



Kingdom of the Netherlands



ALBANIAN HELSINKI COMMITTEE

## STUDY REPORT

**“On the Rights and Freedoms of Migrants,  
Asylum Seekers and Refugees in Albania,  
during 2012 - 2017”**

July 2018

*This report was prepared within the framework of the project "Contribution on a Better Respect for the Rights of Asylum Seekers and Refugees in Albania", supported by the Embassy of the Kingdom of the Netherlands in Tirana, within the framework of the Rule of Law Matra Program.*



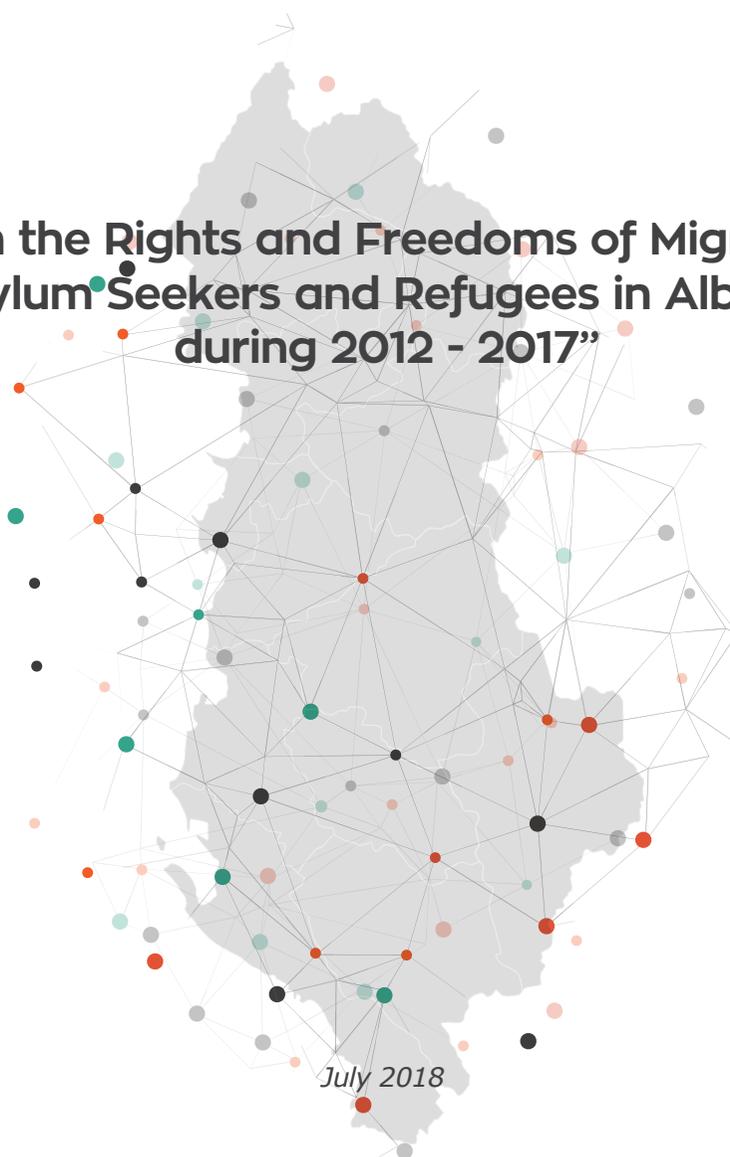
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The content of this report is fully the responsibility of the Albanian Helsinki Committee and does not necessarily reflect the position of the experts involved in this study or the stance of the Embassy of the Kingdom of the Netherlands in Albania.

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**Dear reader,**

One of the main focusses of the Albanian Helsinki Committee's (AHC) continual activities, is that of the respect of migrants, asylum seekers and refugees' rights in Albania.

The geographic region of the Western Balkans with Albania a constituting part, is not foreign to the migrants and asylum seekers flow since it has experienced massive displacement as a result of changes in the political regime, violence or ethnic cleansing during the 1990s.

Gradually, the Western Balkans, besides being a region of origin for migrants, was transformed into a transit and destination region for foreign migrants and asylum seekers arriving here from outside of this region in massive flows of people fleeing mostly war-torn countries.

After in 2009-2010 the European Union paved the way for the visa-free regime for Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia, there was an increase in the number of nationals from the Western Balkans who joined the flows of citizens from Africa and the Middle East with EU countries for their destination. Numerous studies in terms of the main reasons for leaving the region, point to unemployment, poverty, corruption in the public sector and the justice system, lack of meritocracy in appointments in the administration and discrimination of vulnerable groups.

In April 2016, entered into force the agreement between the European Union and Turkey, aiming to curb the flow of immigrants into the Aegean Sea by returning to Turkey those emigrants who had just crossed to Greece. In line with this agreement, Albania was affected by the measures taken by neighboring countries, some of which closed the borders, blocking the transit passage of migrants and asylum seekers coming from Africa or the Middle East. With the closure of this corridor, Albanian territory was often used for the transit of asylum seekers from the border with Greece, and whose destination was the EU. While the Balkan approach to migration took a coarse approach, the few who obtained asylum in the Balkan countries are estimated to have faced a difficult path forward as the countries where they settled did not have sufficient integration programs, social support programs or financial benefits, common to Western European countries.

Despite the changes that our domestic legislation has undergone and the intention to aligning it with EU standards and directives, the respect of human rights standards for refugees and asylum seekers in Albania is not fully in line with international standards and practices. Our country is estimated to lack the necessary capacity to accommodate refugees and asylum seekers and to provide them with basic services such as food, health care, social services, housing, employment, free legal aid, etc.

In these circumstances, there is a need for more activism by independent civil society organizations, which should lobby and advocate for the improvement of treatment,

conditions and respect for the rights of immigrants, refugees, asylum seekers and third country nationals.

To this purpose, the AHC, with the support of the Embassy of the Kingdom of the Netherlands, in cooperation with the Croatian Law Center and the Dutch Refugee Council, undertook this initiative to monitor the respect of the rights and freedoms of asylum seekers, refugees and irregular migrants at the border crossing points and institutions where they are accommodated. The monitoring data served as a basis for this study report, which furthermore analyzes legislation, challenges in terms of its implementation by the Albanian authorities, as well as the practice of our domestic courts. This study analyzes developments in the scope of migration and asylum in a time when Albania is not only a country of origin, but also a country of destination for asylum seekers and irregular migrants.

The Albanian Helsinki Committee acknowledges the work of experts who contributed to the preparation of this study report, and in particular that of the legal expert, Mrs. Luljeta Ikonomi, for her precious and professional contribution. We also thank the network of observers, the AHC's staff, the Croatian Law Center, the Dutch Refugee Council, the Ombudsman's Institution, UNHCR, Terre Des Hommes, the institutions we cooperated with during the implementation of this project as well as the Embassy of the Kingdom of the Netherlands in Albania, for the very good cooperation we have had over the years on human rights and freedoms in Albania and for the support that made possible the realization of this study.

**Wishing you a good reading of this Study Report!**

**Regards,**

**The Albanian Helsinki Committee**

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## Introduction

Movements over international borders have increased with a rapid pace in the recent decades. It is reported that about 258 million people have left their countries of origin to settle in another country.<sup>1</sup> This figure does not include the number of irregular migrants. Due to the nature of their movement, it is difficult to accurately identify how many migrants live and work without proper documentation in a country other than that of their origin. The phenomenon of migration has affected significantly also the post-communist Albania. Over the last 25 years, about 33% of the population has left the country.<sup>2</sup> Emigration, primarily in European Union countries and North America, was initially irregular. Over the years, a significant number of immigrants have benefited regular legal status in the countries of destination, within the framework of the latter's legalization programs. The intensity of Albanian's movements abroad, remains high. Despite of developments and achievements in the country regarding the prospect of accession to the European Union and the general measures taken to combat illegal migration, the number of Albanian nationals who in the last 5 years have sought asylum in EU member states has increased substantially, so much so as to create concerns for the European Union.

Besides emigration, over the recent years has increased also the number of foreign migrants and asylum seekers that are interested in obtaining residence or to transit through Albania. The Albanian territory has been particularly affected by massive flows of asylum seekers and migrants from countries such as Syria, Iran and Afghanistan, moving towards the European Union during 2012-2016. Although the intensity of these movements in the Republic of Albania is negligible compared to that of the countries of the region, nevertheless, they highlighted shortcomings regarding the infrastructure and human resources of the Albanian authorities for the reception of asylum seekers.

This study report takes into analysis the legal and institutional framework regarding the entry and departure of foreigners into the Albanian territory as well as the emigration of Albanian nationals, mainly in EU. It does not address any kind of movement *from* and *to* the Albanian territory, but only those that are carried out in contravention to the legal framework for crossing international borders as well as that on residency in a country other than that of origin. Therefore, the report focuses on the analysis, firstly, of the asylum seekers and immigrants who irregularly entered Albania. Secondly, the report focuses on emigrants departing illegally for the EU, as well as asylum seekers rejected by destination countries, and who have returned to Albania within the framework of the Readmission Agreement between Albania and EU.

This study report takes into analysis a five-year period, 2012-2017. This period marks a new development with regard to movements *from* and *to* Albania. More concretely, the entry into force of the Visa Liberalization Agreement with the European Union was accompanied by a significant reduction of illegal border crossing cases. However, in the following years, there was an increase in the number of people that overstayed the deadlines allowed in the EU (90 days within 180 days) in violation of the Visa Liberalization Agreement and (especially in 2013-2016) there was an almost alarming

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<sup>1</sup> International Migration Report 2017, p. 5 in [http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017\\_Highlights.pdf](http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017_Highlights.pdf).

<sup>2</sup> Enlarged Migration Profile 2012-2014 available in: [http://www.qbz.gov.al/botime/fletore\\_zyrtare/2015/PDF-2015/222-2015.pdf](http://www.qbz.gov.al/botime/fletore_zyrtare/2015/PDF-2015/222-2015.pdf), 14528.

increase of asylum applications in countries such as Germany, the Netherlands, France, etc. The time-period 2012-2017 is characterized also by an increase in the number of foreign citizens entering Albania mainly from Greece, within the massive movements that affected the Western Balkans, with the goal of reaching the European Union countries. Also, since 2013, about 2745 people from the Freedom Camp in Iraq (Mujahidin)<sup>3</sup> have moved in to Albania, having been admitted collectively within an agreement between Albania and the US. Under the domestic legislation on asylum, the Albanian state should facilitate the integration of this group of people, a process that is accompanied by challenges for the authorities in the country.

This period witnessed also an increase of judicial processes on illegal border crossing charges, both towards Albanian emigrants and the immigrants, and in some cases foreign asylum seekers.

## **Methodology**

The study report takes into account and relies on the existing reports on the migratory flows in this period e.g. the reports of European Commission, Ombudsman, International Organization for Migration, UNHCR, OSCE, etc. An important place is given to the data and findings of the relevant authorities for asylum and migration, more specifically the Asylum and Refugees Directorate and the Border and Migration Directorate under the Ministry of Interior Affairs, whose reports constitute the basis regarding statistics presented in this report.

Although the report takes into analyses the legal and institutional framework for migration and asylum, it does not aim at comparing Albanian legislation with international standards and European law. It is so because the central objective of the paper is the assessment of the implementation of legislation and the protection of human rights in practice and does not assess shortcomings of the current legislation (it is not a gap analysis). Consequently, a methodology that intertwined the review of the legal framework with the findings of the monitoring was applied, in order to evidence implementation in practice of the legal framework. The monitoring was carried out by the monitoring teams of Albanian Helsinki Committee in the main border crossing points, in the National Center of Asylum Seekers, as well as in the Closed Center for the Irregular Migrants. The study report also refers to the monitoring or findings of organizations that operate in migration and asylum issues, such as the Ombudsman, UNHCR, OSCE, IOM, Refugee and Migrant Services of Albania (RMSA) and others. Part of the information was gleaned from interviews with representatives of these organizations, as well as representatives of relevant state authorities for migrants and asylum seekers.

An important place in this report is dedicated to the analysis of Albanian courts decisions regarding migration and asylum. Few studies in this area refer to the Albanian courts practice pertaining asylum and migration. This is also due to the fact that the case law of the courts has been limited in this regard. Only in recent years is noted an increase in the number of cases pertinent to asylum and migration, especially in relation to illegal border crossing and the use of counterfeit documents. For drafting this report, the AHC gathered and reviewed decisions by the district court and administrative courts

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<sup>3</sup> See the following section on statistics.

in Tirana, Durrës, Gjirokastra and Vlora.<sup>4</sup> The majority of cases are related to foreign and Albanian citizens moving through international borders irregularly, including the use of counterfeit documents. A limited number of cases relate to asylum applications or renewal requests of the residence permits and/or work permits.

The report does not intend to be exhaustive but presents a synthesis of the legal framework and its implementation in practice regarding migration *from* Albania or *to* Albania. It consists of three main chapters. The first chapter analyzes asylum and immigration in Albania, whereas the second chapter focuses on immigration and asylum from Albania, mainly to EU countries. The first two chapters begin with general information about the dynamics of migration (*in* or *from* Albania) and are followed by analysis of the legal and institutional framework as well as the challenges of implementing the legislation in practice. The third chapter presents the most important findings of this study report and recommendations addressed to the authorities in order to contribute towards improving the situation of respect for the rights of irregular immigrants, asylum seekers and migrants

### **Terminology:**

The study report uses the term *irregular migrant* for those foreigners who entered or reside in Albania irregularly and that do not seek asylum. In these cases, reference is made to the categorization by the migration authorities in their relevant orders or decisions.

The term '*asylum seeker*' is used in those cases when undocumented foreigners have submitted their asylum application to the relevant Albanian authorities, and the process of reviewing their request is ongoing; and '*rejected asylum applicant*' when the asylum authority and appellate authorities have rejected the request for protection. The study focuses on the category of the irregular migrants and asylum seekers, taking into account that the separation line between them is often blurry and problematic. Consequently, even when the foreigner's status is not clear, the term '*irregular foreigner*' is used. This was the case for the majority of the foreigners who entered the Albanian territory during the years 2014-2017, from Greece, as part of the massive flows of people fleeing towards EU, who did not seek asylum in Albania, even though they were in need of international protection.

The study uses the term refugee to denote the asylum seekers who have been granted the status of refugee or of subsidiary protection. The term 'refugee' is also used to refer to the foreigners who come from countries where it is internationally known that their life is in danger.

With regard to Albanian citizens, the term 'emigrant' is generally used. The paper takes into consideration the fact that the majority of Albanians who have applied for asylum in EU countries, have not obtained that status, due to the fact that they have largely left the country for economic reasons, regardless of the fact that they have sought asylum.

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<sup>4</sup>AHC lodged a request to obtain decisions also in the Courts of Shkodra and Korça, but these two Courts did not provide them to us.

## Chapter I: Asylum and Immigration in Albania

### 1. Statistics

Post-Communist Albania is a typical country of origin of immigrants. However, in recent years, the number of foreigners living and working in the Republic of Albania has increased. In addition to regular immigration, a considerable number of foreigners have entered irregularly Albanian territory, mainly through the border with Greece. Increased flows took place especially during 2013-2016, corresponding to the asylum seekers' flows that went through the Balkans towards the European Union. Their impact was felt in Albania, especially after the closure of other Balkan transit routes to the EU (via Macedonia and Serbia).

Over the last 5 years, Albania received 2,901 foreigners from the Iraqi Freedom Camp (MEK) in the framework of an agreement with the US.<sup>5</sup> The re-allocation process started in 2013 and ended in 2016. Out of the agreed 2,901 persons admitted, about 2,745 entered the Republic of Albania by the end of 2016.<sup>6</sup> During the same time period there was also an increase in the number of asylum seekers from war-torn countries such as Syria, Afghanistan and Eritrea, that were part of massive asylum seekers flows to EU countries. They have entered from the border with Greece after the closure of other Balkan routes. A limited number of asylum seekers entered Albania, not necessarily irregularly, from countries such as Turkey, Kosovo, Serbia, Ukraine, Paraguay, Nicaragua etc.

In addition to asylum seekers, Albanian authorities have also dealt with the category of irregular foreigners who either entered irregularly in Albania and did not seek asylum, or entered and resided on a regular basis, but had their legal residence permit expired. This is the case of foreigners who have entered with a visa or within the visa-free regime and have expired residence or have been refused a residence permit renewal.

It should be noted that the number of irregular foreigners who entered Albania during the mass movements of persons from the Western Balkans towards the EU (especially during 2014-2016) is low compared to other Balkan countries such as Macedonia and Serbia.<sup>7</sup> Data from the Migration Profile indicate that in 2012 around 1,182 irregular foreigners entered the Republic of Albania, of which 439 were from Algeria and 63 from Syria. The number of Syrian citizens increased in 2013. Out of a total of 1978 irregular foreigners, 543 were from Syria. About 400 were from Pakistan, 204 from Somalia, and 274 from Eritrea. The number of foreigners rose sharply in 2014, where 2,618 foreigners with irregular residence were found, most of whom, precisely 1,193 people were from Syria. In 2015, 2,047 undocumented foreigners entered Albania, mainly from Greece.<sup>8</sup> Most of them, 1,354, stated being from Syria, 171 from Eritrea, 118 from Somalia, 50 from Morocco, 37 from Iraq, 17 from Afghanistan. May 2015

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<sup>5</sup> It is not clear whether there is a formal agreement or if the whole process is realized within a gentlemen's agreement. It was not possible to identify such an agreement nor its content.

<sup>6</sup> For more information see also: Ikonomi 'Challenges for the Protection of Rights of Asylum Seekers and Migrants in Albania', presented at the Conference 'Asylum at the Frontiers of Europe - Realities and Legal Challenges', organized by the University of Lund, May 11, 2017.

<sup>7</sup> For more about the reasons why Albania is not a favorite country for migratory flows towards EU, see: A Hackaj, 'Albania in the Western Balkans Route' (Working Paper No 1 of the Berlin Process Series, 2016) 7-8; as well as Ikonomi (note 6).

<sup>8</sup> See EC Progress Report 2015. See also Migration Profile 2016.

marked the peak of entry of foreigners from Greece, with 462 people. 1,527 people were apprehended in the border area and 520 in the Albanian territory.<sup>9</sup>

In 2016, there was a reduction in inflows, with a total of 915 people, which means 1,132 people less than in 2015. Also in 2016, most were from Syria, about 310 people, 273 from Afghanistan, 14 people from Somalia and others from Iraq, Pakistan, Eritrea, Morocco. The highest flows were observed in August and September, respectively 131 and 136 people<sup>10</sup>. About 895 undocumented foreigners were apprehended in the border area with Greece and 20 of them in the Albanian territory.

During 2015 and 2016, there was noted an increased presence of families, children and women.<sup>11</sup> Thus, in 2016 were apprehended 164 women and 227 children. Children in some cases stated they were accompanied by relatives. Only 7 minors were identified as unaccompanied. It is worth underscoring that the identification of cases of unaccompanied children is not an easy process. This is due to the fact that border and migration police relies on the statements of the minor or the accompanying persons (in many cases the latter claim to be uncles or kinsmen), because most do not have documentation to support their claims. The process turns even more difficult with the absence of an interpreter.

The border and migration police also found around 122 people who have been apprehended more than once in the territory. Most of the foreigners are apprehended in Kakavija, Gjirokastra<sup>12</sup>, as entry points at the border, at the border between Kosovo and Kukës (Albania)<sup>13</sup>, and at that between Albania (Shkodra) and Monte Negro. A limited number of foreigners have also entered from Korça, on the border crossing between Kapshtica (Albania) and Greece.<sup>14</sup>

If not counting in the asylum/protection applications by Iranian dissidents, from the Iraqi Freedom Camp entering Albania collectively in 2014, there were 132 asylum applications were filed out of a total of 2,618 foreigners, whereas in 2015 were lodged 104 asylum applications from a total of 2,047 apprehended foreigners. In 2016, there was an increase in asylum applications, with 240 persons.<sup>15</sup> Most of applications by non-Iranians come from asylum seekers 'trapped' in Greece, who entered the territory of the Republic of Albania from the Greek border. A small number of applications have

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<sup>9</sup> Information received by Border and Migration Police. See Migration Profile 2016.

<sup>10</sup> Ibid.

<sup>11</sup> Data from UNHCR show that about 75% of foreigners traveled as a family, 63% were women, 76% have been previously in an asylum seekers' camp. Many people were in need of medical assistance or special needs due to age. About 62% possessed identity documents, and about 19% were assisted by third parties to cross the borders. About 23% of foreigners entering the territory applied for asylum, for 28% is not clear whether they applied or not, and 50% did not express interest in applying.

<sup>12</sup> The monitoring teams have identified that in 2014, about 2,092 foreign nationals were apprehended in Kakavija. Of these, 521 were recidivists. (AHC Monitoring Report of 2015). In 2016, the Border and Migration Police in Gjirokastra has apprehended 581 foreign nationals (between 01.01.2016 and 31.10.2016). Of these, 503 volunteer departure orders were issued, also 15 expulsions, 63 asylum requests were granted. Most of the people involved were from Syria, Afghanistan, and Morocco. In 2016, about 190 persons detained in Kakavija/Gjirokastra, were minors.

<sup>13</sup> Monitoring teams found that at the border crossing point of Hani i Hotit, in 2015 were detained 103 people, in 2016 only 7 people. So there is a decrease in 2016, In 2017 there was ascertained a growth, as until September 2017, 36 people have been apprehended. In Tropoja, in 2016 there were 93 people apprehended, while until September 2017, there were only 2. In the Kukës Directorate, there were 58 asylum applications during 2016-2017, mainly from Afghani and Syrian nationals. See AHC Monitoring Reports.

<sup>14</sup> See AHC Monitoring Report for Korça.

<sup>15</sup> Migration profile 2015, p. 34.

been lodged by Turk (2), Kosovan (1), Ukrainian (1), Serb (1), Macedonian (1) and other nationals. Of the asylum applications in 2016, 35 came from male minors, 17 of Syrian origin, 8 from Iraq, 10 from Afghanistan. During this period, 23 female women were apprehended, 4 from Iraq, 10 from Syria, and 9 from Afghanistan. A total of 58 minor asylum-seekers were registered, accompanied by family members/relatives. It is reported that most asylum seekers entering Greece, abandoned the asylum process and left the National Asylum Center.<sup>16</sup>The Asylum Directorate, during 2016-2017 has processed the asylum requests and has made the following decisions:

Chart 1 Requests reviewed by the Asylum Directorate for 2016-2017<sup>17</sup>

<b>STATUS</b>	<b>January– December 2016</b>	<b>2017 January-October</b>
<b>Refugee</b>	11	3
<b>Subsidiary protection</b>	10	6
<b>Temporary protections</b>	0	0
<b>Rejection</b>	13	3
<b>Revoking</b>	27	1
<b>Suspension</b>	23	47
<b>Dismissal</b>	35	28
<b>Restriction of Movement</b>	1	0
<b>Total</b>	120	88

These data indicate a high percentage of withdrawals and suspensions of asylum applications in 2016 and 2017. 2016 marks the highest level of the processes started versus those in 2015 and 2017. In 2016 there were about 240 asylum applications but only 120 cases were finalized, of which 23 were suspended and 35 other ones were withdrawn. There was a total of 21 positive decisions out of 120 reviewed applications from a total of 240 applications. That figure means that less than 10% of applicants were granted protection from the Asylum Directorate.

## 2 Asylum

### 2.1 Legal Framework on Asylum

<sup>16</sup> Information received from the Directorate of Asylum and Refugees. See also AHC's Monitoring at the Asylum Seekers' Center.

<sup>17</sup> Source: A Mele, Directorate for Asylum and Refugees.

The Albanian Constitution provides that foreigners in the Republic of Albania have the right to asylum.<sup>18</sup> Albania has also ratified the 1951 Convention on Refugees and its Additional Protocol (1967), which are mandatory and prevail over the domestic laws.<sup>19</sup>

The right to asylum and asylum procedures in Albania were first stipulated in the Law on Migration (1995) which included also some provisions on asylum. However, in 1998 the Albanian Parliament enacted the Law on Asylum<sup>20</sup>, which five years later was supplemented by Law on 'Integration and Family Unification of Beneficiaries of Asylum in the Republic of Albania' (Law no. 9098, of 03.07.2003). Beside these two laws, in the same time period are approved a series of sublegal acts, relevant to asylum, including the screening order (2006) which regulated procedures for the identification of migrants, asylum-seekers, victims of human smuggling or minors.<sup>21</sup> The order sought to provide specific support to different categories of irregular foreigners, more specifically asylum seekers, victims of smuggling of human beings, unaccompanied minors and irregular migrants, transferring them to relevant mechanisms.

The above-mentioned legal framework, was not fully in line with international standards and Community Acquis. The need to improve the asylum legislation has been repeatedly argued by the EU's Progress Reports and UNHCR. The obligation to respect European and international standards on asylum, derives also from Article 80 of the Stabilization and Association Agreement, which provides that cooperation between Albania and the EU on asylum, will focus in particular '*on the implementation of the national legal framework in accordance with the standards or the Geneva Convention of 1951 and the New York Protocol, to ensure respect for the principle of non-refoulement as well as the rights of asylum seekers and refugees*'.<sup>22</sup> Some organizations involved in the asylum issues have repeatedly noted the partial compliance of Albanian asylum legislation with European and international standards and have recommended its amendment.<sup>23</sup> The Albanian Government has also identified in the National Integration Plan (2014) the need for adopting a new asylum law.<sup>24</sup> The National Plan has also underscored also some priority measures that the asylum authorities should take, such as: issuing identity and travel documents for refugees.<sup>25</sup>

Asylum law reform aimed at adopting a comprehensive law dealing with asylum procedures, different categories of persons seeking protection, as well as the rights of

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<sup>18</sup> Article 40 of the Albanian Constitution.

<sup>19</sup> Article 116 of the Albanian Constitution regarding normative acts in the Republic of Albania and hierarchy among norms.

<sup>20</sup> Law on Asylum 8432/1998, as amended in 2009. See also Law 9098/2003 on the Integration of Persons Who Obtained Asylum in the Republic of Albania.

<sup>21</sup> It was approved under the 'Pre-Screening of Asylum Seekers and Migrants in Albania' project, IOM, UNHCR, OSCE, funded by EU CARDS Program'.

<sup>22</sup> For more, see:

<http://ec.europa.eu/eurld/agreements/prepareCreateTreatiesEorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=7564>,

<sup>23</sup> UNHCR's report and Refugee and Migrants Services (RMSA) <http://rmsa.al/documentation/SFIDAT%20E%20INTEGRIMIT%20TE%20REFUGJATEVE%20NE%20SHQIPERI.pdf>. According to UNHCR, a detailed report of the Asylum System in Albania has been conducted, which has been shared with the Albanian authorities, aiming to consolidate the system in accordance with the Acquis Communautaire.

<sup>24</sup> National Integration Plan 2014-2016, p. 35-36, '[http://www.punetebrendshme.gov.al/files/programs\\_files/15-02-13-12-24-59Kapitulli\\_24\\_ne\\_kuader\\_te\\_PKIE\\_2014\\_-\\_2020.pdf](http://www.punetebrendshme.gov.al/files/programs_files/15-02-13-12-24-59Kapitulli_24_ne_kuader_te_PKIE_2014_-_2020.pdf)

<sup>25</sup> Ibid p. 13. For a detailed analysis, see also Ikonimi (note 3).

persons who acquired refugee status/supplementary or temporary protection. Consequently, the new Asylum Law adopted in 2014 addressed the issues covered by both previous laws, the 1998 Asylum Law and the Law on Integration and Family Unification of Protected Persons (2003).<sup>26</sup> The adoption of the new Law on Asylum was coupled with the adoption of a number of sub-legal acts, and specifically relevant is the Guideline 293/2015 'On Procedures for Treatment of Foreign Citizens with Irregular Residence in the Republic of Albania'.<sup>27</sup> For the purposes of this section, only some of the provisions of the legislation are briefly mentioned, while implementation challenges will be analyzed in the next section.

Law on Asylum (no. 121/2014) affirms the constitutional provision that foreigners have the right to seek asylum in the Republic of Albania.<sup>28</sup> The law provides for the principle of non-refoulement, however, this principle is conditioned by public interest and public security. Also, this principle does not apply to foreigners considered dangerous or sentenced with a prison sentence of not less than 7 years. The last restriction has been criticized by UNHCR on the recommendations made in relation to the Draft Law during its discussions in the Parliamentary Committee.<sup>29</sup>

The Asylum Law provides that asylum seekers entering the territory of Albania irregularly must apply for asylum within 10 days, in order to avoid a Criminal Code application on the charges of illegal entry. The Criminal Code provides that illegal border crossing is punishable by a fine or imprisonment of up to two years (Article 287 of the Criminal Code). Taking into account the human dimension of asylum, the fact that asylum seekers from countries such as Eritrea, Syria etc. have no information on asylum procedures and/or relevant authorities, fines or two-year jail terms for filing an asylum application with the asylum authority after the 10 day deadline should be considered by the Albanian authorities. The sanctioning of unlawful asylum seekers and irregular migrants on the charges of illegal crossing of borders is also in conflict with the UN Convention on Migrant Workers and Members of Their Families, 1991, ratified by Albania. The punitive approach has been criticized also by international organizations and/or representatives of institutions that defend human, asylum seeker and migrant's rights.<sup>30</sup>

The asylum request is generally articulated during the screening process conducted by the border and migration officer, who refers the case to the asylum authorities. Border and migration authorities may not make decisions regarding the asylum application. According to the Law on Asylum, the sole authority that can make such a decision is the 'Asylum Authority'. The Asylum Law does not specify what the 'Asylum Authority' is, it only identifies it as the authority *under the Ministry of Interior*. At present, this authority is with the Department for Asylum in the Ministry of Interior Affairs.

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<sup>26</sup> Law on Asylum 121/2014.

<sup>27</sup> See also DCM 159 (2016) 'On the List of Safe Third Countries'.

<sup>28</sup> Article 2 Law on Asylum.

<sup>29</sup> UNCHR Report on the Draft Law on Asylum. See also the American Embassy Report 2015 on <https://www.state.gov/documents/organization/253027.pdf>

<sup>30</sup> See for example: Thomas Hammarberg 'Its wrong to criminalize migration', <https://www.neweurope.eu/article/it-wrong-criminalise-migration/> at <https://www.neweurope.eu/article/it-wrong-criminalise-migration/>, See also: 'Addressing Irregular Immigration through Criminal Penalties 'Reflection on the Contribution of the ECJ to refining and developing a Complex Balance', by Bruno Naschimbene and Alessia di Pascale, The International Courts and Development of International Law, Springer 2013.

The Asylum Law and the sub-legal framework adopted pursuant to it, provide for certain procedural rights and safeguards for asylum seekers who have applied for asylum.<sup>31</sup> The Law is permeated by the principle of child's highest interest and stipulates special measures in regards to unaccompanied minors, such as the right to a legal custodian (Article 16), the right to have their application reviewed with priority, the provision of infrastructure and living conditions appropriate to their age, etc.<sup>32</sup> The right to legal custodian for the minor is not defined in the Directive 293/2015 that governs the work of the relevant authorities for the screening process. Likewise, this Guideline does not contain neither the right to legal aid provided during the screening process, as a right envisaged by the Law on the Rights and Protection of Children (18/2017).<sup>33</sup> The latter stipulates that in any administrative and judicial process, the minor must be provided with legal aid. Directive 293/2015 should reflect this new regulation of the Law on the Rights and Protection of Children envisaging that during the screening process, the unaccompanied minor, along the social worker/psychologist should obtain also legal aid.

Asylum authorities may refuse to examine asylum application in case that asylum seeker comes from a safe third country or when the asylum application has been rejected or is not accepted or the procedure has been suspended and no evidence has been presented to certify the circumstances on which the previous application was based or on any new corroborative evidence that is presented (Article 39). The asylum seeker has the right to appeal the decision of rejection of the asylum application, within 15 days to the National Commission on Asylum and Refugees.<sup>34</sup> The Committee must decide within 30 days of the receipt of the request.

The 'secure third country' provision, should not be interpreted as allowing authorities to refuse a priori the reviewing of applications by all asylum seekers entering from a secure third country. Automatic refusal to review the merits of the case of all asylum applications from citizens who come from countries identified as safe, is problematic, arbitrary, and can paralyze the essence of the right to asylum. This becomes even more disturbing given the fact that the list of safe third countries is problematic in itself. The Council of Ministers approved a list of safe third countries in 2016 that includes countries such as Greece<sup>35</sup> although the conditions for the reception and accommodation of asylum seekers there, do not meet the standards required for accommodation of asylum seekers.

According to the Law on Asylum, the asylum review process should be guided by the principle that '*asylum seeker has the right of asylum*' and '*not be prejudiced against*' so as to be grounded in the asylum seeker's credibility premise. In any case, authorities must take into consideration the principle of the best interest of the child and the right to family life. In case of rejection of application, the asylum seeker has the right to appeal to the National Asylum Commission. The decision of the later, based on the Asylum Law may be appealed to the Administrative Court.<sup>36</sup>

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<sup>31</sup> Article 30 of the Law on Asylum.

<sup>32</sup> Article 16 of the Law on Asylum.

<sup>33</sup> See also Ikonomi (note # 5).

<sup>34</sup> Article 39. 3 of the Law on Asylum.

<sup>35</sup> DCM 159 (2016) 'On the List of Safe Third Countries'

<sup>36</sup> Article 47. The Law on Administrative Proceedings 44 / 2-15 and the Law on Administrative Courts govern the process of appellate review in administrative courts.

The Asylum Law of (121/2014) sets out clear deadlines regarding the procedures followed by the asylum authority in the Interior Affairs Ministry. Thus, Article 37.4 provides that the '*Authority in charge for Asylum and Refugees shall make a decision within 30 days of the hearing of the asylum seeker and sends a copy of the decision to the asylum seeker and UNHCR without delay, however, in any case, not later than 5 days from the date of the making of the decision*'. Asylum Law underscores the obligation of the asylum authority to make a reasoned decision in writing, which should be taken in a consensual manner, but not necessarily unanimously. (Article 37 of LoF). If there is a minority opinion, it should be attached to the decision of the authority, highlighting therein the reasons for objection. Even in the case of rejection of the asylum application, the asylum seeker has the right to appeal within 15 days of receiving the decision of the National Commission for Asylum and Refugees and the Commission shall make a decision within 30 days from the date of filing the appeal.

