. Srbiju tako, pored Konvencije UN o statusu izbeglica iz 1951. godine i Protokola o statusu izbeglica iz 1967. godine, između ostalog, obavezuju i drugi važni međunarodni ugovori: Međunarodni pakt o građanskim i političkim pravima, Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima, Konvencija UN protiv mučenja i drugih surovih, nečovečnih ili ponižavajućih postupanja i kažnjavanja, Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda, Evropska konvencija za sprečavanje mučenja, nečovečnih ili ponižavajućih postupanja ili kažnjavanja, Konvencija UN o pravima deteta ali i mnoge druge konvencije. Srbija je kao strana ugovornica pomenutih međunarodnih dokumenata u obavezi da u svoje zakonodavstvo unese odgovarajuće odredbe i da donese odgovarajuće akte kako bi svoje zakonodavstvo uskladila sa međunarodnim obavezama.

### 1.1. Ustavni i zakonski okvir za zaštitu prava tražiteljki azila i žena izbeglica u Republici Srbiji

Najznačajniji domaći pravni dokumenti koji regulišu pitanja azila jesu Ustav,[57] koji načelno proklamuje pravo na azil i Zakon o azilu[58] koji ovo pravo reguliše detaljnije. Ustav Srbije, usvojen 2006. godine garantuje stranom državljaninu koji osnovano strahuje od progona zbog svoje rase, *pola*, jezika, veroispovesti, nacionalne pripadnosti ili pripadnosti nekoj grupi ili zbog svojih

57 *Službeni glasnik RS,* 98/06.

58 *Službeni glasnik RS,* 109/07.

političkih uverenja pravo na utočište u Republici Srbiji i određuje da će postupak dobijanja utočišta biti utvrđen zakonom.[59]

Ustav Republike Srbije, u članu 21 takođe navodi:

> *Pred Ustavom i zakonom svi su jednaki.*
>
> *Svako ima pravo na jednaku zakonsku zaštitu, bez diskriminacije.*
>
> *Zabranjena je svaka diskriminacija, neposredna ili posredna, po bilo kom osnovu, a naročito po osnovu rase,* ***pola****, nacionalne pripadnosti, društvenog porekla, rođenja, veroispovesti, političkog ili drugog uverenja, imovnog stanja, kulture, jezika, starosti i psihičkog ili fizičkog invaliditeta.*

Iako je još Savezna Federativna Republika Jugoslavja ratifikovala Konvenciju o statusu izbeglica još krajem pedesetih godina prošlog veka, nju nije pratio i odgovarajući zakonski okvir. U nedostatku zakonskih normi kojima bi se implementiralo pravo na azil, praksa je sve do 2008. godine bila takva da su vlasti omogućavale kontakt tražilaca azila sa predstavnicima UNHCR, koji je utvrđivao status izbeglice, starao se o njihovom smeštaju i osnovnim životnim uslovima, i pronalazio zemlju konačnog odredišta.[60] Prve zakonske odredbe uvedene su u Zakonu o kretanju i boravku stranaca SFRJ iz 1980. godine. Tek dvaneast godina kasnije donet je Zakon o izbeglicama kao odgovor na izbijanje sukoba na prostoru bivše Jugoslavije. S druge strane, prvi Zakon o azilu donet je 2005. godine[61] u vreme državne zajednice Srbija i Crna Gora, i ostao je na snazi sve do 2008. kada je stupio na snagu novi Zakon o azilu Republike Srbije.

Zakon o azilu (ZOA) donet je 2007. godine i propisuje načela, uslove i postupak za dobijanje i prestanak azila, kao i položaj, prava i obaveze lica koja traže azil i lica kojima je priznato pravo na utočište u Srbiji. Pri tome, ovaj zakon se ne primenjuje na lica koja su stekla svojstvo izbeglice na osnovu Zakona o izbeglicama Republike Srbije. Zakon pored prava na azil koje obuhvata

59 Član 57, stav 1 Ustava Republike Srbije.

60 Ivana Krstić, Marko Davinić, *Pravo na azil – Međunarodni i domaći standardi*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013, str. 311.

61 Zakon o azilu, *Službeni list SCG*, 12/05.

pravo na utočište i pravo na supsidijarnu (humanitarnu) zaštitu, obuhvata i privremenu zaštitu koja se pruža u slučaju masovnog priliva lica kada nije moguće sprovesti individualne postupke za odobravanje azila.[62]

Iako se, u načelu, Zakon o strancima ne primenjuje na strance koji su podneli zahtev za dobijanje azila ili kojima je u Republici Srbiji dodeljen azil, odredbe ovog zakona se primenjuju na uslove za spajanje porodice lica[63] kojima je dodeljena supsidijarna zaštita i na udaljenje stranaca.[64]

Zakonom o upravljanju migracijama[65] (ZOUM) uređuje se pitanje nadležnosti za smeštaj i integraciju lica kojima je priznato pravo na utočište ili supsidijarna zaštita,[66] koja je konačno dodeljena Komesarijatu za izbeglice. Komesarijat za izbeglice ustanovljen Zakonom o izbeglicama, nastavio je rad pod nazivom Komesarijat za izbeglice i migracije, i u skladu s novim Zakonom o upravljanju migracijama, Komesarijat obavlja poslove koji se odnose na: utvrđivanje, predlaganje i preduzimanje mera za integraciju lica kojima je, u skladu sa Zakonom o azilu priznato pravo na utočište i smeštaj lica kojima je priznato pravo na utočište ili dodeljena supsidijarna zaštita.

Način integracije, odnosno uključivanja u društveni, kulturni i privredni život lica kojima je priznato pravo na utočište

62 Materija azila uređena je i velikim brojem podzakonskih akata: Pravilnikom o kućnom redu u Centru za azil, *Službeni glasnik RS*, 31/08; Pravilnikom o uslovima smeštaja i obezbeđivanja osnovnih životnih uslova u Centru za azil, *Službeni glasnik RS*, 31/08; Pravilnikom o načinu vođenja i sadržini evidencija o licima smeštenim u Centru za azil, *Službeni glasnik RS*, 31/08; Pravilnikom o socijalnoj pomoći za lica koja traže, odnosno kojima je odobren azil, *Službeni glasnik RS*, 44/08 i 78/11; Pravilnikom o sadržini i izgledu obrazaca zahteva za azil i isprava koja se mogu izdavati tražiocima azila i licima kojima je odobren azil ili privremena zaštita, *Službeni glasnik R*S, 53/08; i Pravilnikom o zdravstvenim pregledima lica koja traže azil prilikom prijema u Centar za azil, Službeni *glasnik RS*, 93/08.

63 Član 4 Zakona o azilu.

64 Član 57 Zakona o azilu.

65 *Službeni glasnik RS,* 107/12.

66 Članovi 15 i 16 ZOUM.

uređuje Vlada, na predlog Komesarijata.[67] Komesarijat je takođe nadležan za predlaganje programa za razvijanje sistema mera prema porodicama stranaca koji ilegalno borave na teritoriji Republike Srbije i predlaganje programa za podršku dobrovoljnog povratka stranaca koji ilegalno borave na teritoriji Republike Srbije u zemlju njihovog porekla.

Važeći Krivični zakonik[68] kao radnju izvršenja dela trgovine ljudima prepoznaje vrbovanje, prevoz, prebacivanje, predaju, prodaju, kupovinu, posredovanje u prodaji, sakrivanje ili držanje drugog lica, a u cilju eksploatacije rada, prinudnog rada, vršenja krivičnih dela, prostitucije ili druge vrste seksualne eksploatacije, prosjačenja, upotrebe u pornografske svrhe, uspostavljanja ropskog ili njemu sličnog odnosa, radi oduzimanja organa ili dela tela ili radi korišćenja u oružanim sukobima. Osim trgovine ljudima, Krivični zakonik inkriminiše nedozvoljen prelaz granice i krijumčarenje ljudi članom 350. Pored kazne zatvora za one koji pređu ili pokušaju da pređu granicu Srbije naoružani ili upotrebom nasilja, predviđena je i kazna od šest meseci do pet godina za lice koje u nameri da sebi ili drugom pribavi korist, omogućava drugom nedozvoljeni prelaz granice ili nedozvoljeni boravak ili tranzit kroz Srbiju. Ukoliko je delo učinjeno od strane grupe ili na način kojim se ugrožava život ili zdravlje lica čiji se nedozvoljeni prelaz granice, boravak ili tranzit omogućava ili je krijumčaren veći broj lica, zaprećena kazna je od jedne do deset godina.[69]

Jedno od osnovnih načela Zakona o zdravstvenoj zaštiti,[70] koje je posebno bitno za grupu migranata i posebno ugroženih grupa unutar migrantske populacije je načelo pravičnosti,

67 Član 16 ZOUM.

68 *Službeni glasnik RS*, 85/05, 88/05 – ispr., 107/05 – ispr., 72/09, 111/09, 121/12 i 104/13

69 Aleksandra Galonja (ur.), Tijana Morača*, Migranti i migrantkinje u lokalnim zajednicama u Srbiji,* Atina – Udruženje građana za borbu protiv trgovine ljudima i svih oblika nasilja nad ženama, Beograd 2014, str. 22.

70 Zakon o zdravstvenoj zaštiti, *Službeni glasnik RS*, 107/05, 72/09 – dr. zakon, 88/10, 99/10, 57/11, 119/12 i 45/13 – dr. zakon.

tj. zabrane diskriminacije prilikom pružanja zdravstvene zaštite po osnovu rase, pola, starosti, nacionalne pripadnosti, socijalnog porekla, veroispovesti, političkog ili drugog ubeđenja, imovnog stanja, kulture, jezika, vrste bolesti, psihičkog ili telesnog invaliditeta (član 20). Takođe, kao jedan od opštih interesa u zdravstvenoj zaštiti je prepoznato pružanje hitne medicinske pomoći licima nepoznatog prebivališta i drugim licima koja pravo na hitnu medicinsku pomoć ne ostvaruju na drugačiji način u skladu sa zakonom (član 18). U posebnom delu koji se tiče zdravstvene zaštite stranaca (deo XIII), Zakon propisuje da tražioci azila – lica koja su u Srbiji ostvarila pravo na izbegličku ili supsidijarnu zaštitu, strani državljani, lica bez državljanstva, koja su stalno nastanjena ili privremeno borave ili koji prolaze preko teritorije imaju pravo na zdravstvenu zaštitu za koju se sredstva obezbeđuju u budžetu (član 238), kao i da se ta zaštita pruža na način pod kojim se pruža zaštita građanima Srbije (član 239). Dalje, od velike je važnosti član 241 koji propisuje da među strane državljane kojima troškove lečenja pokriva Republika Srbija, spadaju i stranci kojima je odobren azil, ukoliko su materijalno neobezbeđeni, kao i strani državljani žrtve trgovine ljudima. Zakon propisuje novčane kazne za zdravstvene ustanove ako strancu ne ukažu zdravstvenu zaštitu ili ako mu ne pruže hitnu medicinsku pomoć (član 256).

Ministarstvo unutrašnjih poslova Republike Srbije nadležno je za vođenje postupka za dobijanje azila. U okviru Ministarstva, formirana je Kancelarija za azil, koja je nadležna za sprovođenje prvostepenog postupka azila. Komisija za azil je drugostepeni organ, čije članove bira Vlada Republike Srbije.

## 2. ANALIZA ZAKONA O AZILU

Autorke ove studije, su pored važećeg Zakona o azilu, analizirale rešenja koja su previđena i u Nacrtu novog zakona o azilu, koji je stručnoj javnosti predstavljen na javnoj raspravi 24. marta 2016. godine. Beogradski centar za ljudska prava je imao prilike da komentariše predložena zakonska rešenja, i neka od njih su prikazana i u ovoj analizi. Novi zakon o azilu još uvek nije ušao u skupštinsku proceduru, jer se u ovom trenutku čekaju komentari Evropske komisije, ali se usvajanje ovog zakona očekuje do kraja 2016. godine.[71]

### 2.1. Opšti pregled

Postupak azila je propisan Zakonom o azilu[72] (članovi 22–35) dok se na pitanja koja nisu uređena tim zakonom primenjuje Zakon o opštem upravnom postupku.[73]

Kako rodna jednakost podrazumeva prihvatanje i jednako vrednovanje razlika između žena i muškaraca i njihovih raznovrsnih uloga u društvu,[74] to znači da bi i u postupku azila trebalo posebno uzeti u obzir postojeće razlike između muškaraca i žena u vezi sa pripadnošću određenoj društvenoj grupi, političkim mišljenjem, verom, nacionalnošću, rasom ili seksualnom orijentacijom. Razmatranje rodnih aspekata zahteva za azil obez-

71 Nacrt novog zakona o azilu dostupan je na sajtu Ministarstva unutrašnjih poslova, na sledećoj adresi: http://www.mup.gov.rs/wps/portal/sr/.

72 *Službeni glasnik RS*, 109/07.

73 *Službeni list SRJ,* 33/97 i 31/01 i *Službeni glasnik RS,* 30/10.

74 *Gender Mainstreaming, Conceptual Framework, Methodology, and Presentation of Good Practicies*, Savet Evrope, Strazbur maj 1998. godine.

beđuje potpuno i fer razmatranje zahteva za azil. I muškarci i žene mogu imati zahteve za azil sa rodnim aspektom, ali su to u praksi najčešće žene.[75] Razumevanje informacija o zemlji porekla u vezi sa položajem žena je od suštinske važnosti za efikasno sprovođenje saslušanja i donošenje pravilne i zakonite odluke.

Ustanovljen je princip prema kome definicija izbeglice u celini treba da se tumači sa svešću o mogućim rodnim aspektima kako bi se na precizan način utvrdio izbeglički status.[76] Ukoliko se tumači pravilno, definicija izbeglice obuhvata i rodno zasnovane zahteve za azil.[77]

### 2.1.1. Definicija društvene grupe

Konvencija o satusu izbeglica iz 1951. ne predviđa eksplicitno progon po osnovu pola ili roda kao osnov izbegličke zaštite, pripadnost određenoj društvenoj grupi, kao osnov progona, se veoma široko tumači, tako da se kroz taj osnov štite osobe od rodno zasnovanog progona. Tako *Smernice UNHCR o međunarodnoj zaštiti: Pripadnost određenoj društvenoj grupi u kontekstu člana 1A(2) Konvencije o statusu izbeglica iz 1951 i/ili njenog Protokola iz 1967 koji se odnosi na status izbeglice* od 7. maja 2002. godine nadležni organi treba da uzmu u obzir prilikom utvrđivanja da li lice koje traži međunarodnu zaštitu pripada određenoj društvenoj grupi:

> [...] *3. Ne postoji „zatvorena lista" koje grupe mogu konstituisati „posebnu društvenu grupu" u smislu značenja čl. 1A(2). Konvencija ne sadrži posebnu listu društvenih grupa, niti istorija njene ratifikacije odražava stavove da postoji set identifikovanih grupa koje se mogu kvalifikovati pod ovaj osnov. Umesto toga, termin pripadnost određenoj društvenoj grupi trebao bi se tumačiti na evolucionaran*

75 *Gender Issues in Asylum Claims*, UK Visas and Immigration, oktobar 2010. godine, str. 3.

76 *Guidelines on International Protection: Gender – Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*", UNHCR, 7. maj 2002, paragraf 2, dostupno na http://www.refworld.org/pdfid/3d36f1c64.pdf.

77 *Ibid*., stav 6.

*način, otvoren ka raznovrsnoj i promenjivoj prirodi grupa u različitim društvima i evoluirajućim normama međunarodnog prava ljudskih prava*[...][78]

Ustav Republike Srbije (član 57) i Zakon o azilu (član 2, stav 1, tačka 6), posebno propisuju da je izbeglica i lice koje osnovano strahuje od progona po osnovu pola, dok progon po osnovu roda nije izričito propisan kao osnov za sticanje izbegličkog statusa. Napred navedene odredbe u velikoj meri olakšavaju utvrđivanje osnovanosti zahteva o azilu u slučaju da je osoba bila progonjena samo zato što je žena ili muškarac, jer tražioci azila ne moraju posebno da dokazuju da pripadnost određenom polu može da bude razlog progona.

Žene se u brojnim zemljama pored teškoća u sferi obrazovanja, zdravstva i učešća u društvenom životu, suočavaju sa ozbiljnim problemima kao što su prisilni brakovi, porodično i seksualno nasilje i genitalna mutilacija, prinudna prostitucija i sterilizacija, a koji dosežu nivo progona, dok se muškarci često suočavaju sa nasilnom regrutacijom i dezerterstvom koje podleže visokim kaznama. Homoseksualci, biseksualne, transseksualne i transrodne osobe su takođe često žrtve progona.[79]

Ipak važeći Zakon o azilu ne definiše pojam „društvena grupa" i ne predviđa eksplicitno da pripadnost određenoj društvenoj grupi može da se zasniva i na rodu tražioca azila, uključujući rodni identitet i seksualnu orijentaciju, usled čega osoba može biti podvrgnuta određenoj sankciji, represivnoj tradiciji ili običaju, a što treba uzeti u obzir ukoliko je to u vezi sa osnovanim strahom od progona tražioca azila.[80]

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78 *Smernice o međunarodnoj zaštiti: „Pripadnost određenoj društvenoj grupi" u kontekstu člana 1A(2) Konvencije o statusu izbeglice iz 1951 i/ili njenog Protokola iz 1967 koji se odnosi na status izbeglice,* UNHCR, maj 2002, str. 2, paragraf 3, dostupno na *http://www.unhcr.org/3d58de2da.html.*

79 *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) to the 1951 Convention and/or its 1967 Protocol relating to the Status of R*efugees, UNHCR, 23. oktobar 2012. godine, paragrafi 1–4.

80 *Directive 2011/95/EU of the European Parliament and of the Council of 13. decembra 2011*, OJ of the European Union, L 337/9, paragraf 30.

Nacrt zakona o azilu i privremenoj zaštiti (u daljem tekstu: Nacrt zakona o azilu)[81] predviđa definiciju društvene grupe u okviru pojma „razlozi progona" tako što propisuje da je to grupa čiji članovi imaju zajedničke urođene osobine ili zajedničko poreklo koje se ne može izmeniti, ili imaju zajedničke karakteristike i/ili uverenja, a koja su u toj meri značajna za njihov identitet ili svest, da se te osobe ne smeju prisiliti da ih se odreknu, pri čemu ta grupa ima poseban identitet u zemlji porekla, jer se smatra drugačijom od društva koje je okužuje (član 26). Iako Nacrt detaljnije definiše pojam društvena grupa postoje mišljenja da tekst Nacrta ostavlja značajno diskreciono pravo donosiocu odluke u odnosu na to da li su zajedničke karakteristike rod, pol, rodni identitet odnosno seksualna orijentacija dovoljni da označavaju određenu društvenu grupu.[82] U praksi Kancelarije za azil ne postoji ujednačen stav po tom pitanju. Dok su u mnogim postupcima kao društvena grupa prepoznati ljudi istog roda i pola, postoje slučajevi u praksi koji idu u prilog tome da rod, pol, rodni identitet i seksualno opredeljenje ne bi bilo suvišno propisati kao zajedničke karakteristike određene društvene grupe. Tako je Kancelarija za azil u jednom predmetu po osnovu zahteva za azil državljanina Sirije, zanemarila činjenicu da je on zemlju porekla napustio iz straha od mobilizacije kao pripadnik grupe „vojno sposobni muškarac", te je tražiocu azila dodelila supsidijarnu zaštitu zbog opšte loše bezbednosne situacije u Siriji.[83]

### 2.1.2. Dela progona

Za razliku od važećeg zakona, Nacrt zakona o azilu bliže određuje dela progona (član 28) tako što propisuje da su to dela koja se smatraju progonom u skladu sa članom 24 (kojim se definiše pojam utočišta) i koja moraju biti dovoljno ozbiljna

81 Nacrt zakona o azilu i privremenoj zaštiti dostupan je na http://www.mup.gov.rs/wps/portal/sr/.

82 Komentari Agencije Ujedinjenih nacija za rodnu ravnopravnost i osnaživanje žena na Drugi nacrt zakona o azilu i privremenoj zaštiti, paragraf 9.

83 Rešenje Kancelarije za azil 03/9–4–26–2780/13 od 15. decembra 2014. godine.

po svojoj prirodi ili ponavljanju da predstavljaju ozbiljno kršenje osnovnih ljudskih prava, naročito prava koja ne mogu biti ograničena prema članu 15, stav 2 Evropske konvencije o ljudskim pravima i osnovnim slobodama ili koja su skup različitih mera, uključujući kršenje ljudskih prava, koje su dovoljno ozbiljne da mogu uticati na pojedinca na sličan način kao kršenje prava iz Evropske konvencije koja se ne smeju derogirati.

Isti član Nacrta zakona, *exempli causa*, navodi da, između ostalog, ta dela mogu biti:

1. Fizičko ili psihičko nasilje, uključujući i seksualno i rodno zasnovano nasilje;
2. Zakonske, administrativne, policijske i/ili sudske mere koje su po svojoj prirodi diskriminišuće ili koje se primenjuju na diskriminišući način;
3. Sudski postupak ili kažnjavanje koje je nesrazmerno ili diskriminišuće;
4. Uskraćivanje sudske zaštite što dovodi do nesrazmernih ili diskirminišućih kazni;
5. Sudski postupak ili kažnjavanje radi odbijanja obavljanja vojne obaveze prilikom sukoba, kada bi obavljanje vojne obaveze uključivalo krivična dela ili radnje koje predstavljaju razloge za uskraćivanje međunarodne zaštite;
6. Dela koja su po svojoj prirodi specifično vezana za pol i ili decu.

Iako, Nacrt zakona preuzima gotovo istovetni tekst Kvalifikacione direktive (član 9, stav 2) u njemu je načinjena greška u tački 6 drugog stava člana kojim su definisana dela progona. Ta greška je učinjena verovatno prilikom prevoda, jer Direktiva govori o delima progona vezanim za rod a ne pol, čime se obezbeđuje šira zaštita stvarnim ili potencijalnim žrtvama rodno zasnovanog nasilja.

Nacrt zakona o azilu dodatno, u okviru definicije pojma izbeglica (član 2, stav 1, tačka 6) i pojma utočište (član 24), predviđa progon po osnovu roda, rodnog identiteta i rodno za-

snovanog nasilja kao osnov izbegličke zaštite odnosno osnov za dodeljivanje utočišta, što bi u postupku azila trebalo da dodatno olakša položaj osoba koje su progonjene po tom osnovu.

Rasa, vera, nacionalnost, političko mišljenje i pripadnost određenoj društvenog grupi nisu osnovi za progon koji se međusobno isključuju već se mogu preklapati. Više od nekoliko osnova progona mogu biti relevantni za određeni slučaj. Izbeglički zahtevi na osnovu rodnog identiteta i seksualne orijentacije nisu isključivo prepoznati kao progon po osnovu pripadništva društvenoj grupi, već mogu uključivati i druge osnove progona kao što je npr. političko mišljenje (LGBTI aktivisti i branioci ljudskih prava mogu biti progonjeni zbog zagovaranja protiv dominantnih političkih ili verskih stavova u nekoj zemlji). Posebno političko mišljenje ili pripadnost društvenoj grupi mogu biti pripisani tražiteljki/tražiocu azila čak iako nisu LGBT, a što može rezultirati progonom. Na primer, žene i muškarci koji se ne uklapaju u stereotipni izgled i društvene uloge mogu biti viđeni kao LGBT. Transgender osobe su takođe često na meti napada zbog pripisane seksualne orijentacije.[84]

Za razliku od važećeg zakona, Nacrt zakona predviđa da osnov progona može biti stvaran ili pripisan od strane činilaca progona, državnih i nedržavnih (član 28), što je veoma dobro rešenje jer pored gore opisanog propisivanja seksualne orijentacije, u nekim patrijarhalnim društvima ženama je često pripisano političko mišljenje supruga ili muških srodnika usled čega su i one podvrgnute progonu.[85]

Zahtevi za azil LGBTI osoba ne bi trebalo da budu odbijeni na osnovu toga što se može pretpostaviti da će osoba biti

84 *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 23. oktobar 2012. godine, paragrafi 40–41.

85 *Guidelines on International Protection: Gender – Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 7. maj 2002, paragraf 33, dostupno na http://www.refworld.org/pdfid/3d36f1c64.pdf.

bezbedna ukoliko ne pokazuje svoj seksualni identitet u državi porekla, takvu garanciju ne predviđa ni važeći Zakon o azilu, ni Nacrt zakona o azilu, ali u dosadašnjoj praksi postupajućih organa u postupku azila, nijedan zahtev za azil nije bio odbijen sa takvim obrazloženjem. Evopski sud pravde (čije odluke još uvek nisu obavezujuće za Srbiju) je u pogledu progona po osnovu seksualne orijentacije zauzeo stav da države članice ne mogu da odbiju zahteve za azil lezbejki i gejeva tražilaca azila očekujući da oni mogu da se vrate u svoju zemju porekla i da tu žive bezbedno skrivajući svoju seksualnu orijentaciju kako bi smanjili rizik od progona.[86] Taj slučaj se ticao tri tražioca azila u Holandiji iz Sijera Leone, Ugande i Senegala. U svakoj od te tri zemlje, homoseksualnost je krivično delo za koje je predviđena zatvorska kazna (doživotna kazna u Siera Leone i Ugandi i kazna do pet godina zatvora u Senegalu). Ni u jednom od tri slučaja, podnosioci zahteva nisu pokazali da su već bili progonjeni ili da im je pretio progon zbog seksualne orijentacije. Ipak, oni su tražili azil jer su smatrali da zbog inkriminacije homoseksualnosti u njihovim zemljama porekla, strahuju da će biti progonjeni ako se u te zemlje vrate. Sud je mišljenja da sama činjenica da postojanje krivičnih normi koje pogađaju homoseksualce znači da oni predstavljaju posebnu društvenu grupu. Takođe, Sud je smatrao da akt progona nije inkriminacija homoseksualnosti *per se,* već rasprostranjena praksa kažnjavanja homoseksualaca. Sud smatra da bi zahtevanje od pripadnika društvene grupe iste seksualne orijentacije da tu orijentaciju krije bilo nespojivo sa priznanjem određenih karakteristika ličnosti koje su od fundamentalnog značaja za nečiji identitet, te da se ne može zahtevati od nekoga da ih se odrekne odnosno da ih skriva.

