

UDC 347.998.85(497.11) ; 342.7:314.151.3

CERIF: S140, S142, S150

DOI: 10.5937/AnalipFB1804056D

Marko Davinić, PhD*

Ivana Krstić, PhD**

THE CAPACITY OF THE ADMINISTRATIVE COURT IN SERBIA TO DEAL WITH ASYLUM CASES

This paper explores the capacity of the Administrative Court in Serbia to adjudicate asylum cases, which have been in its jurisdiction since the Court's establishment in 2010. The analysis of its asylum case law is divided into three phases, based on both temporal and substantive criteria. It demonstrates that the best period in handling asylum cases was 2014–2015, during which judgments of the Court significantly improved the decision-making of administrative authorities. Nevertheless, this research has identified several issues that have negatively influenced the work of the Administrative Court in the field of asylum law: the Court's excessive inherited caseload, the influx of new claims, a small number of asylum-related cases, the insufficient number of judges, the extremely broad jurisdiction of the Court, as well as a lack of specialized panels within the Court. The last problem is identified as the major one and the authors propose concrete steps that should be undertaken in order to increase the capacity of the Administrative Court to deal with asylum cases. Lessons learned from Serbia, as a country in the middle of the Western Balkan migration route, can be useful for all other countries along it.

Key words: *Administrative Court. – Republic of Serbia. – Asylum. – Safe third country. – European Convention on Human Rights.*

* Associate Professor, University of Belgrade Faculty of Law, markod@ius.bg.ac.rs.

** Associate Professor, University of Belgrade Faculty of Law, ikrstic@ius.bg.ac.rs.

1. INTRODUCTION

For many years, refugees and migrants from different parts of the world have been trying desperately to reach Europe. The escalation of this phenomenon in 2015 has been called the European migrant (refugee) crisis.¹ While the migrants' desired destinations are Germany and Scandinavia, the daunting route they face takes them mainly through the Western Balkans.² Serbia is right in the middle of that route and for a long time it has been mainly used as a transit country. However, in March 2016, when neighboring countries (Hungary and Croatia) decided to erect fences and introduce strict border controls, the route was closed, leaving many migrants 'trapped' in Serbia.³ In September 2018, there were around 4,000 migrants in Serbia,⁴ and some of them had decided to apply for asylum.

Prior to the breakup of Yugoslavia in 1991, there was no national comprehensive asylum system and decisions were left to the discretion of national authorities who made *ad hoc* decisions on international protection, mostly for asylum seekers from Hungary (after the Soviet intervention in this country in 1956) and Chile (after the assassination of Chilean president Allende in 1973).⁵ In subsequent cases, the Yugoslav and Serbian authorities allowed asylum seekers to contact UNHCR

¹ M. Barlai *et al.* (eds.), *The Migrant Crisis: European Perspectives and National Discourses*, Studien zur politischen Kommunikation, LIT Verlag, Berlin-Münster-Wien-Zürich-London 2017; L. Buonanno, "The European Migration Crisis", in D. Dinan, N. Nugent and W. E. Paterson (eds.), *The European Union in Crisis*, Palgrave, London 2017, 100 – 129; C. McDonald-Gibson, *Cast Away: Stories of Survival from Europe's Refugee Crisis*, Portobello Books, London 2017; M. E. Johnson, *The European Migrant Crisis: Unprecedented Displacement on an International Scale*, CreateSpace Independent Publishing Platform, 2015.

² For more about the Western Balkan countries, and their aspiration towards EU membership, see: M. Davinić, "The EU Enlargement and Accession Procedure – The Case of Western Balkan Countries", *Zeitschrift für Europarechtliche Studien* 4/2017, 513–526.

³ M. Davinić, "The Role of Public Administration of the Republic of Serbia in Managing the Migrant Crisis", in M. M. Boguslawskij *et al.* (eds.), *Migrationsrecht im östlichen Europa, Die Kieler Ostrechts-Notizen*, Institut für Osteuropäisches Recht der Universität Kiel, Kiel 2017, 29–37; see also: I. Krstić, "Response of Western Balkan Countries to Migration Crisis", *Zeitschrift für Europarechtliche Studien* 4/2017, 527–540.

⁴ During 2018 the number of refugees and migrants in Serbia has stabilized at approximately 4,000. Around 90% of them have been provided accommodation in 15 governmental centers. The rest are refusing to enter the facilities and are sleeping out in the open, mainly in Belgrade, and near the border areas with Hungary, Croatia and Bosnia and Herzegovina. UNHCR, *Serbia Update 17–30 September 2018*, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/66098.pdf>, last visited 2 October 2018.

⁵ M. Stojić Mitrović, "Serbian migration policy concerning irregular migration and asylum in the context of the EU integration process", *Issues in Ethnology and Anthropology* 4/2014, 1107.

representatives,⁶ who provided them with accommodation and humanitarian assistance, and worked to find their country of final destination.⁷ During the last decade of the 20th century, authorities provided humanitarian aid to citizens from the former Yugoslav republics, who were automatically recognized as refugees, which meant that civil servants and judges did not have much experience in interpreting the complex international norms in this area. The legal framework changed with the adoption of the Law on Asylum in 2007, which established a comprehensive asylum system in Serbia.⁸

A foreigner who is seeking international protection in Serbia must first submit his or her asylum application to the Asylum Office, a first instance body within the Ministry of Interior's Border Police Directorate. From that moment he/she is considered an asylum seeker. The Asylum Commission decides in the second instance the appeals against decisions of the Asylum Office. The last resort is the judicial procedure before the Administrative Court, which reviews the legality of administrative acts. Since 2012, the UNHCR has called for the abolition of the Asylum Commission, proposing the introduction of direct judicial control of first instance decisions, by the Administrative Court, further saying that the Commission is not a specialized and independent body.⁹ In order to assess whether Serbia should follow EU Member States in introducing direct judicial control, the authors reviewed the capacity of the Administrative Court to deal with asylum cases.

This paper is divided into several parts. In the opening chapters the authors explain the asylum procedure and concept of administrative dispute in Serbia. The central part focuses on the asylum case law of the Administrative Court, which is divided into three phases, based on

⁶ This was the result of unwritten agreement between Yugoslavia and UNHCR, concluded in 1976. *Ibid.*, 1108.

⁷ I. Krstić, M. Davinić, *Pravo na azil – međunarodni i domaći standardi [The Law on Asylum – International and Domestic Standards]*, University of Belgrade Faculty of Law, Belgrade 2013a, 311. For more on this issue see Danilo Rakić (ed.), *Ljudska prava izbeglica, interno raseljenih lica, povratnika, azilanata i žrtava trgovine ljudima u Srbiji i Crnoj Gori [Human Rights of Refugees, Internally Displaced Persons, Returnees, Asylum Seekers and Victims of Human Trafficking in Serbia and Montenegro]*, Group 484, Belgrade 2006, 150–155.

⁸ Law on Asylum, *The Official Gazette of the Republic of Serbia*, No. 109/07.

⁹ In 2012 the UNHCR found that the Asylum Commission is not independent due to the following: it uses the facilities of the Border Police Department, the Head of the Asylum Commission is also the Assistant to the Head of Directorate of Border Police; most members of the Asylum Commission are police officers or other civil servants with no or limited specific training and expertise on asylum matters. See UNHCR, *Serbia as a country of asylum, Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, 14, available at: <http://www.refworld.org/docid/50471f7e2.html%3E>, last visited 2 October 2018.

temporal and substantive criteria. This part is followed by a summary of the opinions of judges, expressed a questionnaire distributed to them in June 2017. Finally, the authors summarize the findings, identify the main gaps in the application of relevant international standards and EU *acquis* in the field of asylum, and propose activities that would enhance the capacity of the Administrative Court and its judges to provide better judicial review in asylum cases.

2. THE ASYLUM PROCEDURE IN SERBIA

The asylum procedure, as a special administrative procedure in Serbia,¹⁰ is governed by the Law on Asylum and Temporary Protection, adopted in March 2018.¹¹ However, as this Law entered into force only recently, on 3 June 2018, the new case law has not been covered by this study. The authors processed the jurisprudence from 2010 to 2017, that was the result of the 2007 Law on Asylum, which came into effect in April 2008.¹² As a subsidiary act of general application, the Law on General Administrative Procedure applies to all issues not defined by this law.¹³

The asylum procedure is initiated by submitting an asylum application to officers of the Asylum Office, in the prescribed form and within 15 days from registration; this deadline may be extended in justified cases, at the

¹⁰ For more on the asylum procedure in Serbia, see: I. Krstić, M. Davinić, “The Efficiency of Serbian Asylum Procedure”, in M. Bungenberg, T. Giegerich, T. Stein (eds.), *Asyl und Migration in Europa – rechtliche Herausforderungen und Perspektiven*, ZeuS Sonderband 2016, Nomos, Europa Institut, Baden-Baden 2016, 207–219.