While the application review process is ongoing, the asylum seeker can not be subject to return. Also, an asylum seeker is entitled to be accompanied, advised or represented by a legal representative, specialist in refugee affairs (Article 35 of the LoF). According to the Law on Asylum, asylum authorities should take measures for female asylum seekers to be heard and questioned by female staff members of the relevant authority for asylum and refugees. A juvenile asylum-seeker, unaccompanied, is heard and questioned in the presence of a psychologist or an adult who knows well the nature of the child or enjoys his trust (Article 35).

In case that the asylum application is rejected after the examination of the merits of the case, the rejected asylum seeker is subjected to return procedures to the country of origin. The return may be suspended for humanitarian reasons or based on the principle of the best interest of the child and/or the right to family life.<sup>37</sup>

#### *Authorities involved in the asylum process*

Based on asylum legislation, the process of reviewing asylum applications and treating asylum seekers and refugees, is the responsibility of several state authorities. The first contact is made with border and migration police, where the screening process takes place and any foreigner seeking asylum is transferred to the asylum institutions. More specifically at the National Asylum Center, the accommodation and the necessary services are provided. The Asylum Directorate is in charge of processing asylum applications, reviewing and deciding on them.

By 2017, the refusal decisions of the Asylum Directorate, could be appealed to the Court directly due to nonfunctioning of the National Asylum Commission. Since the establishment of the National Committee on Asylum, the asylum seeker appeals the Directorate's decision initially at the later. The decision of the Asylum Commission is not final, but may be challenged at the Administrative Court. The Directorate for Migration and Border is responsible for issuing a residence permit for refugees and the local Employment Directorates are in charge of issuing Labor Permits and handling labor relations of refugees and persons in temporary or subsidiary protection. Social

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<sup>37</sup>Law on Asylum. See also the Law on Foreigners, thoroughly analyzed in the following section.

services and services for minors at each municipality, are also in charge of offering the support needed within the scope of their duty.

## **2.2 Challenges with Implementation of Legislation on Asylum and Protection of Asylum Seeker's Rights**

### *a. Accommodation of foreigners*

**Albanian authorities were unprepared for hosting foreigners entering Albania in 2012-2017 as part of the massive asylum seekers' flow in the Western Balkans.**<sup>38</sup> Thus, the reception facilities at the border with Greece by the end of 2015 were not adequate.<sup>39</sup> In Kakavija (Gjirokastra) border crossing point, which was the main entry point of foreigners coming from Greece, there was no room for temporary reception of foreigners. The monitoring carried out in Kakavija in 2015 by AHC's team found that the waiting room was in dismal conditions, despite that at the time of monitoring there were 6 foreign nationals, 4 from Syria and 2 from Afghanistan. In Pustec as well the situation until 2015 was also very dismal, there was no potable water and no electricity, no beds or beddings as well as no other personal hygiene items. Kapshtica was in the same situation in 2015, lacking beds and potable water. UNHCR created an accommodation facility for 5 people in Kapshtica, in the form of a special tent. Also at 'Tre Urat' border crossing point, according to AHC monitoring, conditions were unsuitable. The situation was more acceptable in QafëBotë, Qafë Thanë and the Tushemisht border crossings.

At the border with Kosovo, in Kukës, and at the border with Montenegro, in Shkodra used by asylum seekers as border points to exit the Albanian territory, the situation was unsuitable up until December 2017. Thus at the border crossing point in Kukës (bordering Kosovo), there is no premise whatsoever for temporary accommodation. Even the room where the screening process is carried out is completely unsuitable, crampy and lacks even the minimum requirements (including toiletries).<sup>40</sup> The situation was particularly dire for the minors and females.<sup>41</sup> Also in the border area with Monte Negro, there was no facility for temporary accommodation. Up until late 2015 border and migration officers in Shkodra have collaborated with the Catholic Diocese for cases of minors and females.

The Temporary Reception Center of Foreigners, as its name reveals, should provide accommodation and allow a dignified treatment of foreigners subject to the border screening process, which can take up to 10 hours. When the screening process is finalized, or when the asylum-seeker's transport to the relevant authorities can not be accomplished immediately due to the lack of means of transport or the late hours, the foreigner without entry document (asylum seeker or irregular migrant) is accommodated in the Municipality's Center of Gjirokastra renovated in 2017.<sup>42</sup>

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<sup>38</sup> EU Progress Report 2014. Recommendation of the Ombudsman, Igli Totozani <http://www.avokatipopullit.gov.al/sq/content/10122015-deklarate-e-avokatit-te-popullit-ne-diten-nderkombetare-te-te-drejtave-te-njeriut>.

<sup>39</sup> Monitoring of AHC 2014.

<sup>40</sup> Monitoring of AHC, Gjirokastra- Kakavija, 2017. See also OSCE Report 'Needs Assessment of Frontline Officers Involved in Pre-Screening', presented on December 7, 2017, Tirana.

<sup>41</sup> Ibid. See also Ikonomi (note # 5).

<sup>42</sup> According to the information received from UNHCR.

It should be noted that during 2016, the Border and Migration Police have been supported by UNHCR and CARITAS regarding the reception and accommodation of foreigners at the border, especially in the case of families with children.<sup>43</sup>The support of the above organizations has brought about improvements, especially in Gjirokastra, as the main entry point of foreigners. More specifically, the temporary reception building was rehabilitated, following the financial support of UNHCR and CARITAS. The building has about 10 beds, 5 for women/families and 5 for men.<sup>44</sup>

Whereas in the main exit points of foreigners, particularly in Kukës are (in the border with Kosovo) and Shkodra (the border with Montenegro), in 2016, CARITAS made available a coordinator in full readiness (24/7) day), for any accommodation need that border and migration police was faced with. CARITAS financially covered the payment for accommodation of irregular migrants/asylum seekers in local hotels until the border and migration police provided the logistics for their transportation to the Asylum Seekers' Center or that of Irregular Migrants.

CARITAS has covered accommodation also at the border crossing point with Greece (Kakavija-Gjirokastra) in those cases when there was no room in the Temporary Center.<sup>45</sup>In these cases, the foreigner is accommodated in the nearby hotels. **If we consider that the support provided by CARITAS depends on the projects, therefore, it is not ongoing, the Albanian authorities should then take measures that at the border crossing points, especially in Kukës and Shkodër, to be operational an acceptable premise for a decent reception of undocumented foreigners.**<sup>46</sup> A very positive development in this regard has been the establishment of a temporary Center in the district of Gjirokastra (Gerhot) that has an accommodation capacity of 60 persons. The Center which was set up by International Organization of Migration (IOM), consist on mobile containers that include the basic conditions of accommodation.<sup>47</sup>It can be moved to other areas in case of alternations in the dynamics of foreigners/asylum seekers in RoA.

Also in the border crossing point in Kukës and Shkodra, it is expected that there will be changes in the situation in terms of the temporary reception facilities. At the new premises of the border and migration police in Kukës, that will serve the integrated management of the border between Kosova and Albania, it is planned also for a facility designated for reception and interviewing of foreigners.<sup>48</sup>Also at the Hani i Hotit border crossing point, there are plans for its reconstruction with the establishment of designated premises for the temporary accommodation of irregular foreigners/asylum seekers.<sup>49</sup>

In 2016, UNHCR offered live scanners to take fingerprints at border crossing points, thus facilitating bureaucracy regarding the delivery and processing of the prints to the headquarter.<sup>50</sup>

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<sup>43</sup> EU Progress Report 2016.

<sup>44</sup> AHC monitoring, Gjirokastra, Kakavija, 2017.

<sup>45</sup> According to UNHCR, this procedure continued until when the foreigners started to be accommodated in the Municipality center after the renovation of the latter.

<sup>46</sup> See also the OSCE Report 'Needs Assessment of the Front-Line Officers Involved in the Pre-Screening Process', presented on December 7, 2017.

<sup>47</sup> For more information, see: AHC Monitoring Report in Gjirokastra. The report ascertains very good conditions in this center.

<sup>48</sup> Monitoring Report of AHC. See also OSCE's Report (2017).

<sup>49</sup> Monitoring Report of AHC in Hani i Hotit 19.09.2017.

<sup>50</sup> According to the information received from Lorena Isla Rodriguez, UNHCR, date 05.04.2018

With the entry into force of the Law on Protection and the Rights of the Child, the accommodation of unaccompanied minors is a task that belongs to the child protection units. Child protection units should take measures to accommodate unaccompanied minors in the Social Care Centers administered by municipalities. Border and migration workers are aware that juvenile accommodation is a task of child protection units under the municipality. Thus, in some of the local directorates interviewed by AHC monitoring teams, border and migration workers, stated that unaccompanied minors should cooperate with child protection structures in each municipality.<sup>51</sup> However, up until 2017, support from child protection units has been virtually non-existent. This has put border and migration authorities in difficulty regarding this category of foreigners.

#### *Food and other basic services*

The Albanian authorities were not prepared for food, clothes or other services necessary for asylum seekers/undocumented migrants. In 2012-2015, border and migration authorities did not have a budget to meet food and clothing needs at border crossing points, nor support from domestic and foreign organizations. Border and migration officers have in some cases used personal income to provide food, especially in cases of minors or families.<sup>52</sup> In 2015, a limited budget was allocated to meet food-related needs, however this budget did not meet the basic requirements of irregular foreigners entering the Republic of Albania.

In 2016, UNCHR and CARITAS were intensively involved in border crossing points, offering food packages, clothes and medicines, according to the needs of foreigners. Monitoring at the border crossing points in Kukës, Shkodra, Gjirokastra and Korça, highlighted the substantial support provided by UNHCR and CARITAS for accommodation, medical assistance and food<sup>53</sup> Just as for accommodation, the UNHCR and CARITAS Coordinator is available 24/7 in the border crossing points to deliver the food parcel, clothes or material goods to foreigners in need, whenever required by the Border and Migration Police. The food parcels includes basic products but in specific cases they can also provide additional products such as milk for children or medicines.<sup>54</sup> Caritas support continued throughout 2017, at all border crossing points where there are foreign influxes (mainly border crossing point with Greece which serves as a point of entry and border crossing point with Kosovo and Montenegro as exit points from the Albanian territory).

#### *Medical services*

The organogram of regional border and migration police departments, does not include the position of the doctor. The needs for medical services that may arise during the screening process of asylum seekers, are covered by the public medical centers of the respective districts. The border and migration police report sporadic cases of foreigners who needed medical services, which they have handled by taking the patient to an emergency, hospital or at the regional medical center, as the situation required.<sup>55</sup> The

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<sup>51</sup> See for example the monitoring report of the border crossing point in Kukës 26.09.2017

<sup>52</sup> Ikonomi (note# 5).

<sup>53</sup> AHC monitoring. See also Ikonomi (note # 5) and the OSCE's Report (note # 43). The monitoring has highlighted the shortcomings of the psycho-social process for foreigners/asylum seekers.

<sup>54</sup> Ibid. Also IOM appointed an information officer in Gjirokastra, who collects information about the number of undocumented asylum seekers/foreigners.

<sup>55</sup> AHC monitoring. See also OSCE Report 'Needs assessment of frontline officers involved in pre-screening', 2017.

medical centers provided the requested service, so there were no cases of refusal.<sup>56</sup> UNHCR and CARITAS have offered their assistance by streamlining the transport when requested. CARITAS has funded the purchase of necessary medicines.<sup>57</sup> Problematic was only the dental services, as that is not provided by free public services.<sup>58</sup>

Border and Migration Police in Gjirokastra pointed to the need for a doctor at the border crossing point of Kakavija after some cases of patients infected with contagious disease.<sup>59</sup> The presence of a doctor at the border crossing point where the foreigner is apprehended and subjected to the screening process, enables the timely identification of cases of contagious diseases, limiting the spread of the disease to other foreigners or to border and migration officers. Border and migration police, during the process of apprehension, interviewing and transferring of foreigners to the relevant authorities (those pertaining asylum, irregular migrants, victims of smuggling of human beings) do not use protective measures or equipment to avoid contracting any contagious disease.<sup>60</sup> They are not even in a position to assess whether foreigner detainees subject to the interview process are suffering from any contagious disease. In early 2017, CARITAS supported the rehabilitation of a medical room at the border crossing point of Kakavija, equipped with all medical equipment, within the overall assistance provided to border and migration police.

### ***Human Resources***

Flows of undocumented foreigners revealed shortages in staff in the years 2012-2016.<sup>61</sup> According to the Albanian legislation, the screening process can only be carried out by the screening specialist, or chief in duty of a shift, which rules out the completion of it by any other border and migration officer.<sup>62</sup> Due to the limited number of irregular foreigners up until 2014, the border and migration police organigram, provided for only one screening officer in each regional directorate. Whereas at the border crossing points, the screening task was carried out only by the chief in duty of the shift. However, the 2014-2016 experience showed that just one specialist was not sufficient for the screening, especially in times when more than 50 people were detained per day.<sup>63</sup> It is not realistic to expect that a single border police officer will be available at any time, 24 hours a day, 7 days a week whenever a foreigner is detained. In periods of migrant flows, this may cause overload, increased fatigue for the screening staff, contributing to their emotional aggravated condition that could affect the treatment of foreigners during the screening process.<sup>64</sup> The AHC's monitoring groups did not find abuses with foreigners at the border.<sup>65</sup> On the contrary, border and migration police officers have spoken about their efforts during migrant flows, when they provided them food at their

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<sup>56</sup> See AHC Monitoring. For example, at the border crossing point of Hani i Hotit and that of Murriqan, the authorities have called for first aid response, and have referred specific cases to the regional hospital in Shkodra. In Bilisht as well, the authorities have received medical services from the health center of the area.

<sup>57</sup> Ibid.

<sup>58</sup> AHC's monitoring in Kakavija (2015).

<sup>59</sup> Ibid. See also Ikonomi (note # 5) as well as OSCE's report (note 46).

<sup>60</sup> OSCE's report, *ibid.*

<sup>61</sup> Progress Report 2015 and OSCE's Report (note # 43) and Ikonomi (note # 5).

<sup>62</sup> See Guideline 293/2015.

<sup>63</sup> See also analysis of the OSCE's Report 'Needs assessment of Front line officers involved in the pre-screening process', December 2017.

<sup>64</sup> Ibid. See Ikonomi (note 6).

<sup>65</sup> See AHC's Monitoring Reports.

own expense at a time when assistance from organizations or even a budget allocated for food for foreigners was missing. However, there have been reported two situations pertaining groups of foreigners became subject to violence, because they refused to accept the return order, requesting transfer to the asylum authorities. In a case of 2017, the Court of the Judicial District of Gjirokastra clearly evidenced the use of violence by border authorities.<sup>66</sup> These situations, though exceptional, should be carefully addressed by border and migration police by pinpointing the respective responsibilities.

The organogram of border directorate not only lacks screening officers in general, but also female officers particularly as screening specialists. The monitoring groups did not find female screening staff at most border crossing points in the regional directorates. Legislation provides that women are interviewed by female police officers. As mentioned above, there is a prevalence of women and children who have undergone the screening process, especially during 2015-2016. The presence of female officers is even more important due to the cultural sensitivity of undocumented asylum seekers/females who entered Albania during the last 3 years.<sup>67</sup> The vast majority of them are from countries where, due to the local customs, women are not allowed to communicate with men, and therefore do not respond to the screening officer's questions. This has occurred in some cases when women asylum-seekers, covered as they were, have refused to answer to the screening officers, due to their customs, or were intelligible due to their head cover. In the vast majority of the cases, the screening specialists conducted the interviews in the presence of male family members who answered instead of the women.<sup>68</sup> This is not in line with the principle of individual interviewing in the screening of women in order to identify potential victims of human smuggling or cases of domestic violence.<sup>69</sup> Border authorities have tried to include female staff members, not necessarily screening specialists, but who nevertheless take part in the process along with the screening specialist.

A similar problem is noted with regard to the social worker/psychologist in the case of unaccompanied minors. Albanian screening legislation provides that unaccompanied minors can only be interviewed in the presence of a psychologist/social worker. In Gjirokastra, the border and migration police authorities cooperated with the psychologist in cases of unaccompanied minors.<sup>70</sup> However, at the border crossing points in Kukës (the border with Kosovo) and in Shkodra (Monte Negro border) there is no structured cooperation with social worker/psychologist. However, at the Regional Border and Migration Directorate in Kukës, the migration specialist stated that if there are cases of unaccompanied minors, they would contact the Kukës District Police Directorate, to call in the psychologist.<sup>71</sup> Even in Korça, border officers were told that if there were any minors, assistance from the municipal bodies would be solicited pertaining social workers/psychologists. However, the cooperation and communication line with these bodies was not very clear. The minor's interview process, and the presence of the psychologist, must take place in the shortest possible time, so there is no chance for a host of bureaucratic papers and prolonged communication to develop. Consequently, it is necessary to establish a clear cooperation procedure - a direct and rapid communication line with the social service or psychologist/social worker. At

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<sup>66</sup>Interview with Asylum Seekers Defense Lawyer January 24, 2018.

<sup>67</sup> See more related to this Ikonomi (note 6) and OSCE Report (note 46)

<sup>68</sup>Ibid. See also the OSCE Report on the Challenges of Border Officers to Respect the Rights of Asylum Seekers and vulnerable categories at the border, presented on December 7, 2017.

<sup>69</sup>Ibid.

<sup>70</sup> AHC's monitoring in Gjirokastra. See also Ikonomi (note # 5) and OSCE's Report (note # 43)

<sup>71</sup> AHC's monitoring in Kukës.

some border crossing points, border specialists highlighted the difficulties of having the social worker's presence and the lack of institutionalized cooperation with the child protection units under the municipality. In other cases, the issue with the psychologist under conditions of the lack of institutionalized cooperation with municipalities, has been resolved through cooperation with UNHCR and CARITAS (Qafë Bote - in the case of two minors.)<sup>72</sup>

In 2017, thanks to the interventions of UNHCR and CARITAS, child protection specialists have been more active throughout the screening process and the identification of unaccompanied minors has led to an increase in their number from 7 to 24 persons. In most of the monitored border crossing points, border officers argue that during the years 2014-2016 the majority of asylum-seeker minors were in the presence of family members and/or relatives. Despite this argument, border and migration authorities should possess a list of social workers or psychologists on stand by, to be at hand when needed to be present while minors are being interviewed. In the best scenario, the social worker can be part of the border and migration department, especially where there are increased inflows of undocumented foreigners. Otherwise, the Border and Migration Directorate should sign a cooperation agreement with social services as well as the Child Protection Units established in each municipality, which should be fully available in any case of unaccompanied minors. This is in line with the Law on the Rights and Protection of Juveniles which provides for the obligation of Child Protection Units to appoint social workers/psychologists and legal representatives for unaccompanied minors subject to an administrative or judicial process.

### ***Interpreters***

One of the key challenges that border and migrant officers were faced with during the screening process during 2012-2017, is translation. The regional border and migration directorates, just as in the case of the border crossing points, did not have a list of certified translators nor a specific budget for translators. Until 2015, border officers made use of Albanian citizens who studied in Arab countries and knew the languages of the majority of asylum seekers.<sup>73</sup> Also, in some instances, the Imams assisted with translation services, especially in the border area between Kosovo and Monte Negro. In Korça, translators from the city's Madrasa were called in. In the Shkodra area, the Sisters of the Catholic Diocese assisted in interpreting from Persian and Indian during the screening process.<sup>74</sup> In other cases, the Border and Migration Police used for an interpreter one of the irregular asylum-seekers/foreigners' group who knew English and interpreted for the entire group. In Kakavija, according to the monitoring of 2015, interviewing in some cases was done in Greek, because the interviewer knew that language, but even the English or Turkish languages were used as the language known to the officers. In Kapshtica, the interview was conducted in English, French, Arabic, or Turkish, by staff who knew the language. Despite the fact that the foreign language knowledge is claimed by the staff, it is necessary for the translation to be done by authorized interpreters. It is certain that these improvised solutions by the border and migration police are not in line with the legal provisions for screening that require individual interviewing in the presence of a certified interpreter.

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<sup>72</sup> AHC's Monitoring in Qafë Botë, 2017.

<sup>73</sup> Ikonomi (note # 5).

<sup>74</sup> OSCE's report (note 46).

The presence of an interpreter is indispensable not only because it enables the screening specialist to understand the reason for the foreigner's irregularly entry in the territory of the Republic of Albania but also because it informs the foreigner of his rights, the opportunity to seek asylum and asylum procedures. The limited number of asylum applications during the years 2014-2015 may be attributed to some extent to translation shortcomings. To avoid the impact of the lack of translation, UNHCR translated the screening form used by the border and migration directory in English, Arabic, Pashtu and Persian.<sup>75</sup> Also, UNHCR, RMSA, CARITAS and the Ombudsman, drafted informational leaflets in English, Arabic, Pashtu and Persian languages. These informative leaflets are posted in the premises where the screening process is carried out. International and domestic organizations, have continually encouraged border and migration officers to inform the undocumented foreigners about their rights, including the right to asylum, by handing out the leaflets. Being informed in a language they understand about the asylum process, as well as the rights of asylum seekers and irregular migrants, foreigners become aware of the opportunities they have in Albania to seek asylum, about the procedures before and after the screening and asylum process. UNHCR and CARITAS have also set up informational billboards at some border crossing points (23 to be precise) where an UNHCR telephone number is displayed for anyone in need of assistance, accessible at any time 24/7.<sup>76</sup> In practice this hotline was utilized by only a few asylum seekers. In most cases, UNHCR has offered its assistance directly to foreign asylum seekers, through its representatives at border crossing points, especially in Gjirokastra. UNHCR has facilitated also the identification of translators and has financially covered translation costs during the screening process in the border crossing points since early 2016.<sup>77</sup>

The Department of Border and Migration under the Interior Ministry has been trying to gradually address the issue of translators, identifying a list of translators, mostly from Tirana, who are ready to travel to the border crossing points that have experienced the largest number of foreigners. Even in the Korça Directorate, interviewers were informed about taking measures for an interpreter who worked on a part time basis as demanded. However, paying translators continues to pose a problem, especially for regional directories.

### ***Screening process***

All undocumented foreigners entering Albania, are subject to the screening process. The current legal basis for the screening process is Guideline 293/2015<sup>78</sup>, which sets out the screening procedures and transfer modalities of foreigners to specific mechanisms. At the conclusion of the screening process, the screening specialist decides whether the undocumented migrant is an asylum seeker/foreigner in need of protection/irregular migrant/unaccompanied minor/victim of human smuggling or a potential victim of human smuggling.<sup>79</sup> Depending on categorization from the screening specialist, it is facilitated the transfer of foreigners to relevant mechanisms, in order to insure the necessary protection particularly for the vulnerable categories.

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<sup>75</sup> Ibid.

<sup>76</sup> Information from L Rodriguez, UNHCR (April 2017). See above.

<sup>77</sup> AHC's monitoring. See for example AHC's monitoring, at the border crossing point of Hani i Hotit, translation services are provided by the CARITAS.

<sup>78</sup> Guideline 293/2015 'On procedures for the treatment of foreign nationals with irregular residence in the territory of the Republic of Albania'. For a detailed analysis of the Prescreening Order and its issues, see UNHCR's Report (Tirana) presented on December 7, 2017.

<sup>79</sup> Guideline 293/2015. See also OSCE's report (note # 43).

The screening process can last for up to 10 hours. In case that this deadline is passed, a note is entered in the foreigners' book on reasons that led to passing of the deadlines.

Several monitoring missions of domestic institutions and organizations have pointed out difficulties and challenges associated with completion of the screening process pertaining the migrant flows entering from Greece. Thus, the European Commission Report of 2015 (referring to the situation of 2014) notes that:

*The border screening process and the accommodation capacities for irregular migrants, need to be enhanced, especially at the southern border, in order to address the growing migration flows of migrants. Registration and referral mechanisms need further consolidation.*<sup>80</sup>

The report recommends that commissioned with administrative procedures teams for irregular foreigners at the border or in the regional border directories, should be supported with the material base and translation services in order to ensure that every foreigner with an irregular stay in the Albanian territory, clearly understands their rights and clearly state whether or not is seeking asylum in the Republic of Albania.<sup>81</sup>

Issues related to the screening process have been the result of the limited number of screening specialists as well as the lack of facilities suitable for reception and interviewing of foreigners. An additional difficulty has been also the lack of translators, which has essentially paralyzed the capability of the authorities to inform the foreigners over his/her rights, including the right to asylum. However, in the recent years it is noticed also a prejudice from the Albanian authorities, that overall, the irregular foreigners entering from Greece, aim solely to transit through and not seek protection/asylum, which has affected the effective access of foreigners to the asylum system.<sup>82</sup>

Even if most foreigners who entered the Republic of Albania during the migrant flows that moved through the Western Balkans, they may have intended to only transit, in practice, authorities' prejudice that anyone who enters in from Greece is a transitory economic migrant, and not an asylum seeker, impedes the effective access to asylum mechanisms, even for those cases, limited as they may be, when foreigners seek protection in Albania. **Consequently, efforts ought to be made in order to ensure that the screening process is rigorously executed in each case, even where the screening specialist may have the conviction that it is in the condition of an irregular immigrant and not an asylum seeker.** In other words, the screening specialist must lay out in the Screening Form the claims of the foreigner subject to the screening, including the asylum application and not the personal opinion of the foreigner, even when he/she believes that the conditions for asylum are not met. The screening officer does not have the power to assess whether the asylum application is

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<sup>80</sup>European Union Progress Report on Albania (2015). See also Ikonomi (note # 5) and the OSCE's Report (note # 43) for a detailed analysis of needs for the implementation of the screening process.

<sup>81</sup>Ibid. See also the Ombudsman's Recommendations addressed to the Albanian Prime Minister on the measures to be taken for the reception of asylum seekers moving through the Balkans, on 7.4.2016.

<sup>82</sup>See AHC's Monitoring Reports. During meetings with border and migration workers, it was stated that foreigners come to transit. See also Enlarged Migration Profile 2012-2014 and Migration Profile 2016. See also Ikonomi (note # 5).

supported or not, and does not prejudge the merits of foreigners' claims; it simply has the task of transferring foreigners to the relevant mechanisms, based on their statements, reflected in the screening form.

According to the border and migration police, foreigners coming from the border with Greece seek asylum to temporarily find shelter in the national asylum center, which is an open center (unlike the center for irregular migrants, which is a closed center), and leave them when they come in contact with people who enable them to cross the Albanian borders with Kosovo or Montenegro. This argument is supported by the high number of quitted or suspended asylum applications.<sup>83</sup> Nonetheless, screening specialists should not deny anyone coming from countries in a state of war, or from life-threatening situations, the access to the asylum system.<sup>84</sup>

In practice, there have been cases when asylum seekers have been denied transfer to asylum mechanisms, due to the preconceived idea by screening specialists that they were abusing the asylum system. Thus, in one case, the Albanian authorities have made the decision to return two nationals from Eritrea to Greece, and then locked them in the closed Center, treating them as irregular migrants. In the closed Center, Eritrea nationals sought asylum, a request that was rejected by the Center's authorities, in violation of the Asylum Legislation.<sup>85</sup> A situation similar to that of Eritrea's nationals reoccurred in 2017. The border authorities in Gjirokastra ordered the return to Greece of some Iranian nationals who should in fact have been treated as asylum seekers.<sup>86</sup> In this case, the prejudice of border and migration police that foreigners abuse with the asylum system, prevailed over the obligation to respect the right of every individual to dignified treatment and effective access to asylum mechanisms.

The Border and Migration Police should have categorized as asylum seekers the nationals from countries where there is war, particularly Syrians, in accordance with the question that the screening form contains for reasons of departure from the country of origin.<sup>87</sup> On the contrary, almost all of them were turned back to Greece after being treated as irregular migrants.<sup>88</sup> Rightly, the Ombudsman recommended that the Albanian government should treat asylum seekers in a humane manner and should provide protection, without prejudicing their interest in pursuing their itinerary to other European Union countries. According to the Ombudsman, *any security policy undertaken in this situation must not violate the human rights*. The Ombudsman called for the provision of temporary protection against asylum seekers, recommending that: *The Government of the Republic of Albania declares, in accordance with the Law "On Asylum in the Republic of Albania", the recognition of temporary protection due to massive flows for persons coming from countries with a common background and*

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<sup>83</sup> For more information, see: Ikonomi (note # 5) and OSCE report (note # 43)

<sup>84</sup> Ibid. Border and migration authorities argue that irregular foreigners are not genuine asylum seekers but foreigners abusing the asylum system in the Republic of Albania. They refer to cases of persons who have been caught several times, once on the border with Greece as their point of entry into the Albanian territory and then on the border with Montenegro or Kosovo as their exit point.

<sup>85</sup> See the decision of the Administrative Court of Vlora (2014), elaborated in the section on court practice.

<sup>86</sup> Information from the Asylum Seeker Attorney in this Judicial Process. In this case, it was evidenced that violence was exercised by border and migration officers against foreigners seeking asylum.

<sup>87</sup> The screening form contains the question: Why did you leave the country of origin?

<sup>88</sup> Information obtained during interviews with border and migration workers in Gjirokastra, Kukës and Shkodra. For more details, see also the OSCE's report 'Needs Assessment of the Frontline Officers Involved in Pre-screening', 2017.

*world-wide known for their persecution, defining the likelihood that persons will be in need of international protection. Refugees and immigrants should be individually guaranteed effective access to asylum procedures without discrimination.*<sup>89</sup> Action taken in order to provide *effective access to international protection for asylum seekers during the screening process, was also evidenced by the European Commission Progress Report since 2014.*<sup>90</sup>

Given the above, border and migration authorities should instruct the screening specialists to respect in every case the request of any foreigner without prejudicing the reasons for their entry into the Republic of Albania. Also, border and migration management authorities should instruct the screening specialists to categorize foreigners from war-torn countries, at least Syrians, as asylum seekers and not as irregular migrants, and to provide effective access to asylum.

### **Accommodation in the Asylum Center**

In case that the foreigner seeks asylum, the regional/local Border and Migration Directorate where the screening process has taken place, must inform the Migration Directorate in the Interior Ministry, the Asylum and Refugees Department in the Ministry of Interior as well as the National Reception Center of Asylum Seekers.<sup>91</sup> The regional/local directorate, coordinates the work for the transport and accompaniment of the Asylum Seeker to the Asylum Seekers' National Reception Center in Tirana and hands over the asylum seeker to this body and receives in return the handing over document which is prepared in two copies. In the event of rising flows of asylum seekers, in the years 2014-2016, transport and accompaniment have had their issues, due to the lack of transport vehicles as well as of border and migration officers responsible for the accompaniment. The involvement of UNHCR and CARITAS at the end of 2015 and during 2016 and onward, facilitated the situation as the two organizations offered continued support when requested by the Border and Migration Police.

In practice, the communication process for the transfer of asylum seekers to asylum mechanisms between the Regional / Local Border and Migration Directorates and the Asylum Authority is carried out through the Central Border and Migration Directorate at the Ministry of Interior. To put it more simply, the regional/local border director, communicates with the Central Migration Directorate for asylum cases ascertained, and the Central Migration Directorate at the Ministry of Interior informs the Director of the Asylum Directorate at the Ministry of Interior. Regional/Local Border Directorates can begin the process of transporting asylum seekers to the Center, only after informing the Asylum Directorate at the Ministry of Interior. Due to the delays that this communication can cause, especially in cases when the director of the Asylum Directorate may not be answering due to duty's commitments (is in a meeting, travelling abroad, etc.), it is rightly recommended that the communication of the Regional Border and Migration Directorates regarding the transfer of asylum seekers to asylum mechanisms, be done directly with the Asylum Department, through a

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<sup>89</sup> See Recommendation of the Ombudsman for the Albanian Government(2016)

<sup>90</sup> See the Progress Report of the European Commission 2014 at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2014/20141008-albania-progress-report\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-albania-progress-report_en.pdf)

<sup>91</sup> See guideline 293/2015, session IV, point 3. See also the Order of the Minister of Internal Affairs no. 611, dated 1.12.2015 On the Procedure and Rules for Referring of the Case, by the Authority in Charge of the Border and Migration, to the Relevant Authority for Asylum and Refugees'.

dedicated number for this purpose, and not by calling exclusively the head of the department.<sup>92</sup> So when the screening Specialist categorizes a foreigner as an asylum seeker and completes the paperwork that is signed by the Director of the Regional Directorate, the latter should have the opportunity to directly inform the Asylum Directorate via the dedicated number to this purpose, rather than expect that this procedure be carried out by the Central Border and Migration Directorate. This is in accordance with the procedure provided for in the Order of the Minister for the Referral of the Case by the Responsible Authority on Border and Migration to the Authority in charge for Asylum and Refugees'.<sup>93</sup> To avoid the bureaucracy, official phone notification is faster and more effective, but there should be a dedicated number rather than the personal phone number of the head of asylum department. It should be noted that this is information, not decision-making or waiting for approval. The information is carried out in order for the authority to take appropriate measures to follow the respective procedures regarding the asylum seeker. In tandem, the Border Authority announces, in a dedicated number for this purpose, also the National Reception Center for Asylum Seekers, to take measures for accommodating the foreigner/foreigners to be transported.

The National Center for Asylum Seekers, located in Babrru, Tirana, is the only Center designated for the accommodation of asylum seekers. Up until 2017, its capacity was 90-100 beds. In 2017 the Center underwent an expansion project, and is expected that by the beginning of 2018, when the construction work is completed, the Center will have an accommodating capacity of about 200 people. The need to enlarge the Center became pressing especially during asylum seekers' flows of 2015-2016. Thus, in one case during 2016, Center's management were forced to accommodate 180 asylum seekers, a number that exceeded the normal hosting capacity.<sup>94</sup>

The AHC's monitoring team, on its monitoring in December 7, 2017, identified that there were 46 asylum seekers accommodated in this Center; 29 males, 7 females and 10 minors (6 minor males and 4 minors female). Due to the reconstruction work, the library hall and the children's playground, were temporarily converted into a staff office. The Center's staff is composed besides others, also of 1 jurist, 1 social worker, 1 psychologist, 1 English translator and 1 physician.<sup>95</sup> The physician is part of the staff and is financially covered by UNHCR.

UNHCR supported financially also the renovations being made to the Center as well as a part of the maintenance. It also provides continuous assistance in terms of the additional services provided to asylum seekers, including translators, psychologists and social workers who are sent from UNHCR to the Closed Center. UNHCR also supports the Department of Asylum at the Internal Affairs Department, where it finances some of the support staff, interpreters, etc. Also, the legal assistance for the asylum seekers is provided by Refugees and Migrants Services Albania (RMSA) which is financed and operates under the umbrella of UNHCR.

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<sup>92</sup> For more details, see OSCE's Report on 'Needs Assessment of Frontline Officers Involved in Pre-Screening', 2017.

<sup>93</sup> Order 611/2015 (note # 91).