Trgovina ljudima sa ciljem prinudne prostitucije ili seksualne eksploatacije takođe može biti osnov izbegličke zaštite[87] a

86 Evropski sud pravde (CJEU), odluka od 7. novembra 2013. godine u objedinjenim predmetima br. C-199/12, C-200/12 i C-201/12, *X., Y i Z. protiv holandskog Minister voor Immigratie en Asiel.*

87 *Guidelines on International Protection: Gender – Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Pro-*

što nije eksplicitno predviđeno važećim zakonom ali se može podvesti pod dela progona predviđena Nacrtom zakona o azilu.

Fizičko, psihološko i seksualno nasilje, uključujući i silovanje mogu da dosegnu stepen progona u slučajevima gde je osnov progona rod ili seksualna orijentacija.[88] Pored toga, diskriminatorne mere koje uključuju ozbiljne pravne, kulturološke ili društvene prepreke za ostvarivanje socijano-ekonomskih, političkih, porodičnih i verskih prava, mogu samostalno, ili zajedno sa drugim faktorima da dovedu do progona.[89] Dela progona, definisana Nacrtom zakona o azilu, trebalo bi da obuhvate napred opisane oblike rodno zasnovanog progona.

U pogledu supsidijarne zaštite Zakon o azilu predviđa da će se ona dodeliti strancu koji bi u slučaju povratka u zemlju porekla bio izložen mučenju, nečovečnom ili ponižavajućem postupanju ili bi njegov život, bezbednost ili sloboda bili ugroženi nasiljem opštih razmera koje je izazvano spoljnom agresijom ili unutrašnjim oružanim sukobima ili masovnim kršenjem ljudskih prava (član 2, stav 1, tačka 8). Nacrt zakona o azilu predviđa odobravanje supsidijarne zaštite kada bi stranac u slučaju povratka u zemlju porekla ili uobičajenog boravka bio izložen trpljenju ozbiljne nepravde i koji ne može ili se zbog takve opasnosti ne želi da stavi pod zaštitu te države (član 2, stav 1, tačka 8). Nacrt zakona u članu 25, stav 2 bliže određuje pojam ozbiljne nepravde[90] ali u njega ne uključuje izričito silovanje i žensku

*tocol relating to the Status of Refugees*, UNHCR, 7. maj 2002, paragraf 18, dostupno na http://www.refworld.org/pdfid/3d36f1c64.pdf.

88 *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 23. oktobar 2012. godine, paragraf 20.

89 *Gender Issues in Asylum Claims*, UK Visas and Immigration, oktobar 2010. godine, str. 5–6.

90 Ozbiljnom nepravdom se smatra pretnja smrtnom kaznom ili pogubljenjem, mučenje, nečovečno ili ponižavajuće postupanje ili kažnjavanje, kao i ozbiljna individualna pretnja po život izazvana nasiljem opštih razmera u situacijama međunarodnog ili unutrašnjeg oružanog sukoba.

genitalnu mutilaciju[91] verovatno iz razloga što su to dela koja su obuhvaćena pojmom progona, tako da je u tom smislu žrtvama takvog nasilja obezbeđena zaštita kroz izbeglički status.

### 2.1.3. Načela

Zakon o azilu sadrži brojna načela kojima bi trebalo da se obezbedi rodno senzitivno postupanje prema tražiocima azila: načelo nediskriminacije, načelo informisanja i pravne pomoći, načelo rodne ravnopravnosti i načelo brige o licima sa posebnim potrebama. Ta načela garantovana su i Nacrtom zakona o azilu.

Načelo nediskriminacije propisuje član 7 Zakona o azilu i ono predviđa zabranu diskriminacije u postupku azila po bilo kom osnovu a naročito po osnovu rase, boje, pola, nacionalne pripadnosti, društvenog porekla ili sličnog statusa, rođenja, veroispovesti, političkog ili drugog ubeđenja, imovinskog statusa, kulture, jezika, starosti ili intelektualnog, senzornog odnosno fizičkog invaliditeta.

Nacrt zakona o azilu predviđa i zabranu diskriminacije po osnovu, *roda, rodnog identiteta i seksualnog opredeljenja* (član 7) što je znatno rodno senzitivniji pristup od važeće zabrane diskriminacije.

U dosadašnjoj praksi postupajućih organa u postupku azila nije uočena bilo kakva rodna diskriminacija tražilaca azila. Štaviše, Kancelarija za azil je davala prioritet prilikom odlučivanja osobama različitog seksualnog opredeljenja i ženama žrtvama porodičnog nasilja.[92]

Načelo rodne ravnopravnosti (član 14) predviđa da će se licu koje traži azil obezbediti da bude saslušano od strane osobe istog pola, uz pomoć prevodioca istog pola, osim kad to nije moguće ili kad je skopčano sa nesrazmernim teškoćama za or-

91 Komentari Agencije Ujedinjenih nacija za rodnu ravnopravnost i osnaživanje žena na Drugi nacrt zakona o azilu i privremenoj zaštiti, stav 8.

92 Informacija dobijena na osnovu zastupanja tražilaca azila u postupku azila od strane pravnika Beogradskog centra za ljudska prava u periodu od 2012. do 2016. godine.

gan koji vodi postupak azila. Prema zakonu, ovo načelo bi trebalo uvek da se primenjuje prilikom pretresanja, telesnih pregleda i drugih radnji u postupku koji podrazumeva fizički kontakt sa tražiocem azila.

Ne može se reći da je nepoštovanje ovog načela nužno protivzakonito, budući da sam zakon predviđa da se od ovog načela može odstupiti. Kancelarija za azil, koja sprovodi prvostepeni postupak azila, u najvećem broju slučajeva angažuje službenike ženskog pola prilikom podnošenja zahteva za azil i saslušanja, a među službenicima Kancelarije za azil ima pripadnika oba pola.[93] Doduše, tokom 2015. i 2016. godine, većinu osoblja Kancelarije za azil čine službenici ženskog pola. Kancelarija za azil nastoji da angažuje prevodioca koji je istog pola kao i tražilac azila u određenom predmetu.

Naslov ovog načela, ipak ne odgovara njegovom smislu iz razloga što se ovaj član, kako je trenutno definisan, ne odnosi na rodnu ravnopravnost (jer ne propisuje da su muški i ženski tražioci azila jednaki u svojim pravima i obavezama), nego na pažljivo postupanje sa tražiocima azila imajući u vidu njihov pol. Ovo načelo ne sadrži, međutim, garanciju da će se muškarci i žene odvojeno saslušavati tokom postupka azila a što je veoma važno u slučajevima kada su žene žrtve nasilja u porodici ili kada postoji neki drugi razlog zbog koga se može pretpostaviti da članovi porodice neće jedni pred drugima da iznose svoje lične prilike kao osnov progona (npr. ne može se očekivati da dete koje je homoseksualac saopšti pred roditeljima da se zbog toga plaši za svoj život i bezbednost u Iranu).

Nepoštovanjem ovog načela može biti ugroženo i načelo istine koje garantuje Zakon o opštem upravnom postupku[94] a koje treba da obezbedi da se u postupku utvrde pravilno i pot-

93 Podatak dobijen na osnovu iskustva pravnika Beogradskog centra za ljudska prava prilikom pružanja pravne pomoći tražiocima azila.

94 U postupku se moraju utvrditi pravilno i potpuno sve činjenice i okolnosti koje su od značaja za donošenje zakonitog i pravilnog rešenja (odlučne činjenice), član 8 Zakon o opštem upravnom postupku.

puno sve činjenice i okolnosti od značaja za donošenje zakonitog i ispravnog rešenja.

Nacrt zakona o azilu donekle otklanja nedostatke sadržane u važećem Zakonu pa predviđa Načelo rodne ravnopravnosti i osetljivosti (član 14). Ovakav naslov načela više odgovara njegovoj suštini da se prilikom službenih radnji uzme posebno u obzir rod tražilaca azila. Takođe, Nacrt zakona o azilu propisuje da će osobe ženskog pola koje su u pratnji muškaraca, podneti zahtev i dati izjavu odvojeno od svojih pratilaca. Nije, međutim, jasno zbog čega takvu garanciju uživaju samo žene, dok ona nije predviđena za ostale članove porodice.

Načelo rodne ravnopravnosti i osetljivosti bi trebalo, međutim, da se primenjuje u svim fazama postupka, dakle i pred Komisijom za azil kao drugostepenim organom i pred Upravnim sudom, ukoliko se održava usmena rasprava.[95] Tekst važećeg zakona i Nacrta zakona ne obezbeđuje primenu tog načela tokom trajanja celog postupka azila.

Postoji preporuka da se tražilac azila prilikom kontakta sa vlastima neke države izjasni da li želi da bude saslušan od strane ženskog ili muškog službenika postupajućeg organa kao i da odabere pol prevodioca.[96] Načelo informisanja i pravne pomoći (član 10 ZOA) bi trebalo da osigura da tražioci azila budu upoznati ne samo o opštim pravima i obavezama u postupku azila već i o tome da mogu da se izjasne da li žele da njihov slučaj vodi službenik Kancelarije za azil ženskog ili muškog pola, odnosno da li žele ženu ili muškarca previodioca. Takođe, tražiocima azila bi trebalo predočiti da je postupak azila poverljiv i da se informacije o pojedinačnim postupcima azila neće ni u kom slučaju otkrivati državi porekla i davati neovlašćenim licima. Nače-

95 Austrijski Ustavni sud (*Verfassungsgerichtshof*) je doneo odluku u kojoj je navedeno da jedan aspekt prava na pravično suđenje pred Upravnim sudom podrazumeva i to da je sudija istog pola kao i tražilac azila ako se zahtev za azil bazira na strahu od seksualnog nasilja. Odluka U 01674/12 od 12. marta 2013. godine.

96 *Gender Issues in Asylum Claims*, UK Visas and Immigration, oktobar 2010. godine, str. 17.

lo informisanja i pravne pomoći garantuje Nacrt zakona o azilu (član 57) sa gotovo istovetnim tekstom, koji ne precizira o kojim konkretno pravima i obavezama treba da se pouče tražioci azila.

Načelo brige o licima sa posebnim potrebama predviđa da će se u postupku azila voditi računa o specifičnoj situaciji lica sa posebnim potrebama koja traže azil, kao što su maloletnici bez pratnje, lica potpuno ili delimično lišena poslovne sposobnosti, deca odvojena od roditelja ili staratelja, osobe sa invaliditetom, stare osobe, trudnice, samohrani roditelji sa maloletnom decom i lica koja su bila izložena mučenju, silovanju ili drugim teškim oblicima psihološkog, fizičkog ili seksualnog nasilja (član 15). Ovo načelo štiti i osobe koje strahuju od progona ili su preživele teško nasilje zbog svog pola, roda ili seksualne orijentacije.

Zakon o azilu, međutim, ne precizira na koji način će se vodiiti računa o specifičnoj situaciji osoba sa posebnim potrebama. U praksi je najčešće Kancelarija za azil u kraćim rokovima sprovodila službene radnje u postupcima po zahtevima ovih osoba ili je tolerisala izvesne propuste u postupku azila i dozvoljavala je povraćaj u pređašnje stanje imajući posebno u vidu ranjivost tražilaca azila. Ipak, praksa Kancelarije za azil nije ujednačena u tom pogledu.[97]

Nacrt zakona o azilu predviđa Načelo obezbeđenja posebnih procesnih i prihvatnih garancija za posebno ranjive osobe (član 15) koje je pandan važećem načelu brige o licima sa posebnim potrebama. Nacrt zakona ne uvodi nove kategorije ranjivih osoba ali dodatno propisuje da će se tražiocima azila pružiti odgovarajuća pomoć ukoliko nije sposoban, s obzirom na lične okolnosti, da ostvaruje prava i obaveze. Ni Nacrt ne predviđa koja će institucija konkretno pružiti pomoć tražiocima azila, u kom obimu i na koji način. Ono što Nacrt zakona izričito propisuje jeste da se izuzetak od mere ograničenja kretanja za posebno ranjive osobe kojima se može odrediti boravak u Prihvatilištu za strance samo ukoliko se na osnovu individualne procene

97 Postupak azila državljanke Ruske Federacije koja je žrtva rodno zasnovanog nasilja traje 7 meseci u momentu sastavljanja ovog dokumenta iako je zakonski rok za sprovođenje postupka azila 2 meseca.

utvrdi da takav smeštaj odgovara njihovim ličnim okolnostima i potrebama, a posebno zdravstvenom stanju (član 81).

U praksi je, međutim, problematično to što nadležne institucije u sistemu azila, Ministarstvo unutrašnjih poslova, Kancelarija za azil i Komesarijat za izbeglice, nemaju razvijene mehanizme za identifikovanje ranjivosti određenih grupa ljudi. Tako, Kancelarija za azil, tek od punomoćnika u postupku azila ili od organizacije koja se posebno bavi zaštitom žena žrtava nasilja, dobija informaciju da je tražiteljka azila trpela porodično nasilje ili da je bila silovana i da iz tog razloga treba obratiti posebnu pažnju na taj slučaj.

## 2.2. Postupak azila i relevantna praksa

### 2.2.1. Pristup postupku azila

Pristup postupku azila se ostvaruje izražavanjem namere za traženje azila (član 22 ZOA). Stranac može prilikom granične kontrole ili u policijskoj stanici unutar Republike Srbije da izrazi nameru da traži azil. Ta namera se evidentira i strancu se izdaje o tome potvrda sa kojom ima obavezu da se javi u centar za azil u koji je upućen u roku od 72 časa od izdavanja potvrde ili direktno Kancelariji za azil, ukoliko stranac ima sredstva da boravi na privatnoj adresi.

Potvrda o izraženoj nameri za traženje azila je zapravo prvi dokument koji se tražiocima azila izdaje u Srbiji i koji im omogućava ne samo pristup postupku azila već i boravak u centrima za azil i zdravstvenu zaštitu.

Primećeno je da se u praksi načelo rodne ravnopravnosti ne poštuje uvek prilikom izražavanja namere za traženje azila.[98] Tako je u jednom slučaju tražiteljka azila iz Tunisa sletela na aerodrom „Nikola Tesla“ u Beogradu gde je provela 3 dana pre nego što su službenici granične policije pristali da joj izdaju potvrdu o izraženoj nameri za traženje azila. Potvrda je tražiteljki

98 Podatak dobijen na osnovu iskustva pravnika Beogradskog centra za ljudska prava u zastupanju tražilaca azila.

azila izdata tek nakon intervencije pravnika Beogradskog centra za ljudska prava. Ona je Tunis, između ostalog, napustila u strahu od odmazde koja joj je pretila od porodice (konkretno oca i jednog od braće) zbog činjenice da je razvedena žena koja čeka dete sa vanbračnim partnerom, što je društveno neprihvatljivo u Tunisu, odnosno zbog čega joj preti ubistvo iz časti od strane njenog oca i brata (*honor – killing*). Takođe, tražiteljka azila je na svom poslu dobijala pretnje smrću od radikalnih islamista kojima je odbila da nezakonito i bez recepta kao farmaceut u bolnici izda lekove. Prilikom pasoške kontrole ovlašćeni policijski službenici SGP Beograd nisu omogućili tražiteljki azila ulazak u Srbiju i planirali su da je vrate u Tunis jer su smatrali da će postupak azila iskoristitii samo radi ulaska u Srbiju i odlaska sa vanbračnim partnerom u Austriju. Ta informacija saopštena je tražiteljki azila na engleskom jeziku koji ona dobro ne razume (jer govori samo arapski i francuski). U tom slučaju, potpuno je izostala procena rodnog aspekta položaja tražiteljke azila odnosno nije uzeto u obzir da joj preti ubistvo iz časti u Tunisu samo zato što je žena usled čega joj je trebalo odmah pružiti odgovarajuću zaštitu i pristup postupku azila.[99]

Prilikom izdavanja potvrde o izraženoj nameri za traženje azila tokom izbegličke krize u 2015. godine, pripadnici Ministarstva unutrašnjih poslova davali su prioritet ženama bez pratnje i ženama sa decom.[100] Takođe, Kancelarija za azil je u julu 2016. godine uvela praksu da tražioci azila moraju prvo da budu smešteni u centre za azil, da podnesu zahtev za azil i tek nakon toga može da im se odobri boravak na privatnoj adresi.[101] Ipak, Kancelarija za azil dozvoljava ženama, za koje postoje indicije da su žrtve nasilja u porodici, da budu odmah smeštene u sigurne

99 Pravnici Beogradskog centra za ljudska prava podneli su u ovom slučaju ustavnu žalbu Ustavnom sudu Srbije o kojoj još uvek nije odlučeno.

100 Podatak dobijen kroz monitoring položaja izbeglica na ulicama Beograda u periodu od maja do decembra 2015. godne koji je sproveo Beogradski centar za ljudska prava.

101 Prethodnih godina, tražioci azila su mogli odmah nakon dobijanja potvrde o izraženoj nameri za traženje azila da se smeste na privatnu adresu i da o tome samo obaveste Kancelariju za azil.

kuće koje vodi NVO Atina bez prethodnog boravka u centrima za azil. Na taj način, Kancelarija za azil je prepoznala posebne potrebe i ranjivost žena koje su preživele rodno zasnovano nasilje. Kao što je već gore navedeno, problem u praksi predstavlja nedostatak mehanizama državnih institucija za blagovremeno identifikovanje takvih osoba, koje uglavnom obavljaju nevladine organizacije. U tom smislu, bilo bi neophodno da Novi zakon o azilu sadrži i norme kojima se bliže uređuje postupak identifikovanja posebno ranjivih osoba.

Nakon izdavanja potvrde Kancelarija za azil vrši registraciju tražilaca azila koja obuhvata utvrđivanje identiteta, fotografisanje, daktiloskopiranje, privremeno oduzimanje identifikacionih dokumenata (član 24). Nacrt zakona o azilu predviđa kao jednu službenu radnju evidentiranje potvrde o izraženoj nameri za traženje azila i registraciju čime se obezbeđuje utvrđivanje identiteta tražilaca azila nakon prvog kontakta sa službenicima Ministarstva unutrašnjih poslova.

### 2.2.2. Podnošenje zahteva za azil i saslušanje

Postupak azila se formalno pokreće podnošenjem zahteva za azil u roku od 15 dana nakon registracije ovlašćenom službeniku Kancelarije za azil koji u propisani obrazac unosi izjavu tražilaca azila (član 25 ZOA). Podnošenje zahteva se, dakle obavlja u formi jednog kraćeg saslušanja. Nacrt zakona o azilu predviđa da stranac može i sam da popuni obrazac zahteva i podnese ga Kancelariji za azil ukoliko mu prvostepeni organ ne omogući da usmeno podnese zahtev (član 36 Nacrta).

Nakon podnošenja zahteva, sprovodi se usmena rasprava (saslušanje) tokom koje službenici Kancelarije za azil detaljnije ispituju tražioca azila o razlozima progona. Službenici Kancelarije za azil bi trebalo, u slučajevima, u kojima je osnov progona vezan za rod tražilaca azila, da se pre saslušanja dobro informišu o položaju LGBTI osoba kao i o položaju žena i muškaraca u konkretnoj zemlji porekla. Takođe, službenici Kancelarije za azil bi posebno trebalo tražioce azila da informišu o načelu poverlji-

vosti (član 18 ZOA i član 19 Nacrta) odnosno o tome da će informacije koje oni saopšte u postupku azila biti dostupne samo ovlašćenim licima i neće se otkrivati zemlji porekla.

Podnošenje zahteva i usmena rasprava (saslušanje) treba da se sprovede u okruženju koje je podržavajuće za tražioca azila i koje obezbeđuje poverljivost a što nije propisano niti važećim Zakonom o azilu niti je predviđeno Nacrtom.

Zakon o azilu predviđa da je lice koje traži azil dužno da u potpunosti sarađuje sa Kancelarijom za azil i da tačno iznese sve činjenice koje su od značaja za odlučivanje (član 26, stav 5). Odbijanje tražioca azila da saopšti činjenice u vezi sa rodno zasnovanim nasiljem ne treba automatski da bude osnov za odbijanje zahteva kao nekredibilnog. Postoje brojni razlozi zbog kojih tražilac azila nije voljan da otkrije neke informacije o sebi kao što su krivica, sramota, briga za čast porodice, internalizovana homofobija, strah od krijumčara. Službenici koju utvrđuju osnovanost zahteva za azil treba da posebno imaju u vidu da rodne i kulturološke norme mogu da utiču na celokupno držanje tražilaca azila tokom saslušanja. Za žrtve seksualnog nasilja nije neophodno da se dobiju svi detalji o radnjama progona. Dovoljno je da tražilac azila opiše događaje i okolnosti koji su doveli do seksualnog nasilja kao i kontekst u kome se dešavalo.[102] Takvu praksu Kancelarija za azil je primenila u nekoliko slučajeva iako o tome ne postoje posebni pravilnici ili interna pravila koja su poznata javnosti.[103] Za razliku od važećeg zakona koji se u delu „Saslušanje" ne bavi rodno osetljivim pitanjima, Nacrt propisuje da ovlašćeni službenik Kancelarije za azil može više puta saslušati tražioca azila radi utvrđivanja činjeničnog stanja osim u slučajevima kad se radi o maloletnom licu ili tražiocu azila koji je žrtva nasilja u porodici ili drugog oblika rodno zasnovanog nasilja (član 37, stav 2) što je donekle dobro rešenje jer u takvim

102 *Gender Issues in Asylum Claims*, UK Visas and Immigration, oktobar 2010. godine, str. 18.

103 Rešenje Odseka za azil 03/9–4–26–1280/13 od 25. decembra 2013. godine i Rešenje Kancelarije za azil 26–652/16 od 17. juna 2016. godine.

slučajevima može biti veoma teško za tražilaca azila da govori o traumatičnim događajima koji izazivaju stid i strah.[104] Ipak, prema smernicama UNHCR za žrtve seksualnog nasilja i drugih vrsta trauma, naknadno saslušanje može biti neophodno kako bi se uspostavio odnos poverenja između tražilaca azila i službenika koji sprovodi postupak.[105]

Nacrt zakona o azilu predviđa mogućnost da se saslušanje izostavi kad se na osnovu dostupnih dokaza može doneti pozitivna odluka, kad tražilac azila nije sposoban da dâ izjavu zbog trajnih okolnosti na koje ne može sam uticati i kada se ocenjuje dopuštenost naknadnog zahteva (član 37, stav 10). Mogućnost izostavljanja saslušanja može donekle olakšati položaj LGBTI osoba i osoba koje su preživele seksualno i rodno zasnovano nasilje. Međutim, isti član Nacrta zakona predviđa da saslušanja, u slučaju masovnog priliva tražilaca azila, mogu sprovoditi službenici drugih organizacionih jedinica Ministarstva unutrašnjih poslova ili drugih državnih organa uz neophodnu obuku pre uključivanja u saslušanje (član 37, stavovi 12 i 13). Ova mogućnost nije dobra jer može dovesti do toga da postupak azila sprovode službenici koji nemaju dovoljno iskustva u radu sa izbeglicama i nisu u dovoljnoj meri senzibilisani.

Nacrt zakona predviđa da se saslušanje članova porodice sprovodi odvojeno, osim kada to nije moguće ili je povezano sa nesrazmernim teškoćama za organ koji vodi postupak (član 37, stav 6). Individualno saslušanje bi trebalo da bude pravilo kako bi se osiguralo da tražioci azila imaju priliku da iznesu sve razloge zbog kojih su napustili zemlju porekla. Posebno prilikom saslušanja treba ženama objasniti da one imaju pravo na individualno saslušanje i na svoj sopstveni slučaj.[106]

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104 *Guidelines on International Protection: Gender – Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 7. maj 2002, paragraf 35, dostupno na http://www.refworld.org/pdfid/3d36f1c64.pdf.

105 *Ibid*., paragraf 36 (iii).

106 *Ibid*., paragraf 36 (i).

### 2.2.3. Odlučivanje

Nakon sprovedenog postupka Kancelarija za azil donosi odluku kojom usvaja zahtev za azil i strancu dodeljuje utočište ili supsidijarnu zaštitu ili odluku kojom zahtev odbija i nalaže strancu da u određenom roku napusti Srbiju.

Nacrt zakona o azilu, za razliku od važećeg zakona, predviđa koje će okolnosti i činjenice Kancelarija za azil prilikom odlučivanja posebno uzeti u obzir kao što je, između ostalog, položaj i lične okolnosti tražilaca azila, uključujući pol i uzrast, kako bi se na osnovu toga procenilo da li postupci i dela kojima je tražilac azila bio ili bi mogao biti izložen predstavljaju progon ili ozbiljnu nepravdu (član 32, stav 2, tačka 3). Ova odredba bi trebalo da osigura to da Kancelarija za azil posebno ima u vidu položaj neke osobe u društvu koji je determinisan njenim polom odnosno rodom.

Nije neophodan nikakav dokument, odnosno materijalni dokaz, na osnovu koga bi se utvrdio izbeglički status u slučajevima seksualnog i rodno zasnovanog nasilja, dok informacije o zemljama porekla mogu da budu izuzetno korisne za utvrđivanje verodostojnosti iskaza.[107] Ipak, treba imati u vidu da statistički podaci o seksualnom nasilju mogu da budu nedostupni i u tom slučaju bi trebalo koristiti alternativne izvore kao što su svedočenja drugih žena i izveštaji nevladinih organizacija.

U dosadašnjoj praksi Kancelarije za azil nije bilo slučajeva da je nekome dodeljen azil iz razloga što je ta osoba progonjena isključivo zbog svog pola ili roda. Doduše u jednom slučaju, Kancelarija za azil je usvojila zahteve za azil dvojice državljana Turske jer je ustanovila da oni imaju opravdani strah da se vrate u svoju zemlju porekla zbog opasnosti da bi zbog svoje vere (hrišćani, katolici), nacionalne pripadnosti (Jermeni i Jevreji) ali i seksualne opredeljenosti (transseksualac i homoseksualac) bili izloženi progonu, nečovečnom i ponižavajućem postupanju kao

107 *Ibid.,* paragraf 37.

i da bi im sloboda i bezbednost bili ugroženi.[108] U tom postupku cenjene su posebno i objektivne činjenice o položaju homoseksualaca u Turskoj koje su ukazale na to da se može razumno pretpostaviti da će tražioci azila biti izloženi progonu u slučaju povratka u svoju zemlju porekla. Kancelarija za azil je u svojoj odluci navela da mnogi izveštaji ukazuju na to da postoji široko rasprostranjena diskriminacija LGBTI osoba u Turskoj kao i homofobija koja je u nekoliko slučajeva rezultirala fizičkim i seksualnim nasiljem. Odgovor turskih vlasti je u tim slučajevima neadekvatan ili uopšte ne postoji a prekršajni propisi se često koriste da se izreknu novčane kazne transrodnim osobama. Kancelarija za azil je konstatovala da im vlasti Turske ne bi pružile adekvatnu zaštitu što ih u smislu Konvencije o statusu izbeglica i Zakona o azilu čini izbeglicama.