¹¹ Law on Asylum and Temporary Protection, *The Official Gazette of the Republic of Serbia*, No. 24/2018.

¹² For more on the provisions of this piece of legislation and their compliance with relevant international law, see: Belgrade Center for Human Rights, *Human Rights in Serbia in 2010: Legal Provisions and Practice compared to International Human Rights Standards*, Series reports 15, Belgrade 2011, 226–231, available at: <http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/04/Human-Rights-in-Serbia-A-Comprehensive-Report-for-2010-in-Serbian-and-English-2011.pdf>, last visited 2 October 2018.

¹³ The Law on General Administrative Procedure, *The Official Gazette of the Republic of Serbia*, No. 18/2016; Provisions of the Law on General Administrative Procedure are of subsidiary nature and are applied to issues which are not regulated by special administrative proceedings (e.g. asylum procedure). However, the provisions of special administrative proceedings must comply with the basic principles of general law, and cannot reduce the level of protection of the parties’ rights and legal interests guaranteed by this legislation. See: Art. 3 of the Law on General Administrative Procedure; D. Vučetić, “Distinctive Features of Special Administrative Proceedings in Health Care Matters”, in M. Lazić, S. Knežević (eds.), *Legal, Social and Political Control in National, International and EU Law*, Faculty of Law, University of Niš, Niš 2016, 181–182.

request of the asylum seeker.¹⁴ The Asylum Office renders a decision either by upholding the application, thereby recognizing the right to international protection (refugee status or subsidiary protection),¹⁵ or by rejecting the application and ordering the third country national to leave the territory within a specified deadline, unless he/she can stay in Serbia on other grounds. Also, the Law on Asylum prescribes the reasons for dismissing the application on several procedural grounds,¹⁶ the safe third country reason being the main one. Safe third country is defined as

“the state from the list adopted by the Government, which respects international principles of refugee protection contained in 1951 Refugee Convention and 1967 Protocol, in which asylum seeker stayed or passed by immediately before entering territory of the Republic of Serbia, in which he/she had a possibility to seek an asylum, and in which he/she would not be exposed to torture, inhuman or humiliating treatment or returning to country where his/her life, safety and security would be endangered.”¹⁷

The Asylum Office may also render a decision terminating the asylum procedure in some cases, primarily if a third country national decides not to pursue the asylum application.¹⁸

The Asylum Office decisions can be appealed before the Asylum Commission¹⁹ within 15 days from the day decision is delivered²⁰ or

¹⁴ Art. 25, par. 1 of the Law on Asylum.

¹⁵ According to Art. 2 of the Law on Asylum, refugee status means “the right to residence and protection granted to a refugee who is on the territory of the Republic of Serbia, with respect to whom the competent authority has determined that his/her fear of persecution is well-founded.” The same article defines subsidiary protection as “a form of protection the Republic of Serbia grants to an alien who would be subjected, if returned to the country of origin, to torture, inhumane or degrading treatment, or where his/her life, safety or freedom would be threatened by generalized violence caused by external aggression or internal armed conflicts or massive violation of human rights.”

¹⁶ Art. 33, par. 1 of the Law on Asylum.

¹⁷ Art. 2 of the Law on Asylum. *See also* I. Krstić, M. Davinić, “Zloupotreba koncepta sigurne treće zemlje [The Misuse of the Concept of Safe Third Country]”, in R. Vasić, I. Krstić (eds.), *Development of Serbia's legal system and harmonization with the EU law*, University of Belgrade Faculty of Law, Belgrade 2013b, 97–116.

¹⁸ Furthermore, termination of the asylum procedure can be caused if third country national fails to appear at the hearing without due cause, refuses to give a statement, fails to inform the Asylum Office about change of address within three days, otherwise prevents the service of summons or other documents, or leaves the territory of the Republic of Serbia without the approval of the Asylum Office. *See* Art. 34, par. 1 of the Law on Asylum.

¹⁹ For more on appeals in the Serbian administrative system, see: V. Cucić, “Administrative Appeal in Serbian Law”, *Transylvanian Review of Administrative Sciences* 32/2011, 50–73; V. Cucić, “Appeals in Special Administrative Domains”, *Transylvanian Review of Administrative Sciences* 34/2011, 63–79; D. Milovanović, M.

within 2 months of submitting application, if no decision was handed down (so-called “silence of administration”).²¹ The nine-member Asylum Commission passes its decisions by majority vote. The procedure before the Asylum Commission is regulated by the Law on the General Administrative Procedure, which prescribes general grounds for dismissing, rejecting or upholding an appeal. If the Asylum Commission upholds the Asylum Office’s decision to dismiss a case on procedural grounds (mainly because a transit country is on the list of safe third countries), it will reject (not dismiss) the appeal. This difference in approach between administrative authorities is not only linguistic, but rather it shows incoherence between the Law on Asylum with the Law on General Administrative Procedure. Therefore, the authors suggest that all aspects of the case of asylum seeker be taken into account, and that the safe third country list should not be applied automatically. In the event that the Asylum Office determines that a particular country from the list is really safe for an asylum seeker, it should reject the application, rather than dismiss it automatically.

The Asylum Commission consists of nine members, all appointed by the Government, for a period of 4 years.²² The Law on Asylum prescribes cumulative conditions for being a member of the Commission: a citizen of the Republic of Serbia, a lawyer with at least five years of professional experience, and a human rights specialist. This formulation does not guarantee that the member of the Asylum Commission will have necessary competence to handle asylum cases since it does not require specific knowledge in the field of asylum, which can affect the quality of decisions. Also, the Law on Asylum prescribes that the Asylum Commission is independent in its work, but additional guarantees of independence are not provided. The way that this works in practice can be illustrated by the composition of the current Asylum Commission, as it comprises mostly of governmental officials with close ties to the police.²³ Three out of nine members come from the Ministry of Interior, five from other ministries, while only one commissioner comes from academia and is independent from the Government (the co-author of this paper).²⁴

Davinić, V. Cucić, “Efficiency of the Administrative Appeal (The Case of Serbia)”, *Transylvanian Review of Administrative Sciences* 37/2012, 95–111.

²⁰ Art. 20, par. 1 of the Law on Asylum.

²¹ Art. 173 of the Law on General Administrative Procedure.

²² The Government of the Republic of Serbia passed a Decision on the Appointment of Commission Members No. 119–1643/2008, dated 17 April 2008, in order to appoint a first mandate of the Commission.

²³ The previous composition is equally illustrative: the President of the Asylum Commission was an assistant chief of the Border Police Department (which supervises the Asylum Office, as the first instance authority).

²⁴ Government Decision 24 no: 119–2520/17, 23 March 2017.

This casts doubt on the independence of the Commission,²⁵ and is certainly not a proper solution. Nevertheless, we will later elaborate that the Court is still not ready to have a greater role in asylum cases. Thus, the Commission cannot be abolished yet as the second instance authority, and there is a need for its greater independence.

3. THE ADMINISTRATIVE COURT AND THE CONCEPT OF ADMINISTRATIVE DISPUTE IN SERBIA

The Administrative Court in Serbia was established on 1 January 2010 as a national court of special jurisdiction that adjudicates in administrative disputes and performs other tasks set forth by the law.²⁶ The Court ‘inherited’ more than 20,000 cases from the former Supreme Court and district courts in Serbia, which dealt with administrative disputes, and has a constant influx of new cases.²⁷ However, this huge number of cases is not matched by the appropriate number of judges; the President and 40 judges can hardly handle this caseload.²⁸

The Court performs the judicial review in three-member judicial panels, which deliver decisions by majority vote, but there are no specialized panels or chambers. The Court assesses the procedural and

²⁵ Belgrade Center for Human Rights, *The Right to Asylum in the Republic of Serbia*, Belgrade, 2017, 44.

²⁶ Art. 11, 13, and 29 of the Law on Organization of the Courts, *The Official Gazette of the Republic of Serbia*, No. 116/08, 104/2009, 101/2010.