<sup>94</sup> See Monitoring Report of AHC at the National Center of Reception of Asylum Seekers, December 7, 2017.

<sup>95</sup> Ibid.

According to AHC's monitoring report in the Reception Center of Asylum Seekers, in 2016, there were 1866 asylum applicants, 99 of whom were children<sup>96</sup>. These people were mostly Iranians. In 2017, there were 238 accommodations, mostly Syrian, Algerian, Afghani, Tunisians etc. The Center has sheltered also foreign asylum seekers who have returned for the second time. Specifically, in 2016, 19 persons were returned and in 2017, 24 persons returned, for whom on a case by case basis the procedures were recommenced from square one, or they have resumed the procedure they had already started previously.

In case that asylum seekers desire to leave Albania, while their asylum application is in process, the Center assists their return by obtaining a statement that the person expresses the will to leave. The request is passed on to the Asylum Directorate in the Ministry of Interior Affairs. The Center does not follow up on the voluntary return procedures all the way to the end of that process. The Asylum Directorate, after receiving the statement, follows the procedures until the removal of these nationals from the territory of the Republic of Albania in collaboration with the Border and Migration Directorate.

The Asylum Law provides that foreign asylum seekers at the Center also benefit a daily allowance (per diem) for strictly personal needs.<sup>97</sup> From the information received during the monitoring, it was noticed that asylum seekers did not practically receive the daily allowance. However, in line with the Law on Asylum, the National Reception Center provided the minimal living conditions, accommodation, food; health service and minimal hygienic conditions.<sup>98</sup>

Children at the Center are subject to additional care; they are entitled to educational, recreational and entertaining activities. However, in 2017, the children's activity room was converted to office space due to the reconstruction of the Center. Apparently this is a temporary situation, and during this period it is expected that the authorities will take alternative measures for conducting suitable activities for minors. The Asylum Law underscores the principle of minor's best interest, that takes precedence in terms of accommodation and stay in the center as well as in regards to examining the priorities of applications for asylum by unaccompanied children.<sup>99</sup>

According to the Center's management, asylum seekers are treated the same way as Albanian citizens and their rights are guaranteed.<sup>100</sup> They are provided with a variety of free classes such as vocational ones on: hairdressing, tailoring, driving school etc. They also receive free transport services (a pass within the framework of cooperation with the Ministry of Transport), are entitled to be educated and obtain medical services provided within the agreement reached with several private hospitals that provide these services to nationals with diverse services.<sup>101</sup>

Rights and responsibilities at the Center are stated as soon as an asylum seeker accommodates in the Center. The Center also possesses information and awareness

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<sup>96</sup> Ibid. The monitoring team could only get information for the 2016 and 2017.

<sup>97</sup> Article 30 of the Asylum Law.

<sup>98</sup> See Article 32 of the Asylum Law. See also Monitoring Report of AHC for the Reception Center of Asylum Seekers.

<sup>99</sup> See Articles 17 and 33 of the Law on Asylum.

<sup>100</sup> See attached the Monitoring Report of AHC for the reception center.

<sup>101</sup> Ibid. According to the Report, the authorities provide asylum-seekers with security and accompaniment measures even during their movements, i.e. while they stay outside the Center, in order to avoid anxiety and insecurity among the foreigners.

leaflets in English, Arabic etc. wherein are listed the rights of asylum seekers. An important role in ensuring the rights of asylum seekers in Albania is played by the legal assistance provided, mainly by RMSA. Likewise, UNHCR, Red Cross and CARITAS provide the necessary translation and psycho-social services. Support with translators from UNHCR and CARITAS is particularly important because the Center is not always able to identify and provide interpreters, especially in the case of rarely spoken languages.

At the Center, food is provided according to a specific menu. In some cases this has led to problems mainly for pregnant women accommodated in the Center or even children. The issue of food is also related to different food culture or traditions. The center has been trying to meet the demands of asylum seekers, especially women and minors, offering at least 1 day a week traditional food, often cooked with the involvement of female asylum seekers. According to the AHC monitoring report, the standard food portion meets the needs of asylum seekers, at least in terms of quantity. As part of the restructuring of the center is expected intervention for the improvement / re-furnishing of the cafeteria, the infrastructure of which is outdated.

The Center also offers psycho-social support. According to the psychologist of the Center, conversation with the accommodated are constantly carried out and the psychological assessment is carried out once a month.<sup>102</sup> In 2017, there was no dedicated office at the Center for conducting hearings, but this is expected to change with the end of the rehabilitation process of the Center. In order to provide the psycho-social care, this Center also cooperates with CARITAS mainly in the event of children's activities. The Center also offers medical service through a general practitioner, and an assistant nurse<sup>103</sup>. The doctor only provides primary care<sup>104</sup>. In cases of urgency, persons are taken to the national emergency or, in some cases, in a maternity by the physician, psychologist or the social worker of the Center. There have been identified cases of asylum seekers with psychological stress, that nevertheless have not been fully followed through by a doctor or psychologist because asylum seekers do not stay for a long time in this Center to follow up with the protocol required for their treatment.<sup>105</sup>

Regarding to the increased number of cases when there was a need for specialized medical assistance that can not be treated by the Center's doctor, it is necessary for the Center's authorities to collaborate with hospitals in order to obtain medical doctors of a variety of specializations, in order to enable the presence of the doctor specialist in the Center, as soon as needs arise, without waiting for the situation to aggravate to an emergency.

Although the Center should provide opportunities for recreational activities, during the AHC's monitoring period there were no such. The library was poor in terms of the

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<sup>102</sup> See AHC's monitoring report of the Asylum Reception Center in Babrru

<sup>103</sup> In December 2017, AHC monitoring team found that 3 of the accommodated persons were ill. See Monitoring Report at the Asylum Reception Center. Due to increased cases of depression, psychiatric service was needed.

<sup>104</sup> There are no periodic visits for asylum seekers in this Center, but only when the person himself requires medical help due to the pain. The doctor has a small office in which there was a bed (an makeshift sofa) and a shelf with various ambulatory medicines, so there was no real storage room for holding various medicines applicable in emergencies. This doctor only provides first aid. AHC monitoring at the Asylum Seekers' Reception Center, December 2017.

<sup>105</sup> Ibid.

variety of books, and mostly were in Albanian. Only religious books were in different languages. Consequently, it is necessary to enrich the library with books in different languages and to make them accessible to people accommodated in the Center.

The monitoring team found that the rooms were suitable for accommodation of 3 to 4 persons and the premises had heating and optimal physical conditions but also hygienic-sanitarian ones. In the Center there was also a room for people with disability, fitted with all relevant elements for this target-group. Therefore, the Center offered acceptable conditions and treatment in terms of accommodation of asylum seekers.<sup>106</sup> However, there was a need for clothes and underwear.

Although the National Reception Center for Asylum Seekers is the only accommodation Center for asylum seekers in the country due to limited capacity, asylum seekers who came from the Freedom Camp in Iraq in the years 2013-2016 were not sheltered in the Center but in buildings rented especially for them, under the coordination of UNHCR. In fact, UNHCR monitors and organizes accommodation and any other element related to their stay in Albania.

### ***Asylum Application Review Procedures***

The National Asylum Center is in charge of housing, nutrition, clothing, medical or psycho-social services or other services related to the well-being of a foreigner but has no authority to assess the asylum application. The asylum application is reviewed by the Directorate for Asylum and Refugees in the Ministry of Interior.

The process of examining asylum applications conducted in the Asylum Directorate should ensure the asylum seeker's right to submit his/her arguments related to the asylum claim. This requires the presence of licensed translators to enable communication between asylum seekers and specialists of the Asylum Directorate who evaluate the asylum seeker's request. Despite the UNHCR's maximum efforts to identify and make available to the Asylum and Refugees Directorate, licensed translators in all the languages required, depending on the origin of the asylum seeker, again there were issues in terms of finding licensed translators for rare languages. This is also highlighted by the European Union Reports, that underscore the lack of qualified translators as a serious concern about the asylum process.<sup>107</sup> The report of the European Commission has also noted the fact that the Asylum Directorate has proceeded slowly in reviewing the respective requests and relevant decision-making.<sup>108</sup> The delays were the result also of the lack of a specialized unit that would collect information from the countries of origin<sup>109</sup>. Information about the countries of origin is essential in order to verify the veracity of asylum seeker's claims.

In this context, the Progress Report for 2016 states that the capacity of the Asylum Directorate to assess individual claims is poor and further training is needed, especially with respect to countries of origin and dealing with cases related to vulnerable persons who have illegally entered the country<sup>110</sup>. These findings of the European Commission Progress Report according to the Center's directors are not relevant to the reality of

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<sup>106</sup>The monitoring team also interviewed a long-term accommodated in the Center, to assess the treatment and optimum living conditions in it.

<sup>107</sup> See European Commission Progress Report 2014, 2015, 2016.

<sup>108</sup> See European Commission Progress Report 2014, 2015, 2016.

<sup>109</sup> EU Progress Report 2014, 2015 and 2016.

<sup>110</sup> Ibid.

2017, because in 2017, the Asylum Directorate staff was augmented, which is allocated by UNHCR and in the latter's payroll. However, in reference to the data regarding the clear difference between the number of asylum applications and the number of decisions taken by the Asylum Directorate (according to Chart 1) in 2015, it is clear, as evidenced by the Progress Report that the Directorate has proceeded slowly. In 2016, there has been an increase in the number of decisions made, but their number is still low compared to asylum applications.

During the process of request reviews, asylum seekers in Albania are represented by Refugee and Migrant Services Albania (RMSA) legal representative. RMSA is the only organization that provides legal assistance to asylum seekers in all stages of asylum process in the Republic of Albania. While UNHCR, in accordance with the Law on Asylum, has the status of observer during the process of appraisal of the request by the Asylum Directorate.

According to the Law on Asylum, the unaccompanied minor asylum seeker must be represented by the legal guardian. Whereas, the Law on the Rights and Protection of Minors clearly stipulates that in any administrative or legal procedure, minors should obtain legal and psycho-social support. In practice, the legal guardian is appointed after the minor asylum seeker articulates his request for asylum, that is after, having stated the request and the reasons for requesting asylum. This is not in compliance to the above-mentioned laws. As noted also by jurists representing asylum seekers, for any juvenile who is *prima facie* in need of protection, a legal guardian should be assigned, before the asylum process commences.<sup>111</sup> So, from the time when the minor is transferred to the asylum system, the first interview related to his/her asylum application must be carried out also in the presence of the legal guardian.

According to the Asylum law, while the asylum application is under review, the asylum seeker is granted temporary residence permit. In case that the asylum application is approved, according to the Law on Asylum, the foreigner obtains the refugee status, temporary protection or subsidiary protection, depending on the application. If the request is rejected, the foreigner has the right to appeal to the Asylum Commission, which has the authority to review the grievances pertaining the refusal of asylum application. Although the Law on Asylum which provides for the establishment of Asylum and Refugees Commission was adopted in 2014, the Council of Ministers' Decision which set up the procedural framework in regards to the establishment of this committee, was adopted two years later, in 2016.<sup>112</sup> The Commission became operational in March, 2017. Prior to the establishment and functioning of this commission, appeal applications were sent directly to the Court.

The Commission for Asylum and Refugees is a collegial body with representatives from the Ministry of Foreign Affairs, the Ministry of Education and Sports, the Ministry of Social Welfare and Youth, representatives of the State Intelligence Services, and a member of the Helsinki Committee. The decision for the establishment of the Commission does not specify criteria pertaining the qualifications of its members who consequently can be of all sorts of educational background and experience. At minimum, these members must have knowledge and experience on asylum issues. It must be underscored that the Asylum Commission makes decisions for a very delicate issue and pertaining a vital need for the individual: the need for protection, because his

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<sup>111</sup>Interview with A Pipro, legal representative in the asylum procedure within the RMSA activity.

<sup>112</sup>Decision 206, dated 16.03.2016 'On the Establishment, Composition, Organization and Functioning of the National Commission on Asylum and Refugees'.

life is endangered. Consequently, the proper qualification of the persons involved in decision making of the Committee, must be an important criterion for their appointment.

Because the National Asylum Commission was not functioning during 2014-2016, applications for appeal to the Asylum Department's refusal decisions were lodged at the Court. It should be noted that asylum seekers find it very difficult to access the Albanian judicial system, and appeal to the courts if they are not provided with legal aid. Until 2017, legal aid for asylum seekers was offered only by a non-profit organization, RMSA which has offered legal representation in the courts, even though in only limited cases. In the case of increase of asylum seekers' flows, the assistance provided by only one organization, will not be sufficient. In this context, and referring to the increase of the asylum seekers flow in 2014, the European Union Report in 2014 noted the difficulties of asylum seekers face in order to access legal aid during all asylum phases and recommends the taking of measures to improve 'access to legal aid and legal representation of asylum seekers'.<sup>113</sup>

Asylum authorities in 2013-2016 were faced with a surge in asylum or protection applications compared to other years. Thus, starting from 2013, the process of examining applications for protection from the received asylum seekers coming from the Camp of Freedom since 2016, reached 2,745 people. Although they have been accepted collectively by Albania, in advance, without them even entering yet into the Albanian territory, on the basis of an Albanian state agreement, the formalization of their status in Albania has been left to the Asylum Directorate at the Ministry of Interior. Although some of them have come to Albania starting from 2013 and up until June 2017, their status was not definitively determined, but the general opinion was that they would be granted the subsidiary protection.<sup>114</sup> This has brought about delays in the decision-making from the part of the Asylum Directorate. Delays in decision making and proceedings have made the number of persons who have benefited asylum in the Republic of Albania to be significantly low. Thus, out of 427 persons from Iran and Syria applying in 2014, only 10 people obtained asylum. In early 2015, there was an increase in requests received, out of 112 applications, 21 people obtained protection. Referring to the Asylum Department's sluggishness, delays in the assessment of asylum applications and the limited number of applications received, the European Union recommends that Albania should improve procedures regarding decision-making on granting the protected status in accordance with international standards'.<sup>115</sup>

### ***The rights of refugees and persons who have obtained temporary and subsidiary protection***

As mentioned above, the number of persons who obtained the status of protected persons during 2012-2016 has been limited. Besides the asylum seekers from the Camp of Freedom in Iraq (Mujahedeen of Khalq) who, although they are yet to formally receive their status collectively, are de facto treated as persons under protection, as already mentioned, the number of requests received from other categories of foreigners is very minimal.

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<sup>113</sup> European Commission's Progress Report 2014.

<sup>114</sup> Interview with A Mele, Directorate of Asylum, June 2017.

<sup>115</sup> EU Progress Report 2014 and 2015.

**The Asylum Law provides that the beneficiaries of refugee status, supplementary protection and temporary protection have several rights such as: the right to housing, the right to health, social protection, primary and secondary education, the right to legal aid, the right to religion, family reunion, the right to work permit and residence permit, the right to identity documents and travel documents.**

Foreigners from the Freedom Camp that are admitted, are placed in several old buildings/apartment blocks adapted for them, where they will remain temporarily up to the erection of a designated building. Costs of their housing are not borne by the Albanian authorities. They benefit from ongoing psycho-social, medical and legal services provided by RMSA. UNHCR and RMSA, that monitor and facilitate their integration process in the Republic of Albania. Despite that their integration in the country does not incur financial costs for the Albanian state, in practice they have still faced difficulties. Thus, the lack of an identity document causes multi-dimensional problems ranging from the possibility of entering into contracts, renting premises, purchasing vehicles, or obtaining a driver's license, as well as being educated. By the end of 2016, only 18 identification and travel documents were issued by the Asylum Directorate. Asylum authorities trace the issue of issuing identity and travel documents to the legal framework for registration in the civil registry. If the persons are not registered in the civil registry, they do not receive identity documents. Only in 2017, this was legally resolved by an Order of the Minister of Interior 'On the Registration in the National Civil Registry (of 2010) of Persons who Have Obtained the Refugee Status or Subsidiary Protection' (no. 28/2016).

UNHCR, RMSA and the European Union have repeatedly raised this issue with the travel and identity documents, until the Order of the Minister of Interior for their registration in the civil registry was issued.<sup>116</sup> EU progress reports year after year have highlighted the fact that 'the infrastructure for issuing refugee identity documents has been set up but the process of issuing documentation has not yet commenced, albeit it is expected to begin soon'. However, by 2017, most of the refugees and persons who had obtained supplementary and temporary protection, obtained only residence permits. Nevertheless the residence permit does not allow a foreigner to appear as a party in those judicial-civil relations that need to be formalized with notary acts or in several administrative processes requiring a passport or other identification document. Adoption of an order for registration of refugees or persons who have obtained protection is thought to speed up the work of the Asylum Directorate to issue the identity and travel document. During the meeting with the Director of Asylum, we were provided with a specimen of these documents. Their format is biometric, similar to the documents issued to Albanian nationals.

**Refugees or persons who have received subsidiary protection, not coming from the Camp of Freedom (i.e. not the Iranians), are faced with additional challenges also due to the fact that they lack financial support.** In a detailed study, Balla, Heremi, Piperi and Dyduch have identified the difficulties that persons who have obtained protection face in terms of accommodation after leaving the National Asylum Seeker's Center, **lack of assistance for the elderly and people with disabilities, difficulties with access to the labor market, difficulties to learn the language and**

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<sup>116</sup> Ibid. See also the European Commission Progress Report of 2016. Discussions at the AHC workshop on Lobbying and Advocacy in 2017.

**to integrate into the education system, etc.**<sup>117</sup>The Albanian authorities are also aware of the problems related to the integration of refugees. Thus, in the National Integration Plan are prescribed the measures that need to be taken to integrate refugees, in accordance with the provisions of the Asylum Law. The European Commission has also specified that the Albanian authorities should strengthen their efforts to facilitate the economic and social integration of refugees, and these efforts should be supported by a sufficient budget.<sup>118</sup>

### **2.3. Court Practice**

One objective of this study was to evaluate the decision-making criteria of the Asylum Directorate, referring to its decisions, as well as the issues that have been finalized in the courts pertaining the appeal of the decision of the Asylum Directorate. For this purpose, AHC addressed the Asylum Directorate for a number of decisions (10 decisions for each year over the period 2012-2017), but only a complete decision was made available to us. Consequently, the review of the asylum process and criteria considered by the asylum office was carried out by referring to the information provided in the decisions of the courts where the rejected decisions of the Asylum Directorate have been appealed. We are aware that by only referring to Court decisions one can not obtain a full picture of the asylum process, also because the number of such decisions is limited. However, we have tried to highlight some aspects of the standard of protection used by the Asylum Directorate.

Even in the decision made available to us by the Asylum Directorate, the presence of the RMSA lawyer was noted in the process of reviewing the asylum seeker's request by this directorate. Also, in this decision is evidenced the presence of the official translator provided by the Ministry of Interior. The positive impact of specialized defense lawyer in the asylum seeker's court proceedings is evident, especially in relation to litigations pertaining migrants with no legal representation, elaborated in the following section.

By reviewing Court decisions since 2009 (although the 2009-2011 period is outside the scope of the study period, and we referred to it because of the limited number of cases)<sup>119</sup>, there is evidenced a gradual improvement in the work of the Directorate pertaining its decisions on asylum applications.

Thus, in 2009, the asylum authority in charge did not follow at all the legal procedures provided for in the Asylum Law. In one of its decision, the Tirana Appellate Court found that the Directorate for Citizenship and Refugees (as the decision-making authority for asylum in 2009) did not conduct any review process in accordance with the legal basis to verify the claim of the asylum seeker. The Directorate actually argued that it had convened for the asylum application assessment on 21.04.2009.<sup>120</sup> However, the Court noted that the Directorate for Citizenship and Refugees had not held a formal

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<sup>117</sup> See Challenges for Refugee Integration in Albania <http://rmsa.al/documentation/SFIDAT%20E%20INTEGRIMIT%20TE%20REFUGJATEVE%20NE%20SHQIPERI.pdf>.

<sup>118</sup> See Progress Report of the European Commission, 2016, p 70, in [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_albania.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_albania.pdf).

<sup>119</sup> About 12 decisions from 2009 to 2016 have been identified.

<sup>120</sup> Decision 1977 (2011) of Tirana's Appellate Court.

meeting to review the asylum application and had not even notified the UNHCR, which should be present in the asylum application assessment process, in accordance with the Asylum Law. The Directorate did not keep any minutes regarding the asylum application process, wherein to reflect the discussions and the voting process. The party also was not given any explanation regarding the decision made on the asylum application.<sup>121</sup> The Court rightfully requested the annulment of the rejection decision of the Directorate of Citizenship and Refugees and the re-examination of the asylum seeker's request. The Court underscored the violation of the decision-making process and the failure to notify UNHCR in this process as procedural defects that were in conflict with the legal provisions for the development of the asylum process and the role/position of the UNHCR.

Gradually, the Asylum Directorate took care to respect formally the procedures required by the Asylum Law. However, there is still a need for improvements regarding the way of assessing asylum seekers' claims, both in terms of the situation in the country of origin and in relation to the concrete personal situation. Some court decisions highlight this fact. Thus, the Appellate Court of Tirana stated in a decision that not only the Asylum Directorate but also the Judicial District Court of Tirana, did not assess the alleged asylum seeker's situation in concrete terms. Rather, as the Asylum Directorate and the First Instance Court presumed that claims of the plaintiff-asylum seeker were ungrounded and have rejected it without providing any reason against the claims of asylum seekers.<sup>122</sup> The decision of the Appellate Court in this case, clearly indicates one of the most frequently encountered issues regarding asylum issues: mistrust towards the asylum seeker and the prejudice against his claims.<sup>123</sup> The reasoning of the Appellate Court, which requires a concrete review of the case, the objective assessment of the situation in the country of origin as a whole, but also the specific situation claimed by the individual, is very important and should serve as a guide for the Asylum Directorate and courts in other similar cases.<sup>124</sup>

Conduction only a general assessment of the situation rather than the specific situation of the individual, is noticed especially with regard to claims by Kosovan asylum seekers.<sup>125</sup> Thus, the Asylum Directorate as well as the first instance courts have in some cases argued that the general situation in Kosovo does not legitimize the asylum application because Kosovo is recognized as an "international judicial ... democratic entity, increasingly consolidating",<sup>126</sup> consequently there is no reason for its citizens to seek asylum in Albania. The fact that a country is a safe country does not mean automatically refusing all asylum applications from its nationals as that would be abusive, and it would erect an insurmountable barrier to the individual seeking protection. In addition to the situation in the third safe country, the personal situation of the person should also be assessed, and to identify whether this claimed personal situation is grounded on credible facts, according to which the person's life in case of his/her return to country of origin would be jeopardized.

In the 2016's decisions, there are notable improvements in this regard. Thus, in the case sent by the Asylum Directorate, the decision-making body has analyzed in detail the

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<sup>121</sup> Decision 1977 (2011) of Tirana's Appellate Court.

<sup>122</sup> Case 3383/1672 (2010) of Tirana's Appellate Court.

<sup>123</sup> Ibid.

<sup>124</sup> See decision 3383/1672 (2010) of Tirana's Appellate Court

<sup>125</sup> See also decision 6313/2009 of Tirana's Court.

<sup>126</sup> Ibid.

situation in the country of origin, referring also to reports from Amnesty International regarding the situation in the country of origin of asylum seekers. The same Authority has also reviewed the evidence provided regarding the individual's personal situation. Also, in the case reviewed by the Administrative Court of Tirana (4461/2016), the Asylum Directorate provides information regarding the situation in the specific region the asylum seeker claims to belong to, i.e. the country of origin. The Directorate also argues that it has also considered the specific situation alleged by the asylum seeker and that it has failed to identify a well-founded concern on this assessment. In this spirit, the Directorate for Asylum has emphasized that it supports the process of reviewing claims of asylum seekers on the principle of credibility and from the presumption that the asylum seeker is right (decision 4461/2016). Yet, even in this decision, both the Asylum Directorate and the Court, seem to have again given more priority to the fact that the person comes from a safe country. It is worth underscoring the fact that this decision indicates a qualitative development regarding the situation analysis in the country of origin and of the arguments that are presented regarding the person's specific situation. However, neither the Directorate nor the Court have properly considered the psychologist's report that evidences the asylum seeker's insecurity for his life in the country of origin. In this decision should also be noted the fact that the Directorate, but also the Court, refer to the country of origin as a safe third country. In fact, the concept of a third country does not imply the country of origin-the country that the individual is fleeing from for fear, but the country from which the individual enters the territory of the country where the asylum application is made. So, basically, it's the transit country. In the present case, Kosovo was the country of origin of the person, and not a third safe country.

In addition, in order to scrutinize the decision-making process for asylum applications from the Asylum Directorate, Courts have also addressed issues related to the removal of asylum seekers without them having been given the opportunity to apply for asylum. In such cases is reviewed the legality of the return decision from the Border and Migration authorities. Thus, in Case No. 1106 (2014), the First Instance Administrative Court of Vlora, found the migration authorities in violation of the Asylum Law in denying access to asylum mechanisms to two foreign nationals. Here should be underscored the role of the specialized defense on this case, which guided the Court towards domestic and international standards in the realm of asylum. Referring to the claim of the plaintiff, the Administrative Court of Vlora rightly ruled some essential cases pertaining the asylum process, as follows:

1. According to the Albanian Legislation, asylum seeker has the right to be transferred to the asylum system at the time he/she requests asylum, even if the request is filed while he/she is kept at the Closed Center or at any stage after the completion of the screening process.
2. In deciding for the return of the individual, border and migration authorities should take into account the constitutional principle of non-refoulement. In other words, if an asylum seeker claims that his return to his country of origin or in a given transit country jeopardizes his life, migration and refugee authorities must transfer him/her to the asylum system in order to assess these claims rather than return him immediately in violation of the principle of non-refoulement.

This decision is pivotal especially pertaining returns to Greece, as the country where most of the foreigners came from during the flows of 2013-2017. Migration and refugee

authorities, as mentioned in the above sections of this paper, consider Greece a safe third country, in line with the list of safe third countries, approved by the Council of Ministers. However, as the plaintiffs argued in this matter, **their situation in Greece, the country from where they entered Albania, is risky due to the collapse of the asylum system as a result of large surges of asylum seekers, the overall asylum system overcrowding, and the general attitude towards refugees and asylum seekers therein.** Claimants argued that their return would violate human treatment principle, referring also to the **UNHCR's Document for Returns to Greece, which advises EU member states not to return asylum seekers to Greece even in cases that Greece was the first asylum country, due to the lack of hosting capacities for asylum seekers, its persistent blenching's at the sea towards Turkey, in violation of the principle of non-refoulement.** The report refers also to inability to access the asylum procedures, the length of time in considering requests for asylum, failure to comply with standards for conducting interviews, low integration opportunities in the country etc.

Rightly, the Court decided in this case to cancel the return decision made by border and migration authorities and to transfer the asylum seekers into asylum procedures, in order for the case to be examined by the relevant asylum body.

The issues dealt with by the Courts, however few in terms of asylum, identify the issues and standards related to the decision-making of the authorities responsible for handling asylum seekers. They also indicate the necessity for recognition of domestic legislation but above all of the international standards on asylum, ratified by Albania.

Another concern regarding the protection of asylum seekers, ascertained by the Courts themselves, relates to cases of foreign nationals' proceedings for illegal border crossing without first being subjected to the screening process. In many cases, as the chairman of the Court of Durres stated, the judges are unaware that the person is asylum seeker because this information does not come from the parties involved (neither from the prosecutor nor from the defendant).<sup>127</sup> This situation indicates several problems.

Firstly, the investigative authorities/prosecution commence the criminal proceedings even when the screening process is not conducted at all, which identifies whether the person is asylum seeker or irregular migrant. This constitutes a violation of the current legal framework that provides for any foreigner entering irregularly to be subjected to screening. Screening is the first administrative act for any foreigner without proper documentation; with no exceptions. If there is a case that deserves prosecution, this is another matter, but prosecution can commence only after the screening process has taken place. The reasons for the implementation of the screening process with priority from the first moment of finding an irregularly residing foreigner, are analyzed in the screening section above. Consequently, investigative bodies may only proceed with prosecution only after the screening process is completed and a copy of the screening act must be included in the person's file.

Secondly, this situation indicates a lack of knowledge of the domestic legislation by the parties in the process. Legislation clearly provides that asylum seekers can not be subjected to criminal prosecution for illegal border crossing if they seek asylum within

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<sup>127</sup> Discussed during the workshop organized by AHC on presenting a preliminary draft of this study on January 24, 2018.

10 days of their entry into the territory. If investigative bodies have begun criminal prosecution, as has actually happened in cases of Syrians or other persons coming from countries in war, without having shown interest in determining whether a person had effective access to asylum at the moment of entry, their actions are in violation of the Law on Asylum. However, also the fact that even the defendant has not stated before the tribunal that is seeking asylum, indicates the lack of information regarding the Law on Asylum, from the part of appointed lawyer. From the analysis of court decisions in the Immigration Section (following below), it is evident that foreign defense lawyers in many cases do not put forward any arguments to defend the party they represent. So, as Mrs. Qeleshi put it, judges are not aware that the defendants are asylum seekers, as this fact does not appear in the case's documents because the screening act is not included or the screening process has not been carried out at all, and the prosecution and especially the defense lawyer do not present this fact. This has caused that in some cases, foreign individuals have been sentenced on charges for the illegal crossing of the border while they may actually have entered Albania to seek protection or asylum, in accordance with the Albanian Constitution and the Law on Asylum. To avoid violating the legal framework, it is recommended that:

1. The investigative bodies should ensure that criminal prosecution and requests for the adjudication of criminal cases related to illegal crossing of borders, are carried out only after the screening process has been completed, since that is the first administrative act to be carried out for any foreigner. If after the screening, the person would turn out to be an asylum seeker, the criminal proceeding must cease. This would not only avoid the violation of the rights of asylum seekers but would also be consistent with the principle of human resources efficiency and judicial economy in general, as criminal proceedings in violation of the Asylum Law would eventually be avoided
2. To avoid making decisions contrary to the Asylum Law and ratified international conventions (elaborated in detail in the following section), Courts should request that the foreigner's file includes also the screening document.
3. There should be provided continuous training of appointed lawyers in the judicial districts with the largest number of illegal border crossing cases, under the asylum and migration law. As evidenced in the following section, their passive role has been determinative in arbitrary sentencing in some cases when it has been in full compliance with the requirements of the prosecutor. If we consider the fact that arrested foreigners are often unable to get acquainted with their rights but are also unable to submit their arguments due to lack of translators, the defense by lawyers who are familiar with the right to asylum and migration, becomes imperative.

### 3 Immigration

The number of foreigners entering without proper documentation in the territory of the Republic of Albania during 2012-2017 gradually increased as a result of the massive movements affecting generally the Western Balkans. The vast majority of foreigners entering without documents, came from countries in a state of war, civil conflicts or in situations of instability, and should in principle be categorized as asylum seekers. However for the reasons listed in the selection section, border and migration authorities categorized most of them as irregular migrants. This section of the paper analyzes the challenges for the implementation of the legal framework regarding irregular immigrants entering Albania during 2012-2017. This part also follows the same structure as in the Asylum Section, starting with the legal and institutional framework, and is followed by an assessment of the practical implementation of legislation by border and migration authorities, and concludes with the Court practice.

#### 3.1 Legal Framework on Irregular Immigration in Albania

##### *Albanian Constitution*

The basis of the Albanian legislation on foreigners is Article 16 of the Constitution, which provides that *foreigners in the Republic of Albania enjoy the same rights as Albanian citizens, except in cases when the Constitution specifically links the enjoyment of certain rights and freedoms to the Albanian citizenship*<sup>128</sup>. The Constitution links the enjoyment of the right to the Albanian citizenship only with regard to franchise, access to free health care, the right to be elected to constitutional functions, and the right not to be expelled from the Albanian territory. Article 16 of the Constitution also does not differentiate between foreigners on the basis of migratory status. Therefore, the rights that are not specifically related to citizenship, apply equally to all foreigners - regardless of their migrant status.

##### *Ratified International Conventions*

Albania has ratified most of the international conventions on human rights, as well as all international conventions pertinent to the migration law, both at the international and regional level.<sup>129</sup> Human Rights Instruments such as the International Covenant on Civil and Political Rights, the Covenant on Economic Social Cultural Rights and the European Convention on Human Rights ratified by Albania are (at least de jure) applicable to all human beings, unless they clearly associate the specific right to the nationality or migration status. The bodies set up to monitor these instruments have emphasized their application to any individual, regardless of nationality or migration status.<sup>130</sup>

With regard to specific conventions pertinent to migration, Albania is part of the group of those few countries that have ratified the International Labor Organization (ILO)

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<sup>128</sup> See Albanian Constitution, article 16. For a more in depth analysis, see: L. Ikonimi 'Migration Law (E drejta e migracionit)', Botimet Onufri 2017

<sup>129</sup> See for a detailed analysis of ratified Conventions, L. Ikonimi 'Right of Migration', Onufri Publishing House 2017.

<sup>130</sup> See for example the General Comment of the Economic, Social and Cultural Rights Committee, 'Non-Discrimination in Economic, Social and Cultural Rights (Article 2, para 2)', UN Doc. E / C.12 / GC / 20, 10 June 2009, paragraph 30.

Conventions on 'Migration for Employment' (C 97)<sup>131</sup> and for Migrant Workers C 143<sup>132</sup>. The Convention on Migrant Workers (C. 143) is of special importance in relation to the rights of irregular migrants. It provides that the States Party to the Convention must respect *the basic human rights of each migrant worker*. The Convention underscores the strengthening of the fight against irregular migration, particularly illegal employment, irregular migration facilitators, or perpetrators and exploiters of labor force trafficking<sup>133</sup> in order to eradicate abuse against migrants<sup>134</sup>. The Convention also urges States Party to protect the human rights of migrant workers, even for those that do not have proper documentation to reside and work in a country. Article 9 of the Convention provides that where it is not possible to regulate the status *of an illegal migrant, he/she is entitled to enjoy the same treatment for himself and his family in respect to previous employment, regarding remuneration, social security and other benefits*. This Article of the Convention is very important in an era when the number of irregular migrant workers in the typical countries of destination is now significant.<sup>135</sup>

Albania is also one of the 51 countries of the world that have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>136</sup> ***This Convention*** provides for a fuller catalog of rights for migrant workers, approximating the rights of irregular migrants to those of regular migrants. It leaves no doubt or opportunity for interpretations of the fact that irregular migrants are entitled to human rights that provides in the Part III<sup>137</sup> (regardless of their status) and for the purpose of this study report there will be highlighted fairly specific rights for irregular migrants such as:

- freedom from slavery, compulsory labor, servitude,
- freedom from arbitrary arrest, fundamental rights and procedural guarantees during the arrest and detention, including the right to be informed about the possibility of communicating with the consular authorities in case of arrest, the right to have an interpreter during the judicial process. Migrants must be notified on the rights during arrest and that of a judicial process in a language he/she understands,
- Migrants detained for violation of migration law should be held separated from other convicted persons or persons charged with criminal offenses held under pretrial detention.
- protection of identity documents from confiscation, destruction or potential misuse by the authorities,
- Protection against collective expulsion and observance of procedural safeguards during deportation,

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<sup>131</sup>The International Labor Organization Convention (hereinafter referred to as the ILO) On 'Migration for Employment ' (No. 97), adopted in 1949, ratified by Law no. 9320/2004.

