



2011 Bulgaria

Annual Report on Border Monitoring

ACCESS TO THE TERRITORY AND STATUS DETERMINATION PROCEDURE

I. GENERAL BACKGROUND

CHAPTER 1. NATIONAL BORDER MONITORING SYSTEM

1.1. Introduction

The Bulgarian border has a length of 2,245 km, which consists of a sea border with the Black Sea to the east, a land border with the Republic of Turkey and the Republic of Greece to the south and with Macedonia and Serbia to the west, and a river border along the Danube river and a land border with Romania to the north.



The Directorate General of the Border Police with MOI (Border Police) maintains information exchange with the border services of the neighboring countries, Black sea countries, and EU member states.

A Black Sea Border Coordination and Information Centre was set up for operational interaction among the border authorities (coastal guards) of the Black Sea countries at

BPRD-Bourgas in 2003. A contact center for information exchange and operational cooperation is up and running on the basis of a Memorandum of Cooperation between the Border Police and the Chief Inspectorate of the Border Police of Romania in Giurgiu. Similar contact centers for information exchange are also in place with the border authorities of Greece and Macedonia, respectively in Promahon and Ghyueshevo; a center with Serbia is planned to be opened in Kalotina, as well as a center in Kapitan Andreevo, which will be a trilateral center for information exchange and operational cooperation with the Republic of Turkey and the Republic of Greece.



1.2. Protection of refugees in the context of the general migration control

The Law on Aliens in the Republic of Bulgaria (LARB) (State Gazette, issue 153/1998) lays down the general regime for the entry of third-country nationals into Bulgaria, while the special Law on the Entry, Residence and Leaving the Republic of Bulgaria by EU Nationals and Members of Their Families (State Gazette, issue 80/2006) regulates the entry into the territory by EU nationals and their family members who are third- country nationals.

The general regime with respect to third-country nationals requires a regular national travel document or another substituting identity document, as well as an entry visa for third-country nationals with respect to whom there is a visa regime¹ (Article 8 of LARB). The types of visa are determined depending on the purpose for which the visa is issued (Article 9a of LARB): an airport transfer visa (type "A"), short-term visa (type "B" for transit through the country's territory), (Article 9e of LARB) – a border visa, issued on exception by the border control authorities at the border check-points are entitled to issue one-time transit visas for a period of up to 2 days, unless an international treaty also provides for such issuing of short-term visas for a period of up to 15 days; short-term visas (type "C") and long-term visas (type "D"). The law does not require visas for nationals of the third countries² listed in Regulation 2001/539/EC or in case a long-term or permanent residence permit has been issued by another EU member state. Such

¹ Pursuant to Article 4(1) of the Ordinance on the Terms and Procedure for Issuing Visas (SG, 44/2008) the countries whose citizens are obliged to transit Bulgaria with a transit visa are: Angola, Afghanistan, Bangladesh, Ghana, Ethiopia, Eritrea, Iraq, Iran, The Democratic Republic of Congo (Zair), Liberia, Nigeria, Pakistan, Somalia, Sudan and Shri Lanka. Pursuant to Article 4(2) of the Ordinance the states whose citizens need a visa for entry and residence in Bulgaria are included on an approved list – see Annex B) to the Report.

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0539:20070119:BG:PDF>

individuals are entitled to stay in Bulgaria without a visa for a period of 90 days within 6 months.

Notwithstanding, where recognized refugees or stateless persons travel with a regular travel document, they may be required to have an entry visa, if the residence permit or the refugee status has been issued by a third state on the list in Annex I to Regulation 2001/539/EC (see Annex B to the Report). The factor determining the need for a visa would be the state of recognition and/or residence, not the country of origin or habitual residence – for stateless persons. Where an alien travels and enters into the territory without any of the required documents and/or visas, as indicated above, he/she is considered an illegal immigrant. Under such circumstances the border authorities are obligated by law to issue a deportation order (Article 41 in relation to Article 44 of the LARB). Deportation can also be safeguarded by means of a signed promise of daily reporting to the police station or by means of placement in a detention center (Article 44, Paragraphs 5 and 6 of the LARB). Where an alien has submitted an asylum application, the execution of the deportation order is automatically suspended by virtue of the law (*ex lege*, as of Article 67, Paragraph 1 of LAR). The law, however, does not provide for an automatic suspension of the detention orders in the detention center with the Migration Directorate of MOI.