²⁷ In 2016 alone, 21,548 new cases were submitted to the Administrative Court. This increasing inflow of new cases is a consequence of the continuous extension of the Court’s jurisdiction, stipulated in new legislation (restitution, election cases, protection of labor rights of municipal public servants, etc.). See: Republic of Serbia, Supreme Court of Cassation, *Godisnji izveštaj o radu sudova u Republici Srbiji za 2016* [Annual Report on the Performance of the Courts in the Republic of Serbia for 2016], March 2017, 6, 8, available at: http://www.vk.sud.rs/sites/default/files/attachments/GODISNJI%20IZVESTAJ%20O%20RADU%20SUDOVA%20U%20REPUBLICI%20SRBIJI%20ZA%202016.%20GODINU_V6_0.pdf, last visited 2 October 2018; There are more than 200 laws and many more bylaws applied by judges of Administrative Court in their work. See the list of all laws applied by the Administrative Court: *Information Bulletin of the Administrative Court 2010–2016*, Administrative Court, Belgrade 2016, 42–53, available at: <http://www.up.sud.rs/uploads/pages/1459337890~Information%20Bulletin%20on%20Work%20of%20the%20Court%20March%202016.pdf>, last visited 2 October 2018.

²⁸ Art 6. of the Decision on the number of judges per courts, *The Official Gazette of the Republic of Serbia*, No. 88/2015. See: <http://www.up.sud.rs/cirilica/uredjenje>, last visited 2 October 2018; Additionally, the Rulebook on Internal Organization and Job Classification of the Administrative Court prescribes the Administrative Court has 123 employees, consisting of 101 civil servants and 22 civil appointees. See: <http://www.up.sud.rs/uploads/useruploads/sistematizacija/SISTEMATIZACIJA-2016.pdf>, last visited 2 October 2018.

substantial legality of final administrative or individual decisions, for cases not given any other judicial protection.²⁹ A final administrative or individual decision is one issued during the second-instance proceedings, or the first-instance proceedings where there is no right of appeal.³⁰

A plaintiff in an administrative dispute may be a natural person or legal person, claiming that some of his/her rights or statutory interests have been violated by an administrative or individual act. An administrative dispute can also be initiated by a public prosecutor or state attorney's office when the public interest or the property rights of the Republic of Serbia have been violated.³¹ On the other hand, the defendant in an administrative dispute is always an authority whose administrative or individual act is being disputed, or an authority who, upon request or appeal of a party, has failed to issue an administrative act ("administrative silence").³² An interested party is a person who would suffer a detrimental effect in the event that the administrative act is annulled,³³ thus being always on the side of a defendant.

An administrative dispute is initiated by filing a claim. In general, a claim can be submitted within 30 days of the day that an administrative act has been delivered to the party, or within the shorter period, set forth by the law.³⁴ The Court either upholds the claim or rejects the claim as groundless and it delivers the judgment to that effect.³⁵ Alternatively, the Court can find the claim inadmissible without entering into its merits.

The Court usually decides cases in limited jurisdiction, which means that after it upholds a claim and annuls the act, it returns the case to the competent authority for retrial.³⁶ However, the Court has also full jurisdictional power to replace an administrative authority's decision with its own, if the nature of the matter permits it and if the established facts provide a reliable basis for this. The exception exists when an administrative act is the result of discretionary power of the given authority, or if the law prohibits full jurisdiction. On the other hand, the

²⁹ Art. 3 of the Law on Administrative Disputes, *The Official Gazette of the Republic of Serbia*, No. 111/2009.

³⁰ Art. 14 of the Law on Administrative Disputes.

³¹ Art. 11 of the Law on Administrative Disputes.

³² Art. 12 of the Law on Administrative Disputes.

³³ Art. 13 of the Law on Administrative Disputes. *See also* Administrative Court Jurisdiction, available at: <http://www.up.sud.rs/english/jurisdiction>, last visited 2 October 2018.

³⁴ Art. 18 of the Law on Administrative Disputes. *See also* Administrative Court/ Transparency, available at: <http://www.up.sud.rs/english/questions-of-citizens>, last visited 2 October 2018.

³⁵ Art. 40 of the Law on Administrative Disputes.

³⁶ Art. 42 of the Law on Administrative Disputes.

Administrative Court is required to decide with full jurisdiction in cases where the repetition of the proceeding before the administrative authority would bring irreparable harm to the claimant and the Court has already established the facts of the case on its own.³⁷

The judgment issued in an administrative dispute cannot be appealed.³⁸ However, parties have two extraordinary legal remedies at their disposal: the motion to review a court decision,³⁹ and the reopening of the procedure.⁴⁰

The Court decides on the basis of facts established in the oral hearing.⁴¹ An oral hearing is especially required in the case of complex disputes, for the better understanding of the matter, in cases where parties with opposite interests participated in the administrative proceedings, or when the Court establishes the facts in order to resolve the dispute in full jurisdiction.⁴² However, the Court adjudicates without an oral hearing when the subject matter is such that it clearly does not require a direct hearing of the parties and special establishment of facts, or if the parties expressly accept this.⁴³ Thus, oral hearings “which should be the basic procedural instrument for establishing the factual ground in an administrative dispute, are still very rare.”⁴⁴

In general, hearings are public, and all adult citizens, as well as representatives of the media, have the right to attend them. However, the

³⁷ Art. 43 of the Law on Administrative Disputes. The Court should decide in full jurisdiction also in a case of obvious discrepancy between the true facts and the facts established in an administrative decision, or failure by the administrative authority to observe a previous annulment of its decision by the Court. *See*: V. Milutinović, T. Jovanić, “Serbia’s New Law on protection of Competition”, in D. Campbell (ed.), *Comparative Law Yearbook of International Business*, Kluwer Law International, Alphen aan den Rijn 2010, 104.

³⁸ Court judgments are binding and relatively unchangeable (there are no ordinary legal remedies), which reinforces the stability of the situation created or confirmed by them. D. Vasiljević, “Mandatory Character of Court Rulings and Their Execution According to new Serbian Law on Administrative Disputes”, *NBP – Journal of Criminalistics and Law* 3/2010, 17.

³⁹ A party or authorized public prosecutor may file, in limited cases, motion to review a final judgement of the Administrative Court before the Supreme Cassation Court. *See* Art. 49–55 of the Law on Administrative Disputes.

⁴⁰ A procedure concluded by a final judgment or a decision of the Court, may be reopened in the cases prescribed by law. Art. 56–65 of the Law on Administrative Disputes. *See also* Information Bulletin of the Administrative Court, 2010–2016, 41.

⁴¹ Art. 2 and 33 of the Law on Administrative Disputes.

⁴² Art. 34 of the Law on administrative disputes. *See also* Information Bulletin of the Administrative Court, 2010–2016, 41.

⁴³ Art. 33 of the Law on Administrative Disputes.

⁴⁴ Z. Lončar, “Administrative Court Control in the Republic of Serbia”, in M. Lazić, S. Knežević (eds.), *Legal, Social and Political Control in National, International and EU Law*, University of Niš Faculty of Law, Niš 2016, 131.

panel of judges may exclude the public from the entire hearing or from part of the hearing, for reasons of protection of national interest, public order and morals, as well as to protect the interests of juveniles or the privacy of the participants in the process.⁴⁵

4. THE ADMINISTRATIVE COURT ASYLUM CASE LAW

An asylum seeker who is not satisfied with the decision delivered by the Asylum Commission is entitled to file a claim with the Administrative Court. The new 2018 Law on Asylum and Temporary Protection provides that final (negative) decision will not become enforceable until the judicial review is completed.⁴⁶ Previously this had been just an option for the Court.⁴⁷ Bearing in mind that according to Article 13 of the European Convention on Human Rights and standards enshrined in the jurisprudence of the European Court of Human Rights, for a legal remedy to be considered effective the suspensive effect must apply automatically rather than be left to the discretion of the Court,⁴⁸ the new solution stipulated in Article 96, par. 2 of the Law on Asylum and Temporary Protection must be welcomed.

Since the establishment of the Administrative Court, the main obstacles in focusing greater attention on asylum issues have been its general workload and a relatively small number of asylum-related cases. By the end of 2017, the Administrative Court had delivered around 60 decisions in asylum cases. Much of the Court's caseload belongs to cases requiring urgent procedure, while paradoxically asylum cases do not belong here (neither under the law nor the Court's in-house regulations). Still, reasonable time standard seems to be followed as asylum judicial procedures usually last between 15 days and 10 months.

The analysis of the case law shows that several phases can be identified in dealing with asylum cases, which will be analyzed in the following text.

⁴⁵ Art. 35 of the Law on Administrative Disputes. *See also* Administrative Court – Transparency, available at <http://www.up.sud.rs/english/transparency>, last visited 2 October 2018.