<sup>132</sup> ILO Convention C 143, adopted in 1975, ratified by the Law 9564/2006.

<sup>133</sup>Article 5 of the Convention,

<sup>134</sup> Article 6 of the Convention.

<sup>135</sup> It is reported that the number of irregular migrant workers varies around 10-15% of the number of regular migrants, which means that it is about 25 to 40 million people.

<sup>136</sup>Adopted by the UN General Assembly in 1991, ratified by Albania by Law no. 9,703, dated 2.4.2007.

<sup>137</sup>Fundamental rights are provided such as the right of departure from any state and the right of entry into the country of origin, the right to life, the freedom from torture, inhuman or degrading treatment or punishment, the right to free thinking, freedom of religion, opinion and conscience, freedom from arbitrary interference in the family, home, private life or correspondence, personal safety, effective protection against violence, physical harm, intimidation by public officials or private persons.

- the right to be recognized as a person before the law,
- equal treatment with the citizen in relation to payment, working conditions, overtime, working hours, weekend, paid vacations, safety, health, termination of employment,
- the right to participate in trade unions,
- the right to social insurances; if this is impossible it should be reimbursed on the amount of the contributions that should have been paid,
- the right to emergency medical assistance, necessary to preserve the person's life or to avoid irreparable damage to health,
- the right of migrant workers' children to have their name, citizenship and to register, regardless of their migrant status,
- the right of children of migrant workers to be equally educated as other citizens. Enrollment in a pre-school educational institution will not be refused or limited due to any parental status irregularities.
- the right to transfer income to the country of origin in case that the migrant workers return.

The above-mentioned rights under the convention are mandatory for recognition and enforcement by states in regard to every worker, including irregular migrant workers. So the convention reinforces the stance that treats human rights as universal, regardless of the person's migration status.

Due to the hierarchy of norms in Albania and the role that the ratified international conventions play (under Article 116 of the Constitution), the above instruments are binding for authorities dealing with foreigners, such as the Border and Migration Police, as well as Prosecution and Courts. This means that in adjudicating cases of irregular foreigners, Albanian courts should give the antecedence to ratified international conventions wherever the domestic laws are in conflict with these instruments.

#### *Law on Foreigners*

In addition to the constitution and ratified international conventions, the treatment of foreigners in Albania is governed by the Law on Foreigners no. 108/2013<sup>138</sup> and by-laws issued for its implementation. The adoption of the law on foreigners in 2013 culminated the several years of efforts from state authorities covering the affairs of foreigners, establishing a legal regime in line with international standards as well as with the *Acquis Communautaire* pertinent to immigration. The obligation for a Community-compatible legislation, stemmed from the Stabilization and Association Agreement<sup>139</sup> signed on 12 June 2006, which was subsequently transformed into an integral part of the strategic instruments adopted by Albania.<sup>140</sup>

In accordance with Community legislation, the Law on Foreigners regulates the entry, stay, treatment and deportation of foreigners. Due to the purpose of this section which focuses on irregular migrants, I will only briefly mention the general rules regarding the entry and stay of foreigners in the country.

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<sup>138</sup> Law on Foreigners, no. 108/2013. Hereafter referred to as LoF.

<sup>139</sup> See Articles 46-47 and Articles 80-81 of the SAA.

<sup>140</sup> See the National Strategy for Integration and Development, 2006 and the National Plan for the Implementation of the SAA in [www.mie.gov.al](http://www.mie.gov.al).

Law on Foreigners sanctions that foreigners' entry into Albania is only carried out at border crossing points<sup>141</sup> and on the basis of complete and acceptable documentation by the Albanian authorities. Just like in the Community legislation, the Albanian law on foreigners provides that the foreigner must have a *valid travel document*<sup>142</sup>; the foreigner must be equipped with an entry visa or residence permit<sup>143</sup>, not to have bad records in the national electronic register of foreigners, not to pose a threat to public order and security, nor to the national security, to not interfere with the international relations of the Republic of Albania with other states, to not pose a risk to public health in the Republic of Albania; to not be debtor in terms of the administrative measures imposed upon him.<sup>144</sup> For persons who are allowed to enter without a visa, the law provides that '*they must show up at the Regional Directorate of Border and Migration (RDBM) within 10 days after entering the Republic of Albania*'.<sup>145</sup> This provision provides this obligation in regard to any foreigner entering the Republic of Albania, regardless of the length of stay, therefore it is problematic, given that many foreigners enter Albania for only short activities such as conferences or seminars which can last from 1-3 days. Consequently, it is recommended that the obligation should be amended to provide the requirement to show up at the Regional Directorate only for persons entering visa-free but desiring to stay in Albania for a certain period of time, no less than 10 days.

Foreigners may stay in Albania for more than 90 days within 180 days if they are admitted for work-related reasons, or are self-employed, qualified workers, for scientific research, for studies, family reunification or humanitarian reasons. In accordance with the admission motif, the relevant document is also issued. Foreigners who have been denied a visa request, residence permits or work permits, are entitled to appeal against the denial. The law of 2013 provides for *the right to appeal even in case of refusal to issue a residence permit* (or its renewal), by amending the problem of the previous law that did not specify this right.<sup>146</sup> Article 36 provides that the appeal shall be made to the direct superior authority of the issuing order, as well as to the court, in accordance with the rules of the legislation in force. In case of refusal of residence permit, the law provides for the possibility of postponing the return due to humanitarian or health reasons.<sup>147</sup>

A residence permit may be revoked in the case that the foreigner is unable to prove that he or she meets the required conditions for residence, according to the required criteria; in case of changes affecting the conditions for which the residence permit was issued; is subject to expulsion; as well as when the permit is granted for the purpose of family reunification and the circumstances that constitute the right to family reunification have changed. The Law on Foreigners stipulates that the decision of the migration authorities, should take into account the principle of the highest interest of the child and the right to family life. In accordance with the right to family life, as well as the EU

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<sup>141</sup> See Articles 6 and 7 of the Law on Foreigners (hereafter LoF).

<sup>142</sup> Article 6.14 and 15. As a travel document it is considered a passport, the document for border crossing, a passing permission released by international organizations that are recognized by Albania based on international agreements.

<sup>143</sup> See above, Article 7 of LoF.

<sup>144</sup> Article 6 of LoF.

<sup>145</sup> See Article 30 of LoF. It stipulates that the CM approves a list of nationals exempted from this obligation.

<sup>146</sup> See L. Ikonimi 'Right to Migration' the first edition (E drejta e migracionit)' Onufri 2011.

<sup>147</sup> Departure and deportation is elaborated in more depth later.

Family Reunification Directive, the Law on Foreigners also regulates in detail the procedures for a residence permit for family reunification.<sup>148</sup>

Foreigners entering and staying in contravention of the criteria set out in the law, are categorized as foreigners with an authorized stay and are subjected to deportation from the territory of the country. The Law on Foreigners does not use the term 'migrant', but the 293/2015 guideline based on the Law on Foreigners, in the categorization made to foreigners with an unauthorized stay, uses the term 'irregular migrant' to differentiate them from category of asylum seekers, victims or potential victims of trafficking, or unaccompanied minors. Before analyzing measures taken for the return of irregular migrants under the law on foreigners, we are briefly explaining the sanctioning of irregular migration under the criminal code.

*Sanctioning of the irregular migration under Albanian legislation.*

Article 297 of the Criminal Code provides that illegal border crossing *is an offence punishable by a fine or imprisonment of up to two years*. This article refers to the crossing of the border outside the border crossing points. However, irregular entry into Albanian territory, using a visa, or a counterfeit passport/residence permit, is dealt with in a separate provision. Thus, Article 189 of the Criminal Code provides that: *Falsifying or using forged ID cards, passports or visas, is punishable by a term of imprisonment of six months to four years.*<sup>149</sup>

The criminal code provides for the sanctioning of also for the facilitators of illegal migration, in its Article 298 on 'Facilitating Illegal Crossing of the Border as follows: *Housing, accompaniment, making available or using means of navigation, flight or other means of transport or any other assistance for the purpose of illegal crossing the border of the Republic of Albania or for the unlawful entry of a person in another country, without being a citizen or having a residence permit in that State, is sentenced to one-four years of imprisonment. When aid is provided for profit, it is punishable from three to seven years of imprisonment.*<sup>150</sup>

Albanian legislation does not provide for a criminal sentencing (but only administrative sanctions) for those who overstay in Albania. This is a correct stance and in line with the Community legislation in this regard. Thus, the ECJ declared Italy to be in violation of the *Migration Acquis* in the case of El Dridi, because it provided for a criminal sentence for individuals who overstay.<sup>151</sup>

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<sup>148</sup>See article 55-57 and 69 of LoF. See for a detailed analysis of family reunification also Ikonimi 2017 (note # 129).

<sup>149</sup> With the amendments of the Criminal Code in 2013, a provision was changed concerning a fine penalty as the main penalty. Before the changes, a fine from four hundred thousand to one million Albanian Lek was provided. The provision provides for severe penalties in case of accomplices, when it has caused serious consequences or when it is carried out by the person who is entitled by duty to issue the documents. For more, see article 189 of the CP amended by Law 144 (2013).

<sup>150</sup> See Article 289 of the Criminal Code amended by Law 9188, dated 12.2.2004; the title and the first paragraph changed by law no. 9686, dated 26.2.2007; amended by law no. 23/2012, dated 1.3.2012; the part that provides a fine as the main penalty in addition to the imprisonment sentence, rescinded, by law no. 144/2014, dated 2.5.2013.

<sup>151</sup> See El Dridi, ECJ, 2011.

Regardless of the provisions of the Criminal Code, irregular migrants should principally be treated on the basis of administrative procedures provided for in specific legislation on foreigners and should not be subject to prosecution for illegal border crossing. This is because the states have an interest in the effective deportation/return of irregular migrants rather than pursuing criminal sanctioning. Penalizing irregular migrants is not only fundamentally unjust<sup>152</sup>, but also carries other consequences for the judicial and penitentiary system<sup>153</sup>. First, criminal prosecution of irregular immigrants in the typical destination states, would be a major burden to the domestic justice system. Secondly, the punishment of migrants under criminal law, leads to overcrowding of prisons or detention centers. Overcrowding naturally leads to non-humane and degrading treatment for detainees, a situation that has often been ascertained by the ECtHR in cases of migrants' detention.

Penalization of irregular migrants is not legitimized not even by international instruments. Thus, the **ILO Convention no. 143** *states effective measures* against organizers of the traffic and illegal migrant employers including the criminal prosecution and punishment of perpetrators of trafficking of the labor force although not sanctioning migrants themselves.<sup>154</sup> On the opposite, it provides (Article 9) that State Parties may legalize irregularly employed migrant status, giving them the opportunity to stay and work on a lawful basis. If legalization is not possible, State Parties should ensure that irregular migrants return be made only after the migrant obtains equal treatment for themselves and the family pertaining rights deriving from previous employment with respect to payment, social insurances and other benefits.<sup>155</sup> According to Convention C 143, migrant's return should not be made at the migrant's expense. Therefore, the irregular migrants not only should not be penalized, but they should be facilitated during the steps of taking the payment for the work they have done and if it is possible to legalize his or her status.

This is also the stance of the Convention on All Migrant Workers and Members of Their Families. This Convention specifies that all workers, regardless of their migrant status, are entitled to receive the same treatment in respect to the working hours, vacations, work safety etc. State Parties will take steps to ensure that migrant workers are not deprived of the principle of equal treatment in terms of employment relationships due to their irregular status pertaining their residence or employment (Article 25). The Convention also provides that, if migrants are subject to detention on account of their migratory status, the detention must be carried out separately from that of the convicted persons or detainees (Article 17 of the Convention). In other words, the UN Convention on Migrant Workers and Members of Their Families, does not allow the detention of irregular migrants as a criminal punishment, but only as an administrative measure, in order to enable their return to their country of origin/transit and only in different premises from those serving their sentences of criminal sanctions.

Albanian authorities, especially the police, prosecution and courts, should consider the ratified international instruments regarding the penalization of migrants, before

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<sup>152</sup> See more Thomas Hammarberg, "It is Wrong to Criminalize Migration" on <https://www.neweurope.eu/article/it-wrong-criminalise-migration/>

<sup>153</sup> See for a detailed analysis Ikononi 2017 (note 129).

<sup>154</sup> Article 2-6 of the Convention C.143.

<sup>155</sup> Ibid. In case of an objection to such rights, immigrant must be allowed to file his claims before a competent body, either himself or through a representative.

sentencing migrants for illegal border crossing. In particular, the Courts should give priority to international law ratified, in accordance with Article 116 of the Constitution, when deciding on foreigners who have entered or stay without proper documentation in the Republic of Albania. In practice, as elaborated in the next section on court rulings, there is a reverse approach to that of the ratified instruments, notably the Convention of ILO C 143 and the Migrant Rights Convention that emphasize protection rather than penalizing migrants. Courts have given priority to the provisions of the Criminal Code, penalizing and in some cases even making harsher the criminal sentences for foreigners who entered irregularly in 2012-2017, including Syrian citizens who have fled their country due to war.

### *Administrative measures to Combat Irregular Migration*

While the Criminal Code treats as a criminal offense the illegal border crossing and envisages prison sentence or fine, the Law on Foreigners provides for administrative measures aimed at the return of a foreigner to the country of origin. The purpose of the Law on Foreigners is to combat illegal migration by strengthening the control of foreigners at the border and in the country's territory, and also by providing measures against the carriers, measures to prohibit marriages solely for purposes of obtaining documentation, measures against employers, as well as obligations against private and public authorities that due to their activity may come into contact with foreigners who do not meet the criteria for entry, residence and employment in Albania.

More specifically, Law No. 108/2013 has reinforced the position against irregular migration by providing for certain provisions dedicated to the supervision and control of foreigners, not only at the border but also in the territory of the republic. For example, Article 131 specifies the right of the border and migration authority to:

- to request travel documents, residence permits or identity documents of a foreigner;
- to accompany to the police station a foreigner who does not have an identity document, residence permit, travel document or any other document proving his/her identity;
- to transport a foreigner for whom an expulsion order is issued, to the border crossing point or to the country of origin;
- to accompany and take measures for the return of illegally staying foreigners to the country of origin or transit country that the foreigner used to enter the Republic of Albania;
- to cooperate with other authorities in order to control the law enforcement by foreigners when entering and staying in the territory of the Republic of Albania.<sup>156</sup>

The law 108/2013 also foresees the obligation of a foreigner to prove the identity and legality of his residence in the Republic of Albania (Article 138), the obligation to notify the address within 10 days of entry into the Republic of Albania, either himself or through the employer or the one that made the invitation (Article 134). Although these provisions essentially aim at migration management and control of irregular migration, the obligation imposed on any foreigner to notify migration authorities within 10 days of entry, increases the bureaucracy for foreigners who come as short-term tourists/visitors. As mentioned above, the latter often come to visit different areas

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<sup>156</sup> For more, see Ikonimi 2017 (note # 129).

of Albania and may not have a fixed address. The obligation to notify about the precise address should be set for those who will stay longer, at least over 15 days.

### ***Obligations for carriers***

The Law on Foreigners defines the *Carrier* as a natural or legal person registered as a provider of persons transport service of people.<sup>157</sup> The driver of a vehicle, the captain of a boat or the pilot of an aircraft, must notify the border control authorities prior to his/her arrival, or upon arrival at the border crossing point. They must ensure that the persons who they are transporting have the right to enter the territory. If a person is found hiding in their vehicle during the journey, they are obliged to notify the relevant authorities. (Article 135). If it turns out that it has transported irregular foreigners into the territory of the Republic of Albania, and has not notified about it, the carrier is liable for all costs related to the return process in the country of origin (Article 135).

The authorities have the right to impose a fine on the agency transporting the foreigner who is refused entry, unless the entry is refused on the basis of the non-fulfillment of the additional conditions of entry and stay of a foreigner in the Republic of Albania or the invalidity of a visa or stay permit, as well as in those cases when errors in the passenger list data are considered justifiable (Article 135).<sup>158</sup>

### ***Measures against fictitious marriages***

Albanian legislation provides concrete measures also against marriages for documentation purposes, in line with the EU's legislation, Article 59 of the LoF defines fictitious marriage as a marriage made in order to avoid fulfilling the conditions for entry and stay of foreigners in the Republic of Albania. The law establishes in an exhaustive list the circumstances that constitute a fictitious marriage.<sup>159</sup> The Law provides that *residence permit* issued *due to family reunification, may be revoked by the central border police and migration authority if it is found that the foreigner has "entered into a fictitious marriage with the purpose of obtaining a residence permit"*.<sup>160</sup> In addition to revoking the residence permit for the foreigner, the legislation provides for a fine for a foreigner or Albanian citizen who enters into fictitious marriage in order to obtain a residence permit.<sup>161</sup> During the period under study, fictitious marriages were not an issue for Albania.

### ***Obligations for employers***

In accordance to the EU Directive Against Illegal Employment, Article 137 of the LoF provides: *Employers who in the Republic of Albania hire a foreigner, are required to apply for a permit or authorization that allows them to work in the period in question, to copy or register the work permit and to keep the copy for inspection by the relevant authorities, to notify the employment authorities concerning the employment of the*

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<sup>157</sup> See Article 3 (6) of LoF.

<sup>158</sup> The carrier is subject to a fine ranging from 300,000 to 400,000 AL Lek per person, if he does not report or provides a complete list of passengers, or when he transports foreigners that obviously do not meet the conditions to enter or pass through the Republic of Albania (Article 145 of the LoF). Before a fine is imposed on the carrier, the carrier or his representative is entitled the right to give written explanations (Article 135 of the LoF). An appeal may be filed against the decision imposing the fine (Article 146 of the LoF), in the Administrative Court, in accordance with the procedures provided for by the legislation in force.

<sup>159</sup> See Article 59.

<sup>160</sup> See Articles 55, 59 and 60 LoF.

<sup>161</sup> See Article 145 LoF.

*foreigner as well as the termination of the employment relationship, within a week from the event.*

If unlawful employment is ascertained, the employer will pay the costs of repatriation, any compensations that are not paid yet to the employee, and any tax or contribution in favor of the illegally employed foreigner (Article 137). The Law on Foreigners also provides for other sanctions in the case of illegal employment such as: exemption from the right to public benefits, aid or financing for up to 5 years, exclusion from public contracts for up to 5 years and temporary or permanent closure of the entities that were made accessory in committing the offense. The employer will also be fined with a fine of 350,000-400,000 Lek per person (Article 145).

Contrary to the EU Directive on Illegal Employment, Article 145 of LoF provides for financial sanctions for employees as well who enter into employment illegally. This provision is problematic - because it is expressed in terms of '*either the employer or the employee*', although the interests and positions of the two are different. This provision contradicts a number of international instruments ratified by Albania that emphasize protection rather than punishment for employment without proper documentation, also considering the vulnerable position of the migrant. One of the reasons that the legislator might have had in providing this measure against the employer, may be the Albanian context in which foreigners working in Albania generally have worked in managerial positions in enterprises or international organizations. So they are 'qualified/skilled workers', therefore disrespect of the legal requirements does not stem from a vulnerable position, but the indifference to respect the legislation in force. However, this does not justify the fact that the Law on Foreigners must be coherent with the international instruments ratified. In any case, where domestic legislation is in conflict with international ratified conventions, the latter have the antecedence.

### **Obligations to authorities that provide public services to companies and/or individuals**

Law on Foreigners no. 108/2013 has extended the obligation of control over foreigners to private and public institutions that are service providers. Article 136 of the LoF provides for the obligation of the institutions providing public services, organizations, local administration, public interest companies and social security institutions, not to provide their services to foreigners who have not obtained a valid travel document recognized by this law, valid visa or residence permit and who do not prove that they have entered and remain legally in the territory of RoA. This obligation extends to hospitals and health centers, except when foreigners are required to receive medical service in emergencies, and when the lack of medical treatment threatens the loss of their life (Article 136).

The general obligation to all public service providers for all undocumented foreigners, is problematic and inconsistent with the conventions ratified by Albania. This provision implies, inter alia, the obligation of civil status offices not to authorize marriages, not to register childbirths, or to oblige schools not to register foreign children without a residence permit. This affects substantially the right of every child to proper education, according to the Constitution and international law ratified, including Convention on the Rights of the Child and the Convention on the Rights of All Migrants and Members of Their Families. At least, the Law should have made an exception regarding the

services offered to children, not only not to fall into controversy with the ratified conventions, but also to avoid adversely affecting a vulnerable category that is in fact entitled to special protection. It should be noted that minors do not choose by their will, to enter or live illegally in a state. They have not taken decisions that have caused their irregular legal status but are subjected to the decisions made by their parents.

The new Law on Foreigners (No. 108/2013) also obliges notaries to request the relevant documentation specifying the legal position of foreigners in completion of notarial acts, as well as to evidence the fact of their legal residence in the compiled notarial acts.<sup>162</sup> The Law also imposes obligations on private entities that provide services. Thus, the Law prohibits the renting of immovable property to undocumented foreigners and also prohibits all private companies that provide hotel services, to accommodate foreigners who are not granted a residence permit.<sup>163</sup> Even the host of a foreigner who comes lawfully but overstays, is liable for paying the repatriation costs. (Article 139). The law also envisages the obligation of all state authorities, private entities as well as individuals that are aware of the illegal residence or employment of foreigners, to notify the relevant state bodies. This obligation makes sense for those state authorities that in carrying out their duties, have the opportunity, but also the right to request the documentation of a foreigner. However, this obligation can not be applied to each individual that obtains knowledge about illegal immigrants, even from casual sources because that can create room for abuse, both from the range of subjects to whom it imposes the obligation and also due to ambiguity regarding how the 'individual' or 'the private entity' may be made aware of the illegal status of the foreigner.<sup>164</sup>

### ***Measures for cases of overstaying***

Article 145 of the provides for fines for foreigners who violate deadline of residence permit, but that leave voluntarily. The penalty for the ones that overstay is also foreseen in the legislation of some EU countries<sup>165</sup>, however, in practice it is not applied, particularly to those who overstay their first residence permit. The goal of EU countries is to encourage voluntary departure, rather than to create other delays to allow for payment of the fines.

Article 145 (c) of the Law provides for the levying of a fine in a mandatory and automatic manner, without allowing for a review of the circumstances or situation that may have led to a violation of the legal deadlines. For example, a foreigner may overstay due to a health situation or family reasons that make it impossible for him/her to return within the deadlines or it may be that he/she has lost the documents. The authorities should also consider cases in which a foreigner may find himself unable to pay the fine at the time of his voluntary departure. Will the foreigner be prevented from leaving the Albanian territory by border and migration police if the former does not have the financial means to pay the fine? If so, where will the foreigner stay? Will he be released or be detained in the closed center? The detention on the closed center would incur an added cost. Moreover, the Law does not allow the detention for cases inability to pay fines. Therefore it is recommended that the foreigner be allowed to

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<sup>162</sup> Article 138 of LoF.

<sup>163</sup> Article 145 LoF provides a fine between AL Lek 300-400 thousand per person.

<sup>164</sup>For more see Ikonomi 2017 (note # 129).

<sup>165</sup>Bulgaria, Czech, Germany, Greece, Spain, France, Croatia, Cyprus, Latvia, Lithuania, Hungary, Poland, Romania, Slovakia, Finland and Sweden.

leave in cases of inability to pay, and a respective note be entered into the system, as well as to notify the foreigner of the liability that he or she is under and the procedures he/she is required to pursue to appeal against the fine or to perform payment outside the Albanian territory.

The authorities responsible for border and migration should make sure that the imposition of fines does not become automatic and arbitrary, but rather take into account the circumstances that may have led to this situation as well as the time period for exceeding the deadlines. In any case, the general spirit of ratified conventions in the protection of migrants, should be respected. In addition, in order to avoid the problem of imposing a fine for overstaying, the border and migration police should notify (distributing leaflets on rights and obligations) foreigners entering the border crossing points, pertaining the duration terms of stay and the legal consequences they may face in case of exceeding them.<sup>166</sup>

### **Repatriation of illegal migrants**

Albanian legislation provides that the repatriation of a foreigner can only be carried out on the basis of a deportation order, which is an administrative act issued and notified to a foreigner under the Code of Administrative Procedures (Article 106 of the Law). As such, it should clarify the reasons for the deportation, the time of the entry into force of the order as well as the appeal procedures. Law provides that the order is communicated in writing to the foreigner in a language that he/she understands.<sup>167</sup>

The Law on Foreigners has followed the general spirit of international and European law, by giving priority to voluntary departure. Thus, the deportation order provides for the possibility of voluntary return within a certain period of time, which in principle must be 7-30 days (Article 106 of the LoF). In accordance with the EU Directive on deportation, the Law provides that the execution of the deportation order may be postponed beyond 30 days in some specific cases.<sup>168</sup> If the foreigner declares that he/she will voluntarily leave the territory, the responsible border and migration authority may not impose a measure of banning of entry up to 5 years in Albanian territory, which is imposed on foreigners subjected to compulsory deportation (Article 108 LoF).<sup>169</sup>

The foreigner, subject to the removal order, has the right to an administrative and judicial appeal.<sup>170</sup> Specifically, he/she may lodge an administrative appeal to the

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<sup>166</sup> This can be accomplished by handing out to foreigners informational leaflets at the moment of their crossing of the border in the border crossing points.

<sup>167</sup> See Article 106, LoF.

<sup>168</sup> Article 106 LoF. This provision constitutes a novelty in relation to the previous Law on Foreigners (LoF 2008). For more, see: Ikonimi 2017 (note # 129).

<sup>169</sup> See Article 108 of the LoF. The possibility of voluntary return is given priority pertaining foreigners who have overstayed illegally but have not brought about harmful consequences to the RA, the unaccompanied minors, parents with young children, victims of trafficking of human beings, asylum seekers who have been rejected the asylum application, the foreigner who has travel documents but does not have the necessary means of residence, or the foreigner that has a lawful residence but who has worked without a work permit. For categories that have no financial means to return themselves, the law provides that border and migration authorities will cooperate with international organizations to find financial means for the return of the foreigner.

<sup>170</sup> See Article 107 of LoF and Administrative Procedure Code no. 44/2015, Articles 99 and 100.

issuing order authority (Border and Migration Police) within 30 days of receipt of the notice.<sup>171</sup> Based on the Code of Administrative Procedures, the exhaustion of administrative appeal is a prerequisite for appeal to the Administrative Court.<sup>172</sup> The removal order is not executed until the completion of the appeal process and a receiving a final form decision (Article 106 of the Law).

The Law on Foreigners refers to the respect of the right to family life, the best interest of the child, the needs of the vulnerable persons and the health of the foreigner in relation to the execution of the deportation order, but not in relation to the decision-making on deportation of the foreigner (Article 106). It is recommended that border and migration authorities, should assess whether the deportation would undermine the right to family life and the best interest of the child before issuing an eviction order.

If the foreigner does not voluntarily leave, he is subjected to the mandatory execution of the order by the border and migration police.<sup>173</sup> The Law uses the term 'deportation' which is an *administrative measure* of the Border and Migration Police to execute the actual removal of the foreigner, who otherwise would not leave the Albanian territory on his/her own.<sup>174</sup>

In addition to the category of foreigners who did not leave voluntarily within the deadlines provided for in the removal order, the Law also provides for several other categories subject to deportation, as follows:

- a foreigner who has entered illegally the territory of the Republic of Albania and intends to use the Albanian territory to illegally transit to other countries;
- a foreigner who has not left the Albanian territory for up to 60 days after the expiration of the visa, or the term of residence provided for in this Law for persons entering without a visa, and in case that there is information that the person intends to abscond the border and migration authorities;
- has been readmitted by other countries on the basis of readmission agreements;
- has been declared persona non grata and his/her presence is considered a serious threat to public order and security;
- was convicted of a deliberately committed crime for which the Albanian legislation provides for a minimum sentence of 3 years in prison.<sup>175</sup>

The deportation order shall be communicated in writing to the foreigner, in a language that he or she understands, or in English. The deportation deed shall specify the reasons for issuing the order, the authority that received the order and the authority to execute it, the date and place where it will be executed, the mode of transport and the time limit for the entry ban, if the deportation order is accompanied by entry ban<sup>176</sup>. The foreigner subject to expulsion has the right to appeal against the expulsion order, pursuing the

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<sup>171</sup> See Administrative Procedure Code no. 44/2015, Article 133.

<sup>172</sup> See Administrative Procedure Code, Article 129. Exhaustion of administrative means is not mandatory unless the law provides for the right to appeal directly to the Court.

<sup>173</sup> See Article 3 of the LoF.

<sup>174</sup> See Article 109 of LoF 105/2015.

<sup>175</sup> See Article 109 of LoF 105/2015. Article 105 of the LoF has been amended in relation to the last category, as the previous law provided for expulsion for foreigners convicted of offenses for which the law provides for not less than 1 year of imprisonment. Article 113 provides for the cases of persons that can not be subjected to deportation. For more information about the amendments made to the Law and for a comparison between the new and old Law, Ikonomi 2017 (note # 129).

<sup>176</sup> See Article 109 of the LoF

administrative appeal procedures, according to the Code of Administrative Procedures. Until the completion of administrative procedures, the foreigner is subject to alternative surveillance measures, or is kept in the Closed Center.<sup>177</sup>

Within the removal process, the Law provides specific procedures for the undesirable persons. A foreigner is declared an undesirable person by a reasoned order of the Minister of the Interior, for the interests of the State, national security or public order.<sup>178</sup> According to the Law on Foreigners, the appeal to the deportation order for the undesirable person is made only to the issuing authority, i.e. to the Minister of Interior (Article 114). The Law has thus excluded the possibility of judicial review of the act, or of different bodies other than the one that issued the order, by treating it as a discretionary competence of the Minister of Interior. Undoubtedly, the process of declaring and expelling foreigners as undesirable persons, carries a high level of confidential information or state secret which, if subject to a court hearing in public trials, could damage the interests of the state. However, the preservation of state interest should not be carried out with disproportionate measures that violate the rights of the individual, in the present case, the right to effective appeal means<sup>179</sup>. The principle that the same authority can not issue, enforce, and review the legality of the legal act it has issued, is a fundamental principle of the rule of law. The ECtHR has a wealth of jurisprudence in cases when the same institution issues, applies or examines the legality of the act it issues related also with state secrecy. For example, in *Chahal v. The United Kingdom*, the ECtHR held that state secrecy considerations can not lead to a violation of the right to an effective legal remedy in the form of an appeal against eviction order. An appeal can not be processed by the same authority that issued the challenged act. If a judicial review is not possible, at least an independent structure should be established to make possible the reviewing the act by balancing the right to an effective remedy with the preservation of state secrecy.<sup>180</sup> This issue has also been addressed by the Constitutional Court on a matter widely analyzed in the section on court practice.

### ***Detention***

Law on Foreigners defines the detention as the *ultimate administrative measure* taken and enforced by the relevant state authority at the local regional level, against the foreigner against whom the removal order was issued, on a case by case basis, when all possible alternative measures have been executed, or when, after an assessment, it is considered that these measures may not apply to foreigners or foreigners readmitted on the basis of international agreements.<sup>181</sup>

The Law highlights the fact that it is an administrative measure, to differentiate it from the criminal sanctioning provided for the unlawful entry/crossing of the border provided by Article 297 of the Criminal Code. This measure can be taken for foreigners subject to deportation order, for the purpose of executing deportation, as well as readmitted foreigners in order to finalize the return to their country of origin or a

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<sup>177</sup> See Article 110 of LoF 108/2015.

<sup>178</sup> See Article 9 of LoF.

<sup>179</sup> See Ikonomi 2017 (note # 129) for more.

<sup>180</sup> See for an example also *Al-Nashif v. Bulgaria* ECHR.

<sup>181</sup> See Article 121 of the LoF. The Glossary of Migration Law defines the detention as '*limiting the freedom of movement of an individual by state authorities, usually by means of isolation*' and distinguishes between criminal and administrative detention. The detention section of the Law on Foreigners 108/2015 has also undergone qualitative amendments compared to LoF of 2008. For additional information, see: Luljeta Ikonomi, Doctoral Dissertation, 2011.

country that accepts them. The Law specifies that it is not an automatic measure, but it is enforced only after a case by case examination, and only when the other measures do not yield results. Since it is not considered a punitive measure, but rather a facilitator to the return process, the detention is rightly treated as the *last resort* for the return of irregular migrants and not to be applied whenever a *return order* is issued. Other alternative measures provided for the first time in the LoF 108/2013 to prepare or ensuring the execution of an order of expelling a foreigner from the territory or to supervise his departure are: the obligation to show up on regular intervals to the regional border and migration authorities<sup>182</sup>; seizing the ticket or travel document;<sup>183</sup> seizing the financial means or demanding a bail<sup>184</sup>; and the obligatory abode in the Albanian territory.

According to LoF the detainee has the right to be notified in a language that he/she understands, about the detention order, which must be in writing, and that he has the right to obtain legal protection, with a lawyer of his/her choice or appointed by the state, and the right to meet relatives.<sup>185</sup> These rights are in accordance with constitutional safeguards, in particular Article 28.1 of the Constitution.<sup>186</sup> The right to be informed on procedural guarantees is a prerequisite for the exercise of other detainees' rights, and rights such as legal protection, appeal to court etc. are of no value if the detainee is not informed of their 'existence'.