The Schengen Information System (SIS-I and SIS-II) is a common information system used in the area of the protection of national security and public order with a view to both promoting police and judicial cooperation and the management and control of external borders. Any detainees with IDs on themselves and those without IDs are checked in the SIS. While Bulgaria is not yet a member of the Schengen area, in its capacity of an EU member state it acted fast in providing equipment and training for the border units and their staff on the access to the relevant levels in the existing systems for information exchange, such as EURODAC, SIS, SIRENE, and FADO. The EURODAC system – being mandatory and accessible – has been used as an instrument for checking the identity and status where an asylum seeker is detained on the grounds of not having an ID or of illegal entry into the territory of the country. Fingerprints are also be taken for the purpose of implementing Regulation 2003/343/EC (the so-called Dublin Regulation) for determining the member state responsible for examining an asylum application. Nevertheless, due to the lack of operational territorial units of SAR in the border areas and thus, unavailability of refugee status determination procedures at the national borders, the Border Police ensured taking fingerprints from asylum seekers, but Dublin procedures under the LAR for determining the member state responsible for examining the asylum application were not conducted at the border check-points.

Asylum applications were registered through the Border Police territorial structures with an incoming number and the date; after that they were dispatched by fax or by e-mail in a scanned form to either of the two Registration & Reception Centers in the city of Sofia and the village of Banya, Nova Zagora municipality. A copy of the asylum application was served to the asylum seeker prior his physical transfer to the SAR premises (146 asylum applications filed at the border), or, to any of the two national detention centers with the Migration Directorate of MOI (159 persons with asylum applications filed at the Lubimets Detention center, within the range of the 30-kilometer border area).

Both in 2010 and 2011 the most serious issue in terms of ensuring access to the territory and the procedure at the national borders was the lack of interpreters/translators with the so-called “rare languages” – Arabic, Persian, Dari, Urdu, Pushtu, Kurdish, Tamil, Somali, etc. – which made the GDBP staff unable to meet their legal obligation to make the registration of the asylum applications and to refer them to the competent authority, the State Agency for Refugees (Article 58, Paragraph 4 of LAR), due to difficulties in communicating with the detained aliens who had claimed asylum.

1.3. Border control authorities

Pursuant to the law, the Directorate General of Border Police with MOI is a national specialized operative structure for control and security of the national borders (Article 526 of the Law on the MOI); in the delivery of its statutory tasks the Border Police carries out activities related to border surveillance, countering illegal migration and trafficking in human beings, border checks, prevention, prevention and investigation of crimes related to illegal migration and trafficking of human beings perpetrated in the border area, the areas of the border check-points, international airports and seaports, internal sea waters, territorial sea, adjacent zones, continental shelf, Bulgarian part of the Danube river and the other border rivers and water basins.

Border Police also conducts investigations into crimes, ensures the public order in the areas of the border check-points, and exercises control over the safety of movement in the area of airports, as well as the administrative control of the entry regime from and into the territories of other countries as well as the residence regime therein in conformity with the law or international treaties of which the Republic of Bulgaria is a signatory state. Border Police is also in charge of the installation and maintenance of border signs, the demarcation of the border line of the national border, mapping and other documentation related to the state borderline, as well as the establishment and maintenance of a geodetic and cartographic database and the methodological guidance and control related to it. Border Police units are entitled to conduct air surveillance of the borders, as well.

Pursuant to Article 84, Paragraph 1 of the Regulation on the Implementation of the Law on Ministry of Interior, a "border area" is an inland territory of 30 km, which is determined by the line of the state border at the land border and by the coastal line at the sea or river borders. Therefore, the Border Police exercises its jurisdiction in terms of guarding the state border and ensuring border control exclusively within this area. Under the law, a "border strip" is a part of the border area immediately along the line of the land border at an inland distance of 300 m from the line of the state border, the islands and the Bulgarian part of the border rivers being also included, except for the Danube river. An ordinance on the Organization, Activity, Management and Interaction of border check-points has been regulated by a COM Decree No 104/20.04.2002.

Border Police structures are divided into 7 regional directorates – "Airports" Regional Directorate in the capital city of Sofia as well as Bourgas, Elhovo, Smolyan, Kyustendil, Dragoman and Rousse regional directorates. Each of the regional directorates is set according to the relevant neighboring country/border, or, respectively –air borders, the Black Sea, Turkey, Macedonia, Serbia and Romania.

1.4. Inter-agency agreements

A Trilateral Memorandum of Understanding among the Border Police Directorate General, the UN High Commissioner for Refugees and the Bulgarian Helsinki Committee was signed in 2010¹. The memorandum replaced the bilateral border monitoring agreement signed between the Border police and the BHC from 2005.