⁴⁶ *See* Art. 23, par. 1. of the Law on Administrative Disputes; Art. 96, par. 2 of the Law on Asylum and Temporary Protection.

⁴⁷ According to Art. 23, par. 2 of the Law on Administrative Disputes, the Court may defer the enforcement of the final administrative act if such enforcement would cause the claimant damages that are difficult to reverse and the suspension is not in contravention of public interest and would not cause major or irreparable damage to the opposing party.

⁴⁸ *See, e.g. Gebremedhin (Gaberamedhien) v. France*, App. No. 25389/05, judgment from 26 April 2007, para. 66; *Hirsi Jamaa and Others v. Italy* (GC), App. No. 27765/09, judgment dated 23 February 2012, para. 200.

4.1. Initial Phase in Handling Asylum Cases (2010–2012)

The first judgment in an asylum case was delivered by the Administrative Court in June 2010. In this case, the asylum seeker claimed that his mental and physical health was not taken into consideration when reviewing his case, and that the denial of the refugee status prevented him from receiving medical assistance.⁴⁹ The Court abolished the decision and returned the case for re-decision, not because of substantive ground, but due to procedural reasons, finding a violation of Article 69 of the Law on General Administrative Procedure, which stipulates that a collegiate body must keep a special record of the deliberation and voting when passing a decision in the procedure.

In 2011, eight judgments in asylum cases were handed down by the Administrative Court and all claims were rejected. No less than seven cases concerned the application of the safe third country principle,⁵⁰ in which the asylum application was rejected on procedural grounds and without the assessment of the merits of the case. In all these cases, the Court rejected the claims relying on the provision which prescribes that an asylum application will be dismissed without examining the eligibility of an asylum seeker for the recognition of asylum if the administrative authority has established “that the asylum seeker has come from a safe third country, unless he/she can prove that it is not safe for him/her”.⁵¹

The first judgment was delivered in June 2011. It was based on the fact that the asylum application of an Uzbek national, who had come to Serbia from Russia, was rejected on the grounds that the asylum seeker had spent 10 years transiting through safe third countries. The administrative authority did not examine the substance of his application.⁵²

The Government adopted the List of Safe Third Countries in 2009,⁵³ and it was the position of the Administrative Court that the list should be applied automatically. However, this list can only be an illustration of human rights situations in different countries, and must always be interpreted, bearing in mind the current situation in particular country, and the possible consequences for the applicant. In particular, the Court considered irrelevant claims that the asylum procedure in a safe

⁴⁹ Administrative Court, 14 U.5754/10, judgment from 11 June 2010.

⁵⁰ The first document that mentions the application of this principle is the Resolution on a Harmonised Approach to Questions concerning Host Third Countries, 1992. For more on the application of this principle see: Krstić, Davinić, (2013b), 97–116.

⁵¹ Art. 33, par. 1 (6) of the Law on Asylum.

⁵² Administrative Court, 8 U 3815/11, judgment dated 7 July 2011.

⁵³ The decision determining the list of safe countries of origin and safe third countries, *Official Gazette of the Republic of Serbia*, No. 67/2009.

third country was inefficient and that there was no integration policy.⁵⁴ A similar position was taken by the Court in another case, where the asylum seeker stayed in Turkey and Greece, before transiting through FYROM.⁵⁵ The applicant claimed that he was not in a situation to apply for asylum in those countries given the position of asylum seekers and migrants there, which was documented in numerous reports by international organizations. However, the Administrative Court held that an asylum seeker stayed in Turkey for 3 months, and in Greece for eight months, having enough time and opportunities to apply for asylum there.⁵⁶ In another case, the Court also considered Romania and Montenegro to be safe third countries.⁵⁷

Nevertheless, in one case, the Court did not rely on the application of a safe third country principle, but found the claim unfounded, as the asylum seeker from Somalia provided many contradictory statements, which were not a result of suggestive questions raised during the hearing.⁵⁸ Three years later (2014), the Constitutional Court adopted a constitutional appeal,⁵⁹ and held that the Administrative Court in this judgment violated the right to a fair trial of an asylum seeker, for failing to provide reasons in the judgment.⁶⁰ The Constitutional Court also found that the Administrative Court had not assessed evidence provided by international organizations, states, NGOs and media, which reported a high level of violence in Somalia. The Constitutional Court emphasized that it was important to consider *ex officio* if a person deserves subsidiary protection, after the Administrative Court concludes that a refugee status cannot be

⁵⁴ For a review of this judgment, see Belgrade Center for Human Rights, *Human Rights in Serbia in 2011*, Belgrade 2012, 188, available at: <http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/04/Human-Rights-in-Serbia-A-Comprehensive-Report-for-2011-in-Serbian-and-English-2012..pdf>, last visited 2 October 2018.

⁵⁵ Administrative Court, 1 U 3554/11, judgment dated 6 October 2011. These three countries (Turkey, Greece and FYROM) were most often considered in asylum cases. See also Administrative Court, 13 U 11129/11, judgment dated 1 December 2011.

⁵⁶ *Ibid*; in another case, an asylum seeker stayed in Turkey for 5 years and in Greece for 5 months. Administrative Court, 15 U 10336/11, judgment dated 10 November 2011.

⁵⁷ Administrative Court, 2 U. 3555/11, judgment dated 14 December 2011.

⁵⁸ Administrative Court, 11 U. 7727/11, judgment dated 20 October 2011.

⁵⁹ See Constitutional Court, Uz – 6596/2011, decision dated 30 October 2014. A constitutional appeal may be lodged against individual acts or actions performed by state bodies or organizations entrusted with public powers, which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified (Constitution of the Republic of Serbia, Art. 170).

⁶⁰ The Court found that in this case Art. 32, par. 1 of the Constitution had been violated.

granted. Therefore, relying on this decision of the Constitutional Court, the Administrative Court annulled its own decision and ordered the Asylum Commission to assess all evidence and to decide if applicant is eligible for subsidiary protection, bearing in mind the current situation in his country of origin.

In 2012, the Administrative Court rejected all seven claims based on denial of asylum application. In the first case, the Administrative Court confirmed the decision of the Asylum Commission to reject the asylum application of a family from Iraq on the basis of the safe third country principle, as they had stayed in Turkey for two weeks, 25 days in Greece, and six days in FYROM, and had not apply for asylum there. The Court did not take into consideration the statement of the asylum seekers that Turkey did not accept refugees from their country of origin, and that conditions in Greece were very difficult for refugees.⁶¹ The same position was held in other cases, in which the Administrative Court ignored the claim of the extremely difficult position of migrants and refugees in the mentioned countries, and the fact that Serbia did not require any assurances that they would have access to asylum procedure if returned to any of these countries.⁶²

Another decision dealt with procedural safeguards: the plaintiff claimed guarantees regarding the right to translation were violated.⁶³ Namely, the official translator for Persian language (Farsi) was engaged, translating from Serbian into Farsi and vice versa, while another foreigner was translating to the asylum seeker from Farsi into Pashtu (his native language), and vice versa.⁶⁴ However, the Administrative Court found that guarantees regarding the right to translation were not violated as a foreigner who helped the translation was chosen by the asylum seeker, and there was no remark in the record that the asylum seeker did not understand any of the questions posed to him. The Court also elaborated that his claim was correctly dismissed on the grounds of the safe third country principle.

The application of the safe third country principle led some organizations to the conclusion that the right to asylum is illusory in Serbia, due to the fact that cases are not examined on their merits, and that the prohibition of non-refoulement is not observed in practice, as the

⁶¹ Administrative Court, 14 U 4132/11, judgment dated 2 February 2012.

⁶² Administrative Court, 1 U. 1902/12, judgment dated 4 July 2012; Administrative Court, 11 U. 4921/12, judgment dated 15 November 2012; Administrative Court, 23 U. 3831/12, judgment dated 11 October 2012.

⁶³ Art. 11 of the Law on Asylum and Art. 16, par. 3 of the Law on General Administrative Procedure.

⁶⁴ *See* Administrative Court, 16 U 3829/12, judgment dated 10 May 2012.

authorities automatically apply principles set out in the Law on Asylum.⁶⁵ At the same time, the UNHCR published observations finding many deficiencies in the asylum system due to which Serbia cannot be considered a safe third country.⁶⁶ The UNHCR especially underlined that the Administrative Court generally conducts its review based solely on procedural grounds, without assessing the substance of asylum claims related to the existence of a well-founded fear of persecution.⁶⁷

Nevertheless, the positive approach of the Administrative Court is reflected in its position that the party was exempted from payment of court fees, bearing in mind its financial situation.⁶⁸ This decision is very important as there is no provision of automatic exemption of court fees for asylum seekers, but the Court recognized their vulnerable position. In another case, the Administrative Court dismissed the claim that the asylum procedure was illegally suspended, as an asylum seeker left the Asylum Center without notification. He was later returned to Serbia under the readmission agreement with Croatia, where he illegally crossed the border.⁶⁹ The Administrative Court relied properly on provisions of the Law on Asylum,⁷⁰ which stipulate that the procedure for granting asylum will be suspended *ex officio* if an asylum seeker leaves the Republic of Serbia without the approval of the Asylum Office.