Kancelarija za azil je u tom predmetu donela zaključak o spajanju postupaka po zahtevima za azil dvojice državljana Turske (član 117 Zakona o opštem upravnom postupku), navodeći u obrazloženju zaključka da se radi o vanbračnim partnerima tj. licima koja imaju zajednicu života i čiji se zahtevi za azil temelje na sličnom činjeničnom stanju. Dakle, Kancelarija za azil je priznala vanbračnu zajednicu dvojice muškaraca za potrebe vođenja postupka azila, što je veoma progresivno imajući u vidu da ni Ustav Republike Srbije ni Porodični zakon ne priznaju nikakav pravni status takvoj zajednici života. Ipak važeći Zakon o azilu definiše članove porodice veoma široko ne spominjući kogentne norme, kao što je priznanje određenog bračnog odnosno vanbračnog statusa samo heteroseksualnim parovima. Tako Zakon propisuje da je član porodice maloletno dete, usvojenik, odnosno pastorak, supružnik ako je brak zaključen pre dolaska u Republiku Srbiju, kao i roditelj i usvojitelj koji su po zakonu dužni da ga izdržavaju. Svojstvo člana porodice može se izuzetno priznati i drugim licima pri čemu će se posebno uzeti u obzir činjenica da li su bila izdržavana od strane lica kome je odobreno utočište ili supsidijarna zaštita (član 2, stav 1, tačka 12). Nacrt

108 Rešenje Odseka za azil 03/9–4–26–1280/13 od 25. decembra 2013. godine.

zakona o azilu sadrži nešto izmenjenu i restriktivniju definiciju člana porodice tako što predviđa da je član porodice vanbračni partner u skladu sa propisima Republike Srbije. Dakle, iako je Nacrt zakona usklađeniji sa Ustavom i Porodičnim zakonom u tom pogledu, on na ovaj način isključuje mogućnost priznavanja istopolnih zajednica za potrebe vođenja postupka azila.

Za razliku od nekih evropskih zemalja, Kancelarija za azil se, u napred opisanom predmetu po zahtevima državljana Turske, uopšte nije upuštala u ispitivanje istinitosti tvrdnje tražilaca azila da su homoseksualci, što je takođe primer dobre prakse budući da utvrđivanje seksualnog opredeljenja u postupku azila može biti veoma ponižavajuće.[109] Medicinsko „testiranje" seksualne orijentacije tražilaca azila predstavlja povredu njegovih osnovnih ljudskih prava i ne sme se koristiti. S druge strane, medicinska dokumentacija koja ukazuje na terapiju promene pola ili hormonski tretman intersex osoba može da potkrepi verodostojnost zahteva za azil.[110]

U drugom slučaju u Srbiji po zahtevu za azil žene sa dvoje maloletne dece iz Avganistana, koji su svi bili žrtve porodičnog nasilja, Kancelarija za azil je podnosiocima zahteva dodelila supsidijarnu zaštitu zbog veoma loše opšte bezbednosne situacije u Avganistanu iako je ta žena bila prinudno udata, trpela nasilje i nije mogla da dobije razvod usled položaja koji žene imaju u Avganistanu i Iranu, gde je imala poslednje stalno prebivalište.[111] Tražiteljka azila S. F. je napustila Avganistan još kao devojčica i sa dva brata, majkom i ocem otišla u Iran gde je prinudno udata. U Iranu nije imala nikakav pravni status jer Iran ne pruža zaštitu izbeglicama iz Avganistana. Tokom bo-

109 „How do you prove you are gay? A culture of disbelief is traumatising asylum seekers", *Guardian,* 24. novembar 2015, dostupno na: https://www.theguardian.com/commentisfree/2015/nov/24/gay-asylum-seekers-sexuality-home-office.

110 *UNHCR's comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation*, UNHCR, april 2011.

111 Rešenje Kancelarije za azil 26 – 652/16 od 17. juna 2016. godine.

ravka u Iranu trpela je fizičko nasilje i psihičko zlostavljanje od strane supruga i nije smela da napušta kuću. Nije mogla da se obrati policiji za pomoć jer je boravila nezakonito u toj zemlji. Da bi sebe i decu zaštitila napustila je Iran i stigla do Srbije gde je zatražila azil. Kancelarija za azil je tražiteljki azila i njenoj deci dodelila supsidijarnu zaštitu razmatrajući samo bezbednosnu situaciju u Avganistanu kao razlog zbog koga ona ne može da se vrati u državu čiji je državljanin. Ipak, Kancelarija za azil nije posebno cenila činjenicu da bi F. S. bila u veoma teškom položaju u Avganistanu kao žena koja je napustila svog muža kao i da u Avganistanu ne bi mogla da dobije nikakvu zaštitu od porodičnog nasilja. Te posledice bi potencijalno mogle da dosegnu razmere progona.

Kancelarija za azil je u svom radu sprovodila postupak azila u brojnim slučajevima u kojima je bio važan rodni aspekt zahteva za azil ali nije donela nijednu odluku (osim dve gore opisane) kojom se dodeljuje zaštita nekom strancu iz razloga što je bio isključivo progonjen zbog svog pola ili roda.[112]

Kako zahtev za azil može biti odbijen usled toga što nije kredibilan (član 30 ZOA), odnosno ako se službeno lice smatra da je zasnovan na neistinitim razlozima, na lažnim podacima, falsifikovanim ispravama, ako su navodi iz zahteva u suprotnosti sa navodima datim prilikom saslušanja ili drugim dokazima, ako se utvrdi da je zahtev za azil podnet radi izbegavanja deportacije ili isključivo iz ekonomskih razloga. Takođe, zahtev za azil može biti odbijen ako lice odbije da dâ izjavu o razlozima za traženje azila ili je njegova izjava nejasna ili ne sadrži navode koji ukazuju na progon. U slučajevima seksualnog i rodno zasnovanog nasilja se neretko dešava da žene daju drugačiju izjavu prilikom saslušanja od one date prilikom podnošenja zahteva za azil, kao i da zbog straha i traume ne žele da pričaju o traumatičnim događajima, te bi trebalo propisati da se to ima u vidu u takvim slučajevima.

112 Podatak dobijen u telefonskom razgovoru sa službenicom Kancelarije za azil 8. septembra 2016. godine.

Nacrt zakona o azilu predviđa da će Kancelarija za azil odbiti zahtev kada utvrdi da nisu ispunjeni uslovi za dodelu utočišta ili supsidijarne zaštite ili ako postoje okolnosti iz člana 40 koji propisuje osnove za vođenje ubrzanog postupka.[113] To praktično znači da bi vođenje ubrzanog postupka moglo da prejudicira negativnu odluku Kancelarije za azil što nije dobro rešenje posebno u slučajevima u kojima se zahtev za azil zasniva na seksualno i rodno zasnovanom nasilju jer žrtve takvog nasilja mogu da daju kontradiktorne izjave ili da iz straha i osećaja stida odbiju da daju podatke koji su važni za dodeljivanje azila.

Kompleksna priroda zahteva za azil koji se zasnivaju na progonu zbog seksualne orijentacije ili rodnog indentiteta čine ove zahteve generalno nepodobnim za ubrzane procedure ili primenu koncepta „sigurne države porekla".[114] Kako je već navedeno, Nacrt zakona o azilu uvodi ubrzanu proceduru (član 40) i mogućnost odbijanja zahteva za azil kada je osoba došla iz sigurne zemlje porekla (član 44) ne predviđajući da će LBGTI osobe ili osobe koje strahuju od rodno zasnovanog progona ili nasilja biti izuzete od tih procedura.

113 Ubrzani postupak će se sprovesti ako se utvrdi da je: 1) tražilac izneo samo one podatke koji nisu od značaja za procenu osnovanosti zahteva; 2) tražilac svesno doveo u zabludu Kancelariju za azil iznoseći lažne podatke ili predočivši falsifikovana dokumenta, odnosno ne pružajući relevantne podatke ili prikrivajući dokumenta koja bi mogla negativno uticati na odluku; 3) tražilac namerno uništio ili sakrio isprave za utvrđivanje identiteta i/ili državljanstva, u cilju pružanja lažnih podataka o identitetu i/ili državljanstvu; 4) tražilac izneo očigledno nedosledne, kontradiktorne, lažne ili neuverljive izjave, koje su u suprotnosti sa proverenim podacima o državi porekla, koje čine njegov zahtev neuverljivim; 5) tražilac podneo naknadni zahtev dopušten u skladu sa članom 46, stavovima 2 i 3 ovog zakona; 6) tražilac podneo zahtev sa očiglednom namerom da odloži ili spreči izvršenje odluke koja bi imala za posledicu njegovo udaljenje iz Republike Srbije; 7) tražilac predstavlja ozbiljnu opasnost po nacionalnu bezbednost i javni poredak; i 8) moguće primeniti koncept sigurne zemlje porekla, u skladu sa članom 44 ovog zakona.

114 *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 23. oktobar 2012. godine, paragraf 59.

## 2.3. Ograničenje kretanja

Ograničenje slobode kretanja u kontekstu migracija nije zabranjeno *per se* prema međunarodnom pravu koje sadrži garancije protiv nezakonitog i samovoljnog određivanja ove mere. Pojam „samovoljnosti" treba da se shvati u skladu sa širom definicijom i treba da obuhvati ne samo nezakonitost, već i elemente neprikladnosti, nepravde i nedovoljne predvidljivosti.[115] Takođe, iako u kontekstu pozitivnih propisa Srbije, pritvor predstavlja pravni institut krivičnog postupka, pritvor u izbegličkom pravu predstavlja svaku meru smeštanja tražilaca azila u ustanove zatvorenog tipa koje tražilac azila ne sme samovoljno napustiti. Pritvor tako predstavlja najekstremniji oblik ograničenja kretanja tražilaca azila.[116] Primena ove mere, onako kako je propisuje važeći Zakon o azilu kao i Nacrt zakona o azilu, ne predviđa izričito da se ona neće primeniti na žene i devojčice, žrtve seksualnog i rodno zasnovanog nasilja niti je ženama obezbeđen poseban tretman u slučaju ograničenja slobode kretanja. Prema Smernicama UNHCR, ženama i devojčicama izbeglicama je potrebna posebna zaštita od dugog i neopravdanog pritvora, a države treba u tim slučajevima da promovišu i osiguraju alternative ograničenju slobode kretanja.[117]

Pritvaranje žena može da dovede do seksualnog i fizičkog nasilja prema njima. Zatvoreni objekti ili kampovi su često ograđeni bodljikavom žicom, odajući utisak da su zatvori, sa zatvorskim ograničenjima sloboda. Nehumana sredina može tako da ohrabri nehumane postupke prema ženama.[118] Iako se u praksi nadležnih organa Republike Srbije ova mera izuzetno retko ko-

115 *„Smernice UNHCR o pritvoru",* UNHCR 2012, paragraf 18, dostupno na *http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html.*

116 *Ibid*., paragrafi 5–6.

117 *UNHCR Smernice o međunarodnoj zaštiti žena izbeglica*, *Guidelines on the Protection of Refugee Women prepared by the Office of the United Nations High Commissioner for Refugees*, Geneva, jul 1991, paragrafi 2 i 81.

118 *Ibid*., paragraf 36.

ristila, potrebno je ipak propisati odgovarajući pravni okvir za njenu primenu.

Članom 51 Zakona o azilu propisano je da se ograničenje kretanja tražilaca azila može ograničiti kada je to neophodno radi uvrđivanja identiteta, obezbeđivanja prisustva stranca u postupku azila, u slučaju kad se osnovano može pretpostaviti da je zahtev za azil podnet u cilju izbegavanja deportacije, ili kad bez prisustva stranca nije moguće utvrditi druge bitne činjenice na kojima se zasniva zahtev za azil. Takođe, kretanje se može ograničiti i radi zaštite bezbednosti zemlje ili javnog poretka. Mere ograničenja slobode kretanja su određivanje boravka u Prihvatilištu za strance ili zabrana napuštanja centra za azil ili određene adrese (član 52). Zakon ne predviđa izričito nikakva odstupanja ili izuzetke u slučaju da se radi o posebno ranjivim osobama ili žrtvama seksualnog i rodno zasnovanog nasilja. Takođe, Zakon ne predviđa ni princip proporcionalnosti, odnosno da će se u konkretnom slučaju primenjivati ona mera kojom se može zadovoljiti svrha ograničenja slobode kretanja.

O žalbi protiv ove mere odlučuje Viši sud. U predmetima u kojima su tražioce azila zastupali pravnici Beogradskog centra za ljudska prava, Viši sud nije usvojio nijednu žalbu protiv odluke o ograničenju kretanja tražilaca azila, odnosno u svim predmetima je potvrđena zakonitost određivanja ove mere.

Nacrt zakona predviđa takođe mogućnost ograničenja slobode kretanja iz istovetnih razloga kao važeći zakon, s tim što poznaje i druge mere ograničenja kao što su redovno javljanje područnoj policijskoj jedinici, određivanje boravka u ustanovi socijalne zaštite sa pojačanim nadzorom, za maloletnike i privremeno oduzimanje putne isprave (član 79). Takođe, prema Nacrtu, o žalbi protiv odluke o ograničenju kretanja odlučuje Viši sud. Pored toga, Nacrt predviđa i princip proporcionalnosti kao i to da se posebno osetljivim licima može odrediti boravak u Prihvatilištu za strance samo ako se na osnovu individualne procene utvrdi da je takav boravak adekvatan za tu osobu imajući u vidu njene lične okolnosti i potrebe, a posebno zdravstveno sta-

nje (član 81). Dakle, Nacrt predviđa samo mogućnost odstupanja od ove mere ukoliko se radi o ženama žrtvama seksualnog i rodno zasnovanog nasilja, ili o ženama čije je zdravstveno stanje ugroženo.

Osnovi za ograničenje kretanja koje predviđa važeći zakon i Nacrt zakona su u skladu za dozvoljenim osnovima za izricanje ove mere koji su propisani Smernicama UNHCR o pritvoru.

Nacrt zakona predviđa posebnu proceduru na granici koja nije bila uređena važećim zakonom (član 41 Nacrta). Ta procedura takođe podrazumeva ograničenje kretanja lica koje je izrazilo nameru da traži azil u tranzitnom prostoru aerodroma ili na drugom graničnom prelazu i određivanje smeštaja u određenom prostoru na granici ili u smeštaju u unutrašnjosti zemlje, gde će se sprovesti celokupan postupak azila. Ova procedura se primenjuje u slučaju da se zahtev za azil može odbiti kao neosnovan (član 38, stav 1, tačka 5), odbaciti (član 42) ili ukoliko se radi o naknadnom zahtevu. Dakle, to praktično može da znači da će se ova procedura uvek primenjivati kad lice izrazi nameru da traži azil na graničnom prelazu. Predviđeno je da tokom granične procedure Kancelarija za azil treba da donese odluku u roku od 28 dana od podnošenja zahteva za azil, a ukoliko to ne učini, licu se omogućava ulazak u Republiku Srbiju radi sprovođenja redovnog postupka azila. Protiv odluke Kancelarije za azil moguće je podneti žalbu Komisiji za azil u roku od 5 dana. Ostaje, međutim, nejasno da li je dozvoljena žalba ukoliko se licu ne omogući ulazak u Srbiju nakon 28 dana i kome se taj pravni lek podnosi i da li je dozvoljena žalba i protiv inicijalne odluke o ograničenju kretanja u graničnom prostoru.

Nacrt zakona tako otvara prostor za ograničenje kretanja velikog broja ljudi, koje po stepenu svog intenziteta predstavlja ograničenje slobode[119] i trebalo bi da sadrži i druge procedural-

119 *Guzzardi protiv Italije*, ECtHR, predstavka 7367/76, presuda od 6. novembra 1980, paragraf 92.

ne garancije kao i garancije adekvatnog postupanja prema strancima i ženama dok traje mera ograničenja kretanja.[120]

Devojčice i dečaci su prema Nacrtu zakona izuzeti iz ove procedure, ali ne i druge ranjive osobe, uključujući i žrtve seksualnog i rodno zasnovanog nasilja. Standardi međunarodnog prava ljudskih prava predviđaju da države moraju da osiguraju odvojeno pritvaranje muškaraca i žena kao i to da žene pretresaju i nadziru samo službenice ženskog pola.[121] Takve garancije bi trebalo da obezbedi i Nacrt zakona o azilu.

U avgustu 2016. godine Kancelarija za azil je državljanki Avganistana sa dvoje maloletne dece (od dve i četiri godine) odredila smeštaj u Prihvatilištu za strance pod pojačanim policijskim nadzorom tokom trajanja postupka azila, smatrajući da je takva mera potrebna radi utvrđivanja njihovog identiteta kao i zbog činjenice da su oni podneli zahtev za azil da bi izbegli vraćanje u Bugarsku.[122] Razlog za određenje smeštaja ove porodice u Prihvatilištu za strance radi utvrđivanja njihovog identiteta, potpuno je proizvoljan, imajući u vidu da na godišnjem nivou hiljade tražilaca azila borave u Srbiji u centrima za azil (dakle, bez ograničenja slobode kretanja) iako im nije utvrđen identitet. Takođe, Kancelarija za azil nije cenila da li bi u ovom slučaju mogla da se primeni neka manje restriktivna mera ograničenja kretanja imajući u vidu da se radilo o samohranoj majci sa dvoje male dece.

Opšte pravilo je da trudnice i dojilje ne treba pritvarati i da bi u razmatranju alternativnih rešenja trebalo ceniti posebne potrebe žena, uključujući i mere zaštite od seksualnog i rodno zasnovanog nasilja. Alternative pritvoru su posebno neophodne kada nisu predviđeni posebni objekti za smeštaj žena.[123] Žena-

120 *Migration and International Human Rights Law, Practicioners Guide No. 6*, International Commission of Jurists, Geneva 2011. str. 150–156.

121 *UN Rules for the Treatment of Women Prisoners and Non–custodial Measures for Women Offenders (Bangkok Rules)*, Generalna skupština UN, 6. oktobar 2010. godine.

122 Rešenje Kancelarije za azil 26–2121/16 od 10. avgusta 2016. godine.

123 *Smernice UNHCR o pritvoru*, UNHCR 2012, paragrafi 58–61.

ma kojima je ograničeno kretanje treba obezbediti odgovarajuće higijenske uslove, zaštitu od povrede prava, podršku i savetovanje, a njihove pritužbe moraju da istraže nadležni i nezavisni organi, uz potpuno poštovanje načela poverljivosti, posebno u slučajevima kada su smeštene sa porodicom i/ili suprugom. Takođe, žene žrtve seksualnog i rodno zasnovanog nasilja moraju da imaju odgovarajuću fizičku i mentalnu zdravstvenu zaštitu tokom pritvora.[124]

U pogledu pritvaranja LGBTI osoba potrebno je preduzeti odgovarajuće mere kako bi se sprečilo njihovo izlaganje riziku od nasilja i kako bi im se obezbedila medicinska pomoć i zaštita. Takođe, zaposleni u objektima u kojima su smešteni stranci čija sloboda kretanja je ograničena, treba da budu obučeni i kvalifikovani u pogledu međunarodnih standarda u oblasti ljudskih prava, zabrane diskriminacije na osnovu seksualne orijentacije i rodnog identiteta. U svakom slučaju, pritvor u samice, radi smanjenja rizika od nasilja prema ovim osobama, nije odgovarajući način obezbeđivanja njihove zaštite.[125]

Ni važeći zakon ni Nacrt zakona ne sadrže dovoljne garancije protiv nezakonitog i samovoljnog ograničenja kretanja niti garancije poštovanja prava pritvorenih žena i LGBTI osoba.

## 2.4. Smeštaj

Zakon o azilu predviđa da već osobe koje su u postupku azila imaju pravo na smeštaj u centru za azil, gde im se obezbeđuju i osnovni životni uslovi, odnosno odeća, hrana i novčana pomoć.[126] Ukoliko lice koje je smešteno u centru za azil raspolaže adekvatnim finansijskim sredstvima, dužno je da učestvuje u snošenju troškova smeštaja u centru, ali u praksi se to do sada nije tražilo. Ukoliko tražilac azila boravi na privatnoj adresi, a ne postoje razlozi za ograničenje njegovog kretanja, Kancelarija za azil može

124 *Ibid.*

125 *Ibid*., paragraf 65.

126 Zakon o azilu, član 39.

odobriti boravak van centra za azil, ali u tom slučaju dužan je da sam snosi troškove smeštaja. Tako *Smernice UNHCR o međunarodnoj zaštiti žena izbeglica,* u stavu 79 navode da je pitanje smeštaja i uređivanje izbegličih kampova, izuzetno važno pitanje za položaj tražiteljki azila i žene izbeglice jer može uticati na ostvarivanje njihovih elementarnih ljudskih prava. Tako se navodi da centri za kolektivno smeštanje tražilaca azila, moraju pružiti adekvatnu zaštitu ženama, i da se mora omogućiti ostvarivanje prava na privatnost. Dalje, *Stav Evropskog saveta za izbeglice i prognanike, o ženama izbeglicama i tražiteljkama azila*[127] ide još dalje, i predviđa nekoliko važnih koraka koje države moraju da preduzmu kako bi se omogućilo poštovanje načela rodne ravnopravnosti kada je reč o standardima po pitanju kolektivnog smeštaja tražilaca azila. To su sledeće preporuke: zaposleni u centrima za azil bi morali da budu edukovani kako bi mogli da prepoznaju i adekvatno odgovore na potrebe žena tražiteljki azila; morali bi da postoje uređeni mehanizmi prepoznavanja nasilja nad ženama kao i izveštavanja nadležnim organima od strane zaposlenih u centrima za azil; zasebni toaleti i kupatila za žene; nezavisno pružanje pravne pomoći i informisanja žena tražiteljki azila (misli se na odvojeno informisanje i savetovanje od ostalih članova porodice).

Nakon dobijanja međunarodne zaštite ženama izbeglicama bi trebalo da se omogući adekvatan smeštaj koji će biti u funkciji njihove integracije. To pre svega podrazumeva smeštajne objekte koji nisu izolovani iz lokalne zajednice i koji ispunjavaju uslove za trajniji boravak. Imajući u vidu ograničena novčana sredstva koja izbeglice imaju, nedostatak socijalnih kontakata i nepoznavanje lokalne sredine, pronalaženje pristojnog i pristupačnog smeštaja u velikim gradovima može biti stvaran izazov.[128]

Zakon o azilu Republike Srbije u članu 21 govori o smeštaju, i predviđa da do donošenja konačne odluke o zahtevu za azil,

127 *European Council on Refugees and Exiles, Position on Asylum Seeking and Refugee Women*, 1. decembar 1997, dostupno na: http://www.refworld.org/docid/3c0261724.html [accessed 3 October 2016].

128 James C. Hathaway, *The Rights of Refugees under International Law,* Cambridge University Press, Cambridge 2005, str. 818.

licima koja traže azil obezbeđuje se smeštaj i osnovni životni uslovi u Centru za azil, koji je u sastavu Komesarijata za izbeglice. Radom Centra za azil rukovodi državni službenik na položaju koji rukovodi Komesarijatom za izbeglice, koji svojim aktom uređuje i unutrašnju organizaciju i sistematizaciju radnih mesta u Centru za azil. Međutim, niti Zakon niti podzakonski akti koji detaljnije uređuju pitanja smeštaja i obezbeđivanja osnovnih životnih uslova nemaju posebne odredbe koje se odnose na pitanje smeštaja žena tražiteljki azila. Nacrt Novog zakona o azilu, predviđa istovetne odredbe kao i postojeći zakon, odnosno ne osvrće se posebno na smeštanje žena tražiteljki azila.

Osobe kojima je priznato pravo na utočište ili im je dodeljena supsidijarna zaštita u Srbiji imaju pravo da im se obezbedi smeštaj u skladu sa mogućnostima države u trajanju do godinu dana od konačnog rešenja kojim im je priznat status.[129] To podrazumeva davanje određenog stambenog prostora na korišćenje ili davanje novčane pomoći za stambeno zbrinjavanje. S obzirom na skromno iskustvo u procesu integracije izbeglice, u ovom delu ne možemo se detaljnije baviti praksom kada je u pitanju smeštaj žena izbeglica.

Pozitivan pomak u tretiranju trudnica i majki koje putuju same sa decom ostvaren je saradnjom Kancelarije UNHCR, nadležnog centra za socijalni rad, Materinskog doma u Beogradu, Beogradskog centra za ljudska prava i nevladine organizacije „Atina".

Posebno osetljivi slučajevi, koji su bili prepoznati od nekog od pomenutih aktera, smeštani su u Materinski dom u Zvečanskoj ulici, koji je deo Centra za zaštitu odojčadi, dece i omladine Beograd. Tako, na primer, tražiteljka azila i klijentkinja Beogradskog centra za ljudska prava K. N. L. iz Kameruna je posle porođaja na Klinici za ginekologiju i akušerstvo u Višegradskoj ulici u Beogradu upućena u Centar za azil u Krnjači, da bi nedugo posle toga, zbog loših uslova za boravak majke i deteta, na inicijativu UNHCR i uz podršku centra za socijalni rad, smeštena

129 Zakon o azilu, član 44.

u Materinski dom. Ova institucija je specijalizovana za zaštitu i oporavak majki i dece, gde su im dostupne zdravstvene usluge, adekvatna ishrana, kao i potrebna higijenska sredstva i odeća. Uočavanje, prosleđivanje u adekvatnu instituciju, medicinska i besplatna pravna pomoć pokazatelj je dobre prakse koja je nakon ovog primera primenjivana u slučajevima još nekoliko majki koje su putovale same sa decom. Takođe, u više slučajeva kada su žene tražiteljke azila bile žrtve nasilja u porodici i na intervenciju nevladine organizacije „Atina" kao i Beogradskog centra za ljudska prava čiji su pravnici stalno na terenu, bile su upućene i smeštene u Sigurnu kuću „Atine".[130] Ipak, ostaje sporno pitanje nepostojanja formalnog mehanizma prepoznavanje žena žrtava nasilja, kao i upućivanja u sigurne kuće od strane nadležnih organa, već je ceo proces neformalno pod nadležnošću civilnog društva.

## 2.5. Integracija žena izbeglica u privredni, kulturni i društveni život

Zakon o azilu predviđa uopštenu obavezu Republike Srbije da u okviru svojih mogućnosti obezbedi uslove za uključivanje izbeglica u društveni, kulturni i privredni život, kao i da omogući njihovu olakšanu naturalizaciju.[131] Zakonom o upravljanju migracijama[132] utvrđena je nadležnost Komesarijata za izbeglice i migracije[133] za smeštaj i integraciju osoba kojima je priznato pravo na utočište ili dodeljena supsidijarna zaštita.