The Memorandum provides for full and unhindered access of UNHCR and BHC to individuals detained in the border area with a view to ensuring access to the territory of the Republic of Bulgaria and to the refugee status determination procedure for those detainees who are in need of international protection as well as specialized legal aid and representation. The staff of Border Police ensures this access and facilitates the activity

¹ Trilateral Memorandum of Understanding regarding the ways of cooperation and coordination in facilitating the access of asylum seekers to the territory of the Republic of Bulgaria and to the refugee status determination procedure in the country among the Border Police Directorate General with the Ministry of Interior of the Republic of Bulgaria, the UNHCR Representation in Sofia and the Bulgarian Helsinki Committee, signed on 14 April 2010.

of the duly authorized representatives of UNHCR and BHC to the facility for the 24-hour police detention at the border and in the border area. Access is also ensured to the logbooks and files registered within the Border Police competences regarding the individuals in compliance with confidentiality rules. If requested, the Border Police staff provides excerpts from official documents containing statistical data and information relevant to the individuals of concern.

UNHCR implements monitoring visits to areas and facilities for the 24-hour police detention for the purpose of inspecting the implementation of the international European protection standards.

BHC staff implements the monitoring of all national facilities for the 24-hour police detention, including the Transit hall at Sofia Airport. In the course of the monitoring BHC also checks the accessibility and the use of the information leaflets and brochures, and provides legal aid, if requested by the Border Police.

1.5. Legal framework of international protection

The legal framework regulating asylum and the international protection of individuals in need of it is based on the provisions of Article 27, Paragraphs 2 and 3 of the Bulgarian Constitution. The Constitution stipulates that asylum shall be granted to foreigners persecuted for their opinions or activity in defending internationally recognized human rights and freedoms, while the conditions and procedure for the granting of asylum shall be established by law.

After the new Constitution was passed in 1991, Bulgaria signed and ratified the UN 1951 Geneva Convention relating to the Status of Refugees (State Gazette, issue 36 of 5 May 1992, add. issue 30 of 1993, SG 88/1993). The Convention lays down the *international "refugee definition"* and the grounds for the recognition, cessation and exclusion of an individual as a refugee as well as the minimum scope of rights acquired and guaranteed with the recognition of the refugee status.

The Convention also *introduces a number of procedural protection safeguards* – the prohibition of return, expulsion or deportation (non-refoulement) to a state where the asylum seeker's life and freedom would be threatened - Article 33, Paragraph 1; the prohibition to impose penalties (non-punishment) on account of illegal entry exercised in order to claim asylum - Article 31; and the right to access to the local courts of justice and exemption from legal fees (*cautio judicatum solvi*). By the act of ratifying the Convention, the government has assumed the obligation to provide protection to individuals who sought it on the national territory; hence, to establish agencies and procedures for status determination to provide protection to the individuals in need of it.

On the grounds of the ratification and pursuant to Article 5, Paragraph 4 of the Constitution, an Ordinance on Granting and Regulating Refugee Status was passed in 1994 (COM Decree N 208/1994, SG issue 84/1994), whereby a specialized administration for the registration and examination of asylum application was established: the National Bureau for Territorial Asylum with the Council of Ministers (NBTA). After the first national law in this area was passed, Law on Refugees (SG, issue 53/1999), the NBTA was renamed into Agency for Refugees, while after the present Law on Asylum and Refugees was passed (SG, issue 54/2002, effective as from 1 Nov. 2002), the Agency was renamed into State Agency for Refugees. Pursuant to the provisions of Article 2, Paragraph 3 of the LAR the State Agency for Refugees (SAR) is the competent authority in charge of examining individual applications for asylum filed on the national territory and of granting, in conformity with the legal provisions, either refugee or humanitarian status.

The other state entities that have competences in this area are the President who, in his/her capacity of head of state, is entitled to grant asylum (Article 98, item 10 in rel. to Article 27, Paragraph 2 of the Constitution and Article 7, Paragraph 2 of LAR); and the Council of Ministers which is entitled to grant temporary protection in the event of a mass influx of refugees fleeing an armed conflict or a humanitarian crisis (Article 2, Paragraph 2 in rel. to Article 11 of LAR).

Pursuant to Article 58, Paragraph 4 of the Law on Asylum and Refugees, where the application is filed with another government authority, the latter must forthwith forward it to the State Agency for Refugees. The obligations under Article 49 of the 1999 Law on Refugees (revoked) were transferred to SAR, which has ever since been the only state body competent to make decisions as to the need to grant international protection. Hence, in 2011 border officers made immediate referrals to SAR for the purpose of registration, examination and issuing a decision on any asylum application filed with them and duly registered in the record-keeping system of the relevant Border Police station.