Despite some positive trends, it must be concluded that the Administrative Court during this period relied heavily on the safe third country principle, without examining the consequences for each individual if returned to a particular country. Furthermore, the Court did not decide any asylum case with full jurisdiction, and did not hold oral hearings, basing its judgments solely on the facts provided by administrative authorities. Finally, the Court did not mention in its judgments the relevant international law, especially the European Convention on Human Rights, as the claimant in several cases asserted a violation of this instrument.

⁶⁵ See, e.g., Belgrade Center for Human Rights, *Human Rights in Serbia in 2012*, Belgrade 2013, 268, available at: <http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/12/Human-Rights-in-Serbia-2012.pdf>, last visited 2 October 2018.

⁶⁶ UNHCR, *Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, available at: <http://www.refworld.org/docid/50471f7e2.html>, last visited 2 October 2018.

⁶⁷ *Ibid.*, 14.

⁶⁸ Administrative Court, III-4 U. 24223/10, judgment dated 13 July 2012. The Court relied on Art. 10 of the Law on Court Fees, *The Official Gazette of the Republic of Serbia*, No. 28/94, 53/95, 16/97, 34/2001, 9/2002, 29/2004, 61/2005, 116/2008, 31/2009, 101/2011, 93/2012, 93/2014, 106/2015.

⁶⁹ Administrative Court, 6 U. 4245/12, judgment dated 13 December 2012.

⁷⁰ Art. 34, par. 1 (4) of the Law on Asylum.

4.2. Intermediate Phase in Dealing with Asylum Cases (2013–2015)

In 2013 the Administrative Court delivered nine judgments in asylum cases, in all of which the claims were rejected. The issue of indirect translation was again raised in 2013.⁷¹ Here, the asylum seeker claimed that another foreigner was translating for him from English to Somalian and vice versa, and that this practice represents violation of Article 18 of the Law on Asylum, which prescribes that data obtained in the course of the asylum procedure constitutes an official secret and access to it is allowed only to persons authorized by law. The Court properly rejected this claim, finding that the foreigner was an authorized person according to Article 11, par. 2 of the said Law, which stipulates that an asylum seeker may engage an interpreter of his/her own choice.

The trend of rejecting claims on procedural grounds, invoking the safe third country principle, continued.⁷² Nevertheless, in a judgment from March 2013,⁷³ the Administrative Court mentioned for the first time the claim that Greece cannot be considered safe third country following the ECtHR's judgment in *M.S.S. v. Belgium and Greece*.⁷⁴ However, the Court erred in holding that the judgment of the ECtHR can be relevant only if an asylum seeker claims that one of his/her human rights guaranteed by the ECHR has been violated in an administrative or judicial proceeding in Serbia.⁷⁵ The ECHR is a part of the Serbian legal system and has supremacy over national legislation, according to Article 16, par. 2 of the Serbian Constitution,⁷⁶ which means that all laws, including the Law on Asylum, must be interpreted with standards enshrined in the jurisprudence of the ECtHR.

In another case, for the first time the plaintiff raised not only the issue of an application of the *M.S.S.* judgment, but also the UNHCR's

⁷¹ Administrative Court, 20 U 6399/12, judgment dated 15 March 2013. *See also* Administrative Court, 9 U 17468/12, judgment dated 13 February 2013.

⁷² *See* Administrative Court, 21 U 3553/11, judgment dated 28 February 2013, as well as Administrative Court, 5 U 3830/12, judgment dated 12 September 2013.

⁷³ Administrative Court, 1 U. 540/13, judgment date 20 March 2013.

⁷⁴ This case concerns the transfer of an Afghan national from Belgium to Greece under the Dublin II Regulation. The Court found that Greece violated Art. 3 of the ECHR of hard living conditions, and Art. 13 regarding deficiencies in the Greek asylum procedure and the risk of expulsion to his country of origin. Also, Belgium was found responsible for sending him to Greece and thus, exposing him to the risk of being sent to his country of origin, and exposing him to hard living conditions in this country. *See* ECtHR, *M.S.S. v. Belgium and Greece* (GC), App. No. 30696/09, judgment from 21 January 2011.

⁷⁵ The same argument was given in Administrative Court, 3 U. 1371/13, judgment dated 20 March 2013, Administrative Court, 23 U. 1280/13, judgment dated 28 March 2013, Administrative Court, 4 U. 9049/14, judgment dated 1 September 2014.

⁷⁶ Constitution of the Republic of Serbia, *The Official Gazette of the Republic of Serbia*, No. 98/2006.

observations on Serbia as a country of asylum, as well as the Constitutional Court's finding that the safe third country principle cannot be applied automatically and that it must be assessed taking into consideration UNHCR reports on a situation in the given country.⁷⁷ In its decision, which was challenged by the plaintiff, the Asylum Commission explained that the situation in Greece had improved after the delivery of the ECtHR's judgment. It also underlined that the ECtHR's judgments are applicable only if the issue in question is the same or relevantly similar to the one examined in the ECHR judgment. The Administrative Court assessed the situation extensively and concluded that the asylum seeker had not proven that Greece was not safe for him.⁷⁸ The Court came to a similar conclusion in cases relating to the situations in FYROM⁷⁹ and Turkey.⁸⁰

These cases illustrate that the Court had started to focus on the issue of whether the countries on the government list were personally safe for asylum seekers, although in a majority of cases it found that a person had not presented enough evidence to prove that they were not safe for her/him. This was a positive trend, taking into account that the Court previously automatically rejected the claims, on the grounds that the given country was on the safe third country list.

The turning point in the case law of the Administrative Court was 2014, when the Asylum Commission's decisions were overturned for the first time. There is one judgment which is of particular importance, as the Court held that the Asylum Commission had not fulfilled its obligation to assess all the allegations in the appeal and performed a "mere blanket" review of the arguments, concluding that one of the safe third countries that the asylum seeker passed through had been safe for her personally.⁸¹ In another case, the Court agreed with the plaintiff that the Asylum Commission had failed to explain why it had upheld the first-instance decision and why it had dismissed arguments raised in the appeal.⁸²

In 2015 the Administrative Court upheld the claims in six cases, which is the record. In most of them (five cases), the Administrative Court annulled the decision of the Asylum Commission due to violation of Article 235, par. 2 of the Law on the General Administrative Procedure, finding that the rationale of a Commission's decision did not contain the reasons why the claims were rejected.⁸³ Furthermore, the Administrative

⁷⁷ Constitutional Court, Uz 1286/2012, decision dated 29 March 2012.

⁷⁸ Administrative Court, 21 U. 3553/11, judgment dated 28 February 2013.

⁷⁹ Administrative Court, 20 U. 6399/12, judgment dated 15 March 2013.

⁸⁰ Administrative Court, 3 U. 6450/13, judgment dated 30 May 2013.

⁸¹ See Administrative Court, 7 U. 3834/12, judgment dated 7 February 2014.

⁸² Administrative Court, 8 U. 18705/13, judgment dated 21 February 2014.

⁸³ See Administrative Court, 21 U. 15736/13, judgment dated 9 March 2015; Administrative Court, 12 U. 17279/13, judgment dated 10 July 2015; Administrative

Court held that it is important to review all the facts in asylum cases in order to satisfy requirements from the ECHR, which is an integral part of the legal system in Serbia.⁸⁴ The Court also recognized the importance of the application of Article 15 of the Law on Asylum, which guarantees the provision of care for persons with special needs,⁸⁵ as in the given case the person had serious a psychological disorder, yet a guardian was not provided during certain parts of the procedure.⁸⁶

Only in one case in 2015 did the Court reject the claim. In that case, a French citizen argued that his own life and the life of his daughter were endangered by Albanians living in France, owing to his website where he showed sympathy for Serbian people who live in Kosovo. However, the Court found that France is to be considered a safe country of origin,⁸⁷ and particularly emphasized that the asylum seeker did not ask the French authorities for protection.⁸⁸

What we conclude about this phase is that in the majority of cases the Court did not automatically apply the safe third country concept and that it started to rely on certain relevant international sources. Furthermore, the Court started to overturn the Asylum Commission decisions, requesting to assess all evidences in asylum cases. It is also important to underline that the Court's case law from 2015 significantly improved the quality of decision-making of the administrative authorities dealing with asylum cases, which is reflected in their more balanced approach to the safe-third country principle. This conclusion was also drawn by NGO's dealing

Court, 25 U. 6368/15, judgment dated 8 October 2015; Administrative Court, 19 U. 14706/14, judgment dated 15 October 2015; Administrative Court, 19 U. 8792/14, judgment dated 15 October 2015.

