

THE ROLE OF THE SERBIAN CONSTITUTIONAL COURT IN THE AREA OF ASYLUM AND MIGRATION

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ABSTRACT

The Constitutional Court in Serbia protects the constitutionality and legality of human rights and freedoms guaranteed by the 2006 Constitution. However, its role in asylum- and migration-related matters is limited. There are two reasons for this: the Court very narrowly interprets its own competencies which results in the rejection of the majority of constitutional complaints, and the Court serves as a protector of state authorities rather than a protector of the human rights of asylum seekers, refugees, and migrants. The jurisprudence of the Constitutional Court in this area relates to several matters: the application of a safe third country principle, rights concerning the asylum procedure, and issues relating to the freedom of movement and detention of migrants. Therefore, the Court has been unable to develop clear and coherent practice in this area. However, it is worth noting that the Court invokes relevant standards derived from the jurisprudence of the European Court of Human Rights, although the application of those standards usually does not lead to a decision to uphold the constitutional complaint. It also relies on other international sources, such as the UN Refugee Agency reports on specific countries, various United Nations and Council of Europe instruments, and reports of non-governmental organisations. Finally, the Court is not interested in the case law of the Court of Justice of the European Union (EU), despite the fact that Serbian legislation in this area is inspired by the EU acquis. Serbia is not a member state of the EU, but as a candidate country it is in the process of aligning its own legislation and practice, and referral to the jurisprudence of the Court of Justice would provide guidance on how to interpret domestic provisions, such as subsidiary protection.

KEYWORDS

asylum procedure
Administrative Court
Constitutional Court
safe third country
freedom of movement
deprivation of liberty

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1. Introduction

The Serbian Constitution is one of the youngest constitutions in Europe² and contains a broad catalogue of human rights.³ This catalogue was inspired by the European Convention on Human Rights (ECHR) and other international human rights instruments accepted by Serbia. The Constitution proclaims equality and prohibits discrimination, protects the right to life and freedom from torture, and stipulates conditions for the deprivation of liberty and the rights of persons deprived of liberty. These rights belong to everyone, but are of particular importance to asylum seekers, refugees, and migrants. Additionally, Art. 57 explicitly guarantees the right to asylum to foreigners who have a reasonable fear of persecution based on race, gender, language, religion, national origin, political opinion, or social group. In this way, the Constitution recognises the grounds for persecution contained in the 1951 Convention on the Status of Refugees and goes further by protecting people from gender-based persecution. Therefore, the right to asylum is constitutional.

The basic role of the Serbian Constitutional Court is to protect the constitutionality and legality of human rights and freedoms.⁴ A total of 15 judges, each serving a nine-year term, are expected to be protectors of human rights and provide an effective remedy for human rights violations and abuses. However, a mixed judicial electoral system,⁵ as well as a lack of clear criteria for their appointment,⁶ does not always ensure the highest quality of judges ready to serve justice and protect human rights. Consequently, in many cases, the Constitutional Court narrowly interprets human rights, even when it invokes the ECHR and standards derived from the jurisprudence of the European Court of Human Rights (ECtHR). In addition, the Constitutional Court is not inspired by the case law of the Court of Justice of the European Union (CJEU) and does not rely on any other EU source despite Serbia being a candidate country since 2012.

Another hurdle is the limited possibility of submitting a constitutional appeal that can be filed against individual acts or actions of state bodies or organisations entrusted with public powers that violate constitutional human rights and freedoms if other legal means for their protection have been exhausted or are not

2 | The Constitution was adopted on 30 September 2006 by a large majority in the parliament, and promulgated on 8 November 2006. See Jerinić and Kljajević, 2016, p. 4.

3 | Krstic, 2012, p. 110.

4 | Art. 166, para. 1 of the Constitutional Court.

5 | Five judges are appointed by the National Assembly (out of 10 candidates proposed by the President), five by the President (out of 10 candidates proposed by the National Assembly), and five at the general session of the Supreme Court of Cassation (out of 10 candidates proposed at a general session by the High Judicial Council and the State Prosecutor Council), the highest Court in Serbia. Serbian Constitution, Art. 172(2)-(3).

6 | The Serbian Constitution only specifies that judges need to be at least 40 years old and be prominent lawyers with 15 years of experience in practicing law. Serbian Constitution (Art. 172(5)). There is no extra clarification of their legal expertise (such as international law, human rights, etc.) and professional abilities, as well as no other criteria, such as personal qualities like social awareness, common sense, etc.

provided.⁷ Violations must be committed through an individual act or action that determines the rights and obligations of the individual. Another possibility for the protection of human rights and freedoms, if unconstitutionality derives from the application of law or general act, is to initiate the procedure of assessing the constitutionality and legality of a legal act.⁸

The role of the Constitutional Court in migration and refugee law is limited, as discussed in the following Secs. The Court has so far decided on several constitutional complaints, and current jurisprudence does not allow the Court to establish solid principles in this area or even derive from previous case law. In the majority of cases, constitutional complaints were rejected, and the human rights of asylum seekers, refugees, and migrants were protected. The same approach is adopted by asylum bodies whose acts are subject to judicial review. Thus, in this study, the asylum procedure and judicial review are briefly explained in Sec. 2 for a better understanding of the decisions of the Constitutional Court as complainants refer to the illegality of the acts of these bodies. Sec. 3 then presents the decisions of the Constitutional Court on matters of asylum and migration, while Sec. 4 illustrates a very limited approach and interpretation of the Constitutional Court's competence and role in emergency situations. The main premise is that the Constitutional Court has remained in the background of human rights protection for asylum seekers, refugees, and migrants, and has not taken the lead in the development of norms and standards in this area.

2. Asylum procedure and the judicial review

The first asylum law to establish asylum procedures in Serbia was the 2007 Law on Asylum (LA),⁹ which was replaced by the 2018 Law on Asylum and Temporary Protection (LATP).¹⁰ Despite the significant improvements in the new legislation, the structure of the administrative procedure has not been changed. The first-instance body that decides on asylum applications is the Asylum Office which operates as a separate unit of the Ministry of the Interior Border Police Directorate.¹¹ Prior to 2015, it operated as an Asylum Unit within the Ministry of Interior, which meant that it never had a civil character.¹² The Asylum Commission is a second-instance body where appeals against the decisions of the Asylum Office can be filed. The Asylum Commission consists of nine members appointed

7 | Art. 170 of the Constitutional Court; Art. 82 of the Law on the Constitutional Court, *Official Gazette of the Republic of Serbia*, no. 109/2007, 99/2011, 18/2013, 103/2015, 20/2023; The Law on the Constitutional Court (LCC), *Official Gazette of the Republic of Serbia*, no. 109/2007, 99/2011, 18/2013, 103/2015, 40/2015, 10/2023.

8 | Art. 168, para. 2 of the Constitution.

9 | Law on Asylum (LA), *Official Gazette of the Republic of Serbia*, no. 109/2007.

10 | Law on Asylum and Temporary Protection (LATP), *Official Gazette of the Republic of Serbia*, no. 24/2018.

11 | Krstic, 2019, p. 163.