1.6. Access to the territory and the refugee status determination procedure

1.6.1. Registration of asylum applications

The time limit for the detention of aliens for illegal crossing of the state border of the Republic of Bulgaria is set out in Article 64 in relation to Article 63, Paragraph 1, item 5 of the Law on the Ministry of Interior. Pursuant to the above provisions the staff of the Border Police shall not be entitled to detain a person for more than 24 hours; after the expiration of that period the detainee shall be removed to a detention center with the Migration Directorate of MOI; as for the aliens who have filed an asylum application, these shall be escorted to an asylum reception center in coordination with the SAR. In other words, where an alien has not requested international protection, he/she shall be considered an illegal immigrant¹ and shall be detained at an immigration detention center with the Migration Directorate, which is authorized under the Law on MOI to implement deportation procedures. However, if an asylum application has been filed, the Border Police staff is obligated to transfer the asylum seeker to the competent administrative authority – the SAR, instead. (argument as of Article 58, Paragraph 4 in rel. to Article 60 of LAR).

In 2011, however, the Border Police conducted the procedure of transferring asylum seekers to the territorial units of SAR in accordance with the provisions of Article 16, Paragraph 1, item 3 of the Ordinance on the Responsibility and Coordination². Pursuant to the provisions of this Ordinance any aliens who have applied for asylum before the staff of Border Police should not be transferred to asylum reception centers of SAR, but instead - to the detention centers of Migration Directorate, MOI except for unaccompanied minors, pregnant women and disabled persons (Article 16, Paragraph 2 of the Ordinance). In conformity with the said Ordinance, the staff of the Border Police submitted to SAR only the asylum applications and related documents (detention order, search protocol, interrogation protocol, health status), but not the asylum seeker himself.

¹ Pursuant to Article 44, Paragraph 1 of the Law on Aliens in the Republic of Bulgaria, the state entities entitled to decide upon the unlawfulness of an alien's residence by means of issuing deportation and expulsion orders are the State Agency for National Security, Organized Crime DG, Border Police DG, the regional structures and duly authorized staff thereof.

² Ordinance on the Responsibility and Coordination of the State Bodies implementing the actions for the application of Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention; Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention (adopted by Decree of COM No 332 of 28.12.2007, prom. SG 3/11 Jan. 2008, amended SG 5/19 Jan. 2010, amended SG 91/18 Nov. 2011)

In the same time, pursuant to Article 67, Paragraph 1 of LAR all punitive administrative measures under the Law on Aliens (deportation, or, expulsion as well as the entry ban) issued with respect to asylum seeker, who entered or resided illegally, should not be implemented, but immediately suspended until the very end of the status determination procedure with a final decision. Depending on the decision - recognition or rejection, the deportation/expulsion orders should be, respectively, either cancelled or enforced. This legal effect was achieved *ex lege*, i.e. by virtue of the legal provision itself without the need an additional order to be issued by any authority. Therefore, despite the fact that the detention orders were not explicitly listed in the legal provision quoted above, yet they also should have not been implemented as far as the detention orders were (and are) issued with only one legal objective in principle - to secure deportation, or, expulsion. Thus, if deportation/expulsion could not be implemented with regard to asylum seekers, therefore their detention could not be legally justified as necessary and ought to be considered as entirely illegal. However, the detention of asylum seekers in 2011 continued on the basis of the Ordinance. That is why, the generally recognised position in 2011 was that both the provision of Article 16, Paragraph 1, item 4 of the Ordinance (prior to its revision of 18 Nov. 2011) and, the ensuing practice of transferring the asylum seekers in detention centers were in violation of the right to access to the status determination procedure.

Hence, in the second half of 2011, at the proposal of the Trilateral Working Group under Article 19 of the Memorandum of Cooperation and at the initiative of the Border Police, by virtue of an Order of the Minister of Interior an working group of experts consisting of experts from the Border Police, Migration Directorate and SAR was set up with the task of working on the revocation of the provision of Article 16, Paragraph 1, item 3 of the Ordinance. At the end of November 2011¹ the provision of Article 16, Paragraph 1, item 3 which had been controversial ever since the adoption of the Ordinance in 2007 was revoked and replaced with a new provision in line with Article 58, Paragraph 4 in relation to Article 60 of LAR. This new provision introduced the explicit obligation for the Border Police to transfer any asylum seeker who applied at the border directly to a reception center of the SAR. The new wording of the provisions of Article 16, Paragraph 1, item 3 of the Ordinance eliminated the contradiction with Article 67, Paragraph 1 of LAR, and, thus the legal framework regarding the access to the procedure (the RSDP) was brought fully in line with the international legal standards and the provisions of Article 18 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