Ostvarivanje prava osoba kojima je priznato pravo na utočište ili supsidijarnu zaštitu u Srbiji regulisano je Zakonom o azilu, i to glavom VI koja sadrži odredbe koje se odnose na pravo na boravak, smeštaj, osnovne životne uslove, zdravstvenu zaštitu,

130 *Periodični izveštaj o sistemu azila u Republici Srbiji, za period april – jun 2016*, Beogradski centar za ljudska prava, jul 2016, dostupno na http://azil.rs/doc/Periodicni_izvestaj.pdf.

131 Član 46 Zakona o azilu.

132 *Službeni glasnik RS*, 107/12.

133 Članovi 15 i 16 ZOUM.

obrazovanje, socijalnu pomoć, kao i druga prava koja se izjednačavaju sa pravima stalno nastanjenih stranaca u Republici Srbiji, kao i prava koja su jednaka pravima državljana Republike Srbije.[134] Ova prava uključuju pravo na rad i prava po osnovu rada, preduzetništva, pravo na stalno nastanjenje i slobodu kretanja, pravo na pokretnu i nepokretnu imovinu, kao i pravo na udruživanje.

U Zakonu o azilu, kao i Zakonu o upravljanju migracijama nisu definisane konkretne mere i postupci za izradu individualnog plana za integraciju osoba kojima je odobreno utočište, već je potrebno da se ova materija reguliše podzakonskim aktom. Očekuje se usvajanje uredbe koja će detaljnije urediti pitanje individualne integracije lica sa izbegličkom zaštitom, dok je u junu 2015. godine usvojena Uredba o merilima za utvrđivanje prioriteta za smeštaj lica kojima je priznato pravo na utočište ili dodeljena supsidijarna zaštita i uslovima korišćenja stambenog prostora radi privremenog smeštaja[135]. Novi Nacrt nakona o azilu, takođe predviđa istovetne odredbe kada je reč o integraciji izbeglica, koristi rodno neutralan jezik i ne uvodi rodno osetljive mere kada su u pitanju žene izbeglice. Ipak, možda je ideja zakonodavca da se detaljnije pitanje integracije ipak uredi podzakonskim aktom, čije se usvajanje uskoro očekuje, stoga ostaje da vidimo da li će on prepoznati važnost uključivanja rodnog elementa u politike integracije u Srbiji.

Bitan nedostatak našeg sistema je nepostojanje institucije koja bi se na sveobuhvatan način bavila integracijom osoba kojima je priznato pravo na azil, kao i nedostatak zakonskih propisa koji bi bliže uredili ovu materiju. Iako je zakonski utvrđena nadležnost Komesarijata za izbeglice i migracije u oblasti integracije izbeglica, ne možemo konstatovati da je Komesarijat centralna institucija kojoj se korisnici mogu obratiti kako bi im se pružila podrška putem konkretnih mera za integraciju. Do sada se u

134 Članovi 22–27 Zakona o azilu.

135 *Službeni glasnik RS*, 63/15.

praksi pokazalo da[136] civilno društvo, koje je aktivno u oblasti azila i migracija, efikasno pruža kako pravnu pomoć prilikom integracije, tako i druge vrste podrške svim osobama koje dobiju međunarodnu zaštitu u Srbiji.

Žene izbeglice, ćesto se suočavaju sa različitim izazovima u zemljama domaćina, gde politike integracije nisu uvek rodno osetljive.[137] Treba imati u vidu specifičan položaj žena i kultura iz kojih dolaze, jer žene izbeglice iako su dobile međunarodnu zaštitu u vrlo liberalnim i demokratskim društvima, i dalje ostaju diskriminisane od članova svoje porodice, ili su izložene neravnopravnom tretmanu u zajednici u kojoj se integrišu. Tako, žene izbeglice ne mogu uvek prisustvovati časovima jezika ili drugim profesionalnim kursevima, jer ne uspevaju da usklade svoje privatne obaveze (brigu o porodici) i profesionalne obaveze. Pored toga, one su često izložene dvostrukoj diskriminaciji, kada je reč o zapošljavanju i pristupu tržištu rada. Tzv. rodno neutralne mere vezane za aktivne politike tržišta rada, ne uzimaju u obzir činjenicu da se žene izbeglice susreću sa poteškoćama od svojih muških srodnika, jer su one tradicionalno odgovorne za decu i zaštitu porodice. Osim toga, zbog svojih obaveza brige o deci, pristup obukama i kursevima jezika, poteškoće prilikom priznavanja njihovih kvalifikacija, dovode do toga da su često zaposlene u slabije plaćenim poslovima u odnosu na muškarce.

Takođe, *Smernice UNHCR o međunarodnoj zaštiti žena izbeglica* vrlo slično u stavu 69 govore o važnosti integracije i uključivanja u društvo zemlje koja je pružila utočište. Posebno se navodi da postoji ozbiljan rizik od efkasnog uključivanja u društvo kada su u pitanju žene izbeglice jer su one često višestruko ranjivije od muškaraca, a vrlo često u zemljama domaćina

136 Pomoć podrazumeva učenje srpskog jezika, administrativnu pomoć oko dobijanja radnih dozvola, nostrifikacije diplome, odnosnu pomoć u komunikaciji sa nadležnim organima RS, kako bi mogli da uživaju prava garantovana ZOA.

137 Silvia Sansonetti, *Female refugees and asylum seekers: the issue of integration,* Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2016. godina, str. 48.

mogu im biti ograničeno ili potpuno isključeno uživanje političkih, građanskih, ekonomskih i socijalnih prava. Tako na primer *UNHCR Smernice* navode da ženama može biti uskraćen pristup tržištima, vlasništvo nad zemljom ili osnivanje preduzeća, pravo na slobodu kretanja, itd.

Pristup tržištu rada, odnosno zapošljavanju ili socijalnoj pomoći, takođe može biti osetljivo pitanje za žene izbeglice. Ponekad, izdavanje radnih dozvola može biti ograničeno samo za određene aktivnosti, sa strogim zahtevima koji se odnose na starost, fizičko stanje, i često sa vrlo ograničenom zaštitom od zloupotreba na radu.

Ipak, žene izbeglice ne treba smatrati kao pasivne žrtve, već politike integracije treba da imaju za cilj njihovo osnaživanje i nezavisnost, kreiranje socijalnih i društvenih usluga i mera integracije koje će odgovarati njihovim specifičnim potrebama. Takve politike treba da kreira i budući plan integracije koji će se primenjivati u Republici Srbiji.

## 2.6. Statistike

Statistički podaci koji se odnose na sistem azila u zemlji, uključujući broj datih međunarodnih zaštita, broj preseljenja u inostranstvo, pritvor, kao i broj povratnika po readmisiji, treba uvek da budu razvrstani prema polu i starosti, kako bi se istakao broj žena i devojčica izbeglica.[138]

U Republici Srbiji, statističke podatke o broju izraženih namera u postupku azila (uključujući podatke o maloletnim licima), dodeljenih međunarodnih zaštita, ograničenju slobode kretanja i readmisiji, vodi Ministarstvo unutrašnjih poslova Republike Srbije, i statistički podaci su uvek razvrstani po polu. Kada je reč o integraciji izbeglica, podatke bi trebalo da vodi Komesarijat za izbeglice i migracije Republike Srbije, ali do sada

138 *UNHCR Smernice o međunarodnoj zaštiti žena izbeglica*, *Guidelines on the Protection of Refugee Women prepared by the Office of the United Nations High Commissioner for Refugees*, Geneva, jul 1991, stavovi 27, 28 i 29.

nemamo informaciju da takva baza podataka postoji, niti da li je razvrstana po polu. Trenutno, tu vrstu evidencija vodi kancelarija UNHCR u Beogradu.

## 2.7. Zdravstvena zaštita

U Zakonu o azilu, u članu 40 propisano je da lica koja traže azil, kao i izbeglice imaju prava na zdravstvenu zaštitu. Dalje, Zakon navodi da se zdravstvena zaštita ostvaruje u skladu sa propisima kojima je uređena zdravstvena zaštita stranaca. Zakon i u ovom delu koristi rodno neutralan jezik, i ne predviđa posebne mere kada je u pitanju zaštita žena.

Jedno od osnovnih načela Zakona o zdravstvenoj zaštiti Republike Srbije[139], koje je posebno bitno za grupu migranata i posebno ugroženih grupa unutar migrantske populacije je načelo pravičnosti, tj. zabrane diskriminacije prilikom pružanja zdravstvene zaštite po osnovu rase, *pola,* starosti, nacionalne pripadnosti, socijalnog porekla, veroispovesti, političkog ili drugog ubeđenja, imovnog stanja, kulture, jezika, vrste bolesti, psihičkog ili telesnog invaliditeta (član 20). Takođe, kao jedan od opštih interesa u zdravstvenoj zaštiti je prepoznato pružanje hitne medicinske pomoći licima nepoznatog prebivališta i drugim licima koja pravo na hitnu medicinsku pomoć ne ostvaruju na drugačiji način u skladu sa zakonom (član 18). U posebnom delu koji se tiče zdravstvene zaštite stranaca (deo XIII), Zakon propisuje da tražioci azila – lica koja su u Srbiji ostvarila pravo na izbegličku ili supsidijarnu zaštitu, strani državljani, lica bez državljanstva, koja su stalno nastanjena ili privremeno borave ili koji prolaze preko teritorije imaju pravo na zdravstvenu zaštitu za koju se sredstva obezbeđuju u budžetu (član238), kao i da se ta zaštita pruža na način pod kojim se pruža zaštita građanima Srbije (član 239). Dalje, od velike je važnosti član 241 koji propisuje da među strane državljane kojima troškove lečenja pokriva

139 *Službeni glasnik RS*, 107/05, 72/09 – dr. zakon, 88/10, 99/10, 57/11, 119/12 i 45/13 – dr. zakon.

Republika Srbija, spadaju i stranci kojima je odobren azil, ukoliko su materijalno neobezbeđeni, kao i strani državljani žrtve trgovine ljudima. Zakon propisuje novčane kazne za zdravstvene ustanove ako strancu ne ukažu zdravstvenu zaštitu ili ako mu ne pruže hitnu medicinsku pomoć (član 256). U svetlu aktivnosti udruženja građana koja rade na direktnoj asistenciji migrantima bitno je napomenuti da Zakon propisuje da u mere društvene brige za zdravlje spada i saradnja zdravstvenih ustanova sa humanitarnim i stručnim udruženjima (čl. 13).[140]

*UNHCR Smernice o međunarodnoj zaštiti žena izbeglica,* u stavu 102 naglašavaju da se posebna pažnja i prioritet u pružanju primarne zdravstvene zaštite, mora dati majkama i deci, pre svega u pružanju ginekoloških usluga, porođaja i nege beba, savetovanje u vezi sa polno prenosivim bolestima, programima za planiranje porodice, kao i zdravstveno savetovanje u vezi javnog zdravlja i štetnih praksi, kao što je obrezivanje žena. Posebnu pažnju trebalo bi posvetiti uslugama koje su potrebne adolescentkinjama. Tebalo bi razviti i saradnju sa državnim institutima i savetovalištima za mentalno zdravlje, posebno za žene žrtve mučenja, silovanja i drugog fizičkog i seksualnog zlostavljanja.

Kada je reč o praksi u Republici Srbiji, tražioce azila pregleda doktor medicine u domu zdravlja nadležnom za opštinu na kojoj boravi tražilac azila.[141] Zbog kratkog boravka u centru za azil izvestan broj tražilaca azila nije imao zdravstveni pregled. Danski savet za izbeglice aktivno prati dostupnost zdravstvenih usluga tražiocima azila na svim nivoima zdravstvene zaštite, uz obezbeđivanje psihološke podrške i prevodilačkih usluga, koje finansira UNHCR, ukoliko je neophodno. Troškove za zdravstvene usluge koje se obezbeđuju tražiocima azila u Srbiji snosi Ministarstvo zdravlja Republike Srbije. Kontinuiran epidemiološki nadzor nad tražiocima azila sprovode zavodi za

140 A. Galonja (ur.), T. Morača, *Migranti i migrantkinje u lokalnim zajednicama u Srbiji,* Atina – Udruženje građana za borbu protiv trgovine ljudima i svih oblika nasilja nad ženama, Beograd 2014, str. 27.

141 *Pravo na azil u Republici Srbiji 2014*, Beogradski centar za ljudska prava, Beograd, jun 2015. godine, str. 46.

javno zdravlje (Beograd, Šabac, Valjevo, Užice, Kraljevo) o čemu izveštavaju Ministarstvo zdravlja i Institut za javno zdravlje. Sve lekove, koji se obezbeđuju tražiocima azila na osnovu preporuke doktora medicine, finansira UNHCR. Posebna pažnja se posvećuje obezbeđivanju lekova za decu, žene, trudnice i lica sa posebnim potrebama. Osim osnovnih lekova, obezbeđuje se terapija tražiocima azila koji pate od hroničnih oboljenja (imunosupresivna terapija nakon transplantacije organa, insulinska terapija za insulin zavisni dijabet itd.).

Nalazi istraživanja *Mentalno zdravlje tražilaca azila u Srbiji* koje je realizovano tokom 2014. godine[142] ukazuju na to da tražioci azila u Srbiji u *znatnoj* meri pate od posttraumatskog stresnog poremećaja (PTSP), anksioznosti i depresivnosti. Podaci koji su dobijeni prilikom ispitivanja u okviru fokus grupa pokazali su da ne postoje značajne razlike u traumatskim događajima u vezi sa zemljama porekla između tražilaca azila iz Sirije, Avganistana i drugih arapskih zemalja. I muškarci i žene su, osim toga, navodili iste traumatske događaje koji su u vezi sa zemljama porekla. Posmatrano na nivou celog uzorka, u dve trećine slučajeva, tražioci azila u Srbiji nisu oženjeni, dok oko trećina ispitanika jeste u braku. Samo jedan ispitanik je razveden, a u uzorku nije bilo udovaca niti udovica, kao ni ispitanika koji su živeli u vanbračnim zajednicama. Zanimljivo je, međutim, primetiti da postoje značajne razlike za muškarce i žene kada je reč o bračnom statusu – muškarci su većinom neoženjeni, dok su žene uglavnom udate.[143] Nešto više od polovine ispitanika (56 procenata) putuju sami, pri čemu treba napomenuti da je među muškarcima taj procenat veći (63), dok žene gotovo isključivo putuju sa nekim (93 procenta), najčešće sa svojim suprugom (52 procenta), decom (37 procenata) ili drugim članovima porodice.[144]

Rezultati istraživanja ukazuju na to da su tražioci azila visokotraumatizovana populacija, koja doživljava brojne i ozbiljne

142 M. Vukčević, J. Dobrić, i D. Purić, *Mentalno zdravlje tražilaca azila u Srbiji,* UNHCR, Beograd, 2014.

143 *Ibid*., str. 12.

144 *Ibid*., str. 16.

teškoće u psihičkom funkcionisanju. Karakteristična osećanja koja se javljaju kod tražilaca azila sa posttraumatskim stresnim poremećajem i depresijom jesu izolovanost od drugih ljudi, povlačenje u sebe i teškoće u povezivanju sa drugima. Ovo se manifestuje i osećanjem da su samo oni pretrpeli tako teško iskustvo, da ljudi ne razumeju šta im se dogodilo, da ni na koga ne mogu da se oslone, da su izdani, usamljeni, da su bez poverenja u druge ljude, kao i da se povlače u sebe. Takođe, rezultati istraživanja ukazuju na to da je doživljaj sebe, kao i svojih kompetencija, kvaliteta i snaga kod tražilaca azila veoma ugrožen. Većinom oni osećaju da imaju manje veština nego ranije, da se teško snalaze, da su bezvredni. Imaju teškoće u donošenju odluka i ispoljavaju negativnu sliku o sebi, samokritičnost i doživljaj bezvrednosti. Pored navedenog, tegobe koje su prisutne kod tražilaca azila su i preterana briga, razmišljanje o tome zašto im se sve to dogodilo, osećaj krivice zbog toga što su preživeli, ponavljanje misli na najteže ili zastrašujuće događaje, osećanje stalnog opreza i iznenadne emotivne ili fizičke reakcije pri sećanju na traumatske događaje, unutrašnji nemir, napetost i razdražljivost, kao i gubitak doživljaja bilo kakvog zadovoljstva.

# Zaključak

Skoro osam godina nakon primene Zakona o azilu ne možemo konstatovati da Republika Srbija ima funkcionalan i efikasan sistem azila u kome se posebna pažnja posvećuje rodno osetljivim pitanjima. Broj tražilaca azila iz godine u godinu raste, te tako od početka primene zakona do kraja 2015. godine, preko 600.000 hiljada ljudi tražilo azil u Republici Srbiji, od čega je 75 lica dobilo međunarodnu zaštitu. Migracioni trendovi ukazuju da će broj lica koja traže azil nastaviti da raste, imajući u vidu da se Srbija graniči sa zemljama u kojima takođe veliki broj ljudi traži azil i koje za sada nemaju dovoljno kapaciteta da sva lica prihvate na odgovarajući način. Imajući to o vidu, pred Srbijom predstoji ozbiljan izazov da sistem azila izgradi tako da bude efikasan i funkcionalan, da sva lica koja traže azil i kojima se odobri međunarodna zaštita zaista imaju mogućnost da ostvare sva prava koja im se garantuje Zakonom o azilu, ali i mnogi drugi zakoni. Takođe, pretpostavka je da kako se naša zemlja bude približavala Evropskoj uniji i dostizala ekonomske, pravne i društvene standarde, da će i sve veći broj stranaca odlučiti da ostane u Srbiji, te je neophodno na vreme izgraditi sistem u kome će se tražioci azila i lica koja dobiju azil lakše integrisati. Važan korak na tom putu jeste prepoznavanje žena tražiteljki azila i žena izbeglica kao specifične grupe migranata, kreiranje mera i programa za njihovo osnaživanje, i uključivanje žena izbeglica u društveni, ekonomski i kulturni život naše zemlje.

Kao što smo iz analize videli, položaj tražiteljki azila i žena izbeglica, posebno je osetljiv, s obzirom na to da one napuštaju svoju zemlju porekla usled osnovanog straha za sopstveni život, progona po osnovu pola i rodnih uloga u društvima iz kojih dolaze, te su zbog svoje ranjivosti veoma česta meta diskriminacije po različitim osnovama.

Republika Srbija još uvek je u procesu izgradnje efikasnog sistema azila i integracije izbeglica u društvo. Kada je reč o normativnom uređenju, iako važeći Zakon o azilu, pored načela rodne ravnopravnosti, ne predviđa druge rodno osetljive mere namenjene tražiteljkama azila i ženama izbeglicama, ipak nadležni organi, pre svega Ministarstvo unutrašnjih poslova – Kancelarija za azil, je u par slučajeva u dosadašnjoj praksi prepoznavala elemente rodno zasnovanih zahteva za azil i dodeljivala međunarodnu zaštitu ženama izbeglicama i LBGT osobama. Ipak, do sad Kancelarija za azil nije ni u jednom predmetu dodelila zaštitu isključivo zbog progona na osnovu pola ili roda.

Još uvek postoji prostor za unapređenje zakonskog okvira a što se može realizovati usvajanjem Novog zakona o azilu, koji znatno može da unapredi pitanje rodne ravnopravnosti.

Ono što evidentno nedostaje jesu pravila postupanja i upućivanja u slučaju identifikovanja ranjihiv grupa, a posebno ranjivih žena i devojčica, koja bi nadležni organi trebalo da slede.

Autorke analize pokušaće nakon analize relevantnih odredaba Zakona da prikažu nekoliko ključnih preporuka, za koje verujemo da se bez velikih teškoća mogu odmah primeniti u praksi, ili mogu da se integrišu u zakonski tekst:

- **Jezička barijera**

Komunikacija sa tražiocima azila najčešće podrazumeva angažovanje prevodilaca. Ukoliko je potrebno koristiti usluge prevodilaca neophodno je voditi računa o rodnoj usaglašenosti prevodioca i tražilaca azila uz posebni značaj obezbeđivanja žene prevodioca.

- **Pružanje pravne pomoći, savetovanje i informisanje**

Isti događaji u različitim kulturama mogu nositi različito značenje. Potrebno je stoga da se osobe koje rade sa tražiocima azila informišu o tome šta se smatra „normalnim", a šta poželjnim u kulturi tražilaca azila sa kojim rade. Osetljivost na kulturološke razlike omogućava bolje razumevanje osobe i problema sa kojim se suočava. Većina tražilaca azila potiče iz islamskih

zemalja (94 procenta), u kojima je razlika između rodnih uloga izraženija nego u našem društvu, naročito u komunikaciji koja se odvija van porodičnog okruženja. Tražioci azila treba da budu blagovremeno informisani o pravu da u njihovom slučaju postupa službenik i prevodilac istog pola, odnosno treba da im se pruži mogućnost da izaberu pol ovih učesnika u postupku kao i svog punomoćnika. Takođe, tražiocima azila, a posebno ženama, treba prilikom prvog kontakta sa vlastima da se stavi do znanja da je sve što iznesu u postupku azila poverljivo i da se neće odati njihovoj zemlji porekla niti članovima porodice.

- **Postupak azila**

Obezbediti da se postupak azila, posebno intervjuisanje, obavlja u atmosferi koja podstiče poverenje i promoviše osećanje sigurnosti posebno u slučajevima kada žene izbeglice podnose zahteve za azil. Obezbediti da tražioci azila mogu da izaberu pol službenika i prevodioca koji učestvuju u saslušanju i drugim službenim radnjama koje podrazumevaju komunikaciju sa tražiocem azila tokom čitavog trajanja postupka.

Novim zakonom o azilu predviđa se da će LBGT osobe ili osobe koje strahuju od rodno zasnovanog progona ili nasilja biti izuzete od ubrzane procedure.

- **Kapaciteti nadležnih institucija**

Službenici Kancelarije za azil i Komesarijata za izbeglice i migracije bi trebalo da imaju dovoljno znanja o rodno osetljivim pitanjima i zabrani diskriminacije u izbegličkom pravu, uključujući upoznavanje sa relevantnim propisima i smernicama UNHCR.

Potrebno je ustanoviti pravila i mehanizme za blagovremeno otkrivanje žrtava seksualnog i rodno zasnovanog nasilja i za njihovo zbrinjavanje i zaštitu.

- **Ograničenje kretanja**

Potrebno je propisati dovoljne garancije protiv nezakonitog i samovoljnog ograničenja kretanja kao i garancije poštovanja prava pritvorenih žena i LGBT. U svakom slučaju, kada su u

pitanju žene i devojčice, treba izbegavati ograničenje kretanja i promovisati druge alternative ovoj meri.

- **Smeštaj**

Potrebno je obezbediti stalne smeštajne objekte za žene bez pratnje porodice kao i za žene sa maloletnom decom. Posebno, treba obezbediti adekvatnu institucionalnu zaštitu i zaseban smeštaj žena žrtava seksualnog i rodno zasnovanog nasilja.

- **Integracija**

Kreirati posebne programe za integraciju žena i devojčica izbeglica, koji treba da vode računa o ranjivosti i specifičnom položaju ove grupe izbeglica. Politike integracije treba da imaju za cilj njihovo osnaživanje i nezavisnost, kreiranje socijalnih i društvenih usluga i mera integracije koje će odgovorati njihovim specifičnim potrebama.

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# ASYLUM ACT GENDER ANALYSIS

## Enforcement of the Gender Equality Principle in the Asylum System in the Republic of Serbia

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# Table of contents

# Introduction

Since the Asylum Act came into force in 2008, the Republic of Serbia has experienced a large-scale inflow of migrants to its territory, including asylum seekers and refugees fleeing war, conflict or persecution in their countries of origin. Valid studies and researches indicate that women do not account for the majority of the migrants. Similarly, people seeking asylum in Serbia are predominantly male as well. Out of the 16,490 people who sought asylum in Serbia in 2014, 1,721 were women, whereas women accounted for 153,476 of the 577,995 aliens registered in Serbia in 2015. In the first eight months of the year, 8,003 people expressed the intention to seek asylum in Serbia; 2,138 of them were women. According to the results of the research entitled *Mental Health of Asylum Seekers in Serbia*, which was conducted in 2014, 56% of the 226 respondents were travelling alone; 63% of them were men, while nearly all women travelled with others (93%), mostly their husbands (52%), children (37%) or other family members.

An increase in the number of vulnerable categories, above all families and women travelling alone with their children, has been noted in the refugees and migrants passing through or staying in Serbia over the past three years. During their work in the field with women travelling alone with their children, Belgrade Centre for Human Rights (BCHR) lawyers collected data suggesting that many of them were travelling alone or had left their countries of origin for the first time, which exacerbated their position. The vast majority still do not perceive Serbia as their destination country and stay in it only until they reunite with the groups or husbands they are travelling with. As per country of origin, nearly half of the asylum seekers in Serbia come from Syria, followed by Somalia and Afghanistan, while

the shares of asylum seekers from Eritrea, Sudan, Algeria, Iraq, Iran, Nigeria, Pakistan, Ghana, Bangladesh, Egypt, Palestine and Ethiopia do not exceed five percent.

However, refugee and asylum seeking women are nevertheless a particularly vulnerable group of migrants, precisely due to their sex and gender stereotypes. Thus, the development and implementation of asylum policies and measures must include programmes protecting and empowering refugee women. To that end, states must be able to recognise their needs and cover asylum seeking and refugee women by their policies and programmes aimed at empowering and protecting women's rights.

The UNHCR has underlined in its Guidelines on the Protection of Women Refugees that women were highly vulnerable groups of migrants and required rapid, coordinated and efficient protection by the destination countries. The concept of refugee women covers all women (including single women travelling alone or with their children, pregnant and breastfeeding women, adolescents, unaccompanied girls, child brides – sometimes with new-borns, LGBT women), as well as women with disabilities.

One of the reasons why refugee and asylum seeking women are vulnerable is linked to the difficulties they often have in proving the grounds required for the recognition of their refugee status, because women frequently do not want to admit that they were victims of sexual violence or gender-based persecution, or are unaware they had been victimised in their country of origin. Gender-based violence is frequently the consequence of gender inequalities in their countries of origin and is often used by the male family members they are travelling with; it may also be the consequence of forced displacement due to conflicts in the countries of origin.

The Gender Analysis of the Asylum Act before you is the result of the project entitled *Refugee and Migrant Crisis in the Western Balkans*, which the BCHR has been implementing in cooperation with Oxfam and UN Women.