12 | Krstic and Davinic, 2013a, p. 173.

by the government over a period of four years. National legislation prescribes the conditions for becoming a member of the Commission¹³ but does not guarantee that members have the necessary competence to handle asylum cases, since it does not require specific knowledge of asylum and refugee law. Moreover, there is no guarantee of independence, and the majority of members are representatives from different line ministries chaired by a representative of the Ministry of Interior.¹⁴

If a party is unsatisfied with the decision of the Asylum Commission, it can file a lawsuit with the Administrative Court, which performs a judicial review of the lawfulness of that decision.¹⁵ The Administrative Court is a court of special jurisdiction operating since 1 January 2010 and¹⁶ is established for the whole country with the competence to adjudicate administrative disputes.¹⁷ Until 2018, complaints to the Administrative Court did not have a suspensive effect, in contrast to Art. 13 of the ECHR.¹⁸ When the new law on asylum was adopted, it expressly introduced the suspensive effects of complaints.¹⁹ Nevertheless, the Administrative Court has a large number of pending cases (c. 130,000) and a great influx of new cases, while having only the president and 52 judges.²⁰ The Court has an extremely broad jurisdiction (approximately 120 different legal areas) and a small number of asylum-related cases, indicating that asylum is an insignificant legal area for the Court.²¹ There is also no specialisation within the Court in the form of compulsory training or specialised chambers, which are required in the area of asylum and migration law, as emphasised in the 2022 Report of the European Commission.²² The Court usually decides on cases in limited jurisdiction, which means that after it upholds a claim and annuls the act, it returns the case to a competent authority for retrial.²³ This prolongs the duration of a final decision for asylum seekers. Moreover, in asylum cases, the Administrative Court usually adjudicates without oral hearings, claiming that the facts of the case are well established.²⁴ However, in some cases, it would be beneficial if the Administrative Court held a public hearing and established additional facts to help deliver a reasonable and just judgment.

13 | Those conditions are as follows: the person must be a citizen of the Republic of Serbia, a lawyer with at least five years of professional experience, and he/she must have speciality in the field of human rights. See Art. 21 of the LATP.

14 | European Commission, Serbia 2022 Report, Brussels, 12 October 2022, p. 62.

15 | Arts. 22 and 96, para. 1 of the LATP.

16 | Art. 11, para. 4 of the Law on organization of the courts (LOC), *Official Gazette of the Republic of Serbia*, no. 116/08, 104/2009, 101/2010, 31/2011, 78/2011, 1101/2011, 101/2013, 40/2015, 106/2015, 13/2016, 108/2016, 113/2017, 65/2018, 87/2018, 88/2018.

17 | Art. 29, para. 1 of the LOC.

18 | See, e.g. *De Souza Ribeiro v France* [GC] App no 22689/07, 13 December 2012, para. 82.

19 | Art. 96, para. 2 of the LATP.

20 | Information obtained from the website of the Administrative Court [Online]. Available at: <https://www.up.sud.rs/cirilica/izvestaji-o-radu> (Accessed: 24 November 2023).

21 | Davinic and Krstic, 2018, p. 65.

22 | European Commission, Serbia Report, p. 63.

23 | Art. 42 of the Law on Administrative Disputes (LAD), *Official Gazette of the Republic of Serbia*, no. 111/2009.

24 | Art. 33 of the LAD.

Currently, it is not possible to submit an appeal against the judgment of an Administrative Court.²⁵

In a case where the constitutional rights of asylum seekers and migrants are violated, the party can submit a constitutional complaint to the Constitutional Court, claiming unlawful and erroneous acts of asylum bodies and the Administrative Court, as well as other bodies deciding their status in Serbia (the Department for Foreigners).

3. Constitutional complaints in asylum and migration matters

This key Sec. will present the decisions of the Constitutional Court on constitutional complaints in two Sub-Secs.: 1) issues concerning the procedure (the right to a fair trial, right to an effective remedy, and 'safe third country' principle); and 2) issues concerning the merit (transit zones, detention of migrants, and discrimination).

| 3.1. Issues concerning the procedure

3.1.1. *The right to a fair trial*

The asylum procedure and judicial reviews must provide effective remedies for asylum seekers. Courts particularly need to provide sufficient reasons for their decisions, explaining why, on what facts, and under which law the decision was based. Nevertheless, the Administrative Court usually relies entirely on facts previously highlighted by the second-instance body, and as a result, there is no independent consideration of the claims.²⁶ Let us consider the case of a citizen of Somalia who claimed that the asylum procedure took too long. He argued that the Asylum Office did not allow him to follow the procedure in his own language, that he was asked suggestive questions with the aim of questioning his credibility, and that the hearing lasted for more than five hours, resulting in the rejection of his asylum claim.²⁷ He complained to the Asylum Commission, which revoked the decision of the Asylum Office several times without independently deciding on the merit.²⁸ He further contested the Administrative Court's judgment as erroneous.²⁹ The Administrative Court did not hold an oral hearing, even though there was a need to clarify and establish the factual situation, and did not consider the allegations or demands of the lawsuit to resolve the dispute in full jurisdiction and to

25 | Parties have two extraordinary legal remedies at their disposal: the motion to review a Court decision and the reopening of the procedure. Arts. 49–65 of the LAD.

26 | See Belgrade Center for Human Rights, 2020, p. 67.

27 | Asylum Office, 03/9-26-886/08, 31 March 2011.

28 | Asylum Commission, 04/10, 1 June 2011.

29 | Administrative Court, 11 U. 7727/11, 20 October 2011.

grant refugee protection. The evidence presented by international organisations, states, non-governmental organisations (NGOs), and the media was not considered, and the Administrative Court erred in finding that the complainant was not subjected to persecution.

In this case, the Constitutional Court rejected other claims but held that the Administrative Court violated the right to a fair trial of an asylum seeker because of the lack of a reasoned Court judgment.³⁰ The Court underlined that, although the obligation to explain the decision does not mean that detailed answers must be provided to all arguments presented, the decision must have sufficient precision in the explanation. It also implies an obligation to state clear, sufficient, and comprehensible reasons on which the Court bases its decision and simultaneously provide a guarantee to the party that the Court considers all allegations and evidence presented in the proceedings. The Constitutional Court further found that the Administrative Court did not assess evidence of international organisations, states, (NGOs), or media that reported a high level of violence in Somalia.

The Constitutional Court emphasised that in each case, it is important to consider *ex officio* if a person deserves subsidiary protection after the Administrative Court concludes that a refugee status cannot be granted.³¹ The Court went even further in referring to the *Sufi and Elmi* cases decided by the ECtHR.³² In this case, the ECtHR found that the level and intensity of general violence in Mogadishu, Somalia, is such 'that any returnee would be at real risk of Art. 3 ill-treatment solely on account of his presence there, unless it could be demonstrated that he was sufficiently well connected to powerful actors in the city to enable him to obtain protection'.³³ This judgment of the ECtHR was delivered in June 2011 and the Constitutional Court's decision was passed in October of the same year. The Constitutional Court found that this assessment could lead to the conclusion that the right to asylum was violated. However, with this argument, the Court immediately limited itself, underlying that according to the ECtHR case law, 'if the applicant has not been extradited or deported when the Court examines the case, the material point in time must be that of the Court's consideration of the case'.³⁴ It also failed to criticise the Administrative Court for not adjudicating in full jurisdiction.

The Constitutional Court annulled the Administrative Court's judgment, finding that the decision was not well reasoned. Accordingly, the Administrative Court annulled its own decision, and instead of deciding on the merit, it ordered the Asylum Commission to assess all evidence and decide if the applicant deserves

30 | Constitutional Court, Uz -6596/2011, 30 October 2014, *Official Gazette of the Republic of Serbia*, no. 124/2014 [Online]. Available at: <http://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 23 July 2023). The Court found a violation of Art. 32, para. 1 of the Constitution.