The Law on Foreigners also stipulates that the foreigner against whom a detention order has been issued in a closed center, has the right to appeal to the judicial district court for this measure at any time after the written notice of the detention or prolongation of detention is received. The court of the judicial district, considers with priority the legality of the detention order on the foreigner in the closed center and decides for his detention in a closed center or of his/her release. This provision is in accordance with the Constitution which, in Article 28 (4) dealing with procedural safeguards in case of deprivation of liberty, provides that '*... a person who is deprived of his or her liberty extra-judicially, may at any time address a judge who decides within 48 hours for the legality of this measure.*' In this way, the new law on foreigners changed the issues with the previous law in which the right to appeal against the detention order, was limited to within 10 days from the date of the detention notice.<sup>187</sup> The new Law No. 108/2013 also provides for the possibility of appealing through a lawyer of his/her choice, or appointed by the state (Article 121). This provision is pivotal if we consider that a detained foreigner does not always have the opportunity or information to select a lawyer. In the context of a legal reality with which the individual does not have the possibility to be familiar with, it is expected that without a lawyer, the chances for a successful appeal are minimal. Hence, the right to be protected by an appointed lawyer, makes possible the exercise of the right of appeal in the First Instance Court. In accordance with the Vienna Convention on Consular Relations LoF sanctions the right

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<sup>182</sup> See Article 115 and Article 116 of LoF.

<sup>183</sup> Article 117 of LoF.

<sup>184</sup> See Article 118 of LoF.

<sup>185</sup> See Article 121 of LoF.

<sup>186</sup> See Article 28(1) of the Albanian Constitution. It provides that *whoever is deprived of liberty has the right to be immediately informed in the language that he understands for the reasons of this measure ... and has the right to immediately notify the lawyer and to be given the opportunity to exercise his rights.* See also Ikonomi 2017 (note 129) for a more detailed analysis.

<sup>187</sup> For more information on the issue of the Law on Foreigners of 2008, see: Luljeta Ikonomi: The Migration Law, first edition Onufri 2011.

of the detainee to notify his or her country's consular or diplomatic representative regarding his/her detention.<sup>188</sup>

#### *Duration of detention*

The duration of the detention is an important element for the legitimacy of the detention and is closely related to the purpose of the detention. **Albanian legislation** provides that a foreigner subject to eviction order, may be detained for a maximum period of up to 6 months (Article 123 of the LoF). If, within 6 months, his eviction has not been made possible, the central authority responsible for border and migration, upon the proposal of the closed center authority, prolongs the detention period at the center of the foreigner for up to 6 more months. The extension can only be made only if within the 6 month period of detention, the removal of the foreigner has not been possible as a result of the foreigner's refusal to provide personal data or information and does not possess the travel documents necessary for his return, or falsely informs, prevents or blocks his/her return in various forms, as well as when the authorities of the country of origin delay for justified reasons the issuance of the travel document. Thus, the LoF envisages a total period of 12 months, which is lower compared to the EU Directive<sup>189</sup> thus taking an approach that takes more into consideration the rights of irregular migrants.

According to the LoF, foreigners are kept in a closed Center established specially for this purpose.<sup>190</sup> Unaccompanied minors can not be subjected to detention in a closed Center, but they can be kept exclusively in open social centers, established in the Republic of Albania particularly for vulnerable categories of persons (Article 125)<sup>191</sup>. In compliance with the international ratified conventions<sup>192</sup> and Albanian Constitution regarding the detention, LoF provides that detained foreigners enjoy the right to human treatment, to have legal assistance in every case, sufficient food and health care (Article 127 of the LAP). The detained foreigner must be informed in a language he/she understands about his rights and duties at the Center and is entitled to appeal in a judicial manner at any time, pertaining his/her treatment at the Closed Center<sup>193</sup>. Due to the fact that the detention, is a deprivation of liberty, the right to appeal against treatment at the Center constitutes a fundamental right that the foreigner should be made aware of and the real conditions for his/her enjoyment of this right ought to be arranged.

#### *State Authorities Responsible for the Handling Foreigners*

The Central Authority responsible for dealing with foreigners in the Republic of Albania, is the Directorate for Border and Migration at the Ministry of Interior Affairs. Alongside the Central Directorate, at the regional and local level, have been set up also the respective directorates for border and migration affairs. The Central Border and Migration Directorate and 7 regional and local directorates are part of the Border and

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<sup>188</sup> See Article 126 of the LoF. The Consular or Diplomatic Office is not notified when the detained foreigner is an asylum seeker.

<sup>189</sup> See Article 123 of the LoF. The European Directive on forced return provides that the detention may be extended for another 12 months, for a total of 18 months.

<sup>190</sup> See Article 120-121 of LoF.

<sup>191</sup> See Article 125 of LoF.

<sup>192</sup> See for example article 9 PNDCP.

<sup>193</sup> See Article 127 of LoF.

Migration Police (BMP). During the period this study report was being prepared, the Ministry of Internal Affairs was in the process of restructuring, a process which envisaged changes to the position of the Border and Migration Directorate. The Closed Center is subordinate to the Central Border and Migration Directorate, in the Border and Migration Police.

The relevant authorities for the issues related to the welfare of unaccompanied minors are the units for the protection of juveniles established in each municipality. This obligation derives from the Law on Rights and Protection of Minors.

The Directorate of Consular Affairs is the responsible structure at the Ministry of Foreign Affairs for drafting policies related to visas and policies of consular activity and service.<sup>194</sup>

### **3.2 Challenges of Implementation of Legislation and Protection of the Rights of Irregular Migrants**

**The dynamics of migratory flows of 2012-2017 showed that the dividing line between asylum seekers and irregular migrants is very thin and often unclear.** However, the categorization of a foreigner after the selection process on one side of the line or on the other, has a considerable impact on his rights.<sup>195</sup> **If the foreigner is categorized as asylum seeker, is transferred to asylum mechanisms and is subjected to protection, but if categorized as an irregular migrant he/she is subjected to eviction.** Therefore, the decision of the specialist that makes the categorization is final with regard to the level of protection that will be offered.

This section elaborates the procedures followed in practice by immigration authorities for the return of foreigners categorized as irregular migrants or asylum seekers is elaborated in the asylum section of this report. Therefore, to avoid repetition, this section elaborates on the procedures from the moment of categorization as an irregular migrant up to the person's effective eviction to the country of origin or transit. This process, until 2013 was governed by the Law on Foreigners no. 9959/2008. From 2014 onwards, border and migration authorities have relied on the Law on Foreigners 108/2013 (analyzed above) and by-laws under its implementation, including the Guideline No. 293/2015 'On Treatment Procedures of Irregular Residence Foreigners'.<sup>196</sup>

#### **Return**

Foreigners entering Albania during 2012-2017, as part of the 'blocked' migrant flows in Greece, were generally detained in the Albanian territory, consequently they were not subjected to immediate blenching at the border, but of the returning procedures. Based on the legislation on foreigners, after categorizing the foreigner as an irregular migrant, the screening specialist formulates the return order, which is then signed by the regional border director. Although the LoF anticipates that the return order should

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<sup>194</sup> Enlarged Profile of Migration 2012-2014.

<sup>195</sup> For more information, see also: Ikonimi "Challenges for the Protection of Rights of Asylum Seekers and Migrants in Albania", presented at the Asylum at the Frontiers of Europe - Realities and Legal Challenges Conference, organized by the University of Lund, May 2017.

<sup>196</sup> For a detailed analysis, see Guideline 293/2015 UNHCR Tirana Report presented on 7 December 2017.

indicate, in a language the foreigner understands, the reasons for the return, the possibilities for appeal, the deadlines for appeal and the body where the return order may be appealed,<sup>197</sup> the standard form of the return order used by the migration authorities, does not contain the deadlines nor the authority's specification to which the appeal will be made. The standard form only quotes the number of LoF's Article that is related to the appeal. Foreigners who entered Albania as part of the migrant flows that affected the Western Balkans in their efforts to move to the EU or even to stay in Albania, had no knowledge or access regarding the LoF (in a language they could understand), and therefore could not know exactly what the Article provides, the number of which is quoted in the return order. In these cases, the presence of a lawyer/jurist is indispensable, and if this is not possible, at least a detailed clarification from the border and migration officer should be made. In practice, during 2012-2017, irregular immigrants enjoyed neither legal assistance nor through clarification about legal avenues for appeals, appeals procedures and relevant bodies. As evidenced by the Ombudsman, many of the undocumented foreigners who entered Albania from Greece (originating from Syria, Eritrea, Afghanistan, Iraq etc.) did not receive information on their rights, including the right to appeal, in part due to the lack of interpreters.<sup>198</sup>

During 2012-2017, the Border and Migration Authorities have coupled the return order with the possibility of voluntary return. For example, in 2016, the border and migration police, issued 655 voluntary return orders, corresponding to 72% of all detained foreigners (out of 915 foreigners detained in 2016). In accordance with the EU Return Directive,<sup>199</sup> voluntary return, for a period of 7-30 days, allows the undocumented foreigner to prepare the return process himself as well as to adjust or accommodate the personal situation before returning. This means that the foreigner has a place to stay during the period that is given the voluntary return. Foreigners entering Greece, detained in Gjirokastra, Shkodra or Kukës (being the areas where most of the undocumented foreigners were apprehended) did not have shelter in Albania, rather they needed accommodation, food and clothes. Consequently, they were detained by the Border and Migration Police in the Closed Center, and from 2016 in hotels, funded by CARITAS.

It is reported that many undocumented migrants have been accompanied by border and migration police to the border with Greece, before the expiration of the seven-day term provided for in the LoF for voluntary returns.<sup>200</sup> Later they were allowed to leave the Albanian territory on their own, in the same way as they entered Albania: i.e. illegally.

Immediate returns, before the end of the 7-day timeframe envisaged for voluntary returns, as well as the way voluntary returns have been carried out, with the migrant accompanied by border and migration police authorities to the border, allowing them to return irregularly to Greece, are not fully in line with LoF.

With this method of the voluntary return, border and migration police avoided the bureaucratic procedures of the Readmission Agreement. In some cases this scheme might have served also those foreigners, subject to returning, who had an interest in returning to Greece without the awareness of the Greek authorities, in order to avoid

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<sup>197</sup>LoF. Article 107. See LoF analysis above.

<sup>198</sup>Ombudsman Recommendations for Albanian Prime Minister. See also the section on Asylum, above.

<sup>199</sup> EU Directive on Common Standards for returning illegally staying in EU of third-country nationals.

<sup>200</sup>Albanian Human Rights Report – US Embassy (2015).

the consequences in their status<sup>201</sup>. Regardless of the advantages, the Albanian authorities should consider the risks associated with irregular entry into Greece by the migrant, linked to the difficult terrain (moving through a mountainous area, through a forest or crossing a river), as well as the possibility of contacts with traffickers (**smugglers**) by migrants on the other side of the border.<sup>202</sup> Particular attention should be paid to the return of unaccompanied minors and families with children. Unaccompanied minors should not return at all if the border and migration police does not guarantee in advance that they will be received by the family or legal guardian. If family reunification is possible, their return should only be achieved through co-operation with the Greek authorities, in order to ensure return without jeopardizing the well-being of the minor and his/her unification with his/her family.<sup>203</sup>

If the person does not return voluntarily, according to the Law on Foreigners, the Border and Migration Police proceeds with the deportation order. This order shall, in principle, be given in writing and in an understandable language for the foreigner, and shall indicate the reasons for the forced return, the deadlines and the authority where the appeal may be made. In practice, just as in the case for the return order, this order too is a standard form with reference to the Article of the Law on Foreigners with respect to expulsion and the right to appeal. This limited information does not enable a foreigner to understand appeals procedures, in the absence of an attorney.<sup>204</sup>

Another issue is that related to immediate returns, which made it impossible for a foreigner to access effective appeal mechanisms. It is reported that in some cases, undocumented foreigners have been returned within 24 hours from the selection process.<sup>205</sup> These returns, are not in line with legislation, which emphasizes the right of a foreigner to appeal against an expulsion order.<sup>206</sup> This issue was also identified by the Ombudsman who noted that border and migration authorities are under the obligation to enable effective access of foreigners to the appeal mechanism of the return order.<sup>207</sup>

The lack of legal assistance in order to appeal against the eviction order, as well as the lack of translators for the notification about such an option, may well be one of the reasons for the limited number of claims in the courts regarding the objection of the eviction order. The need for legal assistance was also ascertained by AHC monitoring teams. In a monitoring at the Closed Center, after the AHC team informed the detained foreigners for the AHC's work in protecting human rights, detainees expressed the their request and the need for legal assistance from the Committee as the only way for them to avoid returning to their country of origin, as this would put foreigners' life in jeopardy.<sup>208</sup> Legal assistance in this case was a necessity to challenge/appeal the deportation order.

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<sup>201</sup> For more see Ikonomi 'Challenges for protection of rights of asylum seekers and migrants in Albania' (2017).

<sup>202</sup> Ibid

<sup>203</sup> Ibid. See also OSCE 2017 (note # 43).

<sup>204</sup> The Ombudsman's Recommendations. See also Decision 1106/2014 (2014) of the Administrative Court of Vlora. For a detailed analysis see also the Ikonomi (note # 5)

<sup>205</sup> Report of the American Embassy for Albania: Albanian 2016 Human Rights Report <[https://al.usembassy.gov/wp-content/uploads/sites/140/2017/03/Albania-2016.pdf?\\_ga=2.110131078.201450012.1504526298-1050141830.1498602203](https://al.usembassy.gov/wp-content/uploads/sites/140/2017/03/Albania-2016.pdf?_ga=2.110131078.201450012.1504526298-1050141830.1498602203)>. See also the 2015 Report of the American Embassy for Albania.

<sup>206</sup> Law on Foreigners, For more see the LoF analysis in the previous section.

<sup>207</sup> Recommendations of Ombudsman. See also the Progress Report of 2016.

<sup>208</sup> Monitoring of AHC in the Closed Center, December 2017.

The standard form of the deportation order makes it impossible also to identify whether the border and migration officer has assessed the foreigner's personal situation before issuing the deportation order. If we refer to the general prejudice of the Albanian authorities, including border and migration police, that all foreigners use Albania to transit, as well as the fact that the selection processes are largely carried out in the absence of translators and often collectively, the use of identical expulsion orders, coupled with very limited access to anti-return appeal mechanisms, may lead the Albanian authorities towards the collective expulsion of irregular migrants entering from Greece<sup>209</sup>. The collective deportation contradicts the Albanian constitution and ratified international conventions. Thus, in the case of *Conka vs. Belgium*, the European Court of Human Rights specified the criteria that prevent the deportation of foreigners to be considered a collective expulsion.<sup>210</sup> It emphasized the need for individual decision, where the personal situation of each foreigner, subject to return, is taken into consideration individually, rather than treatment collectively with others of similar characteristics. It is therefore imperative that border and migration authorities examine the personal situation of each foreigner before issuing an expulsion order and clearly reflect the reasons for expulsion in order to avoid violating the constitutional provision prohibiting the collective expulsion.

### *Detention*

Foreigners subject to expulsion, may be detained in the Closed Center. As elaborated in the Immigration Legislation section, the detention should be the last resort if there is evidence that the foreigner may be absconding or may impede his/her return.

**However, with regard to undocumented migrants entering Albania from Greece, the detention was used as a standard measure, almost automatic in all cases when the voluntary return 'scheme' did not work.** The Border and Migration Police stated that the detention in the Closed Center actually provided their accommodation - that is, it served accommodational purposes, it was a necessity in the conditions when other alternative measures were impossible to achieve as foreigners apprehended had no other housing opportunities.<sup>211</sup>

The detention in the Closed Center can not be used to accommodate a foreigner, but solely to enable him to return effectively. In any case, there should be an return or expulsion order (even without specifying whether it is voluntary or compulsory) before there is a detention in the Center. **Without a return order, the detention order does not meet not even the formal requirements set out in relation to its content. Its standard form contains a section for filling in the reason for the detention, and includes two criteria: detention because the individual is subjected to of an expulsion order or detention for public security reasons. Without one of these reasons (in accordance with Article 121 of the Law on Foreigners), there can be no detention in the Closed Center.** The detention, not based on the Law, is arbitrary and not legitimate and contradicts Article 27 of the Albanian Constitution, as well as

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<sup>209</sup> See for a detailed analysis also Ikonomi "Challenges in the Protection of Rights of Asylum Seekers and Migrants in Albania", presented at the Asylum at the Frontiers of Europe-Realities and Legal Challenges Conference, organized by the University of Lund, May 2017.

<sup>210</sup> *Conka v. Belgium*, Application No. 51564/99 (ECtHR Feb. 5, 2002); For a detailed explanation in Albanian on ECtHR's case law in relation to the deportation, see: Luljeta Ikonomi 'Right to Migration', second edition, Onufri 2017.

<sup>211</sup> Interviews with cross border points staff in Gjirokastra, Kukës and Shkodra. See also Ikonomi (note # 5) and OSCE Report (note # 43).

Article 5. 1. f of the European Convention on Human Rights and Article 9 of the ICCPR. This is important as in many cases in the Center some foreigners have been detained because of a criminal process that has commenced against them. So, not as a result of a return order, but because of a court order for their detention until the end of the criminal process.<sup>212</sup> In such cases, foreigners subject to deportation can not leave, even if they so request, without finishing the criminal process wherein they are called as witnesses. Border and migration authorities (including the directorate of the Center) have rightly expressed concern about these forced detentions due to a court decision on forced residence within a territory. In these cases, their detention in a Closed Center is made to enable their participation in the process, and not to make their return effective. Courts ought to take alternative measures for these cases, as the Closed Center is not intended to ensure that witnesses or parties in criminal proceedings do not leave Albania, rather it serves the process of their effective and rapid return.

The detention order must be in written form and, besides the reason for the detention, must also specify the possibilities for appealing the detention order, the time limits for appeals and the authority where it may be appealed. Just as in the case of a return order and a deportation order, the detention order form is standard, where only the number the LoF Article is quoted in relation to the appeal but not its content. In general, detention orders have the same content, save for the name of the detainee. Due to the standard content, in practice, detention orders do not clearly state the reasons for the detention, thus, they do not indicate inter alia, why the border and migration officer has not considered other less coercive measures as effective.

The detention is depriving a person from his/her freedom. As such, it must be made in accordance with Articles 27 and 28 of the Constitution.<sup>213</sup> Constitution provides the right to every detainee to address to a court of the law which rules within 48 hours for the lawfulness of this measure and the right to communicate with the lawyer.<sup>214</sup> This approach was pursued in general terms in the Law on Foreigners, which provides that the foreigner is entitled to appeal to the court for the legality of his detention<sup>215</sup>. However, it should be kept in mind that irregular foreigners who come from Greece, have no knowledge of the legal system in Albania and can only appeal with the assistance of a lawyer. However access to free legal aid is very limited. Is an undocumented stranger able that while detained in the Closed Center to contact by himself with a lawyer? Unless a list of lawyers and their respective contacts is provided them in advance, it is unrealistic to expect that detained migrants in the Closed Center have the opportunity to contact lawyers. If we consider the economic inability of irregular migrants to pay attorney fees, it will be clear that the detainees virtually are unable to access a lawyer at the Closed Center. Under these conditions, it would have to be done with a lawyer appointed by the state.

The situation during 2012-2017 indicates a significant lack of legal aid for detainees in the Closed Center. The AHC and the Ombudsman's monitoring has evidenced that detained foreigners did not have access to legal aid during their stay in the Center. As mentioned above, this may be the reason why there was no appeal to the court to assess the legitimacy of the detention. Only one case was identified in the Administrative

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<sup>212</sup> See in the following findings from the monitoring mission of AHC in the Closed Center, December 2018

<sup>213</sup> See the previous section with regard to the analysis of the Albanian legislation and the provisions of the constitution pertinent to detention.

<sup>214</sup> Ibid. Articles 27 and 28 of Constitution.

<sup>215</sup> Articles 121 and 122 of LoF. For more, see the analysis in the previous session.

Court of Vlora, where two Eritreans were detained in the Closed Center, despite seeking asylum. This case best illustrates the importance of legal assistance in the Closed Center. For Eritrea nationals who were represented by RMSA's lawyers, the Vlora Court ruled that the detention in the Closed Center was in violation of the law. As it is mentioned in the asylum section, this case indicates the impact of legal protection specializing in the issues of migration and asylum to effectively protect the rights of asylum seekers and detained migrants.

AHC monitors were informed by the Center's staff during a monitoring mission that some detainees had lawyers appointed by the state in the districts where they have been identified as irregular migrant and from where they were brought in the Center. However, it is not clear whether the courts have assigned such lawyers for detainees who are at the same time in a criminal proceeding, i.e. whether the appointed lawyer is assigned due to the criminal processor for all detainees, in order to make possible the evaluation of the lawfulness of the detention. In any case, it is imperative that international and domestic organizations operating in the asylum and migration realm, to be more active in providing legal assistance to detainees. National and international human rights organizations together with the Ombudsman, can send coordinated monitoring missions, in order for the detained foreigners, for at least every other week, to communicate with bodies outside the Center and share problems or express their needs for protection. In case that this will not be possible, then organizations offering free legal aid, can leave their contacts at the Center. AHC monitoring at the Center found that there was no contact list for advocates.

#### *Center for Detention of Foreigners*

The detention of foreigners in the Republic of Albania is made at the Closed Center in Karec-Tirana. The Center was established within a European Union project aimed at creating the necessary infrastructure for the effective management of the EU Readmission Agreement.<sup>216</sup> The European Commission reports have consistently considered the level of implementation of its Readmission Agreement as satisfactory from Albania.<sup>217</sup> Until 2012, implementation was generally unilateral – i.e. returns from EU member states to Albania. As a result of the flows of asylum seekers and migrants in the Western Balkans during 2012-2017, and the entry of a lot of foreigners in the territory of Albania through the border with Greece, Albania, besides the readmission of its own citizens within the framework of the agreement, has also returned nationals of third countries (foreigners who can not leave voluntarily), to Greece as the tranzit country.

Until the conditions for effective return are met, foreigners subject to return (within or without the readmission agreement) have been detained in the Closed Center of Kareç. The center, which was a premise owned by the Albanian Army, was rehabilitated with European Union funds, in order to meet the minimum standards of a Closed Center.<sup>218</sup> It became operational in 2010. The Center has 25 accommodation rooms with a capacity of 100 beds although there have been reported cases of accommodation of

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<sup>216</sup>IOM Project 'Building Capacities of Albania to Implement RA' funded by the EU. See Iconomi and Ndoci 'Do EU Member States Need Readmission Agreements', published in the British Journal of Citizenship, Asylum and Immigration Law Journal (2011), for a detailed analysis of the readmission agreement between the European Commission and Albania.

<sup>217</sup>See the European Commission Reports for Albania during 2012-2016, which evaluates inter alia the level of implementation of the Readmission Agreement.

<sup>218</sup>Rehabilitation was carried out by IOM in the framework of the Project Financed by EU Building Capacities of Albania to Implement RA '.

about 110 people<sup>219</sup>. It has three wards: one for men, one for families and one for females.<sup>220</sup>

Over the past 7 years, in this Center are detained, respectively:<sup>221</sup>

In 2010- 32 people (26 males and 6 females)  
In 2011- 236 people (230 males and 6 females)  
In 2012- 1004 people (978 males and 26 females)  
In 2013- 331 people (300 males and 31 females)  
In 2014- 472 people (424 males and 48 females)  
In 2015- 251 people (236 males and 15 females)  
In 2016- 99 people (84 males and 15 females)

These people accommodated in the Center over the years, are citizens of 59 different states such as Armenia, Afghanistan, Algeria, England, Austria, Iraq, Iraq, Libya, Morocco, Syria, Somalia, Cameroon, Pakistan, Turkey, Ethiopia, etc. From January to November 2017, 64 foreign nationals were accommodated in the Center, of which 51 men, 8 women and 5 children. They are citizens of Algeria, Germany, England, Afghanistan, Iran, Pakistan, India, Serbia, Syria, Morocco, Palestine, Iraq, Turkey as well as several stateless persons.<sup>222</sup>

Albanian authorities try to provide the necessary standards for treatment of foreigners in the Center. **However it should be stated that after the first years of its operation, there was a gradual deterioration of conditions in the Center, related to the lack of maintenance services. This situation was created after the handing over of the Center to the Albanian authorities. The maintenance costs would be covered by the Interior Affairs Ministry's budget and not by EU funding. It is reported that since 2014, the living conditions in the Center have been inadequate to accommodate detained foreigners, especially in cases of families with children.**<sup>223</sup> However, in practice, besides males, families with children and females are also detained there. The Albanian media has reported on the detention on foreigners in 2014, mostly of Syrian families with children who during their stay in the Center have been sick with viral infection. These articles refer to the Center's conditions as unsuitable for hosting families and children.<sup>224</sup> Even the EU Progress Reports for Albania have consistently underscored the inadequate conditions of the Center in Karec. The situation has also been acknowledged by border and migration authorities, who in cases of pregnant women have sought shelter in the National Asylum Center due to the better conditions of the latter.<sup>225</sup> In 2017, there have been some improvements also due to aid received from CARITAS, and efforts by the Border and Migration Directorate to allocate funds for its reconstruction due to pervasive dampness in the Center.

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<sup>219</sup> Monitoring Report of AHC 5.12.2017.

<sup>220</sup> Ibid. See also EC Progress Report 2016

<sup>221</sup> Monitoring report of AHC 5.12.2017.

<sup>222</sup> Ibid.

<sup>223</sup> See EU Progress Report for Albania 2016

<sup>224</sup> <http://shqiptarja.com/news.php?IDNotizia=258375&NomeCategoria=&Titolo=&IDCategoria=1&reply=430799>

<sup>225</sup> For more about the Closed Center, see: Ikonimi (note # 5).

The Center offers accommodation, food, and medical service. Regarding food, during the AHC monitoring, it was noted that the daily diet rate of AL Lek 250 per person, is insufficient. There is a need for other items besides the basic ones, in order to have the necessary nutrients to meet the needs of foreign citizens accommodated therein. This is especially necessary in case of families with pregnant women or children, etc. The daily rate of food for these citizens is low in terms of the calorie limit, because, according to the Ministry of Health and Social Protection, these people are considered inactive and that is the reason that they are given a low rate of food. However, this food rate is not appropriate for minors as they are not expected to stay in this Center. Nevertheless in practical terms, juveniles are also detained, and consequently special attention is required to their meals. According to the AHC monitoring report, detainees had complaints about the inadequate amount of bread and the inappropriateness of the menu vs. the traditional food of the countries which these citizens came from.<sup>226</sup>

The Center provides basic medical services through an infirmary. In case of need for specialists, detainees are sent to the Durrës hospital. An individual medical file is kept for each person accommodated in the Center.<sup>227</sup>In theory, the Center offers psycho-social assistance, through the Center's psychologist.<sup>228</sup>

The Center does not provide clothes which, according to the staff of the Center, are extremely necessary for the detainees. CARITAS and UNHCR have helped constantly, but the needs continue to be pressing. In some cases, the staff themselves helped with clothes. In this context, with the lack of budgeted means, cooperation with other organizations operating in the domain of migration and human rights may be solicited. Especially during winter, the need for clothes is more pressing, as the central heating system is faulty.

The heating system is quite faulty, especially during the winter. During the renovation process of the building for its adaptation as a Closed Center, designers/engineers may have conceived it as a facility that would operate at full capacity and so installed a central heating system. This perception was not, and is not in line with Albania's reality as a host or transit country for irregular migration. During the time of rehabilitation of the Center (2006-2010), the number of detained foreigners was totally negligible, so expectations for an immediate increase that would cause the Center to offer accommodation to its full capacity, were unrealistic. Currently, the Center is in a situation where it needs to turn on the heating system for all its 25 rooms in its two floors, even when there is accommodated only one detainee in only one of the rooms. According to the information received from the staff of the Center, the heating of the entire building is very costly, and obliges the management of the institution to turn it on only for short periods of time, regardless of the number of persons in the Center.

The Center faces shortcomings also in recreational facilities, there are no enclosed grounds for activities such as soccer, volleyball, etc. The recreational room in the interior premise, needs to be equipped with the material base necessary for its operation. There is also a lack of library books in Arabic, French and English as the main languages spoken by citizens accommodated in this Center. According to the

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<sup>226</sup>For more details see: AHC Monitoring Report at the Closed Center, on 5.12.2017.

<sup>227</sup>For more details on issues related to medical services, see AHC's Monitoring Report 5.12.2017.

<sup>228</sup>For more details on the issues related to the provision of social assistance see the AHC's Monitoring Report 5.12.2017.

monitoring team, the rooms as well were poorly furnished with only beds and clothes racks.

The Center is managed by a staff of 31 employees, of which 22 employees are in uniform, including 2 women, and 9 civil servants (1 psychologist, 1 responsible for logistics, 1 assistant physician, 2 cooks, 1 assistant cook, 1 janitor, 1 for maintenance and 1 keeper of the warehouse, of the total of which, 3 are female employees)<sup>229</sup>. The Ombudsman has recommended augmentation of the staff, with a jurist, translators, dentist, social worker, etc.

The presence of translators is a necessity to ensure the communication at the Center. Although in the center there are staff members, including the psychologist, who speak English and often help with the translation, actually, the detained foreigners not always know the English language. Consequently, communication is often done utilizing another of the detainees who speaks English, to translate for others. This makeshift solution is certainly not ideal, therefore the Center should have a list of translators who can be called on a case-by-case basis, as the need be, and especially during the first phase of the detention in the Center, for the interview process wherein the detainee will become familiar with the rules, rights and obligations in the Center.

Translation issues were also evidenced by the AHC monitoring team. In one case, they were able to communicate with the detainee who knew English. However it was completely impossible to communicate with 2 other detainees who did not know the language.

Center's management, in the circumstances of the physical lack of translators, in specific cases, can make use of the telephone or Viber/Skype translation with remote interpreters that can be engaged on a case-by-case basis. This is a practice that is utilized in many EU countries in those cases when it is impossible for the interpreters to arrive on time. This method - that is, the translation through a telephone or Viber/Skype, makes it easier for border and migration authorities for whom it would be sufficient to simply have a list of translators who they can make use of in real time, without delay and remotely. Undoubtedly, the challenge here is the payment for these services that need to be budgeted.

In order to avoid the translation-related problems, the Center has acquired leaflets and informative leaflets on the rights of irregular migrants, prepared by the Ombudsman or other organizations. These brochures need to be distributed effectively. Some of the informational material on the rights of detainees, are posted on the premises of the Center, albeit only in English.

The detainees have the right to complain against treatment and conditions at the Center. They also have the right to translation services and the right to seek asylum during the period they are in the Center. However, as noted above, there have been cases when detained foreigners have not been transferred to asylum mechanisms at the time they made a request as the case was of the Eritrea citizens. The Vlora Administrative First Instance Court ruled that detention in the Closed Center without allowing the foreigner to seek asylum, violates legislation regarding the transfer of detainees to asylum mechanisms. A similar situation to the case of the citizens from Eritrea was also found

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<sup>229</sup> AHC Monitoring Report in the Closed Center, 5.12.2017.

by the Ombudsman.<sup>230</sup> An inspection conducted by the Ombudsman team on **09.10.2017** identified an Afghan citizen that was detained in violation of the Law on Asylum. He was arrested and convicted by the Court of First Instance of Gjirokastra for the criminal offense of "Forgery of passports, ID cards or visas". with 4 months imprisonment (after application of a reduction of 1/3 of the sentence). Following the application of the Article 59 of the Criminal Code, the court ordered the suspension of the execution of the imprisonment sentence for the remaining part of the sentence, by giving a 8 months period of probation. Following that, the court ordered the immediate release of the foreigner and ordered the Regional Directorate of Border and Migration in Gjirokastra to carry out the relevant actions regarding the defendant. The Ombudsman team verified that in his file there was the deportation order, the order for his detention in the Closed Center and the "Screening Form for Irregular Foreigners". Based on this form, the Afghan citizen had left his country of origin for economic reasons and did not intend to seek asylum in the Republic of Albania. From communicating with the Afghan citizen, the Ombudsman's team noted that the detainee was not familiar with the two above-mentioned orders for his expulsion and detention in the Center and that he had sought asylum in the Republic of Albania. Inspectors of the Ombudsman concluded that this detainee and others were violated the right to seek asylum and were detained in the Closed Center contrary to the legislation in force.<sup>231</sup>

We underscore the fact that due to the nature of the asylum seekers and migrants flows during 2012-2017, AHC, the Ombudsman, UNHCR and RMSA continuously monitored the Closed Center for migrants, to ensure the protection of asylum seekers' rights as well as to provide legal assistance if possible. AHC observes did not encounter any obstacle in terms of monitoring conducted in this Center. The monitoring organizations can serve not only as a watch dogs in controlling/monitoring, but also as partners serving the same purpose: protection of the human rights of detained migrants.

#### *Detention of minors*

The Law on Foreigners provides that unaccompanied minors can not be detained in the Closed Center, but in social centers that provide the necessary conditions for their upbringing. However by 2017, no center was established for minors. The lack of such a Center has generated difficulties for border and migration authorities with regard to accommodating the unaccompanied minors. With the adoption of the Law on the Rights and Protection of Children,<sup>232</sup> the responsibility for housing, psycho-social and legal support for unaccompanied minors, is passed on to the bodies established under this law for minors. Thus in each municipality, juvenile units should handle any case of unaccompanied minors.

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<sup>230</sup> According to the 2017 Ombudsman's official letter addressed to the State Police and the Directorate for Border and Migration. This letter is referred to below with regard to clarifying the inspected and identified case.

<sup>231</sup> Ibid. The Ombudsman stated that their detention in the Closed Center had removed the opportunity to pursue the procedures of obtaining the right guaranteed by the Albanian legislation pertaining the refugee status, with the relevant asylum authorities, and it requested from the state police and directorate of border and migration authorities to arrange the transferring of the person to the asylum mechanisms

<sup>232</sup> Law on the Child's Rights and Protection 18/2017

The border and migration police emphasizes that cases of unaccompanied minors during 2012-2016 were scarce, and minors were sent to the Asylum Seeker's Center.<sup>233</sup> Although the Asylum Seeker's Center provides better conditions than the Closed Center and is the best choice that border and migration police has, this solution is not in line with the Law on Foreigners. **The law specifically provides for 'a social center for minors'. Under these conditions, setting up of such a Center is a priority of all the bodies concerned with the protection of juveniles.**

In 2017, CARITAS financed the establishment of a juvenile premise within the Closed Center. This premise is equipped with toys and other recreational and educational tools for minors. Despite the positive intervention, this does not mean that the legal criterion for accommodating minors is met. The recreational premise, child friendly as it is and suitable for minors, is however within the Closed Center. Thus, it is not in accordance with the law, which provides for an open social Center.