The BCHR has from the very start devoted particular attention to its publishing activity. Thus, this project also envisages the preparation and publication of an expert analysis on the enforcement of gender equality principle in the asylum system in Serbia with recommendations on how to develop it further and align it with international standards.

Furthermore, as far as the authors of this publication are aware, Serbia lacks expert literature on this issue that can be perused, primarily by the professionals focusing on this issue, as well as all others who want to engage themselves more actively in the protection of women's rights in refugee law.

The authors analysed the relevant international refugee law standards on the protection of women refugees. They focused their analysis on the valid Asylum Act of the Republic of Serbia, which came into force in 2008, and on the provisions in the draft of the new asylum law, to be adopted by the end of 2016. In view of Serbia's strategic commitment to join the European Union and its intensive work on EU accession issues, especially on opening the initial chapters relevant to the improvement of the general state of human rights in the country, notably Chapter 24 – Justice, Freedom and Security, which covers migration and asylum, the asylum policy institutional framework must be improved as soon as possible, to ensure that Serbia attains the set EU standards, particularly those regarding the efficient asylum and refugee integration system.

We thus hope that the relevant authorities and institutions dealing with the asylum system in Serbia will find this Analysis and the recommendations in it useful in their work.

# PART I

## 1. GENDER EQUALITY IN REFUGEE LAW

Determining whether refugee women are equal to men and whether they are discriminated against and to what extent, i.e. how unequal they are, calls for the continuous collection and analysis of data on the extent, structure and features of the status of refugee and asylum seeking women in the refugee law system, as well as on all the institutional support mechanisms in a society. This also ensures the visibility of the women's status and the problems they face and puts in place conditions for the design of an adequate policy with a view to improving the status of refugee women both in law and in practice.

The fundamental principle of human rights is based on the assumption that all people are born free and equal in dignity and rights and that everyone has rights and freedoms without any distinction, including distinctions on grounds of sex or gender.[1] The prohibition of discrimination principle, including *prohibition of discrimination on grounds of sex*, is now embodied in numerous international documents universal or regional in character, which we will analyse one by one in a separate section. Numerous international documents obligate states to introduce the principle of gender equality of men and women in their national legislation and ensure the practical enforcement of this principle through legislative and/or other appropriate measures.

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1 Saša Gajin (ed.), Tanja Drobnjak, Violeta Koćič Mitaček, Aleksandar Resanović, *Zabrana diskriminacije i uznemiravanja žena, Model izmena i dopuna Ustava Republike Srbije i pojedninh sistemskih zakona,* 2nd edition, Belgrade, 2008, p. 7. Available in Serbian at: http://cups.rs/wp-content/uploads/2010/03/Diskriminacija-zena.pdf.

The protection of asylum seekers and refugees entails all activities aimed at ensuring the full respect of women's rights in accordance with relevant international standards and laws, without discrimination on any grounds, primarily on grounds of sex or gender in our context. The duty to protect rests primarily on the states, the states of origin, transit and destination alike. However, all other actors, such as civil society, international organisations and private individuals are also under the duty to align their policies, programmes and standards to facilitate the equal enjoyment of rights by women and girls refugees. Gender equality is above all a human right and the gender mainstreaming of our policies and activities is an important aspect of refugee law.[2]

The *United Nations 1951 Convention relating to the Status of Refugees* and the *1967 Protocol to the Convention* are the mainstay of international refugee protection. These international instruments define refugees and the rights and obligations they are recognised. The UN Refugee Convention was adopted in 1951 and came into force in 1954. Although the leading source of law in the fields of asylum and refugee law, the 1951 Convention interestingly, defines neither the concept of asylum nor the asylum granting procedure. The UNHCR advocates a liberal asylum granting policy in keeping with the Universal Declaration of Human Rights and the Declaration on Territorial Asylum, adopted by the United Nations. Thus, the idea is that the States Parties to the Convention regulate these issues in their national legislation and that the Convention serve merely as guidance through the main refugee law concepts and standards.

The Convention, however, does define refugees. Under this treaty, the term "refugee" shall apply to any person who: owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or

2 *Inter – Agency Standing Committee, Gender Handbook in Humanitarian Action, Women, girls, boys and women, different needs, equal opportunities*, December 2006, p. 14, available at: https://interagencystandingcommittee.org/system/files/legacy_files/IASC%20Gender%20Handbook%20%28Feb%202007%29.pdf.

political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Given the time of its adoption, the 1951 Convention has traditionally been interpreted through a framework of male experiences. This meant that harm which occurred in the "private sphere", for example domestic violence, female genital mutilation or rape, was not necessarily acknowledged as persecution, or not considered to be linked to a 1951 Convention ground.[3] As a consequence, the variety of ways in which women's political or religious dissent might be manifested, for example through their conduct rather than by direct articulation of resistance, was not always recognised as relevant with regard to their eligibility for refugee status.[4]

Since the mid-1980s, however, there has been increasing recognition of the ways in which an applicant's gender may have an effect on his or her claim for refugee status. Whereas "sex" is defined by biology (male or female), "gender" refers to the socially or culturally defined identities, status, roles and responsibilities that are assigned to individuals on the basis of their sex, and to the way in which these shape the power relations between men and women.

The applicant's gender may affect[5]:

- **The form which persecution takes** (for example sexual violence and rape of men or women, forced marriage,

3 *Refugee Status Determination, Identifying who is a refugee, Self-Study Module 2,* UNHCR Belgrade Office, Serbia, August 2008, p. 41, available at: http://www.unhcr.org/publications/legal/43144dc52/self-study-module-2-refugee-status-determination-identifying-refugee.html.

4 *Refugee Status Determination, Identifying who is a refugee, Self-Study Module 2,* UNHCR Belgrade Office, Serbia, August 2008, p. 42, available at: http://www.unhcr.org/publications/legal/43144dc52/self-study-module-2-refugee-status-determination-identifying-refugee.html.

5 *Ibid*.

female genital mutilation, trafficking for the purposes of forced prostitution or sexual exploitation, dowry and other marriage-related harm and discriminatory laws or practices); and/or

- The reasons for which persecution is experienced (for example, a homosexual may experience violence or severe discrimination on account of his or her sexual orientation, or a woman may be exposed to punishment by her family or her community as a result of her failure to adhere to the codes of behaviour assigned to her on the basis of her sex).

Not all persecution experienced by women is linked to gender, and in many cases women will experience persecution in the same ways, and for the same reasons, as men. It also needs to be underlined that gender-related persecution does not only affect women: claims based on persecutory treatment linked to gender may be submitted ***by men as well as women***.

## 2. GENDER EQUALITY IN THE REPUBLIC OF SERBIA

Gender equality entails equal opportunities of men and women to exercise their human rights, which are presequisite for democratisation and achievement of social justice. Gender equality is based on the generally accepted principle of prohibition of discrimination, thus constituting a particular type of protection and preservation of equality.[6]

Under the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[7], "discrimination against women" shall mean *any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*[8]

The 1995 Beijing Declaration and Platform for Action is the most progressive and most general political framework for improving gender equality at the global level. It defines 12 key areas in which nations are to enforce their policies to establish gender equality: poverty, education, health, violence, armed

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6 Vesna Nikolić Ristanović, Sanja Ćopić, Jasmina Nikolić, Bejan Šaćiri, *Discrimination against Women in the Labour Market in Serbia*, Victimology Society of Serbia, Belgrade, 2012, p. 19.

7 Adopted and open to signing and ratification or accession under UN General Assembly Resolution 34/180 of 18 December 1979. Entered into force on 3 September 1981. In accordance with Article 27. (Official Journal of the SFRY 11/1981).

8 *Ibid*.

conflict, economy, decision-making, institutional mechanisms, human rights of women and girls, media and the environment.

The Constitution of the Republic of Serbia guarantees gender equality and the development of an equal opportunities policy. This constitutional provision is elaborated in the Serbian Gender Equality Act and the Anti-Discrimination Act. In addition, numerous laws and by-laws regulate issues of relevance to gender equality, e.g. in the fields of health, family relations, education, labour and employment, et al.

In October 2013, the National Assembly of the Republic of Serbia ratified the Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence.[9] The Istanbul Convention is the first and only legally binding instrument on violence against women in Europe. When it ratified this Convention, Serbia reserved the right not to enforce the provisions on compensation of damages to victims, the issues of territorial jurisdiction in situations when the perpetrators are habitually residing in Serbia and jurisdiction over sexual violence cases, until it aligned its national criminal legislation with the relevant provisions of the Convention.[10]

In 2009, the Serbian Government adopted the National Strategy for Improving the Status of Women and Gender Equality for the 2010–2015 period. This is the first strategic document of the Republic of Serbia in the field of gender equality. It lays out the state's comprehensive policy aimed at eliminating all forms of discrimination against women and identifies the economy, health, education, suppression of violence against women and elimination of gender stereotypes in the media as its priorities. Apart from the National Strategy, the Government has adopted several other important strategic documents aiming to improve the status of women, such as the recently

9 *Official Gazette of the RS (International Treaties)*, 12/13.

10 BCHR, *2015 Human Rights in Serbia,* Belgrade, 2016, p. 349. Available at: http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/04/Human-Rights-in-Serbia-2015.pdf.

adopted Anti-Discrimination Strategy,[11] the National Strategy for Enforcing UN Security Council Resolution 1325 "Women, Peace and Security" (2010–2015), and the National Strategy for the Prevention and Suppression of Domestic Violence against Women (2010–2015).[12]

The equal opportunities policy has been recognised as one of the main political issues in the EU and is prerequisite for achieving the EU goals regarding its development, employment and social cohesion. The principle of gender equality, equal treatment and equal opportunities for women and men are one of the main legal principles of the European Union enshrined in its Founding Treaty. Advancing gender equality and the status of women in all aspects of political, economic and social life is a prerequisite of all EU strategies and directives. Given Serbia's official commitment to EU accession, gender equality principles and standards will clearly appear in numerous chapters during the accession negotiations and be included in action plans on aligning the Serbian legislation with the acquis.

11 *Official Gazette of the RS,* 55/05, 71/05 – corrigendum, 101/07, 65/08, 16/11, 68/12 – Constitutional Court Decision and 72/12.

12 *Official Gazette of the RS,* 55/05, 71/05 – corrigendum, 101/07, 65/08 and 16/11.

# PART II

## 1. MAIN INTERNATIONAL DOCUMENTS ON THE PROTECTION OF THE RIGHTS OF REFUGEE WOMEN

Human rights were fully developed when they acquired an international dimension and became part of international law. This internationalisation gained full momentum only after World War Two, when people realised violations of human rights inevitably led to major international upheavals. This is why respect for human rights was included in the Charter of the global international organisation, the United Nations, as one of its goals. The United Nations is the leading universal international organisation, which now has 193 members. Universal human rights instruments entail international customary law, included in the Universal Declaration of Human Rights and other resolutions adopted by the General Assembly, and the nine international conventions adopted under UN auspices. They include: the International Pact on Civil Rights and Freedoms, the International Pact on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Protection of All Rights of Migrant Workers and Members of Their Families, the International Convention on the Protection of All Persons from Forced Disappearance and the Convention on the Rights of Persons with Disabilities.

Each of these sources of international law is directly or indirectly relevant to the realisation and protection of the rights of refugee and asylum seeking women. This section will devote

particular attention to the following treaties: the Universal Declaration of Human Rights, the Convention against Torture, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the main universal source in the field of refugee law, the 1951 Convention relating to the Status of Refugees and all the relevant documents.

## 1.1. United Nations Conventions

### 1.1.1. Universal Declaration of Human Rights

The UN Universal Declaration of Human Rights has a total of 30 articles enshrining a broad scope of rights (political, civil, economic, social and cultural). It is also the first universal human rights treaty to mention the right to asylum:

> Article 14
>
> 1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
> 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

As the wording of this article indicates, the right to asylum is equated with the right to seek asylum, but not with a person's right to be granted asylum. In other words, Article 14 protects the procedural aspect, i.e. the right to access the asylum procedure.[13] The wording of the article is a compromise between the states that believed that the asylum issue was an issue of their territorial sovereignty, on the one hand, and states that insisted on recognising the right to asylum as an individual right requiring the engagement and responsibility of the UN. However, the view that a privilege granted by a specific state prevailed, confirming the sovereign right to extend

13 I. Krstić. M. Davinić, 24.

protection.[14] Paragraph 2 of this Article specifies who does not enjoy protection; persons prosecuted for non-political crimes or persons who performed acts contrary to the purposes and principles of the United Nations. Although adopted in the form of a General Assembly resolution, i.e. a legally non-binding act, the Universal Declaration is today considered a source of international customary law.

### 1.1.2. Convention on the Elimination of All Forms of Discrimination against Women

The 1979 Convention on the Elimination of All Forms of Discrimination against Women[15] is the main document regarding the protection and promotion of women's human rights. The principle of gender equality, equal treatment of men and women, is one of the chief values of international law and its foundations were laid by this Convention. Although refugee and asylum seeking women are not explicitly mentioned in the Convention, individual general recommendations provide significant interpretations of their status and obligations arising from this international treaty. The Committee has to date adopted a total of 29 general recommendations, the 26th of which regards women non-nationals and female migrant workers.[16] General recommendation No. 24 on women's health, for example, devotes particular attention to women from particularly vulnerable groups, such as refugee, migrant and displaced women.[17] General recommendation No. 27, focusing on older women, explicitly underlines that asylum seeking and refugee women often face discrimination and abuse and may

14 *Ibid.,* 25.

15 *Official Journal of the SFRY – International Treaties*, 11/81.

16 *General recommendation No. 26 on women migrant workers*, CEDAW/C/2009/WP.1/R, 5 December 2008. Available at: http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf

17 *General recommendation No. 24, women and health,* 2 May 1999. Available at: http://www.refworld.org/docid/453882a73.html

suffer from the post-traumatic stress syndrome, which may not be recognised or treated by health-care providers[18] Furthermore, General recommendation 28 on the core obligations of States Parties, expressly underlines that the states are under the obligation to guarantee the Convention rights without any discrimination to both their nationals and non-nationals, including women refugees, asylum seekers, migrant workers and stateless women.[19]

The Committee on the Elimination of Discrimination against Women reviewed Serbia's Second and Third Periodic Reports in July 2013.[20] The Committee expressed concern over the lack of state monitoring of the living conditions of refugee, asylum seeking and internally displaced women and called on the State Party to establish mechanisms to monitor the situation of this vulnerable group. Pursuant to the international obligations it has assumed, the Republic of Serbia is under the duty to review CEDAW's Concluding Observations, start implementing them and notify the Committee thereof in the next reporting cycle. Paragraph 45 of the Concluding Observations specifies that Serbia is to forward and present its report to this UN body in July 2017.[21] The Serbian Government Gender Equality Directorate prepared the 1st Periodic Report on the first interval of monitoring the implementation of the UN Committee's recommendations, covering the period up to 25 March 2014.

18 *General recommendation No. 27 on older women and protection of their human rights*, CEDAW/C/GC/27, 16 December 2010. Available at: http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010–47-GC1.pdf

19 *General recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16 December 2010. Available at: http://www.refworld.org/docid/4d467ea72.html.

20 CEDAW, Concluding Observations on the Combined Second and Third Periodic Reports of Serbia, CEDAW/C/SRB/2–3, 25 July 2013. Available at: http://www.gendernet.rs/files/dokumenta/Engleski/Reports/CEDEW_concluding_observations_2013_engl.pdf

21 *Ibid.,* paragraph 45.

It said the Commissariat for Refugees and Migration had failed to forward it the relevant data on the fulfilment of these recommendations and that it "has to be approached again, during the preparation of the report on the monitoring of the implementation of CEDAW's Concluding Observations in the following interval".

### 1.1.3. Convention relating to the Status of Refugees

The 1951 Convention Relating to the Status of Refugees[22] was adopted by the UN Conference of Plenipotentiaries on 28 July 1951. It came into force on 21 April 1954.

The Protocol to the Convention[23] was drafted somewhat later because the 1951 Convention was limited to events that occurred before 1 January 1951. By acceding to the 1967 Protocol, states bind themselves to enforcing the 1951 Convention provisions vis-à-vis persons with refugee status under the 1951 Convention, but without the temporal limitation to events that occurred before 1951. Neither document explicitly recognises the right to asylum but they do lay down numerous rights and obligations arising from the right to be granted refugee status. Under the Convention, the term "refugee" shall apply to any person who: owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[24] The main principles of international human rights law provide broader protection than

22 *Official Journal of the Federal People's Republic of Yugoslavia – International Treaties and Other Agreements*, 7/60.

23 *Official Journal of the Federal People's Republic of Yugoslavia – International Treaties and Other Agreements*, 15/67.

24 Article 1A (2), Convention Relating to the Status of Refugees.

the 1951 Convention and apply to all persons in the territory of a state, regardless of their nationality, and, consequently, to irregular migrants and asylum seekers. States are not only under the duty to refrain from violating human rights; they also have to ensure their enjoyment and respect as well, both in law and in practice, and to take measures to prevent third parties from violating these rights.

The 1951 Convention does not explicitly list persecution on grounds of sex or gender as grounds for extending refugee protection; membership of a particular social group, as a reason for persecution, is interpreted extremely broadly, wherefore persons are protected from gender-based persecution under that head. In its *Guidelines on International Protection: Membership of a Particular Social Group within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* of 7 May 2002, the UNHCR specified the following criterion which the relevant authorities need to take into account when determining whether a person seeking international protection is a member of a particular social group:

> [...] *3. There is no "closed list" of what groups may constitute a "particular social group" within the meaning of Article 1A(2). The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.*[25]

25 *Guidelines on International Protection: Membership of a Particular Social Group within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,* UNHCR, May *2002,* p. 2, paragraph 3, available at: http://www.unhcr.org/publications/legal/3d-58de2da/guidelines-international-protection-2-membership-particular-social-group.html *http://www.unhcr.org/3d58de2da.html.*

### 1.1.4. International Covenant on Civil and Political Rights

The 1966 International Covenant on Civil and Political Rights[26] includes a catalogue of civil and political rights guaranteed to all persons under the jurisdiction of its State Parties.[27] The Human Rights Committee, which monitors the fulfilment of obligations under the ICCPR, said in two of its Comments, Nos. 15 and 31[28] that the listed rights applied to all people, therefore also to asylum seekers, refugees, stateless persons, migrant workers, et al. Although the ICCPR does not guarantee the right to asylum, its provisions guaranteeing the freedom of movement (Article 12) and procedural guarantees provided in case of expulsion (Article 13), as well as Article 26, which prohibits discrimination, are of relevance to asylum seekers. This Covenant is also important with respect to the enjoyment of economic and social rights, although only two articles deal with such rights: Article 8(3), which prohibits forced labour, and Article 22, which guarantees the right to form and join trade unions. In its General Comments, the Human Rights Committee also discussed the enjoyment and protection of economic and social rights, including the availability of remedies to migrant workers who were victims of discrimination or exploitation at work.[29] It, however, needs to be noted that the Human Rights Committee is not a forum asylum seekers and refugees, especially women, frequently turn to in order to protect their rights; this particularly holds true for women, mostly because their rights that have been breached fall under the remit of other UN Committees.

The Human Rights Committee's General Comment 3 on Article 3 discusses the equal rights of men and women to enjoy

26 *Official Journal of the SFRY*, 7/71.

27 International Covenant on Civil and Political Rights, Article 2(1). Available at: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

28 *General Comment No. 15: The Position of Aliens under the Covenant*, 11 April 1986, paragraph 1.

29 R. Marin, 202. The Committee commented this issue in its reviews of reports by Thailand and South Korea.

all civil and political rights. The HRC said that this article "... has been insufficiently dealt with in a considerable number of States reports and has raised a number of concerns, two of which may be highlighted. Firstly, article 3, as articles 2 (1) and 26 in so far as those articles primarily deal with the prevention of discrimination on a number of grounds, among which sex is one, requires not only measures of protection but also *affirmative action* designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws. Hence, more information has generally been required regarding the role of women in practice with a view to ascertaining what measures, in addition to purely legislative measures of protection, have been or are being taken to give effect to the precise and positive obligations under article 3 and to ascertain what progress is being made or what factors or difficulties are being met in this regard. 3. Secondly, the positive obligation undertaken by States parties under that article may itself have an inevitable impact on legislation or administrative measures specifically designed to regulate matters other than those dealt with in the Covenant but which may adversely affect rights recognized in the Covenant. One example, among others, is the degree to which *immigration laws which distinguish between a male and a female citizen may or may not adversely affect the scope of the right of the woman to marriage to non-citizens or to hold public office*. 4. The Committee, therefore, considers that it might assist States parties if special attention were given to a review by specially appointed bodies or institutions of laws or measures which inherently draw a distinction between men and women in so far as those laws or measures adversely affect the rights provided for in the Covenant and, secondly, that States parties should give specific information in their reports about all measures, legislative or otherwise, designed to implement their undertaking under this article. 5. The Committee considers that it might help the States parties in implementing this obligation, if more use could be made of existing means of international cooperation with a view to exchanging experience and organizing assistance in solving

the practical problems connected with the insurance of equal rights for men and women."[30]

### 1.1.5. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights[31] (hereinafter: ICESCR) is a universal international treaty of major relevance to the enjoyment and protection of the economic and social rights of migrants and asylum seekers.[32] Its importance is reflected partly in the fact that as many as 160 countries have ratified it to date and partly in the abundant jurisprudence of the Committee on Economic, Social and Cultural Rights, which has adopted a large number of General Comments (20 to date), as well as regular reports extremely relevant to this category of people. Article 2 of the ICESCR states at the very start that "[T]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Under Article 3 of the ICESCR, all States Parties to the Covenant "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".

In its General Comment No. 19[33] on the right to social security, the CESCR states that States Parties should give special attention to those individuals and groups who traditionally face

30 The HRC's General Comment is available at: http://hrlibrary.umn.edu/gencomm/hrcom4.htm.

31 *Official Journal of the SFRY,* 7/71. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

32 R. Marin, 196.

33 General Comment No. 19, the right to social security (art. 9), E/C.12/GC/19, 4 February 2008. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/19&Lang=en.

difficulties in exercising this right, in particular women, refugees, asylum-seekers, internally displaced persons and returnees. The Committee devotes an entire section of the Comment to non-nationals, including migrant workers, refugees, asylum seekers and stateless persons, regardless of their sex or gender. The Committee, highlights that Article 2(2) of the ICESCR prohibits discrimination on grounds of nationality, and specifies that "[W]here non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country."

In its General Comment No. 20 on non-discrimination[34], the Committee on Economic, Social and Cultural Rights, noted that "[T]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."

### 1.1.6. Convention against Torture

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[35] defines and prohibits three forms of ill-treatment: torture, inhuman treatment and punishment, and degrading treatment and punishment. It lays down a number of legal, legislative, administrative and other measures regarding the prevention, investigation and punishment of ill-treatment, as well as the torture victims' right to redress, applying equally to men and women.[36] In its General Comment No 2, the Committee against Torture, the monitoring body established under this Convention, called on States Parties

34 General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009). Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F20&Lang=en.

35 *Official Journal of the SFRY – International Treaties*, 9/91.Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx.

36 I. Krstić, M. Davinić, 45.

to protect minorities and disadvantaged groups at particular risk of torture, especially asylum seekers and refugees. Many of the communications filed with the Committee regard the prohibition of expulsion or extradition of asylum seekers and refugees, due to serious doubts that they will be subjected to torture.

### 1.1.7. Convention on the Elimination of All Forms of Racial Discrimination

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter: ICERD)[37] is the leading international document focusing on the prohibition of racial discrimination. Under the Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[38] The rights of persons belonging to racial, ethnic or national minorities to equality before the law and equal protection of law are the basis of the principle of prohibition of discrimination.

The Convention explicitly says it shall not apply to "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."[39] This provision, however, needs to be interpreted in the context of Article 6, which obligates States Parties to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, notably in the enjoyment of the enumerated rights. They, inter alia, include the right to freedom of movement and residence within the border of the State and the right to leave any country,

37 *Official Journal of the SFRY*, 1/67. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx.

38 Article 1 (1), ICERD.

39 Article 1 (2), ICERD.

including one's own, and to return to one's country. These rights listed in Article 5 of the Convention are particularly relevant to asylum seekers.

Such an interpretation has also been provided by the Committee on the Elimination of Racial Discrimination, which issues General Recommendations (34 to date), in which it interprets the ICERD provisions in greater detail.[40] General Recommendation No. 22 regards refugees and displaced persons[41], many of whom have acquired such a status due to ethnic conflicts around the world. As far as the States Parties' obligations are concerned, the Committee underlines that "Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality"[42] and that Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. The Committee reaffirmed that although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons.[43]

## 1.2. Council of Europe Standards Relevant to the Protection of the Rights of Refugee and Asylum Seeking Women

Under Article 3 of the Council of Europe Statute, "[E]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within

40 I. Krstić, M. Davinić, 57.

41 *General Recommendation No. 22: Article 5 and refugees and displaced persons*, CERD, 24 August 1996. Available at: http://www.refworld.org/docid/4a54bc340.html.

42 *General Recommendation No. 30, Discrimination against Non Citizens*, 1 October 2004. Available at: http://www.bayefsky.com//general/cerd_genrecom_30.pdf.

43 *Ibid*.

its jurisdiction of human rights and fundamental freedoms." In other words, all persons, be they nationals or non-nationals, must be protected from violations of their fundamental human rights. The first step towards that goal was the adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms on 4 November 1950[44], which still represents the mainstay of the protection of asylum seekers in Europe. The Council of Europe has adopted many other conventions protecting different rights, but, for the purposes of this Analysis, we will focus only on the ones directly relevant to the protection of refugee and asylum seeking women.

### 1.2.1. Council of Europe Convention on preventing and combating violence against women and domestic violence

In 2013, Serbia ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (the so-called Istanbul Convention)[45], which is the first and only legally binding document governing violence against women at the European level. Under the Convention, an independent expert mechanism (GREVIO) is to be established to supervise and monitor the implementation of the Convention at the national level. When it ratified this Convention, Serbia reserved the right not to enforce the provisions on compensation of damages to victims, the issues of territorial jurisdiction in situations when the perpetrators are habitually residing in Serbia and jurisdiction over sexual violence cases, until it aligned its national criminal legislation with the relevant provisions of the Convention.