However, according to the position of BHC and UNHCR, the results from the monitoring demonstrated that in spite of the fact that by the end of 2011 the legal barriers in respect of asylum seekers' access to the territory and the procedure had been eliminated, they were replaced by a new administrative policy which, while being in formal terms in conformity with the law, was circumventing it, and this resulted once again in a policy of detention of asylum seekers who applied at the national borders. After the opening of the Lubimets Detention center in the border area with Turkey and Greece, and, in particular after the amendment of the provision of Article 16, Paragraph 1, item 3 of the Ordinance, BHC has reported on an immediate and drastic drop in the number of asylum applications registered by the Border Police.

The findings from the BHC monitoring proved that from that time on, the registration of asylum applications by the Border Police can be defined as sporadic rather than regular. Thus, for example, after the opening of the Lubimets detention center on 15 March 2011, 1 application was registered in May 2011; 0 applications in June 2011; 4 applications in July 2011; 7 applications in August 2011; 2 applications in September 2011; 2 applications in October 2011; 0 applications in November 2011; 0 applications in

¹ SG, issue 91/18 Nov. 2011.

December 2011. All 93 applications filed in the border area for that particular period of time were registered in the Lubimets Detention center by the staff of Migration Directorate after the individuals were transferred as illegal immigrants to the detention centers by the Border Police.

Thus, following the amendments to the Ordinance of 18 Nov. 2011 the Border Police in practice ceased to register any asylum application. As mentioned above, there was not a single asylum application registered by the Border Police during the last two months of 2011 (November and December). All the 93 applications filed during that period in the area of the Border Police Unit-Svilengrad (the Bulgarian-Turkish border) and the Border Police Unit-Novo Selo (the Bulgarian-Greek border) were registered in the Lubimets detention center. Hence, according to UNHCR and BHC, the conclusion is that the asylum applications were not registered in order for the applicants to be treated as illegal migrants and, respectively - avoiding formal violation of the legal requirements of the revised Ordinance – detaining de facto asylum seekers, for the sole reason that SAR's transit center for asylum seekers in the village of Pastrogor was not yet operational. The Bulgarian Helsinki Committee monitored the access to the territory and procedure for a total of 305 asylum seekers, of whom 119 persons (79 adult- and 40 children-asylum seekers) were assisted to access the territory. In result, 81% of all 146 asylum applications registered at the border in 2011 were monitored by the BHC.

Thus, out of the total of 100% (305 persons) asylum seekers in 2011 who filed asylum applications in the areas of responsibility of the Regional Border sector-Elhovo and the regional Border Sector-Smolyan, 47% (146 applications) were registered by the Border Police, of whom 81% (119 persons) were monitored by BHC, 52% (159 persons) were transferred for registration to Lubimets detention center, managed by the Migration Directorate. Out of the total of 305 persons filing asylum applications in the border area only 21% (66 persons) received direct access to the procedure without being detained and were transferred to SAR's asylum reception centers in conformity with the protection standards. While this practice formally met the legal requirements (*letera legis*) as individuals were not officially registered as asylum seekers before their transfer to the detention centers, there was an evident breach of the purpose of the law (*ratio legis* - to ensure an immediate access to international protection and status determination for the individuals fleeing persecution, in violation of their fundamental human rights).

According to *the position of the Border Police*, this practice cannot be related to a violation of the legal provisions regulating the access to the territory and the RSDP. Border Police considers that what is needed is an additional investigation into the reasons for the drastic decrease in the number of asylum applications registered by the Border Police after the opening of Lubimets Detention center and the amendments to the Ordinance in the areas across Turkey and Greece, falling under the responsibility of the regional Border Sector-Elhovo and regional Border Sector-Smolyan.

1.6.2. Prosecuting illegal entry of asylum seekers

Under its obligations, the Border Police notified the Prosecutor's Office about each individual case of illegal crossing of the state border by third-country nationals. In the course of the pre-trial proceedings initiated under Article 279, Paragraph 1 of the Criminal Code, in case the alien concerned filed an asylum application before the Border Police, a report thereon was to be duly submitted to the supervising prosecutor.

In the course of 2011, the Prosecutor's Offices in the border areas along the border with Turkey and Greece continued to initiate pre-trial proceedings under Article 279, Paragraph 1