⁸⁴ See Administrative Court, 19 U. 8792/14, judgment dated 15 October 2015.

⁸⁵ These categories are: minors or persons completely or partially deprived of legal capacity, children separated from parents or guardians, persons with disabilities, elderly people, pregnant women, single parents with minor children and persons who were subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

⁸⁶ See Administrative Court, 21 U. 15736/13, judgment dated 9 March 2015.

⁸⁷ According to Art. 2 of the Law on Asylum, safe country of origin is "a country from a list established by the government whose national an asylum seeker is (...), which has ratified and applies international treaties on human rights and fundamental freedoms, where there is no danger of persecution for any reason which constitutes grounds for the recognition of the right to refuge or for granting subsidiary protection, whose citizens do not leave their country for those reasons, and which allows international bodies to monitor the observance of human rights."

⁸⁸ The Administrative Court found that administrative bodies correctly applied Art. 33, par. 1 (4) of the Law on Asylum. This provision stipulates the following: "The Asylum Office shall dismiss an asylum application without examining the eligibility of an asylum seeker for the recognition of asylum if it has established: ... 4) that the asylum seeker can receive protection from a safe country of origin, unless he/she can prove that it is not safe for him/her."

with asylum cases.⁸⁹ However, despite these positive trends, the Court did not decide cases with its full jurisdiction. Furthermore, it held that oral hearings were unnecessary and the matters under dispute were resolved relying only on the facts provided by the administrative authorities.

4.3. Most Recent Phase in Handling Asylum Cases (2016–2017)

The most recent phase was marked with the closure of the Balkans route in March 2016, which also influenced the more restrictive approach of the Administrative Court in dealing with asylum cases. In 2016 the Court rejected six claims and upheld only one.⁹⁰ Furthermore, it dismissed one claim in a distinctive case. Namely, a claim was filed by the Asylum Office against the Asylum Commission's decision granting subsidiary protection to a married couple from Libya. Here the Administrative Court dismissed the claim finding that Asylum Office, as the first instance body, was not competent to appeal decisions of the second instance authority.⁹¹ It is obvious that the first-instance authority cannot challenge the higher, appellate authority's decision before the Administrative Court, given that they belong to the same branch of government and that they are in a hierarchical relationship.

Only in one case was the claim upheld, when the Court found procedural errors in the decision of the first-instance body, but failed to discuss whether Montenegro can be considered a safe third country for the asylum seeker.⁹²

As previously mentioned, the Court rejected claims in all other cases. In one case,⁹³ the Administrative Court confirmed that it was lawful to reject the asylum application of a Libyan family for security reasons and to deport them to the country of origin, despite numerous reports and the UNHCR position urging states "to suspend forcible returns to Libya, including Tripoli, until the security and human rights situation

⁸⁹ See Belgrade Center for Human Rights, *Pravo na azil u Republici Srbiji u 2015 [The Right to Asylum in the Republic of Serbia in 2015]*, Belgrade 2016, 62, available at: http://azil.rs/azil_novi/wp-content/uploads/2016/12/Azil-2016-SRP.pdf, last visited 2 October 2018.

⁹⁰ Belgrade Center for Human Rights, *Right to Asylum in the Republic of Serbia in 2016*, Belgrade 2017, 55, available at: <http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2017/03/Right-to-Asylum-in-the-Republic-of-Serbia-2016-2.pdf>, last visited 2 October 2018.

⁹¹ Art. 11 of the Law on Administrative Disputes entitles natural or legal persons to file a claim in cases where an administrative act has violated their rights or legally vested interests.

⁹² Administrative Court, 16 U. 5572/16, judgment dated 14 July 2016.

⁹³ Administrative Court, 16 U. 6304/16, judgment dated 26 May 2016.

has improved considerably.”⁹⁴ The applicants had been temporarily residing in Serbia since 2010, and in 2015 the Ministry of Interior cancelled their residence permits on grounds of national security, ordering them to leave Serbia. Following this decision, they submitted asylum applications which were rejected due to security reasons and the fact that they allegedly intended to misuse asylum proceedings with the aim of avoiding deportation. Also, it was found that they did not face any risk in Libya, proven by the fact that they had visited country of origin twice, in 2013 and in 2014. The Administrative Court ignored the UNHCR intervention in the case and rejected the claim. Therefore, the Belgrade Center for Human Rights, a NGO providing free legal aid to asylum seekers, requested an interim measure by the ECtHR, which was issued on 1 July 2016, suspending the family’s return to Libya.⁹⁵

In all the other cases where it rejected claims, the Court confirmed that asylum seekers could submit an asylum application in safe third countries in which they had stayed or transited. The impression is that the Court did so more strictly than in previous years, relying on the 2009 government list, which had not been amended in 8 years, despite major changes in some of the countries from the list. The Court reasoned that different international and national NGO reports did not constitute evidence *per se* that a given country cannot be considered safe, but that in each case the asylum seeker needed to prove that he/she would be personally at risk of being subjected to ill-treatment or returned to the country where his/her life, liberty or security would be at risk.⁹⁶ We consider this argument of the Court to be balanced and justified. However, in some cases the Court held that the authorities are not under obligation to assess whether a certain state is considered safe, but are under the duty to acknowledge them as such because they are on the government list.⁹⁷

This trend continued in 2017 when the Court rejected several claims, on the ground that Hungary,⁹⁸ Bulgaria⁹⁹ and FYROM¹⁰⁰ are

⁹⁴ UNHCR, *UNHCR Position on Returns to Libya – Update I*, October 2015, para. 28, available at: <http://www.refworld.org/docid/561cd8804.html>, last visited 2 October 2018.

⁹⁵ *A. and Others v. Serbia*, App. No. 37478/16, 30 June 2016; Belgrade Center for Human Rights, *Right to Asylum in the Republic of Serbia in 2016*, 57.

⁹⁶ *See, e.g.*, Administrative Court, 17 U. 8414/16, judgment dated 2 September 2016.

⁹⁷ Administrative Court, 21 U. 8539/16, judgment dated 7 October 2016.

⁹⁸ Administrative Court, 4 U. 3027/17, judgment dated 7 April 2017.

⁹⁹ Administrative Court, 7 U. 12672/16, judgment dated 12 January 2017; Administrative Court 25 U. 12673/16, judgment dated 20 January 2017; Administrative Court, 1 U. 13344/16, judgment dated 23 March 2017.

¹⁰⁰ Administrative Court, 9 U. 14748/16, judgment dated 9 May 2017; Administrative Court, 7 U. 14749/19, judgment dated 9 June 2017.

considered safe third countries. The Court did not pay too much attention to UNHCR reports on these countries,¹⁰¹ as well as on the ECtHR judgment *Ilias and Ahmed v. Hungary*, dated 14 March 2017.¹⁰² This case concerned two Bangladeshi nationals who transited through Greece, FYROM and Serbia before reaching Hungary, where they immediately applied for asylum. They were held in a transit zone for 23 days and then sent back to Serbia, based on a Hungarian Government's Decree from 2015, listing Serbia as a safe third country. The ECtHR found serious deficiencies in the Hungarian procedure regarding provision of necessary protection against a real risk of ill-treatment. The Court also observed that in 2012 the UNHCR urged states not to return asylum seekers to Serbia as the country lacked a fair and efficient asylum procedure and there was a real risk that asylum seekers would be returned to FYROM.¹⁰³

It is obvious that the positive trend from 2014 and 2015 did not continue in 2016 and the first half of 2017, when the Court started to apply the concept of a safe third country more restrictively than before. Yet, it is an obligation of public authorities, including the Court, to assess all evidence in the case, especially relevant and reliable reports of different international organizations, in order to come to conclusion on whether a certain country, even one from the Government's list, is safe or not for a particular asylum seeker.

This trend was discontinued in September 2017, when the Court abolished two decisions of the Asylum Commission concerning citizens of Cuba who left their country of origin fearing persecution on the grounds of sexual orientation.¹⁰⁴ The Court emphasized that the government list cannot be applied automatically, and that asylum bodies need to take into account UNHCR reports, as well as reports of NGOs dealing with human rights protection of refugees in the given country.