The Convention is the first Council of Europe document to clearly lay down standards regarding refugee, migrant and asylum

44 *Official Gazette of Serbia and Montenegro*, 9/2003, 5/2005 and 7/2005 – corrigendum. Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

45 *Official Gazette of the RS – International Treaties*, 12/13. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e.

seeking women. Chapter VII of the Convention is fully devoted to Migration and Asylum. Article 59 governs the residence status of migrant women. Under paragraph 1 of that Article, parties "shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship. The conditions relating to the granting and duration of the autonomous residence permit are established by internal law."[46] Paragraph 4 of that Article also obliges states to "take the necessary legislative or other measures to ensure that victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status in the country where they habitually reside, may regain this status".

The Convention also lays down that the asylum process and its procedures shall be gender sensitive. Under Article 60(1), "[P]arties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A(2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection."[47] Under paragraph 2 of that Article, states shall "ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments."

The Convention goes a step further in paragraph 3 of that Article and lays down that states "shall take the necessary legislative or other measures to develop gender-sensitive reception

46 Article 59 (1), Istanbul Convention.

47 Article 60 (1), Istanbul Convention.

procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection."

Article 61 of the Istanbul Convention lays down that states shall respect the principle of non-refoulement, specifying that they shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.

### 1.2.2. European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR)[48] is the main Council of Europe instrument protecting human rights, primarily civil and political rights. Its particular strength lies in the fact that it has been ratified by all European countries except Belarus. Fifteen Protocols to the ECHR have been adopted to date; some deal with procedural issues, while others introduce new substantive provisions, thus extending the catalogue of guaranteed human rights.[49]

The fundamental ECHR rights and freedoms applying to everyone include: the right to life (Article 2), prohibition of torture, inhuman and degrading treatment (Article 3), prohibition of slavery and forced labour (Article 3), right to liberty and security (Article 5), right to a fair trial (Article 6), no punishment without law (Article 7), right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom

48 *Official Journal SCG – International Treaties*, 9/2003, 5/2005, 7/2005 – corrigendum and *Official Gazette of the RS – International Treaties*, 12/2010.

49 I. Krstić, M. Davinić, 121.

of assembly and association (Article 11), right to marry (Article 12), right to an effective remedy (Article 13), and the prohibition of discrimination (Article 14). The list of rights enshrined in the ECHR indicates that this treaty does not include an explicit provision on asylum, which might lead to the conclusion that it is not highly relevant to asylum seekers in Europe. The European Court of Human Rights has, however, developed standards of treatment of asylum seekers in various areas in its ample jurisprudence, such the prohibition of expulsion of non-nationals, right to family reunification, prohibition of discrimination against non-nationals, et al, although it has underlined that the right to political asylum is not guaranteed by the ECHR or its Protocols.[50]

For instance, the European Court of Human Rights judgment in the case of *Siliadin v. France*[51] concerning Article 4 prohibiting slavery, servitude and forced labour, clearly shows how the Court applies an integrated approach to protect the social and economic rights of migrant women. This case concerned the (in)adequacy of protection from slavery, servitude and forced labour of an adolescent from Togo, who promised to perform household chores for her "employer" until she paid off the air ticket he had bought her, after which, according to the agreement he had made with her father, he would ensure she received an education and was granted a residence permit. The employer, however, seized her passport and required she work in his household for free and then "lent" her to another couple. The applicant did the household chores for them for free for three years and took care of their children, 15 hours a day. She slept in the children's room and was allowed to leave the house only to take the children to their classes or other activities. The European Court of Human Rights qualified her work as forced labour, holding that although the applicant was not threatened by a "penalty", the fact remained that she was in an equivalent

50 *Ibid.*

51 European Court of Human Rights judgment in the case of *Siliadin v. France* of 6 July 2005, App. No. 73316/01, paragraph 118.

situation in terms of the perceived seriousness of the threat. As an adolescent unlawfully living in a foreign country, she lived in constant fear of being discovered and arrested. The Court also considered that the applicant was, at the least, subjected to forced labour within the meaning of Article 4 of the Convention at a time when she was a minor since she could not choose whether or not to work for her "employer"[52], especially since she would not be able to stay in France and find a better job if she left his home. As an irregular migrant and worker in her employer's household, she was isolated from French society and could not expect that her situation would improve, all the more since the likely alternative to working and living in inhuman conditions would be her deportation to her country of origin, where she would face a life under the poverty line. This case, therefore, corroborates that the element of forced labour regarding threat of a penalty may cause the worker's fear of reporting it to the police, arrest and deportation, which, coupled with unfamiliarity with the circumstances (and language) in the host country, is conducive to the establishment, maintenance and deepening of the worker's dependence on the employer. This case, therefore, vividly testifies that work of migrants employed in households is fraught with serious risks, because, no matter how poor their living and working conditions are, they will be reluctant to leave the households of their employers because fear of punishment and deportation deters them from initiating proceedings against their employers.

Also in the case of *Abdulazis, Cabales and Balkandali v. the United Kingdom* is an interesting one. The Court found the UK in violation of the prohibition of discrimination on grounds of sex because its law distinguished between foreign nationals, women and men, legally residing in that country and wishing to exercise their right to reunite with their families, notably their spouses. Had the three applicants been men, they would have had a much easier time having their fiancées or spouses join

52 M. Ssenyonjo, *Economic, social and cultural rights in international law*, Oxford/Portland, Hart Publishing, 2009, p. 309.

them. The British Government justified the distinction by saying they were non-nationals and that it was in this way protecting its labour market from unemployment, caused by male immigrants. The Court was not satisfied with these arguments.[53]

Many Court decisions directly or indirectly deal with the protection of refugee, asylum-seeking and migrant women. Several of its cases are outlined below.

## 1.3. Protection of Refugee and Asylum Seeking Women in EU Law

The Charter of Fundamental Rights of the European Union lays down the principle of gender mainstreaming of all European policy fields and activities. The European Union Strategy for Equality between Women and Men 2010–2015 is the strategic EU document defining the policy of activities with a view to achieving gender equality. The Strategy clearly expresses the intention of attaining gender equality in EU Member States and the countries in the pre-accession and accession stages. In March 2010, the European Commission adopted the Women's Charter, in commemoration of the 15th anniversary of the adoption of a Declaration and Platform for Action at the Beijing UN World Conference on Women and of the 30th anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women. In it, the EC confirmed its commitment to gender equality and strengthening gender mainstreaming in all its policies. However, the legal regulation of the particularly vulnerable groups of refugee and asylum seeking women in EU law is quite modest. Only the Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection mentions them explicitly and governs the protection standards in greater detail.

53 *Abdulazis, Cabales, Balkandali v. United Kingdom,* App. Nos. 9214/80, 9473/81 and 9474/81.

### 1.3.1. Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (as amended) of 13 December 2011 (hereinafter: Qualification Directive)[54] is considered one of the fundamental instruments of the European asylum system, primarily because of its provisions on criteria for acquiring protection, i.e. establishing the criteria of who can be a beneficiary of international aid. The Directive also governs an area extremely important to us, the rights of persons under protection, i.e. the rights of asylum seekers, refugees and persons granted subsidiary protection – which had depended on national laws and their interpretations of international refugee protection until the Directive was adopted.[55] The Directive thus governs the granting and termination of refugee status, as well as the rights of refugees and persons granted subsidiary protection. The Directive defines the minimum standards, leaving to the Member States the power to introduce or maintain more favourable provisions than the standards laid down in this Directive for determining who can qualify as a refugee or fulfils the requirements to be granted subsidiary protection.

54 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *Official Journal L*, 337/9. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=en.

55 The possibility of different treatment of asylum seekers, persons granted subsidiary and refugee protection has remained (Article 29, Directive 2011/95).

Article 9(2(f)) of the Directive specifies sex as grounds for persecution, notably acts of a gender-specific or child-specific nature. The Directive does not go beyond this definition and leaves the possibility of governing this issue more thoroughly to the Member States. For instance, in France, female genital mutilation is frequently not considered an act of persecution, but a gross violeation of women's human rights and it most often constitutes grounds to grant a lower degree of protection, so-called subsidiary protection rather than refugee protection.[56]

56 R. Marin, 158.

# PART III

## 1. NATIONAL SOURCES

The Republic of Serbia is bound by many international treaties directly or indirectly dealing with the asylum issue. Apart from the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol, Serbia is, inter alia, bound by the following important international treaties as well: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the UN Convention on the Rights of the Child, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, et al. As a party to these international treaties, Serbia is under the obligation to adopt the relevant provisions and enact the relevant regulations to align its legislation with its international obligations.

### 1.1. Constitutional and Legal Framework for Protecting the Rights of Refugee and Asylum Seeking Women in the Republic of Serbia

The main national legislation governing the asylum issue is the Constitution,[57] which enshrines the right to asylum in principle, and the Asylum Act,[58] which governs this right in greater detail. The 2006 Serbian Constitution guarantees the right to refuge

57 *Official Gazette of the RS,* 98/2006.

58 *Official Gazette of the RS,* 109/2007.

to foreign nationals with well-founded fears of persecution on account of their race, *sex*, language, religion, ethnicity, membership of a group or political beliefs and specifies that the procedure for granting refuge shall be laid down in the law.[59]

Furthermore, Article 21 of the Serbian Constitution reads as follows:

> *All are equal before the Constitution and law.*
>
> *Everyone shall have the right to equal legal protection, without discrimination.*
>
> *All direct or indirect discrimination based on any grounds, particularly on race, **sex**, national origin, social origin, birth, religion, political or other opinion, property, culture, language, age, mental or physical disability shall be prohibited.*

Although the Convention relating to the Status of Refugees was ratified in the late 1950s by the then Socialist Federal Republic of Yugoslavia (SFRY), it was not accompanied by a relevant national legal framework. In the absence of legal norms for implementing the right to asylum until 2008, the authorities facilitated contacts of asylum seekers with the representatives of UNHCR, which was tasked with their accommodation and basic living conditions and identifying their final destination countries.[60] The first legal provisions were introduced in the SFRY Aliens Act, adopted in 1980. Only 12 years later was the Refugee Act adopted, in response to the conflicts that broke out in the former Yugoslavia. On the other hand, the first Asylum Act was adopted back in 2005,[61] by the then State Union of Serbia and Montenegro. It remained in force until 2008, when the new Serbian Asylum Act came into force.

The Asylum Act, adopted in 2007, lays down the principles, requirements and procedure for granting and terminating asylum, as well as the status, rights and obligations of asylum seekers and persons granted asylum in Serbia. The law does not

59 Article 57 (1), Constitution of the Republic of Serbia.

60 I. Krstić, M. Davinić, 311.

61 Asylum Act, *Official Journal of Serbia and Montenegro*, 12/2005.

apply to persons granted refugee status under the Serbian Refugee Act. Apart from the right to asylum, which comprises the right to refuge and right to subsidiary (humanitarian) protection, the Asylum Act also provides for temporary protection extended in case of a large-scale influx of people, when it is impossible to review individual asylum claims.[62]

Although the *Aliens Act* does not in principle apply to non-nationals, who have applied for or been granted asylum in the Republic of Serbia, its provisions apply to the family reunification of persons granted subsidiary protection[63] and to expulsion of aliens.[64]

The *Migration Management Act* (hereinafter: MMA)[65] governs the competences for the accommodation and integration of persons granted refuge or subsidiary protection[66], which have finally been entrusted to the Commissariat for Refugees. The Commissariat, established under the Refugee Act, continued its work under its new name, the Commissariat for Refugees and Migration. Under the MMA, the Commissariat shall perform duties regarding: the identification, proposition and undertaking of measures for the integration of persons granted asylum and the accommodation of persons granted asylum or subsidiary protection under the Asylum Act.

62 Asylum issues are governed by numerous by-laws as well: Rulebook on Medical Examinations of Asylum Seekers on Admission in Asylum Centres (*Official Gazette of the RS,* 93/08); Rulebook on Accommodation and Basic Living Conditions in Asylum Centres (*Official Gazette of the RS,* 31/08); Rulebook on Social Assistance to Asylum Seekers and People Granted Asylum (*Official Gazette of the RS,* 44/08 and 78/2011); Rulebook on Records of People Accommodated in the Asylum Centres (*Official Gazette of the RS,* 31/08) and Rulebook on Asylum Centre House Rules (*Official Gazette of the RS,* 31/08), Rulebook on Asylum Application Forms and Documents Issued to Asylum Seekers and Persons Granted Asylum or Temporary Protection (*Official Gazette of the RS*, 53/2008).

63 Article 4, Asylum Act.

64 Article 57, Asylum Act.

65 *Official Gazette of the RS,* 107/2012.

66 Articles 15 and 16, MMA.

The mode of integration of persons granted asylum in Serbia's social, cultural and economic life shall be regulated by the Government, at the proposal of the Commissariat.[67] The Commissariat is also charged with proposing programmes for developing a system of measures against families of aliens illegally in Serbia and proposing programmes supporting the voluntary return to their countries of origin of aliens illegally in Serbia.

Under the Criminal Code[68], the crime of human trafficking comprises recruitment, transport, transfer, selling, buying, mediating in selling, hiding or holding another person with the intention of exploiting his or her labour, forcing him or her to engage in forced labour, commit an offence, engage in prostitution or another form of sexual exploitation, begging, pornography, or subjecting him or her to slavery or status akin to slavery, removal of organs or body parts or service in armed conflicts. Article 350 of the Criminal Code also incriminates illegal crossing of the state border and human smuggling. Under this Article, persons who illegally cross or attempt to cross Serbia's border, under arms or by use of force, shall be punished by imprisonment up to one year, while those enabling others to illegally cross the Serbian border or illegally sojourn in or transit through Serbia with the intent of making a gain for themselves or another shall be punished by imprisonment ranging between six months and five years. If the offence is committed by a group, in a manner endangering the lives and health of persons whose illicit crossing of Serbia's border, sojourn or transit is being facilitated, or if a larger number of persons is being smuggled, the perpetrators shall be punished by imprisonment from one to ten years.[69]

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67 Article 16, MMA.

68 Article 388 of the Criminal Code, *Official Gazette of the RS,* 85/2005, 88/2005 – corrigendum, 107/2005 – corrigendum, 72/2009, 111/2009, 121/2012 and 104/2013.

69 Aleksandra Galonja (ed.), Tijana Morača, *Migrant Population in Local Communities in Serbia,* Atina – Citizens Association for Combatting Trafficking in Human Beings and All Forms of Gender-Based Violence,

The principle of fairness, i.e. prohibition of discrimination in the provision of health care on grounds of race, sex, age, ethnic or social origin, religion, political or other beliefs, financial standing, culture, language, type of disease or physical or mental disability, is one of main principles enshrined in Article 20 of the Health Care Act,[70] which is of particular relevance to migrants and particularly vulnerable groups of the migrant population. Furthermore, the legislator has recognised the provision of emergency medical care to persons with unknown residence and other persons not exercising the right to emergency medical care in another manner under the law (Article 18) as one of the general interests in health care (Chapter III). Under the Act, asylum seekers – persons exercising the right to refugee or subsidiary protection in Serbia, foreign nationals, stateless persons habitually or temporarily residing in or transiting through Serbia are entitled to health care, the costs of which are covered from the state budget (Article 238); such care shall be extended in the same manner in which it is extended to nationals of Serbia (Article 239). Another important article is Article 241, under which foreign nationals, whose treatment costs are covered by the Republic of Serbia, shall include non-nationals granted asylum in case they are destitute and victims of human trafficking. The Act lays down fees to be levelled against health institutions that fail to extend health care or emergency medical care to aliens (Article 256).

The *Ministry of Internal Affairs of the Republic of Serbia* is charged with conducting the asylum procedure. The Asylum Office, tasked with registering the asylum seekers, initiating the asylum procedure and rendering first instance decisions, has been formed within the Ministry. The Asylum Commission, which reviews appeals of Asylum Office decisions, also operates as part of the Ministry of Internal Affairs.

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Belgrade, 2014, p. 22. Available at: http://www.atina.org.rs/sites/default/files/Atina%20Migranti%20F1%20ENG%20%281%29.pdf.

70 Health Care Act, *Official Gazette of the RS*, 107/2005, 72/2009 – other law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 – other law.

## 2. ASYLUM ACT ANALYSIS

The Asylum Act, adopted in 2007, lays down the principles, requirements and procedure for granting and terminating asylum, as well as the status, rights and obligations of asylum seekers and persons granted asylum in Serbia. Apart from the valid Asylum Act, the authors of this study also analysed the provisions of the draft of the new asylum law, presented to experts at a public debate on 24 March 2016. The BCHR had the opportunity to comment some of the proposed provisions and some of its comments are outlined in this Analysis. The Draft Asylum Act has not been submitted to parliament for adoption yet, as the authorities are awaiting the comments of the European Commission. It is to be adopted by the end of the year.[71]

### 2.1. General Overview

The asylum procedure is laid down in the Asylum Act[72] (Articles 22–35), while the General Administrative Procedure Act[73] applies to issues not covered by the former law.

Given that gender equality means accepting and valuing equally the differences between women and men and the diverse roles they play in society,[74] this means that the existing differences among women and men, which are related to class,

71 The draft of the new asylum law is available in Serbian on the Ministry of Internal Affairs website: http://http://www.mup.gov.rs/wps/portal/sr/ .gov.rs/.

72 *Official Gazette of the RS*, 109/07.

73 *Official Journal of the FRY,* 33/97 and 31/01 and *Official Gazette of the RS,* 30/10.

74 "Gender Mainstreaming, Conceptual Framework, Methodology, and Presentation of Good Practicies," Council of Europe, Strasbourg, May

political opinion, religion, ethnicity, race or sexual orientation need to be taken particularly into account in the asylum procedure as well. Considering the gender related aspects of the claim will help ensure that all aspects of a claim are fully and fairly considered. Gender-related claims may be brought by either a woman or a man, but are more commonly brought by women. An understanding of the country of origin information relating to the position of women is essential to the effective conduct of interviews and to making correct decisions.[75]

In order to understand the nature of gender-related persecution, it is essential to define and distinguish between the terms "gender" and "sex". Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time. Gender-related claims may be brought by either women or men, although due to particular types of persecution, they are more commonly brought by women. In some cases, the claimant's sex may bear on the claim in significant ways to which the decision maker will need to be attentive. In other cases, however, the refugee claim of a female asylum-seeker will have nothing to do with her sex.

It is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status.[76] The refugee definition, properly interpreted, covers gender-related claims as well.[77]

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1998. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680596135.

75 "Gender Issues in Asylum Claims," UK Visas and Immigration, October 2010, p. 3. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf.

76 "Guidelines on International Protection: Gender – Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees," UNHCR, 7 May 2002, para. 2. Available at: http://www.refworld.org/pdfid/3d36f1c64.pdf.

77 *Ibid*., para. 6.

### 2.1.1. Definition of a Social Group

The 1951 Convention relating to the Status of Refugees does not explicitly list persecution on grounds of sex or gender as reason for granting refugee protection; membership of a particular social groups, as grounds for persecution, is interpreted extremely broadly, wherefore protection from gender-based persecution is extended under this head. The UNHCR *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* of 7 May 2002 set out the criteria the competent authorities are to take into account when determining whether an individual seeking international protection belongs to a particular social group:

> "[...] *3. There is no "closed list" of what groups may constitute a "particular social group" within the meaning of Article 1A(2). The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.*"[78]

Article 57 of the Serbian Constitution and Article 2(1(6)) of the Asylum Act specify that refugees include also persons reasonably fearing persecution on grounds of sex, but do not explicitly list gender-related persecution as grounds for granting refugee status. The above mentioned provisions greatly facilitate establishing whether the asylum claims are well-founded in cases when the individuals are persecuted just because they are men or women because asylum seekers do not have to prove separately that their sex may be cause for persecution.

78 *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,* UNHCR, May 2002, p. 2, paragraph 3. Available at: *http://www.unhcr.org/3d58de2da.html.*

Apart from difficulties in accessing education and health care and participating in social life, women in many countries face serious problems, such as forced marriage, domestic and sexual violence, genital mutilation, forced prostitution and sterilisation, which attain the threshold of persecution, while men often face forced mobilisation and harsh punishments for desertion. Homosexual, bisexual, trans-sexual and intersexual persons are also frequently victims of persecution.[79]

The Serbian Asylum Act, however, does not define a "social group" or specify that membership of a particular social group may also be based on the gender of the asylum seeker. As noted in the Qualification Directive, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in, for example, genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution.[80]

The Draft Asylum and Temporary Protection Act (hereinafter Draft Asylum Act)[81] includes a definition of a social group under "grounds of persecution", specifying that it shall denote a group whose members share innate characteristics or a common background that cannot be changed, or common characteristics or beliefs that are so fundamental to their identity or conscience that these persons may not be forced to renounce them, whereby that group has a distinct identity in their country of origin because it is perceived as being different from the society around it (Article 26). Although the Draft goes on to define a social group in greater detail, some experts are of the

79 *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 23 October 2012, paras. 1–4. Available at: http://www.refworld.org/docid/50348afc2.html.

80 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, OJ of the European Union, L 337/9, para. 30.

81 The Draft Asylum Act is available in Serbian at the MIA website http://www.mup.gov.rs/wps/portal/sr/rs.

opinion that it provides the decision makers with considerable discretion as to whether the common characteristics of gender, sex, gender identity or sexual orientation are sufficient to identify a particular social group.[82] The Asylum Office's case law on the issue is not consistent. While it recognised people of the same sex or gender as a social group in many proceedings, it has on occasion rendered decisions indicating that it would not be superfluous to lay down sex, gender, gender identity and sexual orientation as common characteristics of a particular social group. For instance, when it was reviewing an asylum claim by a Syrian national, the Asylum Office neglected the fact that he had fled his country of origin out of fear that he would be mobilised as a member of the group of "able-bodied men" and granted the applicant subsidiary protection due to the poor security situation in Syria.[83]

### 2.1.2. Acts of Persecution

The Draft Asylum Act defines acts of persecution in greater detail than the valid Act. Article 28 specifies that they are acts considered persecution pursuant to Article 24 (defining the right to refuge) and must be sufficiently grave in character or repetitious to constitute a serious breach of fundamental human rights, in particular the non-derogable rights listed in Article 15(2) of the ECHR, or which constitute a set of various measures, including human rights violations, which are sufficiently severe as to affect an individual similarly as violations of non-derogable ECHR rights.

*Exempli causa*, under Article 28 of the Draft Act, the following may, inter alia, constitute acts of persecution:

1) Acts of physical or mental violence, including acts of sexual and gender-based violence;

82 UN Women's Comments on the second draft of Asylum and Temporary Protection Act, para. 9.

83 Asylum Office Ruling No. 03/9-4-26-2780/13 of 15 December 2014.

2) Legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
3) Prosecution or punishment which is disproportionate or discriminatory;
4) Denial of judicial redress resulting in a disproportionate or discriminatory punishment;
5) Prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion from temporary protection;
6) Acts of a sex-specific or child-specific nature.

Although this paragraph in the Draft Act is nearly identical to Article 9(2) of the Qualification Directive, it includes an error in the cited sub-paragraph 6, which was probably made during the translation of the Directive. Namely the Directive mentions acts of persecution of a gender-specific rather than a sex-specific nature, like the Serbian text, thus extending broader protection to the actual or potential victims of gender-based violence.

Furthermore, in its definitions of a refugee (Article 2(1(6)) and refuge (Article 24), the Draft lists persecution on grounds of gender, gender identity and gender-based violence as grounds for refugee protection, i.e. granting refuge, which should further facilitate the status of persons persecuted on those grounds in the asylum procedure.

Race, religion, nationality, membership of a particular social group and political opinion, are not mutually exclusive and may overlap. Refugee claims based on sexual orientation and/or gender identity are most commonly recognised under the "membership of a particular social group" ground. Other grounds may also be relevant depending on the political, religious and cultural context of the claim. For example, LGBTI activists and human rights defenders may have either or both claims based on political opinion or religion if, for example, their advocacy is

seen as going against prevailing political or religious views and/or practices. Individuals may be subject to persecution due to their actual or perceived sexual orientation or gender identity. The opinion, belief or membership may be attributed to the applicants even if they are not in fact LGBTI, and they may be consequently persecuted based on this perception. For example, women and men, who do not fit stereotyped appearances and roles, may be perceived as LGBTI. Transgender individuals often experience harm based on imputed sexual orientation.[84]

As opposed to the valid Act, Article 28 of the Draft commendably specifies that it is immaterial whether the asylum seekers actually possess the characteristics that are the grounds of persecution or whether they are ascribed to them by state or non-state perpetrators of persecution, because, apart from including gender orientation, as noted above, women in some patriarchal societies are attributed with the political opinions of their husbands or male relatives, and subjected to persecution because of the activities of their male relatives.[85]

Asylum applications filed by LGBTI persons should not be dismissed on the assumption that they will be safe unless they reveal their sexual identity in their countries of origin. Such a safeguard is not provided either by the valid nor the Draft Asylum Act. However, the hitherto case law of the relevant asylum authorities in Serbia indicates that none of the asylum applications were rejected under this explanation. As per persecution on grounds of sexual orientation, the Court of Justice of the European Union (whose decisions are not binding on Serbia yet) held that Member States could not dismiss asylum claims by lesbian and gay asylum

84 Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR, 23 October 2012, para. 40–41. Available at: http://www.refworld.org/docid/50348afc2.html.

85 *Guidelines on International Protection: Gender – Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 7 May 2002, para. 33. Available at: http://www.refworld.org/pdfid/3d36f1c64.pdf.

seekers in the expectation that they could return to their countries of origin and live there safely, whilst concealing their sexual orientation in order to avoid persecution.[86] This case concerned three asylum seekers in the Netherlands, nationals of Sierra Leone, Uganda and Senegal. Each of these countries incriminates homosexuality and envisages imprisonment for the perpetrators (life sentence in Sierra Leone and Uganda and maximum five years' imprisonment in Senegal). Neither of the applicants demonstrated they had been persecuted or were at risk of persecution because of their sexual orientation. They had, however, sought asylum because they feared they would be persecuted in their countries of origin if they returned because these countries incriminated homosexuality. The Court held that the very existence of criminal laws, specifically targeting homosexuals, supported the finding that those persons had to be regarded as forming a particular social group**.** The Court also concluded that the criminalisation of homosexual acts per se did not constitute an act of persecution but that the widespread practice of punishing homosexuals did. It held that requiring members of a social group sharing the same sexual orientation to conceal that orientation was incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned could not be required to renounce or conceal it.

Trafficking in humans for forced prostitution or sexual exploitation may also be grounds for granting refugee protection.[87] This is, however, not provided for explicitly by the valid Asylum Act but it may be subsumed under acts of persecution listed in the Draft.