From the monitoring conducted by the AHC team at the Closed Center, it was evidenced that Center's management is aware that the legal framework does not allow the detention of unaccompanied minors in the Center. However, in reality there have been several minor's detention cases, of minors separated from parents but accompanied by relatives or acquaintances, thus moving as part of a group traveling together through the Western Balkans.<sup>234</sup> According to border and migrant officials, in these cases, minors preferred to stay with their relatives, and for that reason are detained in the Closed Center together with the rest of the group. These cases should be treated with great diligence by border and migration police. Prior to the detention, the screening specialist should ensure the truthfulness of the claim that the minor is in the company of relatives. This is to avoid any possible minor's trafficking.<sup>235</sup> The interview should be carried out separately from the alleged relatives, in the presence of a psychologist (or social worker) and a representative of the juvenile unit. Only after it is evidenced that the minor is not a (potential) trafficking victim, it can be allowed for him/her to stay with the relatives. In these cases, as well as for the detention of juveniles with their families, border and migration police authorities should consider the possibility of establishing alternative measures and not detention at the Center. **This is because the detention on the Closed Center is not in accordance with child's best interest.**<sup>236</sup>

During the monitoring of the Center by the AHC monitoring team on December 5, 2017, it was found that in the Center there was a citizen with her 3 minor children.<sup>237</sup> Center's staff spoke of the maximum efforts of all staff to facilitate the stay of minors in the Center, since by its very nature and designed to be a closed institution with a limited freedom regime for its residents, the Center does cause issues in such cases.

### 3.3 Court Practice

For the purpose of this study, AHC collected, systematized and created a database with the Courts' decisions regarding the implementation of the Law on Foreigners, the Asylum Law, and Articles 189, 297 and 298 of the Criminal Code. The decisions were

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<sup>233</sup> For a specific analysis regarding the screening, removal and detention process of minors, see: OSCE's Report (note # 43). See also Ikonomi (note # 5).

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> For a detailed analysis, see: Ikonomi (note # 5).

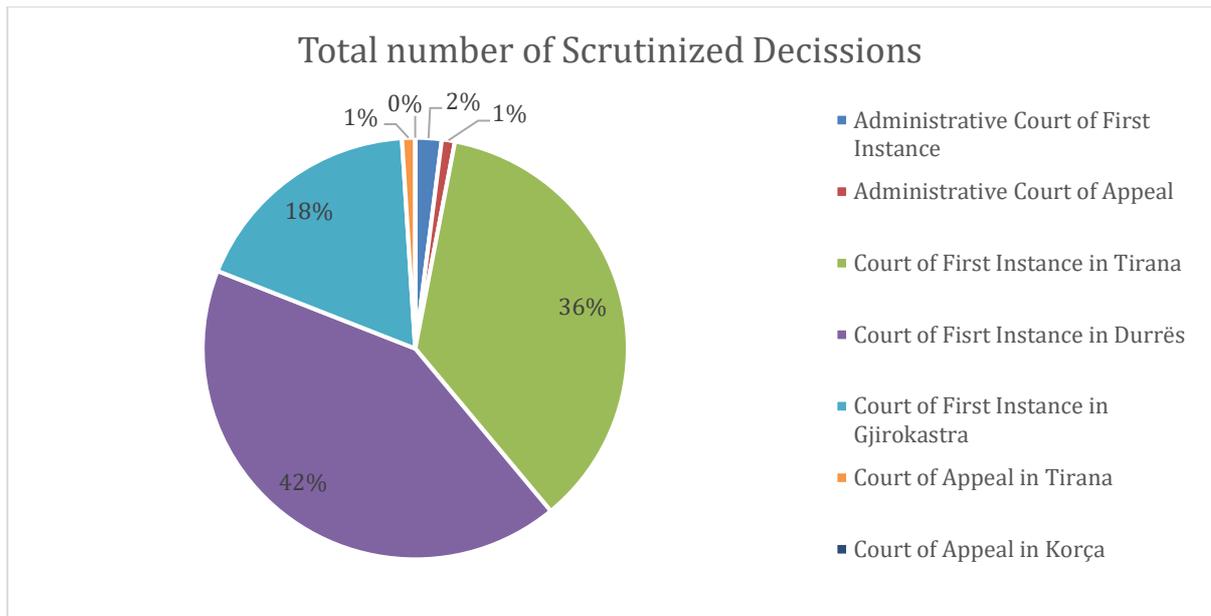
<sup>237</sup> For more information, see the AHC's Monitoring of the Closed Center 5.12.2017.

received from the Constitutional Court, the Supreme Court, and the courts of several districts of Tirana, Gjirokastra, and Durrës, the respective appellate courts, as well as by some administrative courts. Although AHC addressed with a request the courts in Shkodra, Vlora and Korça, none of these Courts responded. The Helsinki Committee also addressed the Prosecution with regard to the criminal proceedings initiated by them during the period under study for the criminal offenses provided by articles 189, 297 and 298 of the Criminal Code. In total, there were identified 876 cases from the courts and 19 proceedings initiated from the Prosecution of Tirana District according to the following chart and graph:

Chart 1. Number of Identified Decisions :

<b>Identified Decisions</b>		<b>Total Amount of Decisions</b>	<b>Foreigners (Excluding KS)</b>
<b>Administrative Court</b>	Adm. Court of First Instance	13	9
	Adm. Court of Appeal	6	4
<b>Courts of First Instance</b>	Court of First Instance Tirana	421	19
	Court of First Instance Durres	301	27
	Court of First Instance Gjirokaster	128	14
<b>Court of Appeal</b>	Appellate Court of Tirana	2	0
	Appellate Court of Korca	3	3
<b>Prosecutor's Office<sup>238</sup></b>	Prosecutor's Office of Tirana	19	5
<b>Supreme Court</b>		1	1
<b>Constitutional Court</b>		1	1
<b>Total</b>		<b>895</b>	<b>83</b>

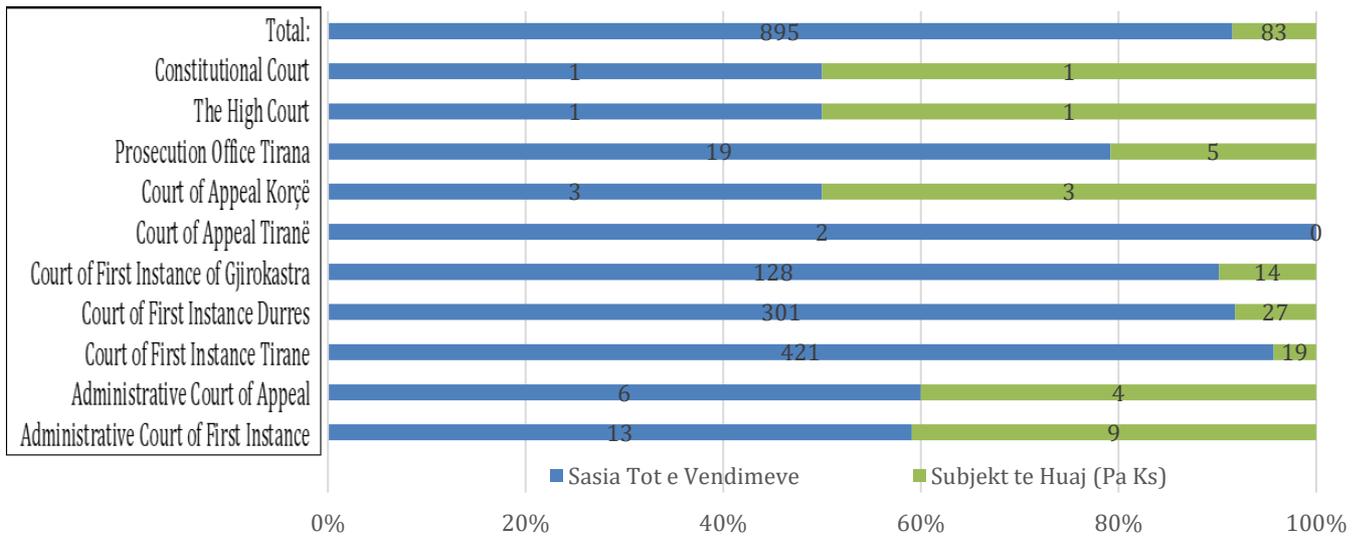
<sup>238</sup> We refer here to the prosecutor's decisions to send the case to the Court.



Although the number of reviewed cases is considerable, we are nevertheless of the opinion that they do not represent all the issues in this regard, as some of the Courts did not reply nor sent the requested documents. We also note that this number also includes issues related to illegal border crossing or falsification of documents (articles 189, 297 and 189 of the Criminal Code) pertaining Albanian citizens. Thus, the legal basis for the decisions found is the Law on Foreigners, the Law on Asylum, the Criminal Code - Articles 189, 297 and 298. Subjects to the decisions are: Foreign asylum seekers, irregular migrants and Albanian citizens crossing the border illegally or that do so using forged documents. As analyzed in the previous section, the number of cases involving asylum seekers is very limited, about 12 cases (However, it is noticeable a significant increase in decisions regarding immigrants and irregular migrants during 2012-2017. Issues related to Albanian emigrants are analyzed in the following section.

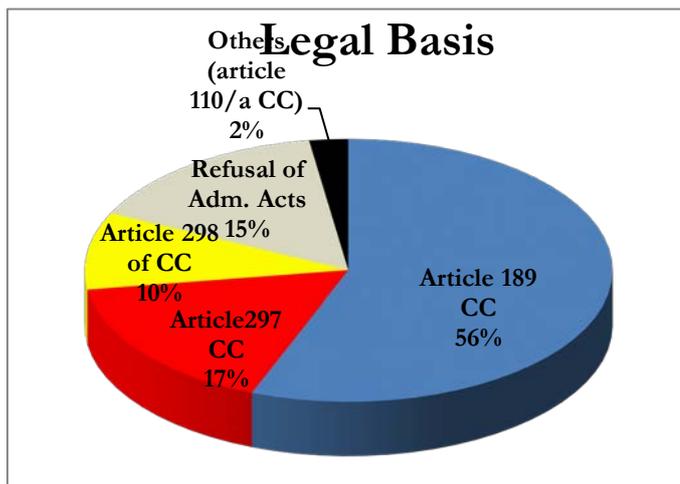
The following chart illustrates the report of the total issues analyzed and elaborated in the database created for this purpose by the AHC's working group with the number of subjects with foreigners involved, and the legal basis of the Law on Foreigners and Articles 18, 297 and 298 of the Criminal Code. This chart does not include decisions for Kosovan citizens, although they are foreigners. We thought that due to specific circumstances related to their entry, stay and departure from Albania, different from the dynamics of flows that entered from Greece, during 2012-2017, be presented and analyzed separately.

### Decisions with a foreign subject



The vast majority of decisions pertaining irregular immigrant, deals with illegal border crossing and the use of counterfeit documents. So there is a significant increase in criminal proceedings against irregular immigrants, which goes in the opposite direction to the ratified international conventions elaborated above. Specifically, out of 83 decisions on foreigners one decision is for the violation of the Article 110/a of the Criminal Code (that is not object of this study) whereas 82 decisions' legal bases is as follows:

- Article 189 of CC            47            46 sentences            1 Suspension/Dismiss
- Article 297 of CC            14            10 sentences            4 Suspension/Dismiss
- Article 298                    8            5 sentences            3 Suspension/Dismiss
- Law on Foreigners        13            4 admitted requests        9 Dismissed



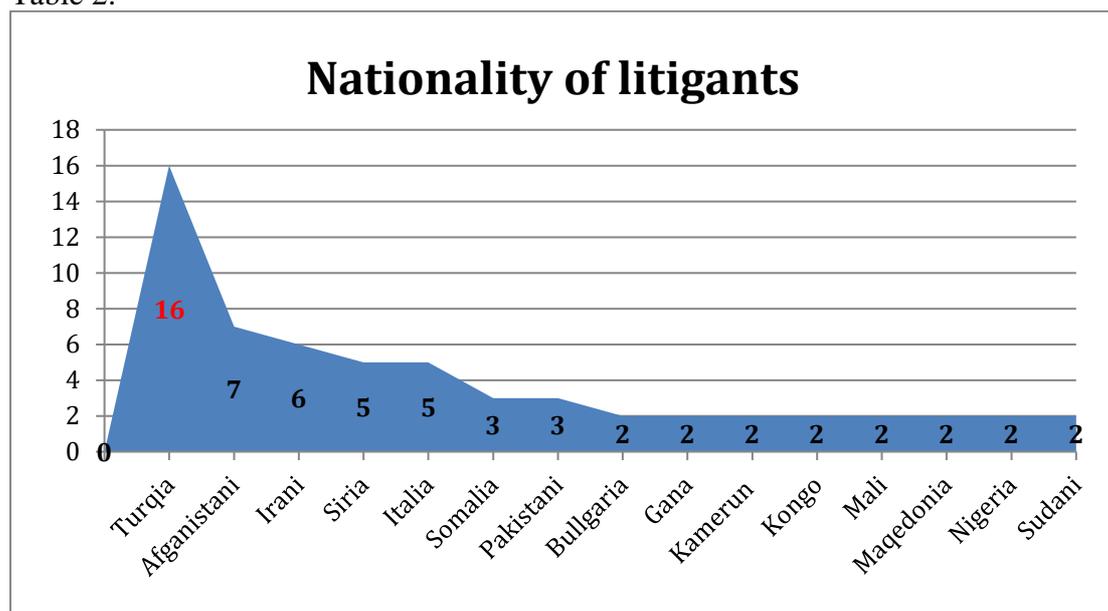
Foreigners in the proceedings are of different nationalities, such as from Afghanistan (7), Iran (6), Syria (5), Pakistan (3), and Turkey (16). The following chart and graph illustrate the nationality of foreigners (excluding Kosovan citizens).

Chart: 2 – Categorization according to the nationality

Nationality	No. of Decisions	Category of the Case			
		189	297	298	Objection
Turkey	16	9		4	3
Afghanistan	7	6	1		
Iran	6	4	1		1
Syria	5	3	2		
Italy	5	1	1	1	2
Somalia	3	2			1
Pakistan	3	3			
Bulgari	2	2			
Ghana	2	2			
Cameroon	2		2		
Congo	2	2			
Mali	2	2			
Macedonia	2	1		1	
Nigeria	2		2		
Sudan	2		2		
Eritrea	2				2
Egypt	2				1
Africa	1	1			
Bosnia	1	1			
France	1	1			
Germany	1				1
Greece	1		1		
Guinea	1	1			
Iraq	1	1			11
Croatia	1				Correction of administrative acts
Cuba	1	1			
Malaysia	2	1			
Morocco	1	1			
Moldavia	1	1			
Russia	1				1
Serbia	1		1		
Slovenia	1	1			
Sweden	1	1			
	82 <sup>239</sup>				

<sup>239</sup> We clarify that here is not included a case where as a legal basis has served Article 110/a because it is outside the scope of this study.

Table 2:



As noted also through Chart 2 indicating nationality of litigants, **authorities have initiated criminal proceedings for illegal crossing of the border and use of counterfeit documents also for 5 cases of Syrian nationals. Despite the fact that the Syrians come from a warring country, a fact well-known to all, which they flee for fear of their lives and therefore, they are essentially asylum seekers, authorities have nevertheless initiated criminal proceedings against them as well and the Court has ruled in all cases the imprisonment sentence.** Although sentences vary from a fine to 1 or 6 months of imprisonment, the sentence for this offense at the peak of massive movements in Balkans and Europe of Syrian citizens in 2015 of **Syrian** nationals, contradicts the general approach to treatment of asylum seekers and irregular migrants who should not be subjected to criminal proceedings and imprisonment. On the contrary, Syrians should have been categorized as asylum seekers and referred to the asylum mechanisms.

The Albanian Courts have also considered a substantial number of issues related to Kosovan citizens. More specifically, AHC has identified about 172 decisions involving Kosovan citizens, which are mainly criminal cases pertaining illegal border crossing and forgery of documents. From the examination of the cases, it is noted that there is an increasing occurrence of the use of passports or counterfeit documents by Kosovan citizens, in order for them to move to the Schengen area. They use Albanian passports and counterfeit Serbian passports, or fake residence permits from EU countries.<sup>240</sup> In the following part there are briefly elaborated the main issues regarding the judicial affairs, grouping separately criminal cases from those concerning the opposition of the decisions of the Border and Migration Police.

<sup>240</sup>Referring to the use of falsified Serbian passports by Kosovar citizens another concern is raised: Is it possible for Kosovo citizens to obtain (in a facilitated way) Serbian citizenship, and as a consequence a valid Serbian passport (not a forged one) which would enable them free movement in the EU? If so, this may be associated with an increased number of demands for Serbian citizenship and passports, if the need to move freely would exceed the nationalistic feelings.

1. Issues regarding the commitment of offenses under articles 189, 297 and 298 of the Criminal Code

Albanian courts have mostly imposed prison sentences from 1 to 18 months for charges of forgery of documents (Article 189 of CC). In many cases they have imposed a fine of about 400,000 AL Lek. In other cases, they have ruled for a combining of a fine and imprisonment. In 2012, it is noted a tendency to combine the fine with the decision of suspension of the order for imprisonment, provided that the foreigner does not commit other offenses. In some cases, fewer in number, alternative sentences were applied such as probation service or regular reporting to police authorities. There are cases, such as that of an Afghan citizen who was an irregular immigrants, who was convicted both for illegal border crossing and forgery of passport, which aggravated his position. These sentences are mainly ruled against males, nationals from Syria, Iraq, Guinea, Congo, Pakistan, Somalia, Ghana, Cuba, etc. However, there are also female convicts, who have been sentenced to prison. For example, a Turkish citizen was sentenced to 1 year in prison for using a falsified passport.

In general, courts have not taken into account the human dimension of massive movements in the Western Balkans towards the EU. **In the majority of cases, foreigners have been defended by assigned counsel, whose presence is formally evidenced in the decision. However, most of the decisions do not contain any reference to the arguments presented by the defendant side.** Therefore, there is the impression that the assigned counsel was just present, has pleaded guilty for his client in terms of the illegal border crossing or falsification of passports, but has not raised any argument to alleviate the position of the defendant. In few cases, he did not even demand a reduction in the sentence or a mitigated sentence, but has simply stated that he "agrees with the sentence" requested by the prosecutor even when it included both jail and a fine. **Only in a few decisions the reasoning which has driven the individual to pass the border irregularly is given and it is required to be taken to account the personal situation of him/her, economic situation and the human dimension of the illegal migration.** In very few cases, the lawyer has pointed to the economic and family issues of the detained foreigner, requiring the Court to impose a mitigated sentence.<sup>241</sup>

Thus, issues concerning the illegal border crossing or the use of forged documents with the foreigner defended with an appointed lawyer are substantially different compared to asylum cases in which the asylum seekers are represented by experienced jurists specialized in this domain. Therefore, it seems that the appointed lawyers take a very passive approach by generally accepting the guilty pleas on behalf of their clients without referring to the International Conventions ratified in the area of migration and refugees, which provide protection for migrants and asylum seekers that are detained or arrested. It should be noted that the right to migration is a new realm, which is also included in the curricula of a few universities as an optional class. Only in the last 10 years it was made available as an optional semestral course at the Faculty of Law, in the University of Tirana. The inclusion of this course in the curricula of the Faculty of Law was made in order to meet the obligation, envisaged in one of the elements of the Action Plan of the National Strategy for Migration. The Strategy identified market needs for lawyers specialized in immigration and asylum. It is therefore not inconceivable that the assigned counsels are unaware of the **ratified international**

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<sup>241</sup>Decision 430/2016 of Tirana Court.

**conventions in the domain of the law on migration, which guide the states party towards a non-punitive approach towards irregular migrants regarding charges of unlawful entry into country's territory.** The clear and qualitative difference between the decisions regarding asylum applications in which the arguments of the party in litigation and the decisions against migrants charged with illegal border crossing or document falsification are covered broadly, best illustrates the positive impact of a specialized defense attorney for an effective defense.

Also, due to the lack of translation, lawyers may have run into difficulties communicating with their clients, which in essence undermines the defense. If the lawyer is not able to communicate with the client, it is not safe to say that he respects the requirements and stance of the latter. From the monitoring carried out at the border crossing points by the Albanian Helsinki Committee, a general lack of translators has been identified in Gjirokastra, Kukës, Korça and Shkodra. The situation with the interpreters has been critical especially for languages from countries such as Syria, India, Afghanistan, Eritrea, etc. Thus, there are a few changes that the district courts would find translators of these languages due to the fact that there is a lack of translators in the respective districts.

Albanians, in their position as immigrants, have experienced on their back the negative effects of the lack of translation in criminal proceedings. The story of the Greek translator who did not know Albanian but who nevertheless "interpreted" for Albanians in criminal proceedings, violating the principle of a due legal process, is well-known and widely covered by the Albanian media. Therefore, the continuation of this situation in criminal proceedings against undocumented foreigners moving to Albania during the refugee and immigrant crisis that effected the Western Balkans particularly during 2013-2016, is not tolerable.

Regardless of the above, one does not exclude the probability that the defense has put forward arguments in favor of the defendant, but the courts in most of the cases did not make reference to the defense arguments. In fact, court decisions on arrested foreigners are brief, without any elaboration about the reason why a type or measure of sentence was given and whether another type or measure might have been more effective.

Overall, judges have argued that the offense of illegal border crossing by a foreigner was committed intentionally, without effectively analyzing the subjectivity of the case. Is the unlawful crossing of international borders voluntary indeed when it comes to foreigners who flee their countries of origin because of war, or is it rather from the transit country due to degrading and inhumane conditions in the camp set up for them, as is the case in Greece? Decisions against foreigners, in general do not refer to the reasons for which they leave and why they cross irregularly in foreign countries from their country classified as unsafe. Quite the contrary, in the case of a Syrian national, the decision refers to the departure of the Syrian from his country as a departure for economic reasons and rules for imposition of a fine on the defendant. This approach, unfortunately reflects the general perception that foreigners entering Albania are economic immigrants.

It should be noted that foreigners involved in criminal proceedings do not pose a social risk. This is admitted by the Courts in several decisions. Thus, in a decision of the Court

of Gjirokastra<sup>242</sup> the judge records the testimony of a local resident according to who the emigrants come to a village's store to purchase groceries and then move on. So, they do not steal or cause havoc. They just shop to supply their immediate needs. The human dimension and the lack of social risk of the individual emerge clearly from the testimony of the local resident. However, in this case, the Court decided to apply the sanctions of the Criminal Code, sentencing the foreigner with a fine of about Lek 60,000 AL for the illegal border crossing. There is no evidence in this decision of the defendant's lawyer arguments.

The refugee flows that have been transitory across Balkan and EU countries, are generally not sanctioned in the effected countries. The punitive practice seems to be typical Albanian regardless of the fact that Albania is itself a country that has an immigration rate that exceeds 30% of its population. For more than 25 years, Albania has "exported" irregular migrants to EU countries, and in the last four years, its citizens have abused massively the asylum system in countries such as Germany, France, the Netherlands, etc. Therefore, a greater sensitivity would be expected with the foreigners apprehended in Albania - and more so with the Syrians who flee because of the war and should therefore be subject to protection rather than punishment.

Beyond, empathy and the humane dimension, court decisions must be in line with the ratified international legal framework. Judges should make decisions not only under the Criminal Code but also on the basis of international conventions ratified by Albania, as elaborated in section on legislation of this study report. As per above, it is necessary to train judges, prosecutors, lawyers in relation to the national and international legal framework in the area of migration, rights of migrants (including those of illegal residence), because in practice the international legal framework has been ignored.

Thus, in the vast majority of the decisions, even though the defendant was originally from a country at war, Courts, without taking into account the situation in the country of origin have not assessed whether the foreigner passing the border illegally or using forged documents is doing that in order to seek asylum. Therefore, although a significant number of the convicted persons are from countries at war, neither the appointed lawyer nor the Court has deliberated the possibility that the case be that of an asylum seeker rather than of an irregular migration. This may have also occurred because of the lack of translation and the inability of the defendant to clarify his position. The authorities should therefore ensure that the foreigner is notified in a language that he understands, during all stages of the criminal process. The presence of an appointed defense lawyer should not dismiss the obligation of having an interpreter. Besides interpreting, the arrested foreigner must be notified of the right to contact the consulate. If the foreigner has no interest in communicating with the consular office, the Albanian authorities should not proceed on their own in this regard. This is because, in many cases, notification of the authorities of the state of origin may put the foreigner in more danger rather than help him/her. Notably, if we take into account **the wrong categorization that the police of border and migration can make, in cases of treatment of asylum seekers as irregular migrants**. This has been one of the cases identified by AHC's monitors, in which the border and migration authorities have contacted the embassy of the country of origin, and according to foreigner detainee, this has put him in danger of life in case of his return to the country of origin. The right to facilitate the communication process with the consulate, derives from the Vienna

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<sup>242</sup>Decision 21-2015-498 (92) Gjirokastra Court

Convention on Consular Relations, ratified by Albania. This right is also foreseen in the Criminal Procedure Code, following the changes it has undergone<sup>243</sup>. But it is an inherent right of the foreign detainee, not also of the state that has detained him; so it can not be initiated by the latter without the consent of the first.

The courts have also raised a concern about the criminal proceedings against foreigners for illegal border crossing and forging of passports. The concern pertains to the fact that many foreigners who are accommodated in the Asylum Center leave the Center without completing the process, and consequently the sentence of conviction can not be realized. Also the lack of an address of the foreigner, that obliges the Court to order the detention at the Closed Center are indicators to the fact that the Albanian courts consider the sentencing of the asylum seekers or irregular migrants on illegal crossing of the border as a purpose in and of itself. The prison sentence, besides an inhumane approach, is in contradiction with the ratified international conventions, incurs additional costs for Albania, is ineffective and does not serve neither the prevention of the phenomenon nor the rehabilitation of the individual.

- Objection to the decisions of the Directorate of Border and Migration

More than 20 decisions of the Courts taken under scrutiny, deal with issues relating to residence permits or renewals requests, objections of fines, or pertaining refusal of family reunification permit. In these decisions, foreigners, due to their position, are generally represented by lawyers of their choice and the impact of the lawyer is evident in the process. Foreigners mainly require the invalidation of an expulsion order or refusal of a residence permit application, or the renewal of a residence permit. From the scrutinized decisions it is ascertained that foreigners who have submitted requests to the Court objecting the refusal of residence permit have Kosovan, Turkish, Croatian, German, Moldovan or Italian nationality.

In one case, in the Court, a claim was filed by a ferry ticket agency with the purpose of objecting a fine that was imposed. In this case, the Border and Migration authorities imposed a fine on the agency on the basis of the provisions of the obligation of the carrier (explained in section 2.1 on Legislation on Foreigners). According to border and migration police, the travel agency did not meet the obligation to submit the list of passengers who it had sold ferry travel tickets to from Durrës to Italy. The court accepted the plaintiff's claim arguing that the agency was not subject to the obligations of the carrier as foreseen in the Law on Foreigners, since it has for the object of its business activity only the sale of the tickets and not the transportation of passengers. As such, it is not a transporter in terms of the Law on Foreigners. In this case, border and migration authorities have also imposed a fine on the lack of a list with the names of Albanian citizens leaving the Albanian territory. The Court rightly explained that the obligation for the transporters envisaged in the LoF is related to the list of foreign passengers, and not that of the Albanian nationals. Another case concerns an appeal against a fine imposed for overstaying by a foreigner. In this case, a Turkish citizen complained of the fine imposed on her, arguing that the day she left the Albanian territory she had not overstayed. The court found that the Border and Migration authorities had miscounted the days and the fine was ungrounded. This decision showed

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<sup>243</sup> See article 34/b of Criminal Procedure Code, amended in 2017.

could the issues related with imposing fines on foreigners, with the argument of overstaying that is widely elaborated in the Section on Legislation of this study report.

Some decisions pertain the objection of the expulsion order taken by border and migration authorities or refusing to issue a residence permit. From their review, it is ascertained that even in these decisions, the Courts stick rigidly to certain provisions of the Law on Foreigners, without analyzing them in accordance with the general principles of the LoF, as well as in accordance with the international law ratified by Albania. Thus, **firstly**, Albanian Courts generally do not take into account the impact of refusal decisions of a residence permit or deportation of a foreigner and the application of the principle of soliciting the best interest of the child and the right to family life. **Secondly**, the Court legitimizes the orders of the Border and Migration Police regarding the expulsion, refusal of residence permit or renewal thereof with the argument of concern for the public security, without providing any clarification nor creating any opportunity for the foreigner to defend his position.

As it was elaborated in section on the migration law, the principle of the highest interest of the child and the right to family life, constitute the basis of the legislation on foreigners. Where authorities' decision-making violates these principles, is needed a careful balancing of the state's interest in managing migration and the right of the individual to family life and protection of the child's highest interest. This process, i.e. the aforementioned balancing of interests, is not taken into consideration in the rulings of the Albanian Courts. In some cases, the residence permit for family reunification was rejected even though the foreigner (e.g. a Kosovan citizen) had married an Albanian citizen and were expecting a child. The impact of the denial of a residence permit on his family life right, was completely disregarded by the Court.

Courts also do not take into consideration the authenticity of the argument for concerns with regard to the national security or risk to public safety, presented by border and migration police to legitimize the refusal of a residence permit or expulsion. In many cases, Courts submit to judicial investigation the evidence that are presented in the process, considering the assessment made by border authorities, based on SIS data, as a discretionary act. Regarding the foreigner's request to become acquainted with the arguments in order to clarify his/her position, Courts generally argue that due to state secrecy, data and assessment of border and migration authorities is discretionary and can not be made available. This position violates the right of a party to a due legal process and particularly the principle of equality of arms and that of the opportunity to object. The party is not granted the opportunity to defend or to argument that it does not pose a threat to the public security. When a residence permit is rejected on public security concerns, the mechanism must be found that public interest considerations and state secrecy do not suspend the foreigner's right to present his/her defense arguments. This can be achieved by involving a third party, on impartial third party that evaluates the evidence presented by border and migration authorities, and is likely to submit arguments regarding interest of the foreigner. Traditional destination countries have experience in regard to these types of situations, and that experience can be applied also by Albanian authorities. Courts and border authorities can also be guided by the ECHR ruling in the case of *Chahal v. UK*, in which the Strasbourg Court widely elaborated on the relationship between public interest, state secrecy, the right to family life and equality of arms in a judicial process (as above-mentioned in the Section on Legislation on Foreigners).

A problem that is evidenced in the decisions, related to the state secrecy, is related to the burden of proof. In some cases, the Courts have stated that the foreigner was unable to prove that did not constitute a threat to public order, even though the individual did not obtain prior knowledge of the reasons why it was classified as such. In these cases, the court states that "*the foreigner did not prove that he did not pose a risk to public order*", while at the same time no evidence was provided as to why border and migration authorities considered him to be so, and that under the excuse of following the principle of public secrecy. If there are claims that the foreigner is a threat to the public order and security, the authorities must back this claim with evidence. Rightly, in a decision, almost exempt from the standard used by the Albanian Courts on these cases, the Administrative Court of Tirana, referring to the circumstances of the fact, the evidence examined at the hearing and the legal cause of the lawsuit, ruled that the claims of the plaintiff are based on the law and that the petition filed by him must be received. According to the Court, 'by the respondent (Directorate of Border and Migration), no evidence was presented to prove that the plaintiff posed a threat to public order and security, to national security, or that his presence could affect international relations. In the absence of concrete evidence, the respondent's claim that he does not endanger public order and security, national security, or that his presence does not affect the international relations of the Republic of Albania with other states, is presumed to be legitimate, for as long as there are no opposite proof to contradict this claim'.<sup>244</sup>

The balance between the right to family life and the best interest of the child on one hand and the public interest on the other, is dealt with in depth in a decision of the Constitutional Court. This issue best illustrates the difficulties the courts face in addressing the issues of migration law. In this case, 3 Egyptian citizens sought to cancel the decision of the Interior Minister to expel them after 13 years of legal residence in the Albanian territory. The deportation order provided for a 10-year entry ban. The order did not provide the reasons for the eviction and the evidence on which it relied. The claimants, having no information on the basis on which their eviction order was based on, nor on the evidence on which it relied, filed an application with the Ministry of the Interior and the Regional Border and Immigration Directorate, but did not receive any response. Subsequently, they appealed to the Tirana District Court with a request for an objection to the "Canceling the Order of the Minister of the Interior ...", which in turn imposed the partial admission of the lawsuit and the annulment of the removal order from the territory of the Republic of Albania. After the appeal to the Ministry of Interior, the Tirana Court of Appeal decided to dismiss the lawsuit. The Supreme Court, having considered the recourse submitted by the applicant, decided in counseling room to reject it. The claimants turned to the Constitutional Court asking for the annulment of court decisions on the basis of the violation of the right to a fair trial in the following aspects. Inter alia, they argued that the principle of *the court established by law* was violated, as the Tirana Court of Appeal and the High Court have classified the administrative act of the Minister of Interior as a discretionary act which can not be appealed to the court but have not examined its legality. According to the claimants, the Order of the Minister not only does not constitute matter for discretion, but has been made in misinterpretation of the substantive law and contrary to the requirements of the Code of Administrative Procedures regarding the form, reasoning, notification

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<sup>244</sup>Administrative Court of Tirana

procedures and the principle of proportionality. As explained in the section on Legislature, LoF provides that the Minister's order to declare non-grata and deportation of the foreigner, can not be appealed in a court of law. The parties also argued that the *principle of equality of arms and the principle of contradiction* had been violated since the Tirana Court of Appeal and the High Court upheld the Interior Minister's order for the removal of the applicants in the absence of evidence proving the merits of this measure by discharging him from the obligation to prove the existence of the circumstances of refusal of the residence permit.

The parties also raised the argument of the right to family life and expulsion of Albanian citizens since the expulsion order has absurdly included the youngest child of the applicant, who enjoys Albanian citizenship. Thus, the party rightfully argues that the deportation order violated the constitutional principle of prohibiting the expulsion of Albanian citizens.

The Constitutional Court analyzed this issue on the basis of the domestic legislation and the ratified international conventions, in accordance with the hierarchy of norms in the Republic of Albania. It argued that the right to a due legal process guaranteed to the individual under Articles 42 and 142/1 of the Constitution and Article 6 of the ECHR also includes also the right to have a reasoned judicial decision. The purpose of a reasoned decision is to show the parties that they are heard and gives them the opportunity to object it. This did not take place in the case of the decisions of the High Court and the Appellate Court

According to the Constitutional Court the decision should be based solely on the facts that have arisen during the trial and should contain the legal basis on which it is based in the dispute settlement, the evidence's analysis and the dispute resolution. Reasoning of decisions is an essential element of a fair decision. From the analysis of the Supreme Court's decision, the CC held that the decision to reject the recourse of the Civil College of the High Court, subject to review, did not respect the constitutional standard of reasoning of court decisions. The Constitutional Court stated that the lack of presentation of the reasoning set out in the recourse constitutes an insurmountable flaw related to the content of the decision and reasoning of the Court, raising doubts as to the effective realization of the right of access by the applicants to the court.