Nonetheless, the Court continued to refuse to hear the cases in full jurisdiction, claiming that it was important to repeat the procedure in order to satisfy lawfulness and comprehensiveness of the decision-making process. However, in some cases, it annulled the decision of the Asylum

¹⁰¹ For example UNHCR, *Hungary as a country of asylum – Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016, available at: <http://www.refworld.org/docid/57319d514.html>, last visited 2 October 2018; UNHCR, *The Former Yugoslav Republic of Macedonia as a country of asylum: Observations on the situation of asylum – seekers and refugees in the Former Yugoslav Republic of Macedonia*, August 2015, available at: <http://www.refworld.org/docid/55c9c70e4.html>, last visited 2 October 2018.

¹⁰² ECtHR, *Ilias and Ahmed v. Hungary*, App. No. 47287/15, judgment dated 14 March 2017.

¹⁰³ *Ibid*, para. 121.

¹⁰⁴ Administrative Court, 3 U. 11867/17, judgment dated 7 September 2017; Administrative Court, 3 U. 11868/17, 7 September 2017.

Commission for a second time, delaying adoption of a final decision in an already lengthy procedure. Finally, thus far the Court has not handled asylum cases on the merits of their asylum applications, regarding the existence of a well-founded fear of persecution. This approach would require more specialization and knowledge on relevant international and European standards on asylum and migration.

5. BUILDING THE CAPACITY OF THE ADMINISTRATIVE COURT FOR HANDLING ASYLUM CASES

As mentioned before, there are no specialized panels at the Administrative Court. The analyzed practice shows that judges of the Court lack specialization in asylum law, especially knowledge of relevant rules of international law, which is needed more than in any other field within the jurisdiction of the Court.

Since 2010 there have been several trainings organized on the topic of asylum. However, training sessions on asylum issues for all judges of the Court are very rare. The reason for this is the fact that only give days per year are designated for different trainings, and some other topics definitely have priority, bearing in mind the very broad jurisdiction of the Court. Thus far, only one training in this area was organized for all judges, in the second half of 2015, after the outbreak of the migrant crisis. Other trainings were organized on an *ad hoc* basis, for 4 to 5 judges, focusing on the application of the ECHR in asylum-related matters.¹⁰⁵

In order to gain insight into opinions on asylum matters, the authors sent a questionnaire to judges of the Court. The questionnaire consisted of 10 questions and 10 judges responded to it. The majority of judges (90%) responded positively that the trainings that they participated in were useful for them, while only one judge said that trainings should be more practically oriented. Also, three judges additionally commented that more asylum-related trainings should be organized due to current migration situation and the need to protect the human rights of migrants.

All judges responded that it is possible to provide specialized panels within the Court if the number of judges increases, while some of them (40%) added that this would be possible if a two-tier administrative justice system were to be introduced in Serbia. They all believe that

¹⁰⁵ For example, three judges participated in an international conference on the common EU asylum system, which was held in Oslo (Norway) in May 2016. The event was organized by EASO and International Association of Refugee Law Judges. See European Asylum Support Office (EASO), *Newsletter – May 2016*, 11, available at: <https://www.easo.europa.eu/sites/default/files/newsletters/EASO%20Newsletter%20May%202016%201500.pdf>, last visited 2 October 2018.

specialization is necessary, bearing in mind the very broad jurisdiction of the Court. Some judges (30%) also said that specialization would contribute to the more efficient work of the Court, especially in urgent matters. However, while some judges (40%) responded that specialization in asylum issues is necessary, a majority of judges (60%) believe that it is not necessary, as there is an insignificant number of asylum cases thus far.

Regarding the full jurisdiction, the opinion of judges varied: the majority of them (60%) were of the opinion that full jurisdiction for asylum cases is not possible or necessary. They gave different reasons for that: case overload, small number of judges, and lack of specialization. Some of them went even further, elaborating that the main role of the Court is not to decide on administrative matters, as this is the duty of the administrative bodies, trained in these matters. They add that the role of the Court is to assess whether an administrative body acted lawfully in the decision-making process.

Half of the judges responded that it would be beneficial to organize training on techniques of interviewing asylum seekers, bearing in mind their vulnerability and special status. One judge said that she was not sure, bearing in mind that from January to July 2017, they had only 3 asylum cases. Another judge explained that judges, due to their vocation, must be educated and trained in asylum matters, while a third judge reasoned that it would be necessary only for judges specializing in asylum matters. Two judges did not explain their negative answer.

A great majority of judges (80%) responded that it would be useful to have additional trainings on some other issues, but they did not specify the exact areas, with the exception of three judges who named the following topics: temporary measures, relevant EU directives, and the jurisprudence of the ECtHR. Four judges also said that it would be useful to have a handbook on migration, with a selection of human rights terms. Additionally, one judge particularly underlined the need to have trainings and materials that would present relevant domestic and international case law.

Eight judges (80%) responded to the question related to the possible abolishment of the Asylum Commission. All of them believe that the Asylum Commission is still necessary and competent to handle asylum cases. Some judges did not refer to the Asylum Commission, but explained that it is important to preserve the two-instance administrative proceedings, especially prior to the introduction of a two-tier administrative justice system.

Regarding possible introduction of this system, where the appeal would be a regular legal remedy against the first-instance judgment, a great majority of judges (90%) responded positively to this question.

However, two judges added that it is not necessary for all legal areas and that the experience of other countries would be a valuable source of information in this matter.

Furthermore, all judges responded that the number of judges is the weakest point in the operation of the Court, as is the breadth of the Court's jurisdiction, lack of specialization, and absence of systemic education of court assistants, especially in legal writing. One judge also said that one of the pitfalls in the work of the Court is the insufficient number of assistants, while two judges referred to the election of judges and the need for their better qualification for the given task.

Some general conclusions can be drawn from the questionnaire: asylum is not perceived as a matter of particular importance to the Court. Specialization is necessary but possible only following the fulfilment of certain conditions. Abolition of the Asylum Commission is currently not an appropriate solution, and a two-tier administrative justice system is desirable but not for all legal areas. The Court has limited capacities to handle asylum cases in full jurisdiction, mainly due to lack of specialized panels. Finally, additional training is necessary, but it should be more practically oriented, focusing on relevant domestic and international case law.

6. CONCLUDING REMARKS AND RECOMMENDATIONS

The Administrative Court has been dealing with asylum cases since 2010, when it was established, as a national administrative court of special jurisdiction. The analysis of the case-law presented in this paper demonstrates that the best period in dealing with asylum cases was 2015, during which judgements of the Court significantly improved the quality of decision-making by the administrative authorities. However, in 2016 and first half of 2017 the Court again took a more restrictive approach, applying almost automatically the third safe country concept and avoiding to decide on the substance of the asylum claims concerning the existence of a well-founded fear from persecution.

There are several reasons for this approach of the Court in asylum matters: it has a very broad jurisdiction and relatively small number of asylum cases, which is why many judges do not see asylum as a priority. Also, judges lack specialization in asylum law, especially related to relevant international and European standards. Specialization of judges of the Court is of utmost importance since they apply more than 200 different pieces of legislation and many more bylaws. Research showed that until the end of 2016, 34 out of the 40 judges were assigned asylum cases, some of whom decided only one, while others ruled in eight cases. As a

consequence, different judge panels have different knowledge in the field of asylum. Nevertheless, the average number of asylum cases per judge is 4 to 5, which is not enough to develop knowledge and skills to adjudicate this complex matter. This is the main reason why the authors believe that it is still premature to abolish a second-instance administrative body, the Asylum Commission, as a necessary “filter” between the Asylum Office and the Administrative Court, despite certain deficiencies in its establishment and functioning. Additionally, as some judges have pointed out, this would be possible only after several reforms: the introduction of a two-tier administrative justice system, an increase in the number of judges, an increase in the number of educated and well-trained assistants, as well as the introduction of specialized judge panels.

It is troublesome that the Court has a practice of ruling on the disputes without holding oral hearings, and that it has never decided an asylum case with full jurisdiction. The authors believe that excessive caseload and the lack of specialized panels are the main reasons for such practices.

In order to increase the capacity of the Court to conduct oral hearings in asylum cases, the authors suggest organizing a training session on developing techniques of interviewing sensitive plaintiffs. An review of the conducted trainings has shown that the judges did not have adequate opportunities to develop their practical skills. The proposed training should also include sensitive communication techniques and breaking with stereotypes and prejudices towards different cultures and their customs.