Physical, psychological and sexual violence, including rape, would generally meet the threshold level required to establish

86 Court of Justice of the European Union (CJEU), decision of 7 November 2013 in the cases of C-199/12, C-200/12 and C-201/12, *X., Y. and Z. v. the Dutch Minister voor Immigratie en Asiel*.

87 *Guidelines on International Protection: Gender – Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 7 May 2002, para. 18. Available at: http://www.refworld.org/pdfid/3d36f1c64.pdf.

persecution on grounds of gender or sexual orientation.[88] In addition, discriminatory measures involving serious legal, cultural or social obstacles to the realisation of socio-economic, political, family and religious rights can result in persecution either independently or in conjunction with other factors.[89] Acts of persecution, specified in the Draft Asylum Act, should include the above mentioned forms of gender-based persecution.

As per subsidiary protection, the Asylum Act lays down that it shall be granted to an alien who, if returned to his or her country of origin, would be subjected to torture, inhuman or degrading treatment, or where his/her life, safety or freedom would be threatened by generalised violence caused by external aggression or internal armed conflict or massive human rights violations (Article 2(1(8)). Article 2(1(8)) of the Draft Asylum Act defines subsidiary protection as a form of protection granted by the Republic of Serbia to a foreigner who would be, if returned to the country of origin or habitual residence, subjected to serious harm, and who is unable or unwilling to avail himself/herself of the protection of that country. Article 25(2) of the Draft Act defines in greater detail the term "serious harm",[90] but does not explicitly specify rape or female genital mutilation as serious harm[91] probably because these acts are covered by the concept of persecution, wherefore victims of such violence are provided with protection via the refugee status.

88 Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR, 23 October 2012, para. 20. Available at: http://www.refworld.org/docid/50348afc2.html

89 Gender Issues in Asylum Claims, UK Visas and Immigration, October 2010, pp. 5–6. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf.

90 Serious harm shall comprise the threat of death penalty or execution, torture, inhuman or degrading treatment or punishment, as well as a serious and individual threat to life due to generalised violence in situations of international or internal armed conflicts.

91 UN Women's Comments on the second draft of Asylum and Temporary Protection Act, para. 8.

### 2.1.3. Principles

The Asylum Act comprises numerous principles to ensure gender-sensitive treatment of asylum seekers: the non-discrimination principle, the principle on the provision of information and legal aid, the gender equality principle and the principle on the provision of care to persons with special needs. These principles are enshrined in the Draft Asylum Act as well.

The non-discrimination principle is laid down in Article 7 of the Asylum Act, which prohibits discrimination in the asylum procedure on any grounds, in particular on grounds of race, colour, sex, ethnicity, social origin or a similar status, birth, religion, political or other beliefs, financial standing, culture, language, age, or a intellectual, sensory or physical disability.

The Draft Asylum Act also prohibits discrimination on grounds of *gender, gender identity and sexual orientation* (in Article 7), which is a much more gender-sensitive approach than the valid prohibition of discrimination.

No gender-based discrimination of asylum seekers has been identified in the work of the Serbian asylum authorities to date. Moreover, the Asylum Office has always given priority in its decision-making to persons of different sexual orientation and women victims of domestic violence.[92]

Under the gender equality principle (Article 14), asylum seekers shall be interviewed by persons of the same sex, with the assistance of interpreters of the same sex, unless that is impossible or entails disproportionate difficulties for the authority conducting the procedure. Under the Act, this principle is always to be applied during searches, physical examinations and other procedural actions involving physical contact with the asylum seekers.

Non-observance of this principle cannot be qualified as being in contravention of the law, given that the Act allows

92 Conclusion reached on the basis of the experience of the BCHR legal team, representing asylum seekers before the relevant asylum authorities in the 2012–2016 period.

derogations from it. The Asylum Office, which conducts the first instance procedure, is staffed by both men and women but mostly engages female officers to receive asylum applications and conduct the interviews.[93] In fact, both in 2015 and 2016, most Asylum Office staff were women. The Asylum Office endeavours to engage interpreters of the same sex as the asylum seekers it is interviewing.

The title of this principle, however, does not correspond to its meaning, because, according to the current wording of the article, it does not regard gender equality (because it is does not set out that male and female asylum seekers are equal in their rights and obligations), but careful treatment of asylum seekers bearing in mind their sex. This principle, however, does not include a guarantee that men and women will be separately interviewed during the asylum procedure, which is extremely important in case the women are victims of domestic violence or there is another reason leading to the assumption that family members will be reluctant to recount their personal circumstances as grounds of persecution in front of each other (e.g. a homosexual child cannot be expected to say in front of his/her parents that s/he fears for his life and safety in Iran because s/he is a homosexual).

Non-observance of this principle may also undermine the principle of truth guaranteed by the General Administrative Procedure Act,[94] which is to ensure the accurate and full determination of all facts and circumstances of relevance for the adoption of a lawful and fair decision.

The Draft Asylum Act partly eliminates the deficiencies of the valid Act and devotes Article 14 to the Principle of Gender Equality and Sensitivity. The title better reflects its essence – to particularly take into account the gender of the asylum seekers –

93 Information obtained from BCHR's legal team extending legal aid to asylum seekers.

94 Article 8, General Administrative Procedure Act: "All facts and circumstances of relevance for the adoption of a lawful and fair decision shall be accurately established in the procedure."(decisive facts)

during the performance of official activities. Furthermore, under the Draft Asylum Act, women accompanied by men shall file their applications and give their statements separately from their male escorts. It is, however, unclear why this guarantee applies only to women and not to other family members as well.

The principle of gender equality and sensitivity should, however, apply in all stages of the procedure, i.e. also before the Asylum Commission, as the second instance authority, and the Administrative Court, in case of an oral hearing.[95] Neither the valid law nor the Draft Act provides for the application of that principle throughout the asylum procedure.

It has been recommended that each applicant is asked at screening to indicate a preference for a male or female interviewer, and it should normally be possible to comply with a request for a male or female interviewer or interpreter that is made in advance of an interview.[96] The principle on the provision of information and legal aid (Article 10 of the Asylum Act) should ensure that the asylum seekers are familiarised not only with their general rights and obligations in the asylum procedure, but that they can indicate whether they prefer to be interviewed by a male or female member of the Asylum Office staff and be assisted by a male or female interpreter as well. Asylum seekers should also be notified that the asylum procedure is confidential and that information on individual asylum cases will under no circumstance be revealed to their country of origin or unauthorised individuals. The principle on the provision of information and legal aid is guaranteed also by the Draft Asylum Act (in Article 57). Its wording is almost identical to that of Article 10 of the valid Act, but it does not

95 The Austrian Constitutional Court (*Verfassungsgerichtshof*) delivered a decision stating that an aspect of a fair trial before the Administrative Court included that the judge reviewing the asylum seeker's claim be of the same sex as the asylum seeker in the event the asylum claim is based on fear of sexual violence. Decision U 01674/12 of 12 March 2013.

96 Gender Issues in Asylum Claims, UK Visas and Immigration, October 2010, p. 17. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf.

specify which specific rights and obligations the asylum seekers are to be notified of.

Under the principle on the provision of care to persons with special needs, the specific situation of asylum seekers with special needs, such as minors, persons completely or partially deprived of legal capacity, children separated from their parents or guardians, persons with disabilities, the elderly, pregnant women, single parents with underage children and persons, who had been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, shall be particularly taken into account in the asylum procedure (Article 15). This principle also protects persons fearing persecution and survivors of grave violence on account of their sex, gender or sexual orientation.

The Asylum Act, however, does not specify how the authorities shall take the specific situation of persons with special needs into account. In practice, the Asylum Office usually performed the official actions in reviews of claims by such persons more rapidly or tolerated specific deficiencies during the asylum procedure and allowed reinstatement, especially in view of the asylum seekers' vulnerability. However, the Asylum Office's practice in this respect is not consistent.[97]

The Draft Asylum Act includes the Principle on the Provision of Special Procedural and Reception Guarantees to Particularly Vulnerable Persons (Article 15), which is similar to the valid principle on the provision of care to persons with special needs. The Draft does not introduce new categories of vulnerable persons, but it does lay down that asylum seekers shall be provided with adequate assistance if they are unable to exercise their rights and fulfil their obligations due to their personal circumstances. The Draft also fails to specify which institution will extend assistance to the asylum seekers, how and to what extent. It does, however, explicitly lay down that the

97 At the time this Analysis was completed, the review of an asylum claim by a Russian Federation national, a victim of gender-based violence, was ongoing for seven months, although the law sets a two-month deadline for the completion of the asylum procedure.

movement of particularly vulnerable persons may be restricted, i.e. that they may be referred to the Aliens Shelter only once the authorities establish, on a case to case basis, that such accommodation is suitable in view of their personal needs and circumstances, especially their health (Article 81).

The competent asylum authorities, the Ministry of Internal Affairs, the Asylum Office and the Commissariat, however, have not developed mechanisms for identifying the vulnerability of specific groups of people. The Asylum Office is informed that individual women asylum seekers were victims of domestic violence or rape by their legal representatives in the asylum procedure or by organisations focusing on the protection of women victims of violence and asked to pay particular attention to their cases.

## 2.2. Asylum Procedure and Relevant Case Law

### 2.2.1. Access to the Asylum Procedure

Access to the asylum procedure is achieved by expressing the intention to seek asylum (Article 22 of the Asylum Act). Non-nationals may express the intention to seek asylum during border control or at a police station in the Republic of Serbia. Their intent is registered and they are issued certificates thereof; they are under the obligation to report to the Asylum Centre they have been referred to within the following 72 hours or directly to the Asylum Office, if they can afford to rent private accommodation.

The certificate of intent to seek asylum is actually the first document issued to asylum seekers in Serbia and it provides them with both access to the asylum procedure and accommodation in an Asylum Centre, as well as health care.

It has been observed that the authorities do not always respect the gender equality principle vis-à-vis aliens expressing the intention to seek asylum.[98] For instance, an asylum seeker

98 As noted by the BCHR legal team extending legal aid to asylum seekers.

from Tunisia arrived at Belgrade Airport "Nikola Tesla" and had to spend three days there before the border police officers agreed to issue her a certificate of intent to seek asylum. She was issued the certificate only after the BCHR lawyers intervened. She had, inter alia, left Tunisia fearing the revenge of her family (her father and one brother) because she was divorced and bearing her partner's child, which is socially unacceptable in Tunisia and may result in honour killing. This asylum seeker, a pharmacist working in a hospital, had also received death threats at work from radical Islamists, to whom she refused to issue medications without a prescription and illegally. The authorised police officers of the Belgrade Border Police Station performing the passport control did not let this asylum seeker enter Serbia and planned on putting her on a flight back to Tunisia, in the belief that she was merely abusing the asylum procedure to enter Serbia and travel on to Austria with her partner. They explained their decision to the asylum seeker in English, which she does not known well (she speaks only Arabic and French). The police in this case did not consider the gender aspect of the asylum seeker's status at all, notably, they did not take into account that she might be a victim of an honour killing in Tunisia just because she was a woman and that she needed to be extended adequate protection and access to the asylum procedure immediately.[99]

MIA officers gave priority to unaccompanied women and women with children when they issued certificates of intent to seek asylum during the 2015 refugee crisis.[100] Furthermore, in July 2016, the Asylum Office changed the order of steps: asylum seekers first have to be accommodated in an Asylum Centre, submit their asylum claims and only afterwards are they allowed

99 The BCHR legal team filed a constitutional appeal to the Constitutional Court of Serbia with regard to this case. The appeal was still pending at the time this Analysis went into print.

100 Information obtained during the BCHR's monitoring of the status of refugees in Belgrade streets in the May-December 2015 period.

to rent private accommodation.[101] However, the Asylum Office allows the immediate accommodation of women, who appear to be victims of domestic violence, in the safe houses operated by the NGO Atina, without first referring them to an Asylum Centre. The Asylum Office has thus recognised the special needs and vulnerability of women survivors of gender-based violence. As already noted, the lack of institutional mechanisms for the timely identification of such persons is problematic in practice and such identification is mostly performed by non-government organisations. This is why the new asylum law should govern the procedure for identifying particularly vulnerable persons in greater detail.

After they are issued their certificates, the asylum seekers are registered by the Asylum Office; registration entails establishing their identity, taking their photographs and fingerprints and temporary seizure of their identification documents (Article 24). The Draft Asylum Act also envisages the entry of the certificate of intent into the records and registration, thus ensuring the establishment of the asylum seekers' identity after their first contact with the MIA officers.

### 2.2.2. Submission of Asylum Applications and Interviews

The asylum procedure is formally initiated by the submission of an asylum application to an authorised Asylum Office officer within 15 days from the day of registration; the officer shall enter the asylum seeker's statement in the prescribed form (Article 25, Asylum Act). Therefore, an asylum application is submitted during a brief (oral) interview. Under the Draft Asylum Act, the aliens may themselves fill the application forms and submit them to the Asylum Office, in the event the Office does not enable them to submit their applications orally (Article 36, Draft Asylum Act).

101 In the past, asylum seekers were allowed to rent accommodation as soon as they were issued their certificates of intent and would notify the Asylum Office thereof.

After they submit their applications, the asylum seekers are interviewed by Asylum Office staff in greater detail about why they are persecuted. In cases in which the grounds of persecution are linked to the gender of the asylum seekers, the Asylum Office staff should inform themselves thoroughly about the status of LGBTI persons and men and women in the asylum seekers' countries of origin. They should also make sure that the asylum seekers are apprised of the principle of confidentiality (Article 18 of the Asylum Act and Article 19 of the Draft Asylum Act), i.e. that the information they provide during the asylum procedure will be available only to authorised staff and will not be divulged to their countries of origin.

The submission of asylum applications and oral hearings (interviews) need to take place in a setting supportive of the asylum seekers and ensuring confidentiality. However, neither the Asylum Act nor the Draft Asylum Act include such a provision.

Under Article 26(5) of the Asylum Act, asylum seekers shall fully cooperate with the Asylum Office and accurately recount all the facts of relevance to the decision on their application. The asylum seekers' refusal to divulge information about gender-based violence should not automatically be grounds for dismissing their applications as lacking in credibility. There may be a number of reasons why an applicant may be reluctant to disclose information, for example feelings of guilt, shame, and concerns about family honour, or fear of traffickers or having been conditioned or threatened by them. Interviewers should be sensitive to the fact that gender and cultural norms may play an important role in influencing demeanour. For victims of rape or sexual violence, it is not necessary to obtain precise details about the act itself. However, information should be obtained about the events leading up to and following the assault and the context in which it took place.[102] The Asylum Office applied such a

102 Gender Issues in Asylum Claims, UK Visas and Immigration, October 2010, p. 18. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf.

practice in several cases although, to the best of our knowledge, there are no rulebooks or internal regulations on this issue.[103] As opposed to the valid Act, which does not deal with gender-sensitive issues in the section on Interviews, the Draft Asylum Act lays down that Asylum Office staff may interview the applicants more than once in order to establish the facts, except when the asylum seekers are minors or victims of domestic or other forms of gender-based sexual violence (Article 37(2)). This solution is good to an extent, because such asylum seekers may find it extremely difficult to talk about traumatic events causing them shame or fear.[104] However, according to the UNHCR Guidelines: "[P]articularly for victims of sexual violence or other forms of trauma, second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information."[105]

Under Article 37(10) of the Draft Asylum Act, an asylum seeker need not be interviewed in the event a decision upholding the application and granting the right to refuge or subsidiary protection can be adopted on the basis of the available evidence; the applicant is unable to give a statement due to enduring circumstances beyond his/her control; and when the admissibility of the subsequent application is being assessed. This possibility can to an extent facilitate the situation of LGBTI persons and victims of sexual or gender-based violence. However, paragraphs 12 and 13 of this Article lay down that officers of other MIA units or state authorities, provided they have undergone the requisite training beforehand, may conduct the interviews in

103 Asylum Unit Ruling 03/9-4-26-1280/13 of 25 December 2013 and Asylum Office Ruling 26–652/16 of 17 June 2016.

104 *Guidelines on International Protection: Gender – Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 7 May 2002, para. 35, available at: http://www.refworld.org/pdfid/3d36f1c64.pdf.

105 *Guidelines on International Protection: Gender – Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 7 May 2002, para. 36 (viii).

case of a massive influx of asylum seekers. This possibility may result in the implementation of the asylum procedure by officers who are insufficiently sensitised and lack experience in working with refugees.

Under Article 37(6) of the Draft Act, family members shall be interviewed separately, unless that is impossible or entails disproportionate difficulties for the authority conducting the procedure. Individual interviews should be the rule, in order to ensure that the asylum seekers have the chance to recount all the reasons why they left their country of origin. During the interviews, women should in particular be explained that they are entitled to an individual interview and that they may have a valid claim in their own right.[106]

### 2.2.3. Decision-Making

After the procedure, the Asylum Offices renders a decision upholding the asylum application and granting the alien refuge or subsidiary protection or rejecting the application and ordering the alien to leave Serbia by a specific deadline.

As opposed to the valid Act, the Draft Asylum Act lays down which facts and circumstances the Office will particularly take into account when ruling on an application; they include, inter alia, the status and personal circumstances of the asylum seeker, including his/her sex and age, in order to assess whether the acts the asylum seeker may be subjected to amount to persecution or serious harm (Art. 32(2(3))). This provision should ensure that the Asylum Office particularly takes into account a person's status in society determined by his/her sex or gender.

No documentary proof as such is required in order for the authorities to recognise a refugee claim, in cases of sexual or gender-based violence; however, information on practices in the country of origin may be extremely useful in establishing the credibility of a statement.[107] It should, however, be borne in

106 *Ibid*., para. 36 (i).

107 *Ibid.,* para. 37.

mind that statistical data on sexual violence may not be available amd that alternative forms of information might assist, such as the testimonies of other women and reports of non-government organisations.

The Asylum Office has not yet reviewed any cases in which it granted anyone asylum because they were persecuted solely on account of their sex or gender. There was a case, however, when it upheld asylum claims of two Turkish nationals, after it established that they had justified fears that they would be subjected to persecution, and inhuman and degrading treatment, and that their liberty and security would be at risk if they returned to their country of origin because of their faith (Catholic), their ethnicity (Armenian and Jewish) and their sexual orientation (trans-sexual and homosexual).[108] In that case, the Office paid particular attention to the objective facts on the situtation of homosexuals in Turkey, noting it could be reasonably presumed that the asylum seekers would be persecuted if they returned to their country of origin. The Asylum Office stated in its decision that numerous reports indicated that there was widespread discrimination against LGBTI persons in Turkey, as well as homophobia, which had resulted in physical and sexual violence on several occasions. The Turkish authorities' response in those cases was inadequate or non-existent, while misdemeanour regulations were frequently applied to impose fines on transgender persons. The Asylum Office concluded that the Turkish authorities would not extend them adequate protection, which rendered them refugees in the meaning of the Convention relating to the Status of Refugees and the Serbian Asylum Act.

In this case, the Asylum Office issued a conclusion to jointly review the two Turkish nationals' asylum applications (under Article 117 of the General Administrative Procedure Act), explaining that they were civil partners and that their applications were based on similar facts. Therefore, the Asylum

108 Asylum Unit Ruling 03/9-4-26-1280/13 of 25 December 2013.

Office recognised the civil partnership of the two men for the purposes of the asylum procedure, which is a major step forward considering that neither the Serbian Constitution nor the Family Act recognise the legal status of same-sex unions. However, the valid Asylum Act defines 'family' extremely broadly, without mentioning cogent norms, such as the recognition of a marital or partnership status only to heterosexual couples. Namely, it defines family members as underage children, adoptive children, step-children, spouses if the marriage was concluded prior to arrival in Serbia, as well as the parents and adoptive parents legally obligated to support the children. Exceptionally, other persons may also be recognised the status of a family member, particularly in view of the fact that they were supported by the person, who has been granted refuge or subsidiary protection (Article 2(1(12))). The Draft Asylum Act contains a somewhat different and more restrictive definition of a family member, as it specifies that civil partners under Serbian regulations shall are also family members. Therefore, although the Draft is more in conformity with the Constitution and the Family Act in that respect, it rules out the possibility of recognising same-sex partnerships for the purposes of conducting the asylum procedure.

As opposed to some European countries, in the above case, the Asylum Office did not check the accuracy of the asylum seekers' claims that they were homosexuals at all, which is also a good practice example because the determination of an applicant's sexual orientation in an asylum procedure may be extremely humiliating.[109] Medical "testing" of an asylum seeker's sexual orientation amounts to a violation of his fundamental human rights and may not be applied. On the other hand, medical documentation indicating a sex change therapy or the

109 "How do you prove you are gay? A culture of disbelief is traumatising asylum seekers," *Guardian* 24 November 2015. Available at: https://www.theguardian.com/commentisfree/2015/nov/24/gay-asylum-seekers-sexuality-home-office.

hormone treatment of intersex persons may corroborate the credibility of an asylum claim.[110]

In another case regarding an asylum application filed by a woman and her two underage children from Afghanistan, who had all been victims of domestic violence, the Asylum Office granted the applicants subsidiary protection because of the extremely poor security situation in Afghanistan, although the woman had been married by force, subjected to violence and was unable to obtain a divorce due to the status of women in Afghanistan and Iran, her last place of habitual residence.[111] The asylum seeker, S.F., had moved from Afghanistan to Iran while she was still a girl, together with her parents and two brothers, where she was forcibly married. She had no legal status in Iran because this country does not provide protection to refugees from Afghanistan. Whilst in Iran, she was subjected to her husband's physical violence and psychological abuse and was not allowed to leave the house. She could not ask the police for help because she was in Iran illegally. In order to protect herself and her children, she fled Iran and came to Serbia, where she applied for asylum. The Asylum Office granted her and her children subsidiary protection, but considered only the security situation in Afghanistan as the reason why she could not go back to her country of nationality. The Office did not take into consideration the fact that F.S. would have found herself in dire straits in Afghanistan because she had left her husband and that she would be unable to receive any protection from domestic violence in that country. Those consequences might potentially reach the threshold of persecution.

The Asylum Office reviewed numerous asylum applications in which the gender aspect of the claims was relevant, but (apart from the two cases described above) it did not render any

110 *UNHCR's comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation*, UNHCR, April 2011. Available at: http://www.refworld.org/docid/4daeb07b2.html.

111 Asylum Ofice Ruling 26–652/16 of 17 June 2016.

decisions granting protection to an alien solely on account of his/her persecution on grounds of sex or gender.[112]

Under Article 30 of the Asylum Act, an asylum application may be rejected because it lacks credibility, i.e. the public official believes it is based on false reasons or data, forged documents, if the allegations in the application are in contravention of the ones the applicant made during the interview or of other evidence, if it is established that it was submitted to avoid deportation or foor purely economic reasons. An asylum application may also be dismissed in the event the asylum seeker refuses to make a statement regarding the reasons for seeking asylum or his/her statement is unclear or does not contain information indicating persecution. In sex– and gender-based violence cases, the statements women give during the interviews and in their applications often differ; furthermore, many do not want to talk about the traumatic events out of fear or anguish. The law needs to specify that this should be taken into account.

Under the Draft Asylum Act, the Asylum Office shall reject an application in the event it finds that the requirements for granting refuge or subsidiary protection are not fulfilled or if circumstances specified in Article 40 on the accelerated procedure exist.[113] This practically means that the

112 Information obtained in a telephone conversation with an Asylum Office staff member on 8 September 2016.

113 An accelerated procedure shall be conducted if it is ascertained that: 1) the applicant presented only the facts that are irrelevant for the assessment of the application; 2) the applicant consciously misled the Asylum Office by providing false information or forged documents, or by not providing relevant information or by concealing documents that may have a negative effect on the decision; 3) the applicant intentionally destroyed or hid documents establishing his/her identity and/or nationality in bad faith so as to provide false information about his/her identity and/or nationality; 4) the applicant presented manifestly inconsistent, contradictory, inaccurate, or unconvincing statements contrary to the verified information on the country of origin, rendering his/her application uncredible; 5) the applicant filed a subsequent application that is admissible under Article 46 (2 and 3) of this Act; 6) the applicant filed the application with the clear intention of postponing or preventing the

implementation of an accelerated procedure may prejudice a negative decision by the Asylum Office, which is not a good solution, especially when the asylum applications are based on sex– or gender-based violence, because victims of such violence may give contradictory statements or refuse, out of fear or shame, to provide information determinative of the decision to grant them asylum.

Due to their often complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of "safe country or origin" concepts.[114] As noted, the Draft Asylum Act introduces the accelerated procedure (in Article 40) and the possibility of rejecting an application if the applicant came from a safe country of origin (Article 44) but fails to provide for the exemption of LGBTI persons and persons fearing gender-based persecution or violence from such a procedure.

## 2.3. Restriction of Movement

Detention in the migration context is not prohibited under international law, which provides substantive safeguards against unlawful as well as arbitrary detention. "Arbitrariness" is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability.[115] Furthermore, although detention is a legal

enforcement of a decision that would result in his/her removal from the Republic of Serbia; 7) the applicant presents a risk for national security or public order; or 8) the safe country of origin concept may be applied in accordance with Article 44 of this Act.

114 *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 23 October 2012, para. 59. Available at: http://www.unhcr.org/509136ca9.pdf.

115 *UNHCR Detention Guidelines*, UNHCR 2014, para. 18. Available at: http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html.

institute in criminal proceedings in the context of Serbia's positive regulations, in refugee law, it refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will. Detention or full confinement is at the extreme end of a spectrum of deprivations of liberty.[116]

There is no explicit provision specifying that this measure, as formulated in both the valid law and the Draft Asylum Act, will not apply to women and girls victims of sexual or gender-related violence; nor are women provided with special treatment in case their freedom of movement is to be restricted. According to UNHCR's Guidelines, refugee women and children need to be provided with particular protection from long and unjustified detention and states need to promote and ensure alternatives to restricting the freedom of movement in such cases.[117] Detention of women can lead to sexual and physical violence against them. Closed facilities or camps are often surrounded by barbed wire, giving the appearance and reality of being prisons with prison-like lack of regard for individual freedoms. Inhuman surroundings can encourage inhumane actions.[118] Although the relevant Serbian authorities have enforced this measure extremely rarely, the legal framework for its application has to be laid down nonetheless.

Under Article 51 of the Asylum Act, the movement of asylum seekers may be restricted in order to establish their identity, ensure their presence in the course of the asylum procedure, if there are reasonable grounds to believe that an asylum application was filed with a view to avoiding deportation, or if it is not possible to establish other essential facts on which the asylum application is based without the presence of the alien in question; or in order to protect national security and public order in accordance with the law. Restriction of movement shall

116 *Ibid*., paras. 5–6.