The Constitutional Court in this decision did not express its stance in relation to certain issues of special concern regarding the decision of removal and the protection offered to foreigners legally residing. First, it did not take into analysis the conclusion reached by the Court of Appeal on the discretionary nature of the Order of the Minister of the Interior. Secondly, it did not address whether the decision to expel a foreigner legally residing was made in accordance with the procedural safeguards provided by the Constitution and the ECHR. Thirdly, it did not address the impact of this decision regarding the right to family life and the best interest of the child. These elements, which are typical of a litigation process regarding the legality of the removal decision, are fully and fairly handled in the paralleled citation of one of the CC's members. This paralleled citation refers to the ECHR jurisprudence, which serves as a guideline for our judicial system in relation to similar cases of non-disclosure of the information by national authorities to the foreign applicant on the grounds of expulsion, which ECtHR has considered a violation of the right to defense, in terms of arms equality and objecting principles. Also, the paralleled citation underscores the need to analyze such

situations in relation to the provisions of Article 8 of the ECHR "Right to respect for private and family life", Article 3 "Prohibition of expulsion of nationals" of Protocol 4, and Article 1 "Procedural safeguards related to the expulsion of foreigners" of ECHR's Protocol 7. The subject matter under consideration at the Constitutional Court in fact necessarily required the examination of the legality of the expulsion decision in accordance with the above articles of the ECHR and those of the Albanian Constitution because it is about expelling a family with a lawful and long-term stay (13 years), which is composed of even an Albanian citizen, a minor. The parallel citation is in full coherence with ECJ jurisprudence developments in the domain of migration, particularly the deportation of long-term foreign nationals due to national security reasons. Judge Kristo rightly quotes ECHR's rulings stating that: *Even when it comes to the issue of national security, the concepts of legality and rule of law in a democratic society require that measures that affect fundamental rights and freedoms should be subjected to contradictory proceedings before an independent competent body for reviewing the reasons for the decision and related evidence, even in cases when procedural limitations are applied in the use of classified information (Kaushal and Others v. Bulgaria, 02/12/2010, § 29)*. Constitutional Court's rulings and especially the arguments of the paralleled citation, constitute an exceptional case in the jurisprudence of our courts regarding the referral to ratified international instruments. Equally important is the argument provided in the paralleled citation, that *the Constitutional Court and courts of lower instances should have taken into account and should have evaluated the fact that one of the children of the applicant to be deported, had Albanian citizenship*.

The diametrically opposed rulings of the First Instance and Appellate Courts, the decision of the High Court and the arguments in the CC decision, as well as the analysis reflected in the parallel citation, indicate the complex nature and difficulties in practice for the implementation of migratory legislation. The Constitutional Court in this decision has evidenced the lack of reasoning by the First Instance Court, the Appellate Court and of the High Court, a problem that is evidenced in most of the decisions analyzed for the purposes of this paper. As mentioned above, Albanian Courts need to be more familiar with the legislation of this aspect, and to consider developments in domestic and international law of similar cases in the future.

## Chapter II: Irregular Emigration and Albanian Asylum Seekers

### *1.1 General information about the dynamics of Albanian emigration*

**Albania is one of the countries with the highest percentage of emigrants in the world in relation to its population, towering to up to 33%.**<sup>245</sup> This has led researchers to refer to it as a State in motion.<sup>246</sup> Indeed, after the collapse of

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<sup>245</sup> See Enlarged Migration Profile 2012-2014 published in the Official Journal no 222 (2015), p. 14530 in [http://www.qbz.gov.al/botime/fletore\\_zyrtare/2015/PDF-2015/222-2015.pdf](http://www.qbz.gov.al/botime/fletore_zyrtare/2015/PDF-2015/222-2015.pdf)

<sup>246</sup> D Carletto, B. Stampini and M. Zessa 'A country on the move', *International Migration Review*; volume 40/7, p 767-785 (2006). See also Ikonomi (note # 5).

communism, emigration became a survival strategy for most of Albanians.<sup>247</sup> Statistics show that about 1.4 million Albanians live and work abroad.<sup>248</sup>

Albanian's emigration over the last 25 years has been largely irregular. Most of them have moved to Greece and Italy, due to the geographical proximity of these two countries. Until 2005, Albania was the main country of origin and transit of migrants from the Balkans to the European Union. Due to the alarming increase in the number of irregular migrants entering Albania as a country of both destination and transit, as well as the high level of organization of criminal networks that facilitated the illegal crossing of the border, especially towards Italy, the European Union conditioned its cooperation with Albania in the framework of the Stabilization and Association process, by Albania's taking effective measures against illegal migration.<sup>249</sup>

The EU provided financial assistance and ongoing expertise in strengthening border control, taking measures against the root causes of illegal migration, as well as for the reintegration of returnees.<sup>250</sup> Based on the EU's recommendations, Albania intensified efforts to effectively control the state border, including inter alia adopting a moratorium on banning the use of speedboats and motorboats as widely used means for irregular migration to Italy. Albania also signed a Readmission Agreement (RA) with the European Commission in 2005. The agreement entered into force in 2006 regarding the readmission of Albanian nationals and in 2008 for the readmission of foreigners entering the EU transiting through Albania. Albania was the first country in Europe and the fourth in the world to sign a readmission agreement with the European Commission following Macao, Sri Lanka and Hong Kong.

In an effort to combat illegal migration, Albania adopted a National Migration Strategy aimed at addressing the causes of illegal migration. In tandem with the measures against illegal migration, negotiations with the EU were intensified for the purpose of reaching an agreement on visa facilitation and then pertaining visa liberalization. The latter was signed in 2010.<sup>251</sup> The visa liberalization agreement, which enables the movement into the Schengen territory without a visa for a period of 90 days within 180 days, was considered by Albanians as one of the greatest achievements after the collapse of communism, bringing them closer to the European dream.

The entry into force of the visa liberalization agreement was followed by a significant reduction in the number of Albanian citizens who crossed the border illegally to the EU. Thus, in 2010, there were 38,132 Albanian citizens with irregular entry or residence in the EU were readmitted, in 2011 around 10,240 irregular migrants were returned from EU countries, and in 2012 the number was further reduced to 10,129 irregularly readmitted migrants from EU countries.<sup>252</sup> It should be noted that prior to the entry into force of the Visa Liberalization Agreement, the number of returnees was about 6 times higher than the returnees in 2012. Thus, in 2009, there were about 65,000

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<sup>247</sup>National Strategy on Migration '2005-2010'.

<sup>248</sup> See Enlarged Migration Profile 2012-2014 published in Official Journal No. 222 (2015), p. 14530

<sup>249</sup> HLWG Interim Report on Albania and the Region 11429/99. See also Ikonimi 'Migration Law', published by Onufri (2017) p. 341.

<sup>250</sup> Ibid.

<sup>251</sup> For a thorough analysis, see: Ikonimi, Ndoci 'Do EU Member States Need Readmission Agreements'. *British Journal of Asylum, Immigration and Nationality Law*. See also: *Migration Law*, Onufri Publications (2017) p. 335-350.

<sup>252</sup> See Enlarged Migration Profile 2012-2014; See also EU Progress Report 2009-2013.

Albanian nationals, irregular migrants to the EU, most of whom were returned by the Greek authorities.<sup>253</sup> So, after the entry into force of the visa liberalization agreement, there is a drastic reduction from 65,000 persons in 2009 down to 38,000 in 2010 and 10,240 returns of irregular migrants in 2011. **However, this trend was reversed in 2013. This is because, in addition to 11,946 irregular Albanian emigrants returned in 2013, there was also noted a 47% increase in asylum applications in EU countries compared with the applications during 2012**<sup>254</sup>. A part of the asylum seekers who applied in 2012, returned in 2014 or later, depending on the length of asylum procedures.<sup>255</sup>

Until 2012, the European Commission reported on a limited number of ungrounded asylum applications by Albanian nationals and noted that most of the persons who moved to the Schengen area under the visa liberalization agreement, did so in bona fide<sup>256</sup> whereas for 2013, the Commission changed its stance, signaling massive abuses by Albanian nationals entering Schengen territory with the free movement agreement. Consequently, the Commission recommended that immediate measures be taken by the Albanian authorities to avoid abuses with the visa liberalization agreement. Inter alia, the Commission recommended cooperation and exchange of information with EU countries, investigations of illegal migration facilitators, effective border control, awareness raising campaigns for Albanian travelers/nationals traveling to the EU, as well as support with material resources especially for minority communities that make up the largest number of those that sought ungrounded asylum in 2013.<sup>257</sup>

However, even in 2013, returns were relatively low compared to those of 2009 or 2010, because asylum applications review procedures were ongoing in the EU countries. In 2014, the trend of abusive asylum applications continued, especially in the summer of 2014, which forced the European Commission to reiterate the demand for serious measures against this phenomenon. In 2014 there is not only an increase in the number of Albanian nationals returning from EU countries, but also of those who were denied exit from the territory. More specifically, in 2015, some 12,867 persons were returned from European Union countries and 11,923 Albanian citizens were subject to refusal of exit from Albanian territory by the Albanian border and migration police.<sup>258</sup>

In 2013-2014, ungrounded asylum applications by Albanian nationals, reached to about 16,795 cases. **The peak of abuses with the asylum system was in 2015, when about 68,750 applications for asylum were reported by Albanians, a figure about 297%**

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<sup>253</sup> See EC Progress Report 2013, p. 46 in relation to the declining trend of illegal migration and returns from the EU at: <http://www.europarl.europa.eu/document/activities/cont/201311/20131105ATT73959/20131105ATT73959EN.pdf>. See also Ikonimi and Ndoci Impact of visa liberalization for the Western Balkans, the case of Albania, presented in the International Conference organized by Epoka University, IBAC 2012.

<sup>254</sup> Ibid.

<sup>255</sup> [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2014/20141008-albania-progress-report\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-albania-progress-report_en.pdf) p 57

<sup>256</sup> <http://www.europarl.europa.eu/document/activities/cont/201311/20131105ATT73959/20131105ATT73959EN.pdf> p. 46.

<sup>257</sup> [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2014/20141008-albania-progress-report\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-albania-progress-report_en.pdf) p. 51

<sup>258</sup> [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2015/20151110\\_report\\_albania.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_albania.pdf) p. 62

**higher than that of 2014.<sup>259</sup> Of these, about 53,800 applications were lodged in Germany.** In 2016 there was a decrease compared to 2015, yet the number of asylum seekers with ungrounded applications, continued to be concerning (about 20,000 people). Thus, the number of asylum applications in 2015 was almost the same as the level of illegal migration before the visa liberalization agreement entered into force, more specifically equal to the figures for returns and readmission reported in 2009. It is clear that there has been a migration pressure that reaches to about 65-68 thousand people. **According to the EU Report in 2016, Albanian citizens constitute the largest group of asylum seekers from Western Balkan countries (54%) and the largest number of persons crossing borders or residing illegally in the Schengen area.<sup>260</sup> Albanians constitute one of the largest groups of asylum seekers in the EU, comparable to that of Syrians, Afghans, coming from a war situation or instability of public order and security. The number of applications received, was less than 1%.** Therefore in 2016, out of 34,000 applications by Albanians in Germany, only 10 people benefited protection. Even in the Netherlands, the number of requests granted is very low. Thus, out of 1,665 applications in 2016, only 5 requests were granted. No requests out of 1,065 such were granted in 2015 and in 2014 there were no application accepted out of 85 asylum applications.<sup>261</sup>

## 1.2 The legal framework on emigration

The Albanian legislation on emigration dates back to 1995 with the adoption of the Law on Migration no. 7939. This law regulated in general terms both migration and emigration. A specific law on emigration was adopted in 2003. Law No. 9034/2003 "On emigration of Albanian citizens for employment" was followed by the adoption of an immigration registry directive.<sup>262</sup> This legal basis governed migratory issues for about a decade undergoing constant changes to adapt to the evolution of the immigration phenomenon. Law on Emigration of Albanian Citizens for Employment, of 2003 was repealed by a law of the same name in 2006. Law on Emigration no. 9668/2006 (as amended) is the main legal act that continues to regulate emigration for the employment of Albanian nationals.<sup>263</sup> The legal framework on emigration is supplemented by other normative acts that regulate both emigration issues such as Law on Protection of Personal Data, Law on Consular Services, Law on the Control and Supervision of the State Border". Part of the mandatory normative acts in this regard are the UN, ILO and EC Conventions ratified by Albania.<sup>264</sup> An important document regulating the movement of Albanian nationals to the EU, as mentioned above, is also the Visa Liberalization Agreement signed from Albania and European Commission.

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<sup>259</sup> [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_albania.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_albania.pdf)

<sup>260</sup> [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_albania.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_albania.pdf) p 69

<sup>261</sup> Information from Netherlands Helsinki Committee.

<sup>262</sup> Guideline no. 1927/2004 "On the functioning of the register for immigrants" and the procedures for the registration of Albanian nationals emigrating for employment and returning from emigration".

<sup>263</sup> Amended by Law No. 10389, dated 3.3.2011 "On Amendments to Law no. 9668 dt. 18.12, 2006 'On the emigration of Albanian nationals for employment'.

<sup>264</sup> See Ikonimi 'Migration Law' 2017 (note # 129), for more information with regard to international ratified conventions.

With regard to illegal migration, the Criminal Code, more specifically Articles 189, 297 and 298 mentioned in the Immigration Section, provide for punitive measures against the use of counterfeit documents for illegal immigration or illegal border crossing. Whereas Article 124 of the Criminal Code specifies sanctions in respect of the abandonment of minor children. Albania also applies the Readmission Agreement with the European Community, which regulates the return and readmission procedures for its nationals and those of third countries who have transited through Albania or vice versa.

This legal framework is governed by some basic constitutional principles such as *everyone's right not to be prevented from leaving the territory*,<sup>265</sup> *the right of nationals to enter the territory of the Republic of Albania*; *protection of Albanian nationals abroad*<sup>266</sup> and *a prohibition of the expulsion of nationals*.<sup>267</sup>

In its entirety, the legal framework for emigration, governs four main dimensions:

- a. Expanding legitimate migration means
- b. Supporting immigrants abroad
- c. Measures against illegal migration
- d. Return and reintegration of immigrants

Although this paper focuses on irregular migration, we will briefly address the extension of legitimate migration means and the support of emigrants abroad. This is because **irregular emigration is at its core, the result of economic difficulties and unemployment in the country, intertwined with limited opportunities for regular emigration**. In fact, the fight against irregular emigration is destined to fail if it is not coupled by energetic measures to facilitate regular emigration. This is especially true of Albania, where immigrant flows are mainly for employment purposes. **In terms of high levels of unemployment and poverty in the country, emigration has been viewed by the emigrant and his family as the only way to survive.** That is why the Albanian legislation places emphasis on *preventing irregular migration and trafficking of human beings by expanding regular emigration channels*.<sup>268</sup> Measures taken to put to a halt the irregular migration, must not be interpreted in any way as a restriction of the right to emigrate - this right is explicitly recognized in the Constitution as the right to move outside the state territory<sup>269</sup>. The Law on Emigration also provides that every Albanian citizen has the right to emigrate from off the territory of the Republic of Albania<sup>270</sup>, and that the Albanian state does not restrain employment emigration, but is committed to taking measures to facilitate and integrate Albanian nationals into host countries.<sup>271</sup>

*a. Expanding legal immigration channels*

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<sup>265</sup>See Article 38 of the Albanian Constitution.

<sup>266</sup>Article 8 of the Constitution.

<sup>267</sup>Article 39 of the Constitution.

<sup>268</sup>See the Law on Emigration of Albanian Citizens for Employment, No. 9668, of 18.12.2006, Article 1 (henceforth the Law on Emigration).

<sup>269</sup> Ikonomi 'Migration Law', Onufri 2017 (note # 129).

<sup>270</sup>See Art 5 of the Law on Emigration.

<sup>271</sup>See Law on Emigration, Onufri 2017 (note # 129). See article 14 of Migration Law.

The Law on Migration for Employment provides that state authorities take measures to create legal and administrative conditions and facilitations for Albanian citizens who desire to emigrate lawfully, such as: priority treatment for providing the necessary documentation,<sup>272</sup> informing potential migrants about the conditions and situation in host countries and, in particular, on the signing of bilateral and multilateral employment agreements,<sup>273</sup> organizing orientation courses and vocational training,<sup>274</sup> drafting vocational training curricula with a view to their recognition in host countries. The current legal framework provides for the establishment of a Register for Immigrants, wherein are registered Albanian nationals seeking to emigrate for employment as well as the returnees.<sup>275</sup>

By the very nature, the promotion and expansion of channels for lawful emigration abroad and cooperation with employment agencies, are dependent on the demand, hence the employment opportunities in the host countries. Consequently, the law speaks mainly in terms of aspirations or ideals, and not in imperative terms. Much of the provisions are narrative in nature, expressing commitment and willingness to achieve objectives that do not necessarily depend on local bodies<sup>276</sup>. The issue of implementing the Law on Emigration is also noted in the Law on Promotion of Employment.<sup>277</sup> The latter aims to combat irregular emigration by creating employment opportunities within the country. Specifically, the Law on Employment Promotion is important for the mandating of employment offices with the task of advising and providing vocational orientation, information and employment mediation. In 2015, the Law on Jobseekers was also adopted which aims to regulate the process of registering jobseekers in employment offices, matching job demand with its supply and vocational training, the supervision of safety and health at work as well as regarding the payment of the job provided by the employment offices.<sup>278</sup>

#### *b. Protecting Immigrant's Rights*

Along with the efforts to facilitate regular migration, Albanian legislation foresees the obligation of state bodies to protect the rights of Albanian nationals permanently and temporarily residing outside their country's borders, and to provide assistance to develop ties to the national culture heritage.<sup>279</sup> In the same lines, the Law on Emigration sets out as its purpose the care, protection, preservation of the national identity of Albanian citizens and the strengthening of ties with the country of origin.<sup>280</sup> The law is geared to ensure some of the rights of migrants, such as the suffrage<sup>281</sup> and of organization, social and economic rights, educational and cultural rights, administrative and judicial support etc. Albanian authorities, according to the Law on Emigration, are responsible for the establishment, development and strengthening of immigrant

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<sup>272</sup>See Art 30 of the Law on Emigration. See also Ikonimi 2017 (note 129).

<sup>273</sup> See Article 3 of the Law on Employment Emigration, no. 9688 of 18.12.2006.

<sup>274</sup> Ibid. Article 35 of the Law.

<sup>275</sup> The establishment of a register for migrants is based on Order No.1712 / 2007 of the Minister of Labor, Social Affairs and Equal Opportunities.

<sup>276</sup> For more see Ikonimi 'Migration Law', 2017 (note 129).

<sup>277</sup> See Law on Employment Promotion, no. 7995/1995 as amended by law no. 8444/1999; law no. 8862/2002 and law no. 9570/2006.

<sup>278</sup> Law No 146/2015. The focus of the law on professional development of jobseekers is important.

<sup>279</sup> See Article 8 of the Constitution.

<sup>280</sup> See Article 1 of the Law on Emigration.

<sup>281</sup> See Article 6 of the Law on Emigration for Employment of the Albanian Citizens

communities abroad by consolidating the activities undertaken by clubs, organizations and associations with a view to the strengthening of ties with the country of origin.<sup>282</sup> Practically, assistance from the Albanian state in this regard has been almost inexistent. The Minister of State for Diaspora in the draft strategy for Diaspora and Migration, envisions a series of measures regarding the strengthening of migrant networks and state relations with the Albanian diaspora. By the end of 2017, the Strategy document was under review.

Consulates have the obligation to facilitate administrative procedures for migrants abroad, such as the issuing of a passport, the registration of birth, marriage or death deeds, as well as diplomatic protection exercised in accordance with international conventions for persons under charges or that are in litigation.<sup>283</sup> Also the consular officer helps persons sentenced to imprisonment/detainees, shows interest in ensuring their rights in accordance with international norms, provides legal aid for judicial defense, such as a recommendation for a legal advisor, etc., receives information on the reasons for detention and arrest or the raised charges, visits the national, etc.<sup>284</sup>

Despite the legal provisions as indicated above, implementation in practice has been difficult. Due to the large number of immigrants in countries such as Greece and Italy, and the limited number of consular offices and consuls, it is impossible to claim that these rights are enjoyed by immigrants or are practically exercised by consular missions.<sup>285</sup> Complaints about the stance of Albanian embassies/consulates to Albanian emigrants continue to this day. Thus, in the case of immigrant F.B. who lost his life in an asylum seekers center in France, public opinion raised concerns about the indifference of the representative of the Albanian embassy in France regarding this case.<sup>286</sup> Criticisms on consular representations and embassies in general, were from both directions, by Albanian emigrants who have found it difficult over the years to obtain services from them, but lately also by Albanian government high officials.<sup>287</sup> The Foreign Ministry has made public its goal of facilitating the process of applying for documents to Albanian consulates and providing as many services to immigrants as possible therein. The Draft Strategy for Migration and Diaspora also envisions a series of measures with the objective to facilitate the services of immigrants abroad and to increase the engagement of Albanian consulates abroad for the protection of their rights.

### *c. Legal Measures Against Irregular Migration*

As mentioned above, according to the Albanian Constitution, Albanian citizens can not be prevented from leaving the territory of the Republic of Albania. This constitutional

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<sup>282</sup> Ibid.

<sup>283</sup> These competencies are provided in the Law on Exercise of Consular Functions by Diplomatic or Consular Representatives, no. 8372/1998. See Articles 9-16.

<sup>284</sup> See Article 6, of the Law on Exercise of Consular Functions by Diplomatic or Consular Representatives, no. 8372/1998, Articles 5 and 8.

<sup>285</sup> For more, see: "Migration Law" Ikonomi, 2017 (note 129).

<sup>286</sup> For an illustration, see the article: <http://www.balkanweb.com/site/pas-protstavave-reagon-ambasada-e-frances-autopsia-do-tregoje-pse-vdiq-florenci/>

<sup>287</sup> See Prime Minister Rama's speech addressed to diplomats in August 2017, where he stated that: "You can not be content a note of protest, with a simple announcement, or simply waiting for a call so that to justify your salary." See <http://www.kohajone.com/2017/08/24/live-rama-takim-me-ambasadoret-remember-takimin-e-nanos-15-vite-me-diplomatet/>.

right can only be restricted by law, for a public interest or for the protection of the rights of others.<sup>288</sup> The restriction should be proportionate to the circumstances that dictated it, however, it can not violate the essence of the right per se and can not go beyond the limits set forth in the European Convention on Human Rights.

Limitations may stem from the criteria set out in the law on crossing the border. Thus, Albanian legislation provides that anyone who crosses the state borders is subject to control by the Border and Migration Police. Border crossing is only carried out at designated border crossing points and only after verification by border and migration authorities.<sup>289</sup> According to Law 8961/2008 'On State Border Control and Surveillance' (part of the provisions of which were repealed by Law 71/2016) as well as the 'Border Control Law' no. 71/2016 border and migration police have the right to check the documentation before allowing the exit from the territory or entering the territory of RoA of persons moving towards the border of the Republic of Albania.

However, in the exercise of border control, the border and migration police under the Law on Border Control shall act in full compliance with the fundamental human rights and freedoms set forth in the Constitution of the Republic of Albania, the European Convention for the Protection of the Human Rights and Fundamental Freedoms, Geneva Convention of July 28, 1951, "On the Status of Refugees", as well as mandatory international law for the Republic of Albania,<sup>290</sup> Consequently, during the conduct of border control, the responsible authorities cannot discriminate anyone on the bases of gender, racial or ethnic origin, religion, language, disability, economic status, age or sexual orientation. Also, border and migration officers should pay special attention to unaccompanied/accompanied traveling minors.<sup>291</sup> The latter is of particular importance if we take into consideration the phenomenon of the abandonment of unaccompanied minors by their parents in the EU countries.

In assessing the documentation, border officers, for reasons of border control, also have the right to refuse the exit to persons who do not have a valid travel document; for whom there is a court order prohibiting the departure from the Republic of Albania; who want to abscond the criminal prosecution, detention, arrest or execution of imprisonment; or whose identity documents are seized, that were denied the issuance of travel documents; as well as those that use a document of another person or use forged document etc.<sup>292</sup> In addition to the criteria set out in the Law on the State Border, Albanian nationals who want to travel to the Schengen area, must meet the criteria laid down in EU legislation for entry of third-country nationals. The Visa Liberalization Agreement stipulates that anyone who desired to enter an EU member state must have, in addition to the valid travel document, the documentation indicating the motive for traveling to Schengen area. The documentation should be in line with the objective of their visit to EU countries. Thus, in the case of vocational activity,

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<sup>288</sup>Article 17 of the Albanian Constitution.

<sup>289</sup>Article 12: The crossing of the state border is allowed only at authorized border crossing points, within official working hours. At the border crossing points, which are not open 24 hours, the official timetable is announced noticeably.

<sup>290</sup>Article 4 The Law on Border Control 2016

<sup>291</sup>Ibid.

<sup>292</sup>Law on Border Control 2016

business, education, training, tourism etc., a document proving the motive of travel is required.

Consequently, border authorities should also examine the necessary documentation regarding the reasons for entry into Schengen territory as well as the compatibility with the rules of the Union Code for entry into Schengen territory.<sup>293</sup> More specifically, Albanian citizens have to meet certain conditions for EU entry and residence for a period of 90 days within 180 days. Thus, according to Article 6 of Regulation 399/2016 on the rules of entry of persons into the Schengen Borders, third-country nationals must have a biometric passport with a validity of more than 3 months after the last residence date, travel information such as a hotel reservation or residence address, information on the reasons for travel, financial means that provide for living in the Schengen area and means of return to Albania, health and vehicle insurance, no red flag displays in the system for them and not to pose a risk to public policy, internal security, public health, etc.<sup>294</sup> If these criteria are not met, the border officer may ban the person from leaving the country.

In addition to control and measures taken at the border crossing points, border and migration authorities are also mandated with the overall border patrol duty and the right to undertake investigative and procedural actions in cases of border-related offenses.<sup>295</sup> The Criminal Code, as elaborated in the Immigration Section, provides that illegal border crossing constitutes criminal offense punishable by a fine or imprisonment for up to 2 years. Also assisting the illegal border crossing is punishable as well as (298 CC) and falsification of passports or documents (189 CC). Referring to the increased number of unaccompanied Albanian juveniles traveling towards EU countries, by the end of 2017 and beginning of 2018 the number of criminal proceedings has increased for abandonment of juveniles. Specifically, Article 124 CC provides that the abandonment of a child under the age of 16 by the parent, or the person who is obliged to care for him/her, is punishable by a fine or up to three years of imprisonment.<sup>296</sup>

#### *d. Return and Readmission of Irregular Albanian Nationals*

The return of Albanian emigrants from the EU member states, is realized on the basis of the Readmission Agreement, signed between the European Commission and Albania, which entered into force in 2006.<sup>297</sup> The European Commission continuously monitors the implementation of the readmission agreement and has stated that Readmission Agreement is being implemented *satisfactory*.<sup>298</sup>

Based on the agreement *‘Albania shall readmit, at the request of a Member State and without further formalities other than those laid down in this Agreement, all persons*

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<sup>293</sup> <https://publications.europa.eu/en/publication-detail/-/publication/42fba6c3-f0c5-11e5-8529-01aa75ed71a1/language-en>

<sup>294</sup> Article 6 of the Schengen Borders Code. See also Regulation 539/2001, "Third countries whose nationals must possess visas when crossing external borders and nationals to whom this obligation does not apply" as well as Regulation 1289/2013.

<sup>295</sup> See the analysis for Articles 297 and 298 of the Criminal Code above- the Immigration Section.

<sup>296</sup> Article 124 CC. When serious damage to the health or death of the child is caused by the offense, it is punishable by three to ten years of imprisonment.

<sup>297</sup> The Readmission Clause entered into force on 2008.

<sup>298</sup> The 2010 Analytical Report on Albania, p. 98.

*who do not meet or no longer meet the conditions in force for entry, stay or residence in the territory of the Requesting State Party, provided that it is proven or validly admitted on the basis of presenting apparent evidence, that they are nationals of Albania.*<sup>299</sup>

Therefore the Readmission Agreement treats as proof of citizenship not only the original documents and material evidence, but also '*prima facie*' evidence, or apparent evidence, such as a statement of a returnee or his/her relative, as well as his/her language. As elaborated broadly in another paper, *the language*, regarded as a *prima facie* evidence is quite problematic in practice, because a good part of irregular migrants from Kosovo, Montenegro and Macedonia, who speak Albanian language, may be returned (have returned) to Albania as Albanians and not as third country national, based on the language<sup>300</sup>. So, in the case of Albania, which is bordered by countries with an Albanian-speaking population, i.e. Montenegro, Macedonia and Kosovo, language as a *prima facie* evidence of nationality poses an issue and has led to many cases of mistaken readmissions.<sup>301</sup>

Albanian legislation provides some measures for the reintegration of Albanian returnees. Thus, the Law on Emigration specifies that the reintegration of returnee Albanian nationals, should be implemented through training programs, enrollment in employment offices and their priority employment from these offices; recognition of vocational qualifications and education, especially for children, provision of financial assistance for economic reintegration, preservation of social security rights through fiscal incentives and business development programs.<sup>302</sup> The purpose of the legal framework is to promote sustainable returns through reintegration.

### ***1.3 Issues related to the implementation of the legal framework***

The increase in the number of Albanian citizens who abused the asylum system in the EU in recent years was accompanied by the intensification of the European Commission's demand and representatives of some EU member states affected by the phenomenon for taking emergency measures from Albanian authorities to address abuses with the asylum system. Thus, in the Progress Report of 2015, the Commission has stated that Albania should '*increase its efforts to address the growing number of ungrounded applications of its asylum-seekers in EU countries; and take firm and immediate action ... this is even more pressing if we consider the spiking up of applications in the summer.*'<sup>303</sup> Commission underscored the strengthening of cooperation with EU member states, to carry out information campaigns targeting travelers, and above all to address socio-economic factors that motivate ungrounded applications.<sup>304</sup> The Commission also noted the increase in the number of *unaccompanied minors who illegally reside or seek asylum and called for measures to strengthen the effectiveness of border control, especially to prevent unaccompanied*

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<sup>299</sup>See Article 2 of the Readmission Agreement, in the official Albanian version, ratified by law no. 9466 of 23.1.2006.

<sup>300</sup> For more, see: Ikonomi and Ndoci 'Do EU Member States Need Readmission Agreements', published in the British Journal of Immigration, Asylum and Nationality Law, Volume 25 (2011).

<sup>301</sup>For more see Ibid.

<sup>302</sup>Ibid, Article 22 (2).

<sup>303</sup>Progress Report of 2015 p 65

<sup>304</sup>Ibid.

*minors from leaving the country. The Progress Report of 2016 also states that 'The number of ungrounded asylum applications by Albanian nationals in EU countries remains high. Albania should take immediate and firm action, also within the monitoring mechanisms of post-liberalization of visas, to effectively address the phenomenon'.*<sup>305</sup>

Until 2016, the Albanian government did not respond with a comprehensive, multidimensional action to address the causes of irregular migration/ungrounded asylum applications. However, it focused its efforts on effective border control, without addressing the causes of irregular migration. Thus, the Border and Migration Police intensified its controls on Albanian nationals traveling to the Schengen area to ensure that they meet the criteria of movement in accordance with the visa liberalization agreement. Consequently (especially in 2016), the number of detentions/rejection of exits from the Albanian territory increased for nationals who did not meet the additional conditions of entry in EU, such as those who did not have enough finances, or an invitation from the host, the return ticket, or hotel reservation.

This action should have been preceded by ongoing, awareness-raising campaigns regarding the entry criteria in Schengen territory and the consequences of the abuse of the visa-free regime. If we turn to the first period of entry into force of the visa liberalization agreement, Albanian citizens, thinking that visa liberalization meant only the possession of a valid passport as a criterion for travel to EU member states, were faced with massive returns by Greek border authorities. In the Albanian media and public opinion, this position of the Greek side was considered a violation of the liberalization agreement. This perception was the result of the lack of awareness-raising campaigns, television spots, etc., on travel documents that Albanian citizens should use. About five years later, Albanian citizens faced a similar situation, but this time by the Albanian border and migration police, which prevented the departure from the Republic of Albania of any citizen who intended to travel to the EU without the additional documentation.

It is worth underscoring that there is very little information in Albanian on the Internet about the obligations stemming from visa liberalization for persons traveling to the Schengen area. In 2010, a few online portals that, informally covered the criteria for entering the EU countries, but that was not an official information.<sup>306</sup> No information is available either on the web site of the Ministry of Interior or that of the Foreign Affairs on visa requirements for entering EU countries.<sup>307</sup> Only a report of the Ombudsman (2014) on the situation of immigration and asylum from Albania, specifies the movement criteria within the framework of the liberalization agreement referring to the Schengen Regulation. However, even this report does not specify the amount of money Albanians must have with them for each day spent in the EU member states, which differs from country to country. Lack of sufficient financial means in some cases, penalized Albanian citizens who have not been able to explain how they would financially face their short-term EU stay.

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<sup>305</sup>See Progress Report of 2016. p 5.

<sup>306</sup> See for example <http://www.shqiptariitalise.com/itali/itali/shqiperi/cdokumente-duhet-te-kem-per-te-udhetuar-ne-shengen-pa-vize.html>; see also: <http://lajmetshqip.com/liberalizimi-i-vizave-rregullat-dhe-sanksionet-ne-rast-se-shkelen/>

<sup>307</sup>From the online research in December 2017.

In 2017 there was a positive development in this direction, within the framework of an awareness project by the International Organization for Migration in cooperation with the Ministry of Interior Affairs, which has embarked on a 'door-to-door campaign with regard to legal migration. In the framework of the project, an information leaflet was drafted, including inter alia the criteria - documentation for EU entry in the framework of visa liberalization agreements.

It should be noted that even at the Rinas Airport, the main point of exit from the Albanian territory to the Schengen area, there is a poster stating that the violation of the free visa regime damages the entire Albanian society. If we consider that a good part of Albanians leave because of the unemployment, poverty and the need for survival, the public's awareness impact of this poster is low as it emphasizes the consequences for the whole society in abstract terms. Also, when a potential immigrant, planning to abuse the visa regime, arriving at the airport is unlikely to change his/her itinerary after having bought the ticket and making the necessary arrangements. More than simply putting up a poster at the airport, the Albanian authorities should have persisted with TV spots and programs discouraging the abuse of the visa regime.