31 | *Ibid.*, p. 11. However, administrative bodies do not apply this standard of the Constitutional Court in their decisions. See, Belgrade Center for Human Rights, 2020, p. 59.

32 | *Sufi and Elmi v. UK*, App. nos. 8319/07 and 11449/07, 28 June 2011.

33 | *Ibid.*, para. 293.

34 | Here the case cited *Chahal v. the United Kingdom*, ECtHR, App. no. 22414/93, 15 November 1996, para. 86; *K.A.B. v. Sweden*, ECtHR, App. no.886/11, 5 September 2013.

subsidiary protection, bearing in mind the current situation in Somalia.³⁵ This further prolonged the final decision in this case, which could not be considered as a trial within a reasonable time.

3.1.2. *The right to an effective legal remedy*

Art. 13 guarantees the right to an effective remedy.³⁶ The Serbian Constitution stipulates that everyone has 'the right to an appeal or other legal remedy against any decision of their rights, obligations, or lawful interests,' and it supposes that the legal remedy is accessible and effective. In one asylum case, the Constitutional Court dealt with this issue by relying on the principles derived from the ECtHR's case law.³⁷ In this case, a citizen of Afghanistan, who left his country of origin after being hospitalised because of a physical attack by the Taliban, applied for asylum in Serbia. On his way to Serbia, he travelled to Iran, Turkey, Greece, and North Macedonia. He complained of freedom from torture, the right to an effective remedy, and the principle of non-refoulement. His asylum request was dismissed by applying the safe third-country principle, and he challenged the fact that the first-instance body did not go into the merits of his case to assess the validity of his fear of persecution in the country of origin.³⁸ At that time, the composition of the second instance body was not formed, and he challenged the fact that he could not submit an appeal to the Asylum Commission. Further, he claimed that even if this happened, it would not give him an effective legal remedy because all the appeals of asylum seekers submitted to the second-instance body had been rejected thus far, not leaving reasonable prospects of success. Finally, he claimed that a lawsuit before the Administrative Court was ineffective as the Court did not engage in the merits of asylum cases.

Bearing in mind that the complainant had applied to the Constitutional Court without exhausting all legal remedies, the Court relied on the jurisprudence of the ECtHR to assess whether it could accept a constitutional complaint. The Court's starting point was the principle from *Akdivar and Others v. Turkey*, that the rule on the exhaustion of remedies must be evaluated in light of the circumstances of each case.³⁹ The principle also entails that only available and sufficient legal remedies need to be exhausted⁴⁰ and that their application requires some degree of flexibility and no excessive formalism.⁴¹ The Constitutional Court reasoned that if someone claims that the practice of administrative authorities is in general futile and ineffective, that must be proved 'beyond reasonable doubt', in accordance with the ECtHR's practice.⁴² However, the Court avoided citing that it means 'an

35 | Administrative Court, III-11 Y. 14154/14, 18 December 2014.

36 | Art. 13 of the ECHR applies to asylum procedure. See Guide, 2022, para. 121.

37 | Constitutional Court, Uz-5331/2012, 24 December 2012, *Official Gazette of the Republic of Serbia*, no. 4/2013 [Online]. Available at: <http://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 24 November 2023).

38 | Asylum Commission, 03/9-26-2656/11, 28 May 2012.

39 | *Akdivar and Others v. Turkey*, ECtHR, App. no. 21893/93, 16 September 1996, para. 69.

40 | *Vernillo v. France*, ECtHR, App. no. 11889/85, 20 February 1991, para. 27.

41 | *Cardot v. France*, ECtHR, App. no. 11069/84, 19 March 1991, para. 34.

42 | *Cyprus v. Turkey*, ECtHR, App. no. 25781/94, 10 May 2001, para. 115.

accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system'.⁴³ This standard describes the issues raised by the complainant.

Regarding the argument that the Asylum Commission was not formed, the Constitutional Court found that the complaint was submitted on 12 June 2012 while the Asylum Commission was established on 20 September 2012 'only' three months later. The Constitutional Court supported its view by relying on the ECtHR's standard that 'even if a single remedy does not by itself entirely satisfy the requirements of Art. 13 of the ECHR, the aggregate of remedies provided for under domestic law may do so'.⁴⁴ By doing so, the Court did everything to protect asylum bodies and their practices. It rejected the constitutional complaint on the grounds that the decision of the Asylum Commission had not been made before the constitutional appeal, and pointed out that the exhaustion of legal remedies did not mean only their filing but also the adoption of a decision by the competent authority or Court. It also made a mistake by publishing its own, non-anonymised decision in the Official Gazette and thus violated the asylum seeker's right to privacy.⁴⁵

3.1.3. The 'safe third country' principle

The most common reason for dismissing asylum requests, before the adoption of the new law on asylum in 2018, was when an asylum seeker came from a safe third country,⁴⁶ unless a person proved that it was not safe for them.⁴⁷ This concept derives from practice and was first recognised in a Resolution of the EU Council in 1992.⁴⁸ It is usually misused and transfers the obligation from one state to another to decide on asylum requests.⁴⁹

Until 2018, the 'safe third country' was 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 the 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.⁵⁰

43 | Ibid.

44 | *Gebremedhin v. France*, ECtHR, App. no. 25389/05, 26 April 2007, para. 53.

45 | Belgrade Center for Human Rights, 2012, p. 26.

46 | Krstic and Davinic, 2016, p. 173.

47 | Art. 33, para. 1 (6) of the LA.

48 | The Resolution on a Harmonised Approach to Questions concerning Host Third Countries, 1992.

49 | More on this see Davinic and Krstic, 2013b, pp. 97–116.

50 | Art. 1, para. 1 (11) of the Law on Asylum, *Official Gazette of the Republic of Serbia*, no. 109/2007. Since 2018, the List has been removed, and a 'safe third country' is defined as a country in which the applicant is safe from the persecution and where he/she enjoys the guarantees from non-refoulement and the possibility of accessing an efficient asylum procedure and granting protection in accordance with the 1951 Refugee Convention. Art. 45 (1) of the LATP.

In accordance with this provision, the government adopted a list of safe third-party countries in 2009.⁵¹ The list includes all neighbouring countries, including North Macedonia,⁵² Hungary,⁵³ Greece,⁵⁴ Turkey,⁵⁵ and Italy,⁵⁶ all of which were facing serious deficiencies in their asylum systems.

Considering that asylum requests were dismissed in a high number of cases, it is not surprising that the Constitutional Court delivered several decisions dealing with the application of the 'safe third country' principle by asylum bodies. However, these cases are also relevant from the perspective of interpreting the non-refoulement principle.⁵⁷

In the first constitutional claim of this kind, the complainant, a Cuban citizen, claimed that his right to a fair trial and asylum had been violated.⁵⁸ The complainant argued that he was a refugee and a political opponent of the Cuban regime. He was expelled from school to distribute posters against Fidel Castro's regime, and later from university. The police searched for him several times, and he was followed and interrogated by the state authorities. He left his country of origin legally in 2009 and moved to Romania, where he stayed for three months. Thereafter, he entered Serbia for a week with the aim of extending his visa and then returned to Romania, where he stayed for another three months. Subsequently, he travelled to Serbia by train, where he stayed until the start of February 2010, when he took a bus to Montenegro and returned to Serbia. He claimed to have a well-founded fear that his extradition to Cuba would endanger his life and integrity.

The Constitutional Court rejected a constitutional complaint submitted against the Administrative Court for an erroneous decision. In this case, the concept of a

51 | The decision determining the list of safe countries of origin and safe third countries, *Official Gazette of the Republic of Serbia*, No. 67/2009, decision no. 110-5055/09, 17 August 2009.

52 | Submission by the UNHCR for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: The former Yugoslav Republic of Macedonia [Online]. Available at: <https://www.refworld.org/country,UNHCR,MKD,51c945134,0.html> (Accessed: 24 November 2023).

53 | UNHCR urges Hungary not to amend its asylum system in rush, ignoring international standards [Online]. Available at: <https://www.unhcr.org/ceu/420-ennews2015unhcr-urges-hungary-not-to-amend-its-asylum-system-in-a-rush-ignoring-international-standards-html.html> (Accessed: 24 November 2023); UNHCR concerned Hungary pushing asylum seekers back to Serbia, 15 July 2016; *Ilias and Ahmed v. Hungary*, ECtHR (GC), App. no. 47287/15, 21 November 2019.

54 | See, e.g., *M.S.S. v. Belgium and Greece*, ECtHR (GC), App. no. 30696/09, 21 January 2011.

55 | UNHCR: Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey under safe third country and first country of asylum concepts [Online]. Available at: <https://www.unhcr.org/media/legal-considerations-returning-asylum-seekers-refugees-greece-turkey-under-safe-third-country> (Accessed: 24 November 2023).

56 | See for instance: *Sharifi and Others v. Italy and Greece*, App. no. 16643/09, judgment from 21 October 2014; *Tarakhel v. Switzerland*, App. no. 29217/12, judgment from 05 November 2014.

57 | Kovacevic, 2020b, p. 240.

58 | Constitutional Court, Uz1286/2012, 29 March 2012, *Official Gazette of the Republic of Serbia*, no. 42/2012 [Online]. Available at: <https://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 24 November 2023).

'safe third country' was applied by the first-instance body, as the complainant spent some time in Romanian and Montenegro, both safe third countries for Serbian authorities.⁵⁹ This decision was confirmed by the second-instance body⁶⁰ and the Administrative Court,⁶¹ reasoning that Romania and Montenegro were safe third countries, that the complainant had the possibility of applying for asylum in those countries, and that he did not prove that he was unable to do so. In this case, the Constitutional Court found that the complainant did not present any indication that Romania or Montenegro was unsafe for him but also underlined that the government's list cannot be automatically applied without considering UN Refugee Agency (UNHCR) reports. Here, the Court referred to *M.S.S. v. Belgium and Greece*⁶² and emphasised that the ECtHR found that Belgium, an EU member state, violated Art. 3 of the ECHR, as Belgian authorities knew or should have known that there was no guarantee that the asylum seeker's request would be seriously considered by Greek authorities. Thus, the Court mentioned the *M.S.S.* judgment as well as UNHCR observations on Serbia as a country of asylum, underlining 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 a particular country. The Court also referred to *T.I. v. UK*⁶³ where the ECtHR further assessed that the state could not automatically rely on the obligations of other states under the Dublin Convention and that the Court should consider whether there are any effective procedures that protect the asylum seeker from removal from Germany to Sri Lanka.

The Constitutional Court established the principle that a government's list could not be automatically implemented without assessing whether a particular country could be considered safe in each case. The Court further underlined that asylum bodies should also examine in detail all relevant documentation submitted by the complainant.⁶⁴ The complainant was a citizen of Somalia and had three children. He claimed that their transit through Turkey, Greece, and North Macedonia could not be considered as passing through safe third countries, as they feared 'chain refoulement' to their country of origin. He documented his claim in several reports from the Committee of Ministers of the Council of Europe, UNHCR, and NGOs. He particularly emphasised that the Administrative Court did not consider the previous constitutional decision and that it automatically applied the government's list.⁶⁵ The Constitutional Court reasoned that the government's list is subject to corrections by the UNHCR reports⁶⁶ and that the asylum request should not be

59 | Asylum Office, 03/9-26-512/10, 31 August 2010.

60 | Asylum Commissions, Az 17/10, 5 November 2010.

61 | Administrative Court, 3555/11, 14 December 2011.

62 | *M.S.S. v. Belgium and Greece*, ECtHR, App. no. 30696/0, 21 January 2010.

63 | *T. I. v. UK*, ECtHR, App. no. 43844/98, 23 July 1999.

64 | Constitutional Court, Uz-3548/2013, 19 September 2013 [Online]. Available at: <http://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 24 November 2023).

65 | Administrative court, U. 1371/13, 20 March 2013.

66 | In this case the main reference was given to UNHCR, Serbia as a Country of Asylum, Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia, August 2012 [Online]. Available at: <https://www.refworld.org/publisher,UNHCR,COUNTRYPOS,50471f7e2,0.html> (Accessed: 24 November 2023).

dismissed on the grounds that a person transited through a country from the list if its asylum procedure is contrary to the Convention on the Status of Refugees.⁶⁷ This decision also illustrates that the Administrative Court does not apply decisions of the Constitutional Court, which maintains the *status quo* in asylum procedures.

Another case involves a citizen of Sudan who transited through Turkey, Greece, and North Macedonia, where he spent 10 days without any problems.⁶⁸ He challenged the decision of the Asylum Office to dismiss his case because the UNHCR and European Commission did not release any report suggesting that the asylum system in North Macedonia was inefficient, concluding that it was a safe third country for the complainant.⁶⁹ This decision was confirmed by the Asylum Commission⁷⁰ and Administrative Court.⁷¹ The Constitutional Court looked at the UNHCR reports of 2012 and 2016 and Amnesty International's report of 2015 and identified several deficiencies in the asylum system in Serbia and North Macedonia. The Court particularly emphasised that these deficiencies were caused by a massive influx of migrants and that they were beyond the responsibility of the states.⁷² The Court further concluded that the facts of the case demonstrated that the claim was unfounded and that returning the complainant to North Macedonia by the readmission procedure did not put him at risk of being deported to Greece or Turkey.⁷³ Thus, the Constitutional Court demonstrated that the consideration of UNHCR reports is not thorough and detailed enough and that the question of the real possibility of accessing the asylum procedure is not conducted by Serbian authorities, including the Constitutional Court. In this case, the Constitutional Court cited its previous decisions on the application of a 'safe third country' principle mentioned above and repeated the non-automatic application of the government's list, invoking also *M.S.S. v. Belgium and Greece* case⁷⁴. The Constitutional Court underlined the importance of this case in the opinion of the ECtHR that the existence of laws and international treaties guaranteeing human rights is not in itself sufficient to ensure protection from the risk of abuse in a situation where reliable sources (reports of the UNHCR, Council of Europe (CoE) Commissioner for Human Rights, non-governmental organisations, and research in the field) demonstrate that the practice is contrary to the principles enshrined in the ECHR⁷⁵.

67 | Constitutional Court, Uz-3548/2013, p. 7. [Online]. Available at: <http://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 24 November 2023).

68 | Constitutional Court, Uz-8023/2016, 11 April 2019 [Online]. Available at <http://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 24 November 2023).

69 | Asylum Office, 26-5724/14, 9 December 2015. At this time, asylum practice changed, and Serbian authorities focused only on the country from which a person entered Serbia.

70 | Asylum Commission, Az-08/15, 12 April 2016.

71 | Administrative Court, U. 8418/16, 2 September 2016.

72 | Constitutional Court, Uz-3548/2013, p. 8.

73 | *Ibid.*, p. 9.

74 | *M.S.S. v. Belgium and Greece*, ECtHR, App. no. 30696/0, 21 January 2010.

75 | Constitutional Court, Uz-3548/2013, p. 7.

| 3.2. Issues on the merit

3.2.1. Transit zone

There were many cases before the ECtHR in which the Court discussed the issue of the treatment of migrants arriving at airports. In one case, a pregnant citizen of Tunisia was arrested at the airport on the suspicion of coming to Serbia to meet her partner, an Austrian citizen, with the aim of illegally entering Austria.⁷⁶ Police informed her that she would be deported to Tunisia. However, she claimed that she received information in English and was forced to be in a transit zone, she did not have legal representation or any other right that belonged to persons deprived of liberty, and no decision was issued in her case which would allow her to appeal to it. According to her testimony, she left her country of origin as a divorcee expecting a child with a foreigner and fearing family ostracism. She also feared radical Islamists working in the pharmacy and refused to issue receipts for the medicines they requested. She claimed that the police officers did not understand her because she spoke French. After three days, she was allowed to enter Serbia as an asylum seeker. In her constitutional complaint, she argued that she did not receive immediate medical help, privacy, and adequate sleeping conditions.

In this case, the Constitutional Court relied on the relevant jurisprudence of the ECtHR, which refers to the conditions of staying in transit zones and underlined the principles that were important for the decision.⁷⁷ The Court also relied on the findings of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) on its visit to Serbia from 2015 and Concluding Observations on the Second Report of Serbia to the UN Committee against Torture (CAT), as well as on a report on Serbia by the Special Rapporteur on Torture from 2017. Regrettably, the Constitutional Court reasoned that the complainant entered Serbia and left the transit zone immediately after she expressed an intention to seek asylum, and that she was in the transit zone for only three days, which is the usual time spent in this zone. The Court also reasoned that she could seek asylum at any moment and stay shorter in the transit zone, that she had medical protection and adequate accommodation, as well as contact with others by phone. Although the Court accepted that her freedom of movement was limited, it concluded that her medical condition required rest and that she had no need to leave the room in which she was accommodated. The Constitutional Court also found that she was not deprived of her liberty, but was only exposed to the

76 | Constitutional Court, Uz-3651/2015, 30 June 2022 [Online]. Available at <http://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 24 November 2023).

77 | The Constitutional Court invoked the following cases: *Amuur v. France*, ECtHR, App. no. 19776/92, 25 June 1996; *Shamsa v. Poland*, ECtHR, App. no. 45355/99, 45357/99, 27 November 2003; *Mogoş v. Romania*, ECtHR, App. no. 20420/02, 6 May 2004; *Mahdid and Haddar v. Austria*, ECtHR, App. no. 74762/01, 8 December 2005; *Riad and Ildiab v. Belgium*, ECtHR, App. nos. 29787/03, 29810/03, 24 January 2008; *Nolan and K. v. Russia*, ECtHR, App. no. 2512/04, 12 February 2009; *Gahramanov v. Azerbaijan*, ECtHR, App. no. 26291/06, 15 October 2013; *Z.A. and Others v. Russia*, ECtHR (GC), App. nos. 61411/15 et al., 21. November 2019, *Khlaifia and Others v. Italy*, ECtHR, App. no. 16483/12, 15. December 2016.

limitations of freedom of movement.⁷⁸ Unfortunately, this decision shows how the Constitutional Court attempted to justify the actions of police officers while ignoring the fact that the complainant was in a vulnerable position and in a serious health situation.

3.2.2. *Detention of migrants*

The detention of migrants, asylum seekers, and refugees is common in many European countries. This has serious consequences on the well-being of detainees and requires strict scrutiny, legitimacy of the measure in question, and respect for the rights of persons deprived of liberty. The qualification of deprivation of liberty in the Serbian legal framework is aligned with European standards. However, several practical challenges still remain.⁷⁹ The Constitutional Court discussed these issues in several complaints and had the opportunity to establish standards in this area.

In one case, five applicants from Libya claimed that their constitutional rights were violated by the Ministry of Interior, which cancelled their stay in Serbia for security reasons and ordered a 10-year ban on entry. They claimed that the Ministry's decisions were not specific to the security risks presented by the main applicant and their family members to Serbia. None of them committed a criminal offence in the territory of Serbia, nor was any procedure initiated against them to assess security risks, especially as they were former diplomats, students of medicine and dentistry, psychologists, and minors. Therefore, they argued that the actions of the Ministry of Interior were arbitrary and factually unfounded, and placed them at direct risk of torture. After their stay was cancelled, they applied for asylum, but their request was rejected.⁸⁰ However, as the situation in Libya deteriorated, they re-applied for asylum and were granted subsidiary protection based on the security situation in Libya and the main applicant's state of health.⁸¹ The Constitutional Court did not find a violation on the part of the Ministry of Interior, as decisions on expulsion were never executed, so it dismissed the constitutional complaint.⁸² The Court also did not go into the merits of the case, as the applicants were granted subsidiary protection in Serbia by the subsequent decision of the Asylum Office, which was based on its decision on the health status of the complainant, UNHCR reports, and instructions of the UK Ministry of Foreign Affairs on the security and humanitarian situation in Libya. The Constitutional Court, once again, omitted the introduction of standards in the case of individuals who posed a risk to the security of Serbia but lacked the possibility to challenge that risk.

A constitutional complaint was also submitted by 18 applicants from Afghanistan, some of whom were minors, for their arrest for the purpose of identifying persons, inhuman and degrading detention conditions which lasted for 12 hours,

78 | *Ibid.*, p. 25.

79 | Davinic and Krstic, 2019, pp. 139–149.

80 | Asylum Office, 26-222/15, 10 December 2015; Asylum Commission, Az 23/15, 11 February 2016; Administrative Court, 16 U. 6304/16, 26 May 2016.

81 | Asylum Office, 26-222/15, 3 July 2018.

82 | Constitutional Court, Uz – 6006/2016, 19 December 2018.

and no right to an attorney during that time.⁸³ After their identities were established, they were sent to the Misdemeanour Court and released after seeking asylum in Serbia. The complainants claimed that their arrests were arbitrary and unlawful. During their detention, they were not given the opportunity to explain why they had left their country of origin and Bulgaria. They also claimed to have been exposed to ill treatment, including overcrowding and poor conditions in the police detention unit; waiting in the hall of the Misdemeanour Court in Pirot while the Misdemeanour proceedings were ongoing; and transportation in a police vehicle, that is, deportation to the territory of Bulgaria. They were driven to the 'green border' with Bulgaria and were ordered to leave the van. After multiple hits, they were left in the woods at minus 2 degrees, from where they travelled to Sofia. They claimed that their collective expulsion by public authorities left them with fear, humiliation, hopelessness, and uncertainty. After their expulsion, they stayed in Bulgaria on the streets and in hostels for a week, with the support of humanitarian organisations, and then returned to Serbia.

Considering this case, the Constitutional Court emphasised that the right to freedom is a fundamental constitutional right.⁸⁴ The Court invoked the relevant jurisprudence of the ECtHR, underlying that the deprivation of liberty is an autonomous concept, that it must be lawful, and that there is a difference between this right and the freedom of movement. Relying on these principles, the Constitutional Court reasoned that their arrest was lawful and non-arbitrary, as the state had the right to control its borders and establish an identity for those who illegally resided and were without any identification (ID).⁸⁵ However, the Constitutional Court found that during their detention, they did not have legal representation. It also examined whether they were detained under inhuman conditions (in the overcrowded basement of a police station without furniture that could be used for rest, without heating, or in a toilet). Here, the Court underlined the requirement for minimal severity to attain the threshold for ill-treatment. Despite the terrible conditions in which persons were held, the Court did not find ill-treatment based on its decision on the facts that they received food, clothes, and shoes; that the circumstances of accommodation of a large number of persons were unexpected due to the migrant crisis and increased influx of persons in Serbia; and that they only stayed there for 12 hours and waited for the misdemeanour procedure for only 10 hours.⁸⁶ Regarding the final argument of their collective expulsion to Bulgaria, the Constitutional Court again referred to the relevant jurisprudence of the ECtHR. The Court reasoned that police officers did not act on the order of the Misdemeanour Court when they collectively expelled complainants from Serbia.⁸⁷ This was the only violation found, despite minors being exposed to terrible conditions while in detention.

83 | Constitutional Court, Uz 1823/2017, 20 January 2021, *Official Gazette of the Republic of Serbia*, no. 6/2021 [Online]. Available at: <http://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 24 November 2023).

84 | *Ibid.*, p. 17.

85 | *Ibid.*, p. 19.

86 | *Ibid.*, p. 23.

87 | *Ibid.*, p. 28.

In the third case, a citizen of Finland was deprived of her liberty in a hostel and was brought to a Correction Facility for Foreigners.⁸⁸ She was placed at the decision of the Ministry of Interior, which only stated that she was a threat to public and national security.⁸⁹ The Higher Court confirmed this decision.⁹⁰ She was not informed of the reasons for her detention and did not have an interpreter or legal representation. She received only written information in English on the rights of people deprived of liberty. During the detention, she could go outside for half an hour under police supervision as well as to the toilet accompanied by a police escort. One day after her arrest, she was informed of the right to consular protection. Three days later, she was transferred to the airport, where she received a decision for her expulsion.⁹¹ She claimed that she was denied her right to freedom, the right to be informed immediately in a language she understood about the reasons for her arrest and the accusations against her, and the right to inform without delaying the person of the choice of her whereabouts. After considering the case, the Constitutional Court found that the deprivation of liberty was illegal, as the decision on her expulsion was delivered when she was already in detention.⁹² However, the Court further found that other aspects of the constitutional complaint did not stand, as she said that she was fluent in English, did not need consular support, and immediately engaged a lawyer, which meant that she had proper legal representation.⁹³ This part of the judgment is also highly problematic because the ECHR is clear about the rights of persons deprived of their liberty.

3.2.3. Discrimination

Art. 21 of the Serbian constitution proclaims equality and prohibits discrimination through open-ended clauses. This provision is further elaborated upon in the Law on the Prohibition of Discrimination, which clearly stipulates equality for all, including asylum seekers, refugees, and migrants.⁹⁴ One constitutional complaint concerning migrants is discrimination. Specifically, a citizen of North Macedonia claimed that he was not allowed to enter Serbia because of his Roma ethnicity.⁹⁵ He claimed that, on 17 October 2010 at the border, the police told him that there was an order not to allow entry into Roma for those who travelled in groups. He also claimed that no one asked him about the purpose of his travel, invitation letters, money, or employment status and that the police only wanted to know about his

88 | Constitutional Court, Uz-1189/2015, 1 April 2021. See also almost identical cases of Bulgarian nationals, Constitutional Court, Uz-1237/2015, 1 April 2021; Constitutional Court Uz-1239/2015, 20 May 2021; decisions [Online]. Available at: <http://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 24 November 2023).

89 | Ministry of Interior, 138/14, 15 December 2014.

90 | Higher Court of Belgrade, 5/15, 15 January 2015.

91 | Ministry of Interior, 1875/14, 17 December 2014.

92 | Constitutional Court, Uz-1189/2015, p. 8.

93 | *Ibid.*, p. 9.

94 | Law on the Prohibition of Discrimination, *Official Gazette of the Republic of Serbia*, no. 22/2009, 52/2021.

95 | Constitutional Court, Uz-3970/2015, 18 May 2017 [Online]. Available at: <https://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 24 November 2023).

final destination. He further argued that the other Romas with whom he travelled (12-13 persons) were also banned from entering Serbia. At the same time, public officials did not provide any reason for rejection or submit any official records of the rejected persons, while the reasons for the measure were established later in the civil procedure. It was found that from January 2010 to March 2011, the complainant entered the Serbian border 105 times, and on 17 October 2010 he travelled with several Romas on a minibus to Germany. The border police argued that he was unemployed and did not have enough money in his possessions. According to some information, in 2010, 536 citizens of North Macedonia were denied entry into Serbia, with 206 rejections in October of the same year. The border police also claimed that they do not treat persons as a group but as individuals, and that they do not know the ethical background of a person, as this information is not included in passports.⁹⁶ Consequently, the national Courts ruled that the plaintiff failed to prove that this was a case of discrimination.⁹⁷ The Constitutional Court referred to the case law of the ECtHR that concerns collective expulsion, but concluded that the complainant was subject to individual assessment of the case.⁹⁸ Regarding the assessment of discrimination claims, the Constitutional Court underlined that the complainant must show that he was treated differently from those in similar situations. The Court also invoked the relevant jurisprudence of the ECtHR to underline the principle that discrimination exists if a person is treated less favourably than another person in a similar situation.⁹⁹ Because the complainant did not have the required amount of money to enter Serbia, he did not prove that persons in his situation of non-Roma origin were allowed to enter Serbia.¹⁰⁰ The Constitutional Court emphasised that, according to the practice of the ECtHR,¹⁰¹ the applicant needed to prove that he was discriminated against, and if so, the burden of proof shifted to the state to show that there was objective and reasonable justification for such a discriminatory act.¹⁰² The standard is that if it is likely that discrimination has happened, then the state needs to prove and explain the high number of Roma who were denied entry into Serbian territory. Moreover, the state did not prove that other foreigners who were unemployed and did not have enough money were banned from entering Serbian territory.

96 | *Ibid.*, p. 3.

97 | See the contested decisions First Basic Court in Belgrade, P. 7556/11, 21 June 2012; Appellate Court in Belgrade, Gz 6690/14, 16 January 2015; Supreme Court of Cassation, Rev. 1920/15, 11 February 2016.

98 | Constitutional Court, Uz-3970/2015, p. 7.

99 | *Lithgow and Others v. UK*, ECtHR, App. no. 9006/80 et al., 24 June 1986; *Fredin v. Sweden*, ECtHR, App. no. 12033/86, 18. February 1991; *Brkic and Others v. Croatia*, ECtHR, App. no. 53794/12, 6 December 2016.

100 | *Ibid.*, p. 8.

101 | The Constitutional Court cited *Andric v. Sweden*, ECtHR, App. no. 45917/99, 23 February 1999; *Hirsi Jaama and Others v. Italy*, ECtHR (GC), App. no. 27765/09, 23 February 2012; *Mikolenko iv. Estonia*, ECtHR, App. no. 10664/05, 8 January 2008; *Abdi Ahmed and Others v. Malta*, ECtHR, App. no. 56796/13, 16 September 2014.

102 | *Darby v. Sweden*, App. no. 11581/85, 23 October 1990.

4. The limited role of the Constitutional Court in protecting constitutional rights

This Sec. illustrates the Constitutional Court's limited approach to three situations: 1) the absence of regulations, 2) the interpretation of general acts, and 3) a state of emergency. In all these situations, the Court failed to protect asylum seekers, refugees, and migrants from serious human rights violations.

4.1. *The absence of regulations*

Since the adoption of the LA in 2007, it has been stipulated that the Ministry of Interior would adopt a bylaw (within 60 days of entry into force on 1 April 2008) on travel documents for asylum seekers and refugees.¹⁰³ The same time limit was reiterated in the 2018 Law on Asylum and Temporary Protection.¹⁰⁴ However, this requirement has not yet been fulfilled, despite the fact that freedom of movement is guaranteed by Art. 39 of the Serbian Constitution and Art. 39 of the 1951 Refugee Convention. This provision clearly stipulates that states are obliged to issue refugees 'travel documents for the purpose of travel outside their territory unless compelling reasons for national security or public order otherwise require.'

Therefore, a Syrian refugee granted refugee status in Serbia in 2015 for his political activities, and the general state of insecurity in his country of origin applied to the Asylum Office for a travel document for refugees.¹⁰⁵ The Border Police Directorate informed him that there was no possibility of issuing him a travel document as a bylaw that would regulate the content and design of the document had not been enacted.¹⁰⁶ The complainant underlined that the Ministry of Interior had failed to enact the relevant bylaw and that the Border Police was unable to issue him a document. He requested that the Constitutional Court order the Minister of Interior to urgently adopt the bylaw.¹⁰⁷ However, the Constitutional Court dismissed the constitutional complaint as inadmissible, finding no competence in assessing the constitutionality of the non-existing acts. The Court underlined that it had the competence to assess constitutionality against individual actions or decisions and could not be lodged against inaction and the non-adoption of a general legal act.

This decision illustrates the very narrow interpretation of the Constitutional Court regarding its own competence and its limited role as a human rights

103 | Art. 58, para. 5 of the LA; Art. 67, para. 1 (4) of the LA.

104 | Art. 101, para. 1 (1) of the LATP.

105 | See also the citizen from Kazakhstan, who was granted asylum in Serbia (by a decision Asylum Office, 26-4906/15, 9 December 2015), and who complained to the Constitutional Court claiming that Art. 39 of the Constitution was violated due to the fact that the Ministry of Interior failed to adopt the bylaw regulating travel documents, stipulated as an obligation in domestic legislation, as well as in international law. Constitutional Court, Uz-4427/2016, 16 January 2018.

106 | Border Police Unit, no. 03/10, no. 26-1342/14, 11 June 2015.

107 | Belgrade Center for Human Rights, 2018, p. 88. The Constitutional Court dismissed the constitutional complaint on 20 June 2016.

protector. Additionally, this decision is unclear, because the consequences of the illegal and unjustified limitations of freedom of movement are reflected in individuals who cannot obtain that right.¹⁰⁸ The case was submitted to the ECtHR in 2016 and communicated with the government in 2018; the judgment was delivered in July 2023.¹⁰⁹ The ECtHR found that Serbian authorities, by notifying the applicant of their inability to issue him a travel document due to formal reasons, 'deprived his right to leave the country of any effectiveness for an extended period of seven years in a manner undoubtedly amounting to an interference with the meaning of Art. 2 of the Protocol No. 4 (freedom of movement).'¹¹⁰ The Court noted that it could not accept the government's argument that comprehensive technical and software solutions for all travel documents in Serbia are required, which also requires financial resources, stating that the law itself entrusted the Minister of Interior to regulate this matter within 60 days of its implementation.¹¹¹

| 4.2. Interpretation of general acts

The List of safe third countries, which was disputed in several constitutional complaints, is still automatically applied by administrative asylum bodies and the Administrative Court, despite the Constitutional Court's clear position on this matter. The Belgrade Center for Human Rights (BCHR), a Serbian NGO, decided to submit an initiative to assess the constitutionality and legality of the government's decisions.¹¹² It proposed that the Court suspend the decision as well as the execution of previous decisions. It was claimed that the decision was contrary to the Serbian Constitution and the different ranges of international conventions: the 1951 Refugee Convention and its Protocol, ECHR, Convention against Torture, and Convention on the Rights of the Child.¹¹³ The application of the list violated the well-established principle of international law, the non-refoulement principle, which means that a person cannot be expelled to a country where he or she is in real danger of serious human rights violations. The claim was that by implementing the decision, Serbia violated the right to access an efficient and fair asylum procedure as well as the rule of non-refoulement.¹¹⁴ Since 2009, after the list was adopted, Serbia has denied almost all asylum seekers the right to asylum, because the decision enables asylum requests to be rejected without involving competent authorities in the merits. Several reports have documented its erroneous application, including that of the Hungarian Helsinki Committee.¹¹⁵ Thus, in conclusion, it was emphasised that Serbia declared certain third countries as safe, without

108 | AIDA, 2022, p. 193.

109 | *S.E. and Others v. Serbia*, ECtHR, App. no. 61365/16, 11 July 2023.

110 | *Ibid.*, para. 81.

111 | *Ibid.*, para. 87.

112 | Belgrade Center for Human Rights, Initiative for Assessing the Constitutionality of the Government's Decision on Safe Third Countries, 18 September 2012.

113 | *Ibid.*, p. 1.

114 | *Ibid.*, p. 3.

115 | Hungarian Helsinki Committee, Serbia: Not a safe country of asylum, 20 June 2012 [Online]. Available at: <https://helsinki.hu/en/serbia-not-a-safe-country-of-asylum/> (Accessed: 24 November 2023).

previously examining whether asylum seekers have access to a fair and efficient asylum procedure in which their requests would be thoroughly examined. In other words, the automatic application of the list makes the institution of asylum illusory and denies asylum seekers the right to access an efficient and fair procedure in which their request is considered on merit.¹¹⁶ Furthermore, the list was claimed to have been adopted under unclear criteria and had not been updated; thus, it no longer reflected the ongoing situation in countries. The BCHR concluded that the practice of Serbian authorities led to the conclusion that the *ratio legis* of the decision on safe countries was to avoid fulfilling the accepted international obligations.¹¹⁷

Acting on this initiative, the Constitutional Court adopted a short conclusion regarding the dismissal of the constitutional complaint. According to the Court, the decision was not of a general nature, or in other words, a general act, but contained a list of specific states.¹¹⁸ This narrow way of interpreting general acts by the Constitutional Court must be criticised, as the decision had a very general nature, was applicable to almost all asylum cases, and served as the basis for dismissing asylum requests by asylum bodies in many instances.

| 4.3. State of emergency

Owing to the COVID-19 pandemic, Serbia declared a state of emergency on 15 March 2020.¹¹⁹ The next day, the government adopted a decision on the temporary restriction of the movement of asylum seekers and irregular migrants in asylum and reception centres, including their surveillance.¹²⁰ Asylum seekers and irregular migrants were exceptionally and in justified cases allowed to leave the facilities with the permission of the Commissariat for Refugees and Migration. The decision was valid until 9 April 2020 when its provisions were transferred to the Decree on measures during the state of emergency,¹²¹ and remained in force until 6 May 2020 when the state of emergency was lifted.¹²² Subsequently, on 7 May 2020 an Order restricting movement at entrances to open spaces and facilities of reception centres for migrants and asylum centres was issued.¹²³ This Order extended the prohibition of leaving facilities ‘until the cessation of the danger of spreading the infectious disease caused by COVID-19.’ This Order was terminated on 14 May

116 | Initiative, p. 5.

117 | Ibid.

118 | Constitutional Court, IUo- 812/2012, 24 April 2013.

119 | Decision on the declaration of the State of Emergency, *Official Gazette of the Republic of Serbia*, no. 29/2020. More on state of emergency in Serbia see Krstić and Davinić 2020.

120 | Decision on Temporary Restriction of Movement of Asylum Seekers and Irregular Migrants Accommodated in Asylum Centre and Reception Centers in the Republic of Serbia, *Official Gazette of the Republic of Serbia*, no. 32/2020.

121 | Decree on Measures adopted during the State of Emergency, *Official Gazette of the Republic of Serbia*, no. 53/2020.

122 | Decision on lifting the State of Emergency, *Official Gazette of the Republic of Serbia*, no. 65/2020.

123 | Order on the Restriction of Movement on open space and facilities of reception center for migrants and asylum seekers, Decree on Measures adopted during the State of Emergency, *Official Gazette of the Republic of Serbia*, no. 66/2020.

2020.¹²⁴ A constitutional complaint was submitted claiming that the detention of migrants was illegal, arbitrary, and a collective deprivation of their liberty. Some claimed that the strict regime imposed on the freedom of movement of asylum seekers and migrants amounted to the deprivation of liberty.¹²⁵

In its decision, the Court found that the restrictions on movement were constitutional.¹²⁶ It underlines that restrictions on freedom of movement were extended to all citizens, depending on their level of vulnerability, and were loosened with a better epidemiological situation.¹²⁷ The Court further argued that the order aimed to prevent the uncontrolled movement and voluntary abandonment of asylum and reception centres of persons who may be carriers of the COVID-19 virus.¹²⁸ Thus, it rejected the claim that the restriction of movement was an arbitrary, illegal, and collective deprivation of liberty based on discriminatory criteria and without the possibility of judicial protection. The Court found that this was not a deprivation of liberty, either according to its purpose or content.¹²⁹ The Court reasoned that the purpose of temporary restrictions on freedom of movement was effective protection from dangerous infectious diseases of asylum seekers and irregular migrants and adequate protection of the general population in Serbia. Both purposes are legitimate, legally acceptable, and constitutionally justified. If asylum seekers and irregular migrants were allowed to move freely, they would be exposed to severe risk.¹³⁰ Simultaneously, the risk of exposing other persons in Serbia to the possibility of contracting the disease had significantly increased. The Constitutional Court emphasised that asylum seekers and irregular migrants, in most cases, do not intend to stay and live permanently in Serbia and try to move to other countries without prolonged retention. In other words, the Court suggested that in specific circumstances in which State borders were maximally secured, they would certainly not have real opportunities to leave Serbian territory. However, if they succeeded, they would face severe problems in neighbouring countries, which supposedly demonstrated that their treatment in Serbia was still much better than that in the adjoining region.¹³¹ Finally, the content of the measure was effective protection from dangerous infectious diseases, precisely targeting categories of persons who had a significantly increased risk of spreading dangerous infectious diseases in relation to other persons. This decision is unsatisfactory as an explanation and illustrates the Constitutional Court's need to defend the government at all costs while using a strange analogy and discriminatory argumentation.¹³²

124 | Order on the termination of the Order on the restriction of movement on open spaces and facilities of reception centers for migrants and asylum seekers, Decree on Measures adopted during the State of Emergency, *Official Gazette of the Republic of Serbia*, no. 74/2020.

125 | See, e.g., Kovacevic, 2020a.

126 | Constitutional Court, IUo-45/2020, *Official Gazette of the Republic of Serbia*, no. 126/2020, 25 October 2020 [Online]. Available at: <http://www.ustavni.sud.rs/page/jurisprudence/35/> (Accessed: 24 November 2023).

127 | *Ibid.*, p. 29.

128 | *Ibid.*, p. 31.

129 | *Ibid.*

130 | *Ibid.*, p. 32.

131 | *Ibid.*

132 | See also Belgrade Center for Human Rights, 2020, p. 91.

5. Conclusion

The role of the Serbian Constitutional Court in the development of asylum and migration laws is very modest.

The Constitutional Court delivers either short decisions (especially on the dismissal of constitutional complaints or initiatives for the assessment of the constitutionality and legality of certain acts) or decisions containing information on disputed acts and relevant national and international law, while the decision's rationale is usually brief. There is no single judgment that links asylum and migration issues to the issue of constitutional identity; however, the Court acts as a defender of national authorities rather than that of human rights. Moreover, in a decision concerning the state of emergency and restrictions on the freedom of movement of asylum seekers, refugees, and migrants, it is visible that the Constitutional Court approved the view of the national authorities that migrants are particularly dangerous for spreading the virus, which lead to the distinction between 'us' and 'them'. Another unusual conclusion of the Court was the arrogant attitude that Serbia provides better treatment and protection for migrants than neighbouring countries, which was not necessarily true and was not up to the Court to express such a view.

Moreover, not only were a few constitutional complaints submitted and decided by the Court, but the Court also limited its own role, especially when it interpreted general acts or the absence of regulations that were supposed to be enacted, violating important constitutional rights such as freedom of movement. The Court is aware that the majority of decisions do not develop or interpret existing national norms, as only five decisions concerning asylum and migration are published in the Official Gazette of the Republic of Serbia. These judgments concern the following standards: the importance of a reasoned judgment and the *ex officio* consideration of subsidiary protection after it is found that refugee protection cannot be granted; interpretation of the effective legal remedies in asylum procedure; non-automatic application of the government's list on 'safe third countries'; standards related to deprivation of liberty of migrants and conditions of their detention; and the restrictions on freedom of movement of asylum seekers, refugees, and migrants during the state of emergency. Only for the issue of a 'safe third country' principle can it be concluded that they are flagship judgments, as the Constitutional Court developed a standard on the importance of individual case assessment without the automatic application of the government's list, which led to the amendment of this principle in a new asylum law.

Furthermore, the Constitutional Court did not have the opportunity to derive from its own practice (developmental arc), as it dealt with the same matter in only a few cases, repeating the same standards on which it based the decision. It is particularly important that the Court reconsider its conclusions on the restrictions on the freedom of movement for asylum seekers, refugees, and migrants during a state of emergency. The ban on movement was not based on an assessment of individual circumstances, such as health conditions, but rather on an arbitrary assessment by the authorities. Furthermore, the Court introduced aspects of

its reasoning in its judgment based on stereotyped notions which justified the violations. However, the proportionality of a measure, such as its length (almost 50 days), intensity of the restrictions on freedom of movement and social contact, duration, degree of supervision, and severity of the prescribed penalties for violating the measure, was not properly assessed.

Finally, on a positive note, the Constitutional Court has regularly relied on the relevant jurisprudence of the ECtHR. Usually, the Court invokes several judgments adequately, incorporating these standards into its decisions; however, it wrongly applies these standards to concrete cases. For example, the Court correctly invokes principles of the right to an effective remedy but then concludes that the complainant had this right, even though the Asylum Commission was inoperative for several months, without any justification. Therefore, it is necessary to incorporate these principles into concrete cases. Moreover, the Constitutional Court relies on different UN resources, CoE instruments, and the findings of different supervisory bodies (such as the CPT), UNHCR reports, and NGO reports. However, the Court does not rely on the jurisprudence of the CJEU, although the law on asylum was inspired by the EU *acquis*, and the interpretation of some provisions of asylum directives can provide clear guidance on the correct interpretation of some institutions. Reference to the legislation and case law of other EU member states would also be beneficial for interpreting norms in the areas of asylum and migration. In the future, the Constitutional Court is expected to have more determination and guidance in correctly applying international standards in the areas of asylum and migration.

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