Judges particularly highlighted the need to have tools for the very complex and living jurisprudence of the ECtHR in asylum cases. They are not equipped to follow this jurisprudence by themselves, as they are overloaded with cases. A further important barrier is the lack of adequate knowledge of the English language. Taking into consideration that the jurisprudence of the ECtHR is evolving and that it is impossible to follow it without proper knowledge of English, it is recommended that judges are offered a course in legal English which would enhance their capacity to read judgments directly.

However, in a meantime, the authors suggest preparation of a handbook on the application of the asylum-related jurisprudence of the ECtHR for the judges, and further support on complex issues related to migration and asylum. Additionally, the authors recommend preparation of a glossary with terms used in migration, asylum and refugee law. This glossary would consist of the most important terms, defined according to national law. Each term would also be explained from the international perspective, mentioning some leading cases and the principles that are derived from them. This would allow judges to assess whether domestic

law stipulates a lower level of protection, which should then be corrected in the decision-making process.

Finally, it is of great importance that judges are capacitated to obtain evidence by investigating different sources for themselves, such as information provided in reports published by the UNHCR and relevant international and local organizations. As a result, they would better understand the consequences of the application of safe third country principle in each case, and why it is important to consider the merits of asylum cases. Only by achieving this would they be capable of protecting the human rights of asylum seekers, not only in a lawful, but also in a balanced and just way.

REFERENCES

- “Administrative Court – Transparency”, available at: <http://www.up.sud.rs/english/transparency>, last visited 2 October 2018.
- Barlai, M. et al. M. (eds.), *The Migrant Crisis: European Perspectives and National Discourses*, Studien zur politischen Kommunikation, LIT Verlag, Berlin–Münster–Wien–Zürich–London 2017.
- Belgrade Center for Human Rights, *Human Rights in Serbia in 2011*, Belgrade 2012, available at: <http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/04/Human-Rights-in-Serbia-A-Comprehensive-Report-for-2011-in-Serbian-and-English-2012..pdf>, last visited 2 October 2018.
- Belgrade Center for Human Rights, *Human Rights in Serbia in 2012*, Belgrade 2013, available at: <http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/12/Human-Rights-in-Serbia-2012.pdf>, last visited 2 October 2018.
- Belgrade Center for Human Rights, *Right to Asylum in the Republic of Serbia in 2016*, Belgrade 2017, available at: <http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2017/03/Right-to-Asylum-in-the-Republic-of-Serbia-2016-2.pdf>, last visited 2 October 2018.
- Belgrade Center for Human Rights, *Right to Asylum in the Republic of Serbia in 2015*, Belgrade 2016, available at: <http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2016/05/Azil-2016-ENG.pdf>, last visited 2 October 2018.
- Buonanno, L., “The European Migration Crisis”, in D. Dinan, N. Nugent, W. E. Paterson (eds.), *The European Union in Crisis*, Palgrave, London 2017, 100–129.
- Cucić, V., “Administrative Appeal in Serbian Law”, *Transylvanian Review of Administrative Sciences* 32/2011, 50–73.

- Cucić, V., “Appeals in Special Administrative Domains”, *Transylvanian Review of Administrative Sciences* 34/2011, 63–79.
- Davinić, M., “The EU Enlargement and Accession Procedure – The Case of Western Balkan Countries”, *Zeitschrift für Europarechtliche Studien* 4/2017, 513–526.
- Davinić, M., “The Role of Public Administration of the Republic of Serbia in Managing the Migrant Crisis”, in M. M. Boguslawskij *et al.* (eds.), *Migrationsrecht im östlichen Europa, Die Kieler Ostrechts-Notizen*, Institut für Osteuropäisches Recht der Universität Kiel, Kiel 2017, 29–37.
- European Asylum Support Office (EASO), *Newsletter – May 2016*, available at: <https://www.easo.europa.eu/sites/default/files/newsletters/EASO%20Newsletter%20May%202016%201500.pdf>, last visited 2 October 2018.
- Information Bulletin of the Administrative Court, 2010–2016*, Administrative Court, Belgrade 2016, available at: <http://www.up.sud.rs/uploads/pages/1459337890~~Information%20Bulletin%20on%20Work%20of%20the%20Court%20March%202016.pdf>, last visited 2 October 2018.
- Johnson, M., *The European Migrant Crisis: Unprecedented Displacement on an International Scale*, CreateSpace Independent Publishing Platform, 2015.
- Krstić, I., Davinić, M., “The Efficiency of Serbian Asylum Procedure”, in M. Bungenberg, T. Giegerich, T. Stein (eds.), *Asyl und Migration in Europa – rechtliche Herausforderungen und perspektiven*, Zeus Sonderband 2016, Nomos, Europa Institut, Baden-Baden 2016.
- Krstić, I., Davinić, M., “Zloupotreba koncepta sigurne treće zemlje [The Misuse of the Concept of the Safe Third Country]”, in R. Vasić, I. Krstić (eds.), *Development of Serbia’s legal system and harmonization with the EU law*, University of Belgrade Faculty of Law, Belgrade 2013, 97–116.
- Krstić, I., Davinić, M., *Pravo na azil – međunarodni i domaći standardi [The Right of Asylum – International and National Standards]*, University of Belgrade Faculty of Law, Belgrade 2013.
- Krstić, I., “Response of Western Balkan Countries to Migration Crisis”, in *Zeitschrift für Europarechtliche Studien* 4/2017, 527–540.
- Lončar, Z., “Administrative Court Control in the Republic of Serbia”, in M. Lazić, S. Knežević (eds.), *Legal, Social and Political Control in National, International and EU Law*, University of Niš Faculty of Law, Niš 2016, 119–136.
- McDonald-Gibson, C., *Cast Away: True Stories of Survival from Europe’s Refugee Crisis*, Portobello Books, London 2017.

- Milovanović, D., Davinić, M., Cucić, V., “Efficiency of the Administrative Appeal (The Case of Serbia)”, *Transylvanian Review of Administrative Sciences* 37/2012, 95–111.
- Milutinović, V., Jovanić, T., “Serbia’s New Law on Protection of Competition”, in D. Campbell (ed.), *Comparative Law Yearbook of International Business*, Kluwer Law International, Alphen aan den Rijn 2010, 79–106.
- Rakić, D. (ed.), *Ljudska prava izbeglica, interno raseljenih lica, povratnika, azilantata i žrtava trgovine ljudima u Srbiji i Crnoj Gori [Human Rights of Refugees, Internally Displaced Persons, Returnees, Asylum Seekers and Victims of Human Trafficking in Serbia and Montenegro]*, Group 484, Belgrade 2006.
- Republic of Serbia, the Supreme Court of Cassation, *Godišnji izveštaj o radu sudova u Republici Srbiji za 2016 [Annual Report on the Performance of the Courts in the Republic of Serbia for 2016]*, March 2017, available at: <http://www.vk.sud.rs>, last visited 2 October 2018.
- Stojić Mitrović, M., “Serbian migration policy concerning irregular migration and asylum in the context of the EU integration process”, *Issues in Ethnology and Anthropology* 4/2014, 1105–1120.
- UNHCR, *Hungary as a country of asylum – Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016, available at: <http://www.refworld.org/docid/57319d514.html>, last visited 2 October 2018.
- UNHCR, *Serbia as a country of asylum, Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, available at: <http://www.refworld.org/docid/50471f7e2.html>, last visited 2 October 2018.
- UNHCR, *The Former Yugoslav Republic of Macedonia as a country of asylum: Observations on the situation of asylum-seekers and refugees in the Former Yugoslav Republic of Macedonia*, August 2015, available at: <http://www.refworld.org/docid/55c9c70e4.html>, last visited 2 October 2018.
- UNHCR, *UNHCR Position on Returns to Libya – Update I*, October 2015, available at: <http://www.refworld.org/docid/561cd8804.html>, last visited 2 October 2018.
- UNHCR, *Serbia Update 17–30 September 2018*, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/66098.pdf>, last visited 2 October 2018.
- Vasiljević, D., “Mandatory Character of Court Rulings and Their Execution According to New Serbian Law on Administrative Disputes”, *NBP – Journal of Criminalistics and Law* 3/2010, 17–25.

Vučetić, D., “Distinctive Features of Special Administrative Proceedings in Health Care Matters”, in M. Lazić, S. Knežević (eds.), *Legal, Social and Political Control in National, International and EU Law*, University of Niš Faculty of Law, Niš 2016, 179–202.

Article history:

Received: 10. 09. 2018.

Accepted: 29. 11. 2018.