117 *Guidelines on the Protection of Refugee Women*, UNHCR, Geneva, July 1991, paras. 2 and 81. Available at: http://www.unhcr.org/publ/PUBL/3d-4f915e4.pdf.

118 *Ibid*., para. 36.

be implemented by: ordering the alien's referral to the Aliens Shelter or prohibiting him/her from leaving an Asylum Centre or a particular address (Article 52). The Act does not explicitly provide for any derogations or exceptions in case of applicants who are particularly vulnerable persons or victims of sexual or gender-based violence. Furthermore, it does not envisage the principle of proportionality, i.e. that the least restrictive measure fulfilling the purpose of restricting the freedom of movement shall be applied in each individual case.

Appeals of these measures are ruled on by the Higher Court. The Higher Court did not uphold any such appeals in cases in which the BCHR lawyers represented the asylum seekers, i.e. it upheld the lawfulness of the measures restricting the asylum seekers' movement in all those cases.

The Draft Asylum Act lays down the same reasons for restricting the freedom of movement as the valid law, but also introduces new measures, such as regular reporting to the relevant police station, referral to a juvenile home under enhanced supervision and temporary seizure of travel documents (Article 80). Appeals of decisions on the restriction of movement shall be reviewed by the Higher Court under the Draft Act as well. In addition, the Draft envisages the principle of proportionality and lays down that particularly vulnerable persons may be referred to the Aliens Shelter only once the authorities establish, on a case to case basis, that such accommodation is suitable in view of their personal needs and circumstances, especially their health (Article 81).

The grounds for restricting the freedom of movement set out in the valid law and the Draft Act are in accordance with those allowed in the UNHCR Detention Guidelines.

Article 41 of the Draft Asylum Act introduces a special border procedure that is not prescribed in the valid law. Under this procedure, the movement of an alien, who expressed the intention to seek asylum, may be restricted in an airport transit zone or another border crossing and s/he may be referred to a specific area at the border or in the interior of the country, where

the entire asylum procedure will be implemented. This procedure is applied in case the asylum application can be rejected as ill-founded (Article 38 (1(5))), dismissed (Article 42) or if the alien submitted a subsequent application. This practically means that this procedure can be applied whenever a person expresses the intention to seek asylum at a border crossing. Under the Draft, the Asylum Office must render its decision on the application in such a procedure within 28 days from the day of submission; if it fails to do so, it shall allow the alien to enter Serbia and undergo the regular asylum procedure. The Asylum Office's decision may be appealed with the Asylum Commission within five days. It, however, remains unclear whether an appeal may be lodged if the alien is not allowed to enter Serbia after 28 days and to which authority it is to be submitted to; it is also unclear whether the aliens may challenge the initial decision to restrict their movement to the border area. The question also arises whether this measure, which amounts to a de facto restriction of liberty, is in accordance with Article 30 of the Serbian Constitution,[119] under which any person reasonably suspected of having committed a crime may be remanded in custody only pursuant to a court order and must be brought before the relevant court, which shall review the detention order, within the following 48 hours.

The Draft Act thus leaves room for restricting the movement of a large number of people, and the degree of intensity amounts to restriction upon liberty,[120] wherefore it should include other procedural safeguards and guarantees of adequate treatment of aliens for the duration of the measures restricting their movement.[121]

119 *Official Gazette of the RS*, 98/06.

120 *Guzzardi v. Italy*, European Court of Human Rights judgment of 6 November 1980, App. No. 7367/76, para. 92.

121 Practitioners Guide on Migration and International Human Rights Law, Practitioners Guide No. 6, International Commission of Jurists, Geneva 2014, pp. 150–156. Available at: http://www.icj.org/practitioners-guide-on-migration-and-international-human-rights-law-practitioners-guide-no-6/.

Under the Draft Act, this procedure shall not apply to unaccompanied minors. However, other vulnerable persons, including victims of sexual and gender-based violence, are not exempted. Under international human rights law standards, states must ensure that men and women are held in separate remand facilities and that women are searched and supervised only by female officers.[122] The Draft Asylum Act should include such guarantees as well.

In August 2016, the Asylum Office referred an Afghani national and her two children (two and four years of age) to the Aliens Shelter under enhanced police supervision during the asylum procedure, holding that such a measure was indispensable to establish their identity and because, in its opinion, they had applied for asylum to avoid being returned to Bulgaria.[123] The first reason is absolutely arbitrary, in view of the fact that thousands of asylum seekers have in the past few years lived in Serbian Asylum Centres (i.e. their movement has not been not restricted) although their identity has not been established. Furthermore, the Asylum Office did not review the possibility of applying a less restrictive measure to restrict the movement of this single mother and her two small children.

As a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained. Alternative arrangements should also take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation. Alternatives to detention would need to be pursued in particular when separate facilities for women and/or families are not available.[124] Where detention is

122 UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), UN General Assembly, 6 October 2010. Available at: http://www.un.org/en/ecosoc/docs/2010/res%202010–16.pdf.

123 Asylum Office Ruling 26–2121/16 of 10 August 2016.

124 UNHCR Detention Guidelines, UNHCR 2014, paras. 58–61. Available at: http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html.

unavoidable for women asylum-seekers, facilities and materials are required to meet women's specific hygiene needs, protection from violations of their rights, support and counselling, and their complaints must be investigated by the competent and independent authorities, with full respect for the principle of confidentiality, including where women are detained together with their husbands/partners/other relatives. In addition, women victims of sexual or gender-based violence are to be provided with the requisite physical and mental health care, support and legal aid in detention.[125]

Measures may need to be taken to ensure that any placement in detention of LGBTI asylum-seekers avoids exposing them to risk of violence, ill-treatment or physical, mental or sexual abuse; that they have access to appropriate medical care and counselling, where applicable; and that detention personnel and all other officials in the public and private sector who are engaged in detention facilities are trained and qualified, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation or gender identity. Where their security cannot be assured in detention, release or referral to alternatives to detention would need to be considered. In this regard, solitary confinement is not an appropriate way to manage or ensure the protection of such individuals.[126]

Neither the valid Asylum Act nor the Draft Asylum Act include sufficient safeguards against illegal and arbitrary restrictions of movement or guarantees of respect for the rights of the detained women and LGBTI persons.

## 2.4. Accommodation

Under the Asylum Act, asylum seekers are entitled to accommodation in an Asylum Centre, where they shall be provided with the basic living conditions, i.e. clothing, food and

125 *Ibid.*

126 *Ibid.*, para. 65.

financial aid.[127] Although asylum seekers with adequate funds are under the obligation to cover part of their accommodation costs in the Centres under the law, the authorities have not required of them to do so in practice. The Asylum Office may approve the request of an asylum seeker to live in private accommodation provided there are no reasons to restrict his or her movement. In such cases, the asylum seeker covers the rent costs. In paragraph 79 of its *Guidelines on the Protection of Refugee Women*, UNHCR warns that refugee women face dangers stemming from poor design of camps, that may affect their exercise of their fundamental human rights and that they need to be provided with adequate protection and enabled to exercise their right to privacy. The European Council on Refugees and Exiled Persons goes even further in its *Position on Asylum Seeking and Refugee Women*[128] and sets out several important steps states have to make to ensure respect for the gender equality principle as far as standards of collective accommodation of asylum seekers are concerned. It recommends the following: that the personnel be trained to be sensitive to the needs of refugee women and familiar with gender issues that may arise; that mechanisms are in place to facilitate the reporting of physical and sexual violence, appropriate support and means of redress in such cases; that women are provided with private toilets and bathing facilities; and that they have access to general and legal counselling services in conditions of privacy upon request, (i.e. in the absence of their family members).

Refugee women granted international protection need to be provided with adequate accommodation facilitating their integration. This, above all, means that they need to be accommodated in facilities not isolated from the local community and suitable for longer term residence. In view of the refugees' limited funds, lack of social contacts and unfamiliarity with the

127 Asylum Act, Article 39.

128 Available at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=-search&docid=3c0261724&skip=0&query=ecre.

local community, finding decent and accessible accommodation in large cities may be a genuine challenge.[129]

Under Article 21 of the Asylum Act**,** which deals with accommodation, pending the adoption of a final decision on their asylum application, asylum seekers shall be provided with accommodation and basic living conditions at the Asylum Centres, operating as part of the Commissariat for Refugees. The Asylum Centres shall be managed by the Commissariat Manager, who shall adopt enactments governing the Asylum Centres' internal organisation and staffing. However, neither the Act nor the by-laws governing accommodation and basic living conditions in greater detail include provisions on the accommodation of asylum seeking women. The Draft Asylum Act includes identical provisions as the valid law, i.e. it does not mention the accommodation of asylum seeking women specifically.

Persons granted asylum or subsidiary protection in Serbia are entitled to accommodation commensurately with the capacities of the Republic of Serbia, but not for longer than one year from the final decision recognising their status.[130] This entails allowing them to use residential facilities or providing them with financial aid to rent accommodation. Given the modest experiences in the refugee integration process, BCHR was unable to investigate the accommodation of refugee women in practice thoroughly.

The treatment of pregnant women and mothers travelling alone with their children has been improved thanks to the cooperation between the UNHCR Office, the competent Social Welfare Centre, the Belgrade Home for Mothers, the Belgrade Centre for Human Rights and the NGO Atina.

Particularly vulnerable mothers and children, identified by one of the above stakeholders, have been referred to the Home

129 James C. Hathaway, *The Rights of Refugees under International Law, Cambridge University Press, Cambridge 2005,* p. 818.

130 Asylum Act, Article 44.

for Mothers in Zvečanska Street, part of the Belgrade Centre for the Protection of Infants, Children and Youths. For instance, K.N.L. from Cameroon, an asylum seeker BCHR extended legal aid to, was initially referred to the Asylum Centre in Krnjača after she gave birth to her baby at a Belgrade maternity hospital. Soon afterwards, at UNHCR's initiative and with the support of the Social Welfare Centre, she and her baby were referred to the Home for Mothers, because of the living conditions in the Asylum Centre were inadequate for the mother and her newborn. The Home for Mothers specialises in the protection and recovery of mothers and children, providing them with health care, adequate nutrition and the clothes and hygiene products they need. This case was the first example of a good practice applied subsequently in cases of several other mothers traveling alone with their children. Furthermore, asylum seeking women, victims of domestic violence, have been referred to an Atina safe house in a number of cases, after interventions by Atina's and BCHR's legal teams, which are constantly in the field.[131] However, an institutional mechanism for identifying women victims of violence and referring them to safe houses does not exist yet, wherefore the entire process is informally managed by civil society.

## 2.5. Integration of Refugee Women in Serbia's Economic, Cultural and Social Life

Under the Asylum Act, the Republic of Serbia has the general obligation to put in place conditions for the integration of refugees in Serbia's social, cultural and economic life commensurately with its capacities.[132] The Migration Management Act[133] entrusts the accommodation and integration of persons granted asylum

131 *Right to Asylum in the Republic of Serbia, Periodic Report, April–June 2016*, BCHR, July 2016. Available at: http://www.azil.rs/doc/ENG_FINAL.pdf.

132 Article 46, Asylum Act.

133 *Official Gazette of the RS*, 107/12.

or subsidiary protection to the Commissariat for Refugees and Migration.[134]

The exercise of rights of persons granted asylum or subsidiary protection in Serbia is governed by Chapter VI of the Asylum Act, which includes provisions on the rights to residence, accommodation, basic living conditions, health care, education, welfare and other rights, equal to those enjoyed by non-nationals habitually residing in Serbia, and to those enjoyed by the nationals of the Republic of Serbia.[135] These rights include the work and employment related rights, right to permanent residence, freedom of movement, the right to movable and immovable property and the right to association.

Neither the Asylum Act nor the Migration Management Act define specific measures or procedures for designing individual integration plans for individuals granted asylum, wherefore this matter needs to be regulated by subsidiary legislation. The Serbian authorities are expected to enact a decree that will govern the individual integration of persons granted refugee protection. In July 2015, the Government of the Republic of Serbia adopted a Decree on Criteria for Establishing Priority Accommodation of Persons Recognised the Right to Refuge or Granted Subsidiary Protection and the Conditions for the Use of Temporary Housing.[136] The Draft Asylum Act includes identical provisions on the integration of refugees, uses gender neutral languages and does not introduce gender sensitive measures regarding refugee women. The legislator perhaps intends to govern the integration issue in greater detail in a by-law. Such a regulation is expected to be adopted soon, and will hopefully gender mainstream Serbia' integration policies.

Serbia, unfortunately, does not have an institution charged with comprehensively addressing the integration of persons granted asylum; nor has it adopted legal regulations governing

134 Articles 15 and 16, MMA.

135 Articles 22–27, Asylum Act.

136 *Official Gazette of the RS*, 63/15.

this matter in greater detail. The Commissariat for Refugees and Migration, entrusted with the integration of refugees under the law, cannot be qualified as the central institution the beneficiaries can turn to for support through specific integration measures. It has transpired in practice that civil society focusing on asylum and migration has efficiently extended both legal aid during integration and other forms of support to all persons granted international protection in Serbia.[137]

Refugee women often face various challenges in the host country, where integration policies are not always gender-sensitive. The specific status of women and the cultures they are coming from need to be borne in mind, because even refugee women granted international protection in very liberal and democratic societies are still discriminated against by members of their families or subjected to unequal treatment in the host community. For instance, refugee women cannot always attend language lessons and other professional courses, because they are unable to reconcile their private obligations (family care) and their professional obligations. In addition, they are often exposed to double discrimination in access to employment and the labour market. In this situation, so called gender neutral active labour market measures do not take into account that refugee women encounter more difficulties than their male counterparts in finding a job since they are responsible for the children and family care. Moreover, because of their difficulties with childcare, access to training and language courses and the lack of recognition of their qualifications, they are often employed in low-paid jobs in the domestic labour sector.[138]

137 This assistance mostly involves the organisation of Serbian language lessons, extension of administrative assistance to aliens filing requests with the competent institutions, etc.

138 Silvia Sansonetti, *Female refugees and asylum seekers: the issue of integration,* Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2016, p. 48. Available at: http://www.europarl.eu-

Paragraph 69 of the *UNHCR Guidelines on the Protection of Refugee Women* discusses the importance of integration and involvement in the life of the host country in a similar vein. The UNHCR warns of the serious risks regarding refugee women's effective integration in society because they are much more vulnerable than men and because their enjoyment of political, civil, economic and social rights may be limited or denied in their host countries. The UNHCR, for instance, warns that the absence of legal rights impedes the ability of refugee women to attain full economic self-support because they could be denied access to markets, ownership of land and businesses, the right to travel freely throughout the country, etc.

Access to employment and income-support for needy families is a further issue affecting refugee women who are settled in countries of asylum. Sometimes, work permits are limited to certain activities such as domestic labour, with strict requirements related to age, physical condition, and often with very limited labour protection

Refugee women, however, should not be viewed as passive victims. Integration policies need to aim at their empowerment and independence, the introduction of social services and integration measures responding to their specific needs. Such policies need to be effected also through the future integration plans that will be applied in the Republic of Serbia.

## 2.6. Statistics

Statistical data on the national asylum system, including the number of people granted international protection, the number of people who moved abroad, the number of people in detention, as well as the number of returnees under readmission agreements, should always be desegregated by sex and age, to

ropa.eu/RegData/etudes/STUD/2016/556929/IPOL_STU(2016)556929_EN.pdf

identify the number and problems of refugee women and girls and address them.[139]

In the Republic of Serbia, the statistical data on the number of people who expressed the intention to seek asylum (including minors), who were granted international protection, whose freedom of movement is restricted and the number of returnees under readmission agreements are kept by the Serbian Ministry of Internal Affairs. The statistical data are always desegregated by sex. As far as refugee integration is concerned, the data should be kept by the Serbian Commissariat for Refugees and Migration, but we have been unable to ascertain whether such a database exists and whether the data are desegregated by sex. Such records are at present kept by the UNHCR Office in Belgrade.

## 2.7. Health Care

Article 40 of the Asylum Act sets out that asylum seekers and refugees are entitled to health care. This law further lays down that the right to health care shall be exercised in accordance with the regulations governing the health care of non-nationals. The Act uses gender neutral language in this part as well, and does not specify any measures regarding the protection of women.

The principle of fairness, i.e. prohibition of discrimination in the provision of health care on grounds of race, *sex*, age, ethnic or social origin, religion, political or other beliefs, financial standing, culture, language, type of disease or physical or mental disability, is one of main principles enshrined in Article 20 of the Health Care Act,[140] which is of particular relevance to migrants

139 *UNHCR Guidelines on the Protection of Refugee Women,* July 1991, paras. 27, 28 and 29. Available at: http://www.unhcr.org/publ/PUBL/3d4f915e4.pdf.

140 Health Care Act, *Official Gazette of the RS*, 107/2005, 72/2009 – other law, 88/2010, 99/2010, 57/2011, 119/2012 and 45/2013 – other law.

and particularly vulnerable groups of the migrant population. Furthermore, the legislator has recognised the provision of emergency medical care to persons with unknown residence and other persons not exercising the right to emergency medical care in another manner under the law (Article 18) as one of the general interests in health care. Chapter XIII of the Health Care Act, which is devoted to the health care of non-nationals, lays down that asylum seekers – persons exercising the right to refugee or subsidiary protection in Serbia, foreign nationals, stateless persons habitually or temporarily residing in or transiting through Serbia are entitled to health care, the costs of which are covered from the state budget (Article 238) and that such care shall be extended in the same manner in which it is extended to nationals of Serbia (Article 239). Another important article is Article 241, under which foreign nationals, whose treatment costs are covered by the Republic of Serbia, shall include non-nationals granted asylum in case they are destitute or victims of human trafficking. The Act lays down fees to be levelled against health institutions that fail to extend health care or emergency medical care to aliens (Article 256). In light of the activities of civic associations directly assisting migrants, it needs to be noted that the Act lists cooperation between the health institutions and humanitarian and professional associations among the measures aimed at ensuring society's care for health.[141]

In paragraph 102 of its *Guidelines on the Protection of Refugee Women,* the UNHCR underlines that high priority should be given to the provision of primary health care, including maternal and child health services, gynaecological services, birthing care, counselling regarding sexually transmitted diseases, family planning programmes, and health education regarding public health and harmful practices such as female circumcision.

141 Aleksandra Galonja (ed.), Tijana Morača, *Migrant Population in Local Communities in Serbia,* Atina – Citizens Association for Combatting Trafficking in Human Beings and All Forms of Gender-Based Violence, Belgrade, 2014, p. 27. Available at: http://www.atina.org.rs/sites/default/files/Atina%20Migranti%20F1%20ENG%20%281%29.pdf.

Special attention should be paid to services needed by adolescent girls. It also recommends instituting counselling and mental health services for refugee women, particularly for victims of torture, rape and other physical and sexual abuse.

Asylum seekers in Serbia are examined by doctors in outpatient health clinics covering the municipality in which the asylum seekers are residing.[142] A number of asylum seekers had not undergone check-ups because they spent only short periods of time in the Asylum Centres. The Danish Refugee Council actively monitors the availability of health services to asylum seekers at all levels of health care and, if necessary, provides psychological support and interpretation services, which are funded by the UNHCR. The costs of health services extended to asylum seekers in Serbia are covered by the Serbian Health Ministry. The Public Health Institutes (in Belgrade, Šabac, Valjevo, Užice, Kraljevo) continuously perform epidemiological supervision of the asylum seekers and report to the Health Ministry and the national Public Health Institute. All medications prescribed to the asylum seekers by the doctors are funded by the UNHCR. Particular attention is paid to providing medications for children, women, pregnant women and persons with special needs. Apart from the basic medications, the asylum seekers with chronic illnesses are provided with the requisite therapies (immunosuppressive therapy after organ transplantation, insulin therapy for insulin-dependent diabetes, etc.).

The results of the research entitled *Mental Health of Asylum Seekers in Serbia*, conducted in 2014[143], indicate a significant presence of the post-traumatic stress disorder (PTSD), anxiety and depression in asylum seekers. The data obtained in focus

142 *Right to Asylum in the Republic of Serbia 2014*, BCHR, Belgrade, June 2015, p. 46. Available at: http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2015/04/Right-to-Asylum-in-the-Republic-of-Serbia-2014.pdf.

143 M. Vukčević, J. Dobrić, and D. Purić, *Mental Health of Asylum Seekers in Serbia,* UNHCR, Belgrade, 2014. Available at: http://www.unhcr.rs/media/MentalHealthFinal.pdf.

groups showed no significant differences in the trauma events related to the countries of origin between the asylum seekers from Syria, Afghanistan and other Arab countries. Both men and women specified the same trauma events related to the countries of origin. At the level of the entire sample, two-thirds of the asylum seekers in Serbia are single and one-third is married. Only one respondent is divorced and there were no widowers, widows or respondents who lived in common law marriages in the sample. Interestingly, significant differences exist between men and women with respect to marital status – as opposed to women, men are not married for the most part.[144] Just over one half of the respondents (56%) travel alone. Notably, this share is higher among men (63%), while women travel only in company (93%) – with their husbands (52%), children (37%) or other family members most often.[145]

The research results indicate asylum seekers are a highly traumatised population, experiencing numerous grave difficulties in psychological functioning. The typical feelings of asylum seekers suffering from PTSD and depression are feelings of isolation, detachment and withdrawal from others. This is manifested also in their feelings that they are the only ones to have gone through such difficult experiences, that people do not understand what had happened to them, that they cannot rely on anyone, that they have been betrayed; they feel lonely, they trust no-one and withdraw into themselves. The results of the study indicate that the asylum seekers perceptions of themselves and their skills, qualities and strengths in asylum seekers are extremely undermined. The majority of them feel they have fewer skills than before, that they can hardly cope and that they are worthless. It is difficult for them to make decisions, plan their day and they have a negative perception of themselves. They are critical of themselves and feel useless. In addition, the most frequent symptoms that the asylum seekers experience

144 *Ibid.*, p. 7.

145 *Ibid.*, p. 9.

are excessive worry, thinking why all that happened to them, survivor's guilt, repeated thoughts about the most difficult or terrifying events, feelings of permanent alert, sudden emotional or physical reactions when reminded of the most hurtful traumatic events, anxiety, tension and testiness, as well as the inability to feel any kind of satisfaction.

# Conclusion

Although the Serbian Asylum Act has been enforced for nearly eight years now, the national asylum system cannot be qualified as functional and efficient or as devoting particular attention to gender sensitive issues. The number of asylum seekers has been growing every year: over 600,000 sought asylum in Serbia from the day the Act came into force until the end of 2015; 75 of them were granted international protection. Migration trends indicate that the number of asylum seekers will continue growing, given that Serbia borders with countries in which large numbers of people are seeking asylum as well and which lack the capacity to take all these people in. Serbia thus faces a serious challenge: to build an efficient and functional asylum system to ensure that all asylum seekers and persons granted international protection actually can exercise all their rights guaranteed both by the Asylum Act and many other laws. In addition, it may be presumed that more and more aliens will opt to stay in Serbia as it makes progress towards EU membership and achieves its economic, legal and social standards, wherefore a system facilitating their integration needs to be built on time. Identification of asylum seeking and refugee women as a specific group of migrants, design of measures and programmes for their empowerment, and involvement of refugee women in Serbia's social, economic and cultural life are all important steps that have to be made in that direction.

As this Analysis shows, asylum seeking and refugee women are an extremely vulnerable category; they have left their countries of origin out of reasonable fear for their lives, due to sex-based persecution and the gender roles in the societies they are coming from, wherefore they are often discriminated against on various grounds because of their vulnerability. The

Republic of Serbia is still in the process of building an efficient asylum and refugee integration system. As far as legislation is concerned, although the valid Asylum Act does not specify any other gender sensitive measures targeting asylum seeking and refugee women, apart from the gender equality principle, the competent authorities, notably the Ministry of Internal Affairs – Asylum Office, have already recognised elements of gender-based asylum applications in several cases and granted international protection to refugee women and LGBTI persons. The fact remains that no-one has been granted protection solely on account of sex– or gender-based persecution.

There is still room for improving the legal framework, which can be done by adopting a new law on asylum and thus advancing the gender equality issue considerably. The competent authorities are evidently in need of regulations on the treatment and referral of identified vulnerable groups, particularly vulnerable women and girls.

Herewith our key recommendations which, in our opinion, can be applied in practice immediately or integrated in the law:

- **Language Barriers**

Communication with asylum seekers usually entails engagement of interpreters. Efforts should be made to engage interpreters of the same gender as the asylum seekers, i.e. ensure a sufficient number of female interpreters.

- **Legal Aid, Counselling and Provision of Information**

Same events have different meanings in different cultures. Personnel working with asylum seekers need to familiarise themselves with what is considered "normal" and desirable in the culture of the asylum seekers they are working with. Sensitivity to cultural differences facilitates one's understanding of people and the problems they face. Most asylum seekers come from Islamic countries (94%), in which the differences between gender roles are greater than in Serbia, especially regarding communication with people who are not family. Asylum seekers should be

promptly notified of their right that their case be handled by an officer and interpreter and have a legal representative of the same sex. Furthermore, asylum seekers, especially women, should be notified during the initial contact that everything they say during the asylum procedure shall be treated as confidential and not divulged to their country of origin or family members.

- **Asylum Procedure**

Ensure that the asylum procedure, especially the interviews, are conducted in an atmosphere encouraging trust and feeling of safety, especially when refugee women are applying for asylum. Ensure that the asylum seekers can request that the officers and interpreters performing the interviews and other official actions involving communication with them throughout the procedure are of the same sex as they are. The Draft Asylum Act lays down that LGBT persons and persons fearing gender-based persecution or violence will not be subject to the accelerated procedure.

- **Capacities of the Relevant Institutions**

Staff of the Asylum Office and the Commissariat for Refugees and Migration should be sufficiently familiar with gender-sensitive issues and prohibition of discrimination in refugee law, as well as with the relevant regulations and UNHCR guidelines. Rules and mechanisms for the prompt identification of victims of sexual and gender-based violence and their care and protection need to be put in place.

- **Restriction of Movement**

The law needs to lay down sufficient safeuguards against illegal and arbitrary restriction of movement and guarantees of respect for the rights of detained women and LGBT persons. In any case, where women and girls are concerned, avoid restricting their movement and promote alternatives to that measure.

- **Accommodation**

Make provision for permanent accommodation facilities for unaccompanied women and women with underage

children. Ensure adequate institutional protection and separate accommodation for women victims of sexual or gender-based violence.

- **Integration**

Design special programmes for the integration of refugee women and children, which will take into account the vulnerability and specific situation of this group of refugees. Integration policies need to aim at ensuring their empowerment and independence and involve the design of social services and integration measures responding to their specific needs.

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