During 2013-2016, Albanians had more information about legalization opportunities by obtaining asylum seeker status than information about the issues that could result in event of abuse of the asylum system and the visa liberalization agreement. The Albanian authorities remained relatively indifferent to the phenomenon, and in some cases went so far as to deny it altogether, not addressing it as an Albanian issue. Thus, in 2015, authorities stated that Albanian asylum seekers in the EU were not from Albania but from Greece.<sup>308</sup> So, for the Albanian Government, those seeking asylum in EU countries and mainly in Germany, were Albanian immigrants in Greece who left Greece due to the financial crisis there, and not from Albania. Even if the majority of them were Albanian immigrants who lost their jobs in Greece as a result of the financial crisis in the neighboring country, this did not make it an irrelevant matter to the Albanian government. Actually, the unemployed Albanian emigrants in Greece are not a problem or issue of the Greek government, but the issue and the responsibility of the Albanian government. Moreover, a good part, as evidenced in EU reports, has left from Albania rather than Greece. This stance of the Albanian authorities that does not correspond to the reality of Albanian nationals emigration, is related with the reasons why they leave and have traditionally left: unemployment and extreme poverty. Statements from the authorities that unemployment is not an Albanian phenomenon, moreover, that "There are job vacancies but there is a lack of skilled workforce"<sup>309</sup> serve as an indicator of the fact of denial that 68,000 Albanians left for the EU countries in 2015 due to unemployment, poverty and lack of prospects in the country. Since 2014, the ombudsman has demanded the assessment of the situation, and has called for emergency action to prevent the phenomenon from taking unmanageable proportions.<sup>310</sup> However, only after the active involvement of representatives of foreign embassies in the country, such as the German one or the arrival of French and Dutch

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<sup>308</sup>See for example <http://www.javane.ws.al/emigrantet-rama-nuk-jemi-magjistare-na-duhet-me-shume-ndihme-nga-be/>

<sup>309</sup>The statement covered in the media, see for example <http://top-channel.tv/2016/02/10/rama-vende-pune-ka-por-nuk-ka-profesioniste>

<sup>310</sup> See Ombudsman's Report on reasons of emigration of Albanian asylum seekers in EU <http://www.avokatipopullit.gov.al/sites/default/files/field/image/Raporti%20i%20Avokatit%20te%20Popullit%20mbi%20azilkerkuesit.pdf>.

representatives who clearly stated that the possibilities for obtaining refugee status from Albanian asylum seekers were next to zero, as well as the increase in number of the deported from EU countries, only then there was noted a decrease in the number of Albanian citizens seeking asylum in the EU.

Therefore it is safe to say that the reduction of abusive asylum applications in 2016-2017 compared to 2015 when the demand was at its peak, was largely the result of 'repressive' measures, i.e. returns from the countries affected by the increase in ungrounded asylum application, as well as preventing the exit from Albanian territory by Albanian border and migration police, and not through any intervention by the Albanian government for eradicating the causes that lead Albanians to ungrounded asylum and emigration applications.

In the absence of clear and formal information on the criteria and documentation needed by the Albanians in order to travel to EU countries, as well as with the increase in the number of banning from exiting the Albanian territory, it is necessary that the process of verification of Albanian passenger documentation by the border and migration police, to be subjected to monitoring, in order to ensure that it is carried out in a transparent manner, without prejudice to the constitutional right of every citizen to leave the territory of the Republic of Albania. In the event of a deterrent, border and migration police should describe in writing what is the legal basis and reason for refusing the national's leave from off the Albanian territory. In any case, the restriction of freedom to leave the territory of the country, must be lawful, necessary and proportionate to the public interest being protected. Rejection of the national's exit shall be made in writing, with an administrative act specifying, in accordance with the Administrative Procedure Code, the reason for the refusal, the authority where the appeal can be made and the time limits for the appeal. It is imperative that the process is transparent so as to avoid banning of exit based on an element of prejudice of age, appearance, belonging to a minority group, etc. Particular attention should be paid to the limitations of this right disproportionately to members of minority communities, as EU reports point out asylum applications unrelated to this category. The border and migration police must examine the documentation free of any prejudice according to which any minority member seeking to leave from the Albanian territory, is a potential asylum seeker.

Undoubtedly, the causes of Albanian's emigration, i.e. unemployment, poverty and general uncertainty for Albania's prospects, are issues that can not be addressed immediately. However, at least, authorities need to program, plan in the short and medium term, the most priority areas and the actions that need to be first taken in order to reduce the phenomenon of massive departures.

In analyzing the causes that have led to the increase of asylum requests of Albanian citizens, the Ombudsman identified the blood feud, domestic violence (against women); discrimination (Roma minority, LGBT community); trafficking of human beings; health problems and economic reasons<sup>311</sup>.

The IOM study on Socio-Economic Profile of the Albanian Returned Migrants, points out that the returned asylum seekers are in dire economic conditions than they were

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<http://www.avokatipopullit.gov.al/sites/default/files/field/image/Raporti%20i%20Avokatit%20te%20Popullit%20mbi%20azilkerkuesit.pdf>

prior to leaving Albania,<sup>312</sup> and underscores a number of actions that the Albanian Government ought to take, including the drafting of a national strategy and national immigration plan.<sup>313</sup>

It is noteworthy that Albania currently lacks a multi-dimensional strategy regarding migration management. The first National Strategy for Migration and the National Action Plan were implemented, at least in part until 2010. In addition, the Action for the Return and Reintegration Strategy (2010-2015) was completed in 2015. Gradually, there was a dip in the focus of the Albanian government on migration. Since 2013, the Ministry of Labor and Social Affairs website no longer included a migration link containing immigration information, employment agreements, rules of legal migration to the EU or reintegration of returnees. In 2017, within the restructuring of the Albanian Government, the Ministry of Labor and Social Affairs merged with the Ministry of Health. However, on the website of the Ministry of Health and Social Protection there is no link or informative page about migration. It is noteworthy that in 2017, the Albanian government added the position of the Minister of State for Migration and Diaspora. However, the Minister's portfolio does not cover the illegal migration. Also the draft strategy that he presented in 2017 envisaged actions mainly pertaining Albanian's development through the strengthening of the collaboration with Diaspora but no measures to counter the illegal migration. **Under the new circumstances of Albanian's migration, it is necessary to adopt a comprehensive migration strategy that would address, inter alia, the phenomenon of abuse with the visa regime and identify actions to combat the root causes of migration, such as unemployment, poverty and lack of support from state bodies towards the vulnerable categories.** Vigorous measures need to be taken with regard to the integration of returnees, in order to avoid illegal immigration. The relevant bodies should conduct a study on the achievements and failures of the reintegration strategy and reflect the new needs in a comprehensive migration strategy.

The influx of abusive asylum applications has also been accompanied by an increase in the number of unaccompanied minors in EU countries. There are reported numerous cases of children who were abandoned by parents with the intention of legalizing their status in EU countries. This phenomenon obviously requires taking concrete actions from the part of the Republic of Albania, starting with raising awareness about the consequences of abandoning children and identifying concrete cases of parents who commit such acts. Awareness is needed because Albanian parents do not consider what they do to be an abandonment, but as a sacrifice for a better future of their children. So, in circumstances of extreme poverty and inability to secure the basic benefits of survival, the parents have 'surrendered unconditionally' by letting their children grow, not in the institutions of the Albanian government, but the institutions of the EU countries. They estimate that their children will have the opportunity to survive only if they are under the supervision of juvenile institutions in EU member countries.<sup>314</sup> Albanian authorities should persist with information campaigns, pointing out that

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<sup>312</sup> The Socio-Economic Profile of Returned Migrants (2016), p. 7

<sup>313</sup> Ibid, p. 7, p. 41 and p. 42.

<sup>314</sup> Interview with a parent, who sent his minor children to a EU member state. See about the abandonment of Albanian children and the actions taken by border and migration police: <http://www.newsbomb.al/nena-braktis-femijet-e-mitur-ne-gjermani-falsifikimet-dhe-kontrabande-japaligjshmerite-e-goditura-nga-migracioni-ne-durres-105865>

sending unaccompanied children abroad constitutes a criminal offense and is punishable under the domestic law.

#### 1.4 Court Practice

The entry into force of the visa liberalization agreement was accompanied by a decrease in the number of people seeking to illegally cross the state border. In tandem, border control measures were reinforced, including criminal proceedings in accordance with Articles 189, 297 and 298 of the Criminal Code. Consequently, there is an increase in the number of criminal cases and sanctions against citizens who commit these acts.

The entirety of court decisions also illustrates the dynamics of movements in an irregular manner over the last five years. Thus, in the decisions made by the Durrës Court, indicate an increase of cases of nationals attempting to cross the state border by using a fake passport or residence permit. More specifically, out of 29 decisions reviewed by the Durrës Courts, 23 are sentencing verdicts on the use of counterfeit documents, 3 are for illegal border crossings (Article 297), and 3 others for assisting illegal border crossing. Illegal border crossing is carried out through the Port of Durrës. Thus, in one case, the defendant tried to cross the border by fitting himself under a truck in the port of Durrës. **The perpetrator pointed to his difficult economic situation that had forced him to choose the illegal crossing of the border. Even though his aggravated economic situation was accepted as an extenuating circumstance, it did not prevent the judge from imposing a fine of 40 thousand AL Lek.** In another case, the defendant passed over the railings of Durrës port and got into a ferry. Ultimately he was returned to Albania by the Italian authorities. He stated that he has left because of his economic dire situation, is a student, unemployed and has no income, not even sufficient to get himself a passport. Even in this case, the court ruled for sanctioning him, with a fine of 60,000 ALL.

The Durrës court in most cases sanctioned with a fine, both those charged with illegal border crossing and those charged with falsification. There were cases of courts rendering prison sentence, as well as the suspension of the execution of the prison sentence, with the measure of probation for a period from 18 months to 2 years. In some cases, the defendants have benefited from the amnesty. It should be noted that the Criminal Code went through changes in 2013 and repealed the provision of the fine as the principal punishment measure for falsification of documents. Consequently, in 2014-2017 the prison sentence is predominant, which is often subject for suspension to probation period.

The Gjirokastra Judicial District Court has been faced with issues of illegal border crossing. There are about 33 illegal border crossing decisions, which have only been sanctioned by a fine. The majority of them have been subject of amnesty. While the Court of Tirana, as the one in Durrës, has a dominance of decisions concerning the violation of Article 189 of the Criminal Code (about 200 cases) for the falsification of documents, and less cases regarding illegal border crossing (about 40 cases) for the period 2012-2017.<sup>315</sup>

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<sup>315</sup> Although AHC identified over 250 issues in the online research at the database of the Court of Tirana with defendant Albanian citizens, due to the limited time available for compiling this study report, it was not possible to examine thoroughly in details all of these decisions.

The Court of Tirana has also given sentences imposing fines and imprisonment for all three offenses under consideration in this study report. In some cases, the prison sentence was suspended for a probation period ranging from 18 months to two years.

It is worth underscoring that citizens who had criminal responsibility have expressed the economic inability as a factor that forces them to leave. They are of low social risk and have expressed penitent for the act committed. Although the Court has pointed out the low social risk of the person and his economic dire situation, it has nevertheless rendered prison sentence in cases where it is not covered by the amnesty. **Only in some isolated cases the judge's analysis includes considerations of the human dimension of illegal migration as a phenomenon and the fact that the person's sentencing is unprofitable both to the society and to the individual concerned.** Thus, in its decision, in the impact analysis of the sentence, one of the Durrës Court Judges states that the Criminal Code is based on humanism and that punishment is not an end in itself. He argues that the *usefulness* of the decision does not consist of the measure taken against the defendants but in the effects that must be achieved in the society. In a pure utilitarian analysis, the judge refers to rehabilitation, general restraint, and special deterrence as elements that should be considered in determining the severity of the sentence. Consequently, related to illegal border crossing or the use of forged documents for illegal border crossing, the judge argued that: *Taking into consideration these elements, as well as the low risk of the person, the age, physical or mental health, the way of life and the needs, especially those that are related to family, education or work, the circumstances of commission of the criminal offense and the conduct thereafter, the Court when it verdicts a sentence of up to five years imprisonment, may order that the convict keep in touch with the probation service and be put to the test by suspending the execution of the sentence under conditions that during the probationary period, to not commit other criminal offenses*'.

It is noteworthy that this decision is of the few that takes into account the human dimension of illegal migration and the usefulness/impact of the sentencing as such regarding the illegal border crossing or falsification of passports, visas and other documents for the purpose of illegal border crossing.<sup>316</sup> Nevertheless, there were also diametrically opposed decisions where the sentence requested by the prosecutor has been lengthened by the judge. Thus, in one case, the judge renders a more severe sentence than the prosecutor's request. The prosecutor requested the suspension of imprisonment, converting it to the probationary service, but the judge stated that *'the prosecution's request for non-prison sentence but probationary service instead'* is rejected, giving the defendant 1 year of imprisonment in a standard security prison and a fine of 400 thousand AL Lek.

Court decisions also illustrate an argument highlighted by international studies in the domain of migration, which is: *illegal migration is essentially the result of migration legislation*.<sup>317</sup> We hold that because in some of the court's decisions regarding the falsification of documents, it is evidenced that the citizens have declared on their own to the competent institutions that in the past they have used falsified passports. The

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<sup>316</sup> There are mainly the decisions of a judge in Durrës regarding the illegal crossing of the border and the use of forged documents for emigration, with defendant Albanian and Kosovan citizens.

<sup>317</sup> For a detailed analysis, see: "Migration Law" 2017 (note 129)

criminal proceeding against them started only after self-declaration in the offices where the passport are provided. In the decisions of the Court of Durrës, Tirana and Gjirokastra there were evidenced many cases when citizens used falsified passports before the visa liberalization but were not caught by the authorities. After the entry into force of the Visa Liberalization Agreement, they went to the passport offices and requested to obtain the passport with their correct personal information. They have stated that they have been driven by the economic inability to migrate with falsified documents. Thus, in one case, the defendant states that she has been forced to obtain a forged passport to send her child to Germany for a medical visit. She stated she deeply regretted that and voluntarily handed over to the authorities her falsified passport in order to receive an original document.

**Therefore, when the free movement within the EU was enabled for Albanians under the Visa Liberalization Agreement, some of those who used to move by using falsified documents, approached to the relevant authorities in order to obtain valid passports. In these cases, the courts, even though they have taken into consideration the circumstances that have led persons to use falsified passports, still proceed with sanctioning citizens, by a fine or by imprisonment. In many decisions, fines ranged from 400,000 to 600,000 Lek despite the economic inability claimed by the defendant.<sup>318</sup> The court also imposed a combined sentence of a fine and imprisonment.**

In some cases examined by the Court, falsification of documents has been identified by the employees of Aleat company that produces passports. Thus, the aforementioned company's employees have identified via fingerprints that some citizens turn out to have 2 identities in the system. In such cases, they notify the General Directorate of the State Police. In the examined cases, citizens change completely their personal information, or just their name or surname. Thus, in a decision of the Durrës District Court, the Albanian citizen had changed his name to adapt it as a Greek-type name. According to his claim, using a Greek name makes it easier for him to find a job in Greece. He had applied for a passport once in Gjirokastra (2011) and another time in Durrës (2015), and it was found out from the fingerprints that it was the same person. The court gave a 6-month prison sentence, which was suspended to be converted to probation service for about 12 months.

Even though fewer in number, there were also cases when people changed their age for migration reasons. Thus, a citizen used the personal information of a younger person in the application for a passport in order to be classified as a minor so that he could go to England. After marrying a foreign citizen, he re-applied for a regular passport, and there it was found out that the person had used different names and different age. The court sentenced him to 6 months in prison but suspended the execution of the sentence by converting it to probation service for 18 months.

In other cases, Albanian citizens have attempted to cross the Albanian border with a regular Albanian passport but have nevertheless possessed falsified documents for their use in EU countries. Thus, from the thorough check of the luggage of a person, falsified

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<sup>318</sup> In one case the defendant, who showed up voluntarily, argued that she was forced to use a falsified passport in order to be able to visit her hospitalized child in Germany. She submitting the relevant information. Nevertheless, the Court sentenced her with 600 000 Lek, reduced to 400 000 Lek by reducing 1/3 of the sentence in an expedited judgment.

Italian documents were found, which he claimed that he had acquired in order to enter England. The defendant, as evidenced in the Court's decision, stated that was unemployed and intended to emigrate to England where he had relatives, due to the difficult economic situation in Albania. He had paid about 1,500 EUR to get the falsified document. The court imposed on him a six-month sentence for possession of a falsified document.

- *Sentences against deportees for illegal border crossing.*

Some of the citizens have been sentenced for illegal border crossing after their return from EU states. Thus, after registering in the database of the data of deportees as part of the readmission process, border and migration authorities found that the citizens did not leave the country lawfully, as there was missing the respective note marking their exit of the territory in the system. **The absence of the note that marks their exit from the Albanian territory, is treated as a conclusive proof for the illegal crossing of the border.** For example, in one case, the defendant returned to the Republic of Albania, deported by the French police authorities. Out of the verifications from the system it resulted that the defendant was debtor for an administrative fine that amounted to 50 thousand AL Lek due to his illegal crossing of the state border. He not only did not pay the fine, but also in the second case did not cross the state border through the border crossing points of the Republic of Albania in a legal way because he had no note in the system to prove otherwise. During the process it was proven that he exited the Albanian territory near the border crossing point of Morina, from where he had entered the Republic of Kosovo. The court sentenced him to a 40,000 AL Lek fine. In another case, the person was convicted in absentia, because as the process took place, he had gone illegally to France, from where he was immediately deported. In these cases, their lawyers clarify that the defendants leave due to the difficult economic situation.

In other cases, deportations point to citizens that use their relatives' documents, relying on their lookalikes, often times seen in cases of brothers or sisters with regular documents in EU countries. In these decisions, the defendants have accepted the use of their family documents due to the difficult economic situation and the lack of employment opportunities in Albania. They have stated that they could not leave with their own documents because they were already denied entry to EU countries. The courts, in these cases, imposed substantial fines ranging from 600,000 to 105,000 AL Lek.

### ***Facilitating Illegal Border Crossing***

Decisions regarding the provision of assisting for illegal border crossing are fewer in number. For the most part, these are cases where a citizen's passport is given to be used by another citizen, or providing transportation by truck, car etc. So in one case, the court sentenced by 2 years in prison an Albanian citizen who gave to a Kosovo citizen his passport in order to cross the border.

In another case, the defendant gave away to use the American documents of his family members, his daughters and wife, in order help three other citizens to illegally pass the border with destination to USA, through the border crossing point of Rinas. The defendant and the three nationals made it through the border crossing point of Rinas but were caught in the Airport of Budapest, as during a routine check it was found out

that the persons who were traveling were not the ones in the respective documents, and therefore were returned to Albania. The authorities have failed to find out the amount of money that the defendant would get from the three citizens for doing this. However, they did find that he had used the American passport of his daughters several times, because in the TIMS system it turned out his daughters had entered 2 times in Rinas and left Rinas towards America 7 times. The court imposed a one-year prison sentence and 3,000,000 (three million AL Lek) fine for the defendant, evidencing the defendant's deep regret.

In other cases, courts have given sentences for Albanian citizens who facilitate the illegal crossing of the border. Thus, the court ruled a 3 years jail sentence (reduced to 2 years due to the expedited trial) an Albanian who had invited four Turkish citizens to enter Albania. The latter were detained in Rinas, upon the suspicion of the authorities regarding the reasons of their entry into Albania. The authorities rejected their entry on the territory because they were not convinced regarding their reasons of entering to Albania. During the check of their personal belongings, an invitation from the defendant was found. The Turkish citizens declared that the defendant would meet them at Rinas Airport and would send them to Belgrade, Serbia, where they would be picked up by other people. So the defendant would help them to enter and stay in Albania, and then leave the territory of the Republic of Albania illegally. These citizens were returned to their home country in Turkey. Although the defendant objected and claimed that he had no motif and practical means to send the Turkish citizens to Beograd, the Court sentenced him for facilitating the illegal crossing of the state border. It is relevant to clarify here that the Turkish citizens did not enter the territory illegally, they did not use falsified documents nor attempted to enter other than in the border crossing points. Nevertheless, the court considered as facilitation for illegal border crossing the fact that the defendant had offered to help the Turkish citizens for the journey to Belgrade. The sentence given to this citizen was higher than the sentence given to the person who actually gave to the Albanian citizens the passports in order to use them to travel to America, and who had facilitated the illegal border crossing several times.

Court rulings highlight also cases when Albanian citizens were defrauded from persons who provide assistance for immigration. Thus, in one case, the Court has convicted the owner of an insurance company who had promised immigration in Australia to an Albanian. The decision also indicates the travel itinerary and the risks that are associated with irregular migration. Thus, the Albanian citizen paid firstly the defendant an amount of 500000 Lek. After paying this amount, the Albanian citizen traveled with the defendant to Bulgaria, where they would get a visa to Indonesia. While in Indonesia, his family members paid also 200,000 Lek, which they wired via Western Union. However, after sending that amount, his family members did not have any contact anymore with their relative. According to the defendant, he had arrived in Australia, but he was accommodated in a camp for asylum seekers and couldn't communicate with his family. His family, worried about their relative with whom had no contact, informed the relevant authorities. The defense lawyer argued that the citizen - the emigrant left Albania in a legal way and therefore Article 298 of the Criminal Code can not be applicable. However, the Court ruled that the defendant had perpetrated the criminal offense of providing assistance for the illegal crossing of the border and sentenced him to 10 years imprisonment, in accordance with Article 298/3 of the Criminal Code. Article 298 of the CC does not only deal only with assisting the

illegal crossing of the Albanian border, but also with the facilitation of entering illegally in another country.

In another case, the defendant was convicted of facilitating the illegal crossing of the border because he had traveled to Croatia with a citizen with whom he had a relationship, who used his cousin's passport, not her own. The citizen was reported missing by her family members and was identified by the anti-trafficking structures. The court found the defendant guilty for the criminal offense of facilitating the illegal border crossing under Article 298/1 of the Criminal Code and sentenced him to eight months in prison.

#### *Convictions against juveniles*

**The courts have also handled cases of minors illegal border crossing.** The judges approach has been different. In some cases they have taken into consideration the principle of the best interest of the child and did not rule a criminal convictions. In other cases they considered the prison sentence as rehabilitative. Thus, in the process against a high school student who left illegally to Macedonia due to the economic situation, the Court referred to the specific provisions of the CC for minors. Pursuant to the Article 52 of the Criminal Code, which provides that: "*The court, given the low risk of the criminal offense, the concrete circumstances of how it is committed and the previous conduct of the minor, may spare him/her from the conviction*". The judge, rightly, did not convict the minor. It is clear that in this provision is reflected the human dimension of the criminal legislation against minors, by giving the Court a legal prerogative for the exclusion of a minor who has committed a criminal offense from the enforcement of the conviction when faced with a number of mitigating circumstances present. In this case should be taken into consideration not only the age of the minor, but also the nature of the offense, with poses a low social risk. As mentioned in other cases, the illegal border crossing has been the main means of Albanians for emigration, so much so that it was not perceived as a violation of the Albanian legislation by the society in general, but more like a violation of the legislation of countries where Albanians have entered illegally. We would like to recall that out of the 1.4 million Albanian emigrants of the last 25 years, most of them have illegally crossed the border to Greece and Italy.

The minor's age, his and his illegal border crossing offence's low risk, as well as the fact that emigration is considered as a life-style strategy by Albanians, was not taken into account by judges in other cases. Thus, two juveniles, who were detained while trying to pass to Macedonia, were sentenced to one month and the other one for 15 days imprisonment. Both minors left their homes because of the dire economic conditions. As soon as they were detained by the police, they informed them that they wanted to go to the city of Gostivar 'to work as shepherds to make a living.' **According to the Court, the minors' imprisonment for illegal border crossing was completely justified because it would serve the education of the defendants, prevention for the commitment of other offenses, their rehabilitation, as well as to the general prevention of this criminal offense in society in general. This court practice, to imprison minors of low social risk whose departure from Albania is deemed to have been motivated by the level of poverty, we are of the opinion that contradicts the principle of pursuing the best interest of the child.** In this case, children are protected by an state-appointed lawyers, who did not address at all the factors and reasons that influenced in the decision of the juvenile to leave their home, nor the obligation or the impossibility of their parents to provide the basic goods as well as the relevant authorities for the minor's protection. The legal defense

of the minors in these cases is not only inefficient, but rather lousy. **No consideration at all is made whether other less restrictive remedies than prison sentence would serve better to the rehabilitation and education of children.** Will a minor be effectively rehabilitated and educated a minor after leaving prison, when faced with the same reality that pushed him away from home i.e. the extreme poverty, lack of the daily bread. The imprisonment of minors by the ruling of the Albanian courts for illegal border crossing for emigration purposes, is not in line with the minor's best interest, and is not coherent to the general approach regarding the phenomenon of emigration by the Albanian society in general over the past 27 years, nor with the International Conventions ratified by Albania.

## **CHAPTER III - Conclusions and Recommendations:**

### **1. Albania as a transit and destination country for foreign nationals**

- 1.1** During 2012-2017, Albania lacked the necessary capacity to receive and handle foreigners in accordance with domestic legislation and international standards. However, by the end of 2015 and onward, there were improvements in several dimensions, mostly owing to the financial assistance and projects implemented by organizations such as UNHCR, CARITAS and IOM.
- 1.2** The domestic legal framework has undergone positive amendments following the adoption of the new law on foreigners and asylum. The legal basis was gradually supplemented with the necessary sub-legal framework, especially in regards to asylum, which opened the door to developments related to the registration of refugees in the civil registry, the establishment of the Asylum Committee, etc. Nevertheless, there is still room for improvements in some regards.
- 1.3** According to our assessment, the number of screening specialist needs to be augmented as currently it is limited. AHC recommends that a change is made to the current situation of just one screening specialist in areas where there are migrant flows, especially in Gjirokastra. Border and Migration Authorities should also hire other border officers, especially women, to carry out the screening process at the border and at the local/regional directorates.
- 1.4** AHC deems that there should be an end to the preconceived idea that all foreigners entering Albania are economic migrants or that they aim only at transiting at the screening process. The Border and Migration Directorate should instruct the screening specialists on how to carry out the screening process strictly and objectively on a case by case basis and to avoid prejudices about the status of foreigners. In case that foreigners come from countries at war, especially the Syrians, they should not be subjected to return procedures but rather of the transfer to asylum mechanisms. Expression such as 'No Asylum in Albania'<sup>319</sup> should not be used in any case by border and migration officers.
- 1.5** We are of the opinion that the reported cases of violence perpetrated against undocumented foreigners, especially in Gjirokastra area, should be handled with priority. Especially the case of Iranians violated by the Border and Migration Police in Gjirokastra, which is highlighted in the decision of the District Court of Gjirokastra, should be coupled by sanctions taken against the responsible officers. The Directorate for Border and Migration should continually instruct and train border officers, especially in areas that expect increased inflows (Gjirokastra), for a dignified treatment and respect for the rights of every foreigner without prejudice. In cases of exertion of violence or other forms of abuse toward foreign migrants, the prosecutor's office, based on reports by citizen or on its own initiative should start the criminal proceedings. The officers that violate these obligations should be held accountable administratively and/also criminally, depending on the infringement committed.

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<sup>319</sup>As it was ascertained by the Ombudsman in the interviews made with the detainees in the Closed Center during 2017.

- 1.6** AHC recommends that effective actions are taken in order for translators as well as psychologist or social workers to be present during the screening process, in cases involving unaccompanied minors.
- 1.7** In the case law underlying this study, it is noted that the authorities are focused on toughening actions against irregular migration, despite the impact on individual rights. This stance is incoherent with the fact that Albania ranks among the first countries in Europe regarding the number of the ratified conventions pertaining protection of migrants' rights, including the rights of irregular migrants. The severity and extent of the control and punitive measures, and the increased criminal proceedings for illegal border crossing, violate the rights provided for in the ratified international law. Also, it should be kept in mind that Albania is a country that has generated and continues to generate immigrants, mostly irregular ones or those who overstayed in EU countries who, in general, were not subjected to fines or penalties over there. The justice institutions in Albania should give priority to the legal treatment and assessment of the irregular migration and not sanction them or toughen the punitive measures.
- 1.8** AHC recommends that action is taken in order to enable foreigners to effectively exercise their right of appeal against the expulsion, deportation and detention order. Detainees at the closed center have little or no knowledge at all regarding the procedures being followed to file the appeal to the court and do not know the language so as to be able to formulate the appeal. Consequently, it is necessary the effective implementation of the new law on Legal Aid, and also the active engagement of organizations that focus on migration and human rights, in order to provide ongoing legal assistance to detainees at the Center.
- 1.9** AHC sees it necessary to recommend the civil society organizations to continue to monitor the respect for the rights of migrants, asylum seekers and refugees in Albania, as well as the effectiveness of the legal aid provided to them
- 1.10** AHC recommends that action is taken to institutionalize cooperation and referral of minors from the authority for border and migrants to the Child Protection Units of the municipalities and to the minor's relevant authority. Minor's housing, as well as the identification of psychologists, legal custodian of the minor's etc. are competencies that must be exercised by the child protection relevant authority and the Child Protection Units established under each municipality, in line with Law no. 18/2017 'On the Child's Rights and Protection'.
- 1.11** AHC recommends migration authorities to take into account the principle of the best interest of the child and the right to family life during their decision-making on foreigners. The granting of these rights are often pivotal to the legitimacy of the detention or deportation order, or for the rejection of the residence permit, despite the existence of other circumstances stipulated in the law.
- 1.12** In accordance with Article 116 of the Constitution, AHC recommends that judges and prosecutors pay special attention to the implementation of the legal framework, part of which are also the international conventions and agreements ratified by Albania. Whenever the domestic law does not comply with the international ratified laws, the norm that provides more protection should have the antecedence. The increased number of cases

related to migration and asylum examined by the courts, calls for a better familiarization from the part of judges, prosecutors and lawyers to the domestic legal framework and international standards. In this regard, a contribution could be the organization of ongoing trainings for them.

- 1.13** AHC recommends that detention in the closed Center of foreigners should be avoided in order to enable their participation in criminal proceedings, as well as after the criminal sentence. If the court rules in the case of a foreigner to suspend *the execution of the imprisonment sentence*, this should not be carried out by detaining the foreigner in the closed Center. The detention on the Center is the deprivation of liberty to make effective the removal order, and as such should be carried out only in relation to the return process. It should not be treated as an alternative to the criminal sanctioning.

## **2. Albania as a country of migrant's origin**

- 2.1** Irregular migration of Albanians, mainly towards EU countries, is still a matter of concern, especially for destination countries. Albanian authorities initially denied the existence of the phenomenon, and afterwards treated it in a one-dimensional way, placing a disproportionate burden on border and migration institutions to intensify their border controls.
- 2.2** The efforts to raise awareness among Albanians about consequences of irregular migration were intensified only in 2017 again as a result of an IOM project, and not at the initiative of the authorities themselves. The 2016 EU Report states that 'Albania has strengthened border control procedures, but efforts to raise Albanians' awareness has been limited to only some sporadic instances of government officials' public statements.
- 2.3** AHC reckons that the relevant authorities ought to strengthen their efforts to address the negative phenomenon of illegal migration. However, actions of preventive nature towards abuse with visa liberalization agreement and asylum system in EU countries, must not prejudice the foundational individual freedom to leave the Albanian territory.
- 2.4** AHC recommends the courts that in the implementation of the type of punitive measures to consider the human dimension of the irregular migration. The implementation of the domestic legal framework must be in accordance with the ratified international conventions, giving priority to that norm that provides more protection for the individual. Also, the profitability of the sentence must be assessed in terms of its impact on the individual and society. It is not effective to prosecute and sentence thousands of Albanians returning each year, on the charges of illegal border crossing or the use of counterfeit documents for immigration purposes. Likewise, before rendering an imprisonment sentence against parents who abandoned their children in EU countries, the impact of that court decision on the family as a whole and on the minor children in particular, should be assessed. We are of the opinion that the principle of child's best interest must guide the decision-making of the courts.

- 2.5** The 'door to door' awareness raising activity has to be coupled by TV ads and other visual informational means that must be constantly circulated on the online platforms/the social media most widely used by Albanians, in order to attain the desired impact. The information provided for awareness raising must include also notification about provisions of the Criminal Code pertaining illegal border crossing, providing assistance for illegal border crossings, the abandonment of the minors and use of falsified documents.
- 2.6** AHC recommends that state institutions should pay particular attention to raising awareness among parents regarding the child abandonment offense. As elaborated in this study report, Albanians do not view it as abandonment, but rather than a sacrifice from the side of the parents for a brighter future of the child, sending children to EU countries. Hence, information should be constantly provided in the media that leaving children on their own and unaccompanied is considered abandonment of children and is consequently punishable by the Criminal Code.
- 2.7** We are of the opinion that courts should pay particular attention to the punitive measures against minors charged with illegal crossing of the border. Illegal crossing of the border for labor migration due to poverty and unemployment in the country, should be taken into account by the court regarding the enforcement of the sanction and the type of sentencing. Imprisonment sentences are not in compliance with international conventions ratified by Albania pertaining migration and children's rights.
- 2.8** AHC recommends that state authorities enter into agreements with travel agencies that sell tickets as well as provide transport by busses, ferries or airplanes, that when issuing the ticket, they should provide also a summarized information on the entry and residence criteria in the EU as well as the consequences of the violation of the visa liberalization agreement. The information should clearly delineate the conditions that Albanians must fulfill in order to migrate to the Schengen area, which may be subjected to change, depending on the motivation of the entry. It should also specify the cash amount that each citizen should possess for each day of stay in different EU countries.
- 2.9** Under the circumstances of the dynamics of migration *from* and *to* Albania, drafting a multidimensional migration strategy is needed in order to address, inter alia, the measures needed to be taken against the reasons of irregular migration. At the moment, authorities place the brunt of responsibility to countering illegal migration at the effective border control. However, without tackling the reasons of irregular migration, measures against irregular migration can not yield success.
- 2.10** Authorities should take effective actions for the reintegration of returnees, in order to avoid the cycle of irregular migration. In the absence of work and financial means, the returnees may relapse in illegal migration, as traditionally Albanians have resorted to over the last 25 years.

**2.11** Border and migration workers should reject Albanian citizens' exit from the country only after examining their documentation, in accordance with Albanian legislation and the visa liberalization agreement, without prejudice to the reasons why the citizens leave, in order not to violate the constitutional right of the persons to leave the Albanian territory. In any case, the refusal must be accompanied by a written document stating the reasons for banning the person from leaving the territory, its legal basis, possibilities for appealing, including the deadlines and the authority where the appeal request can be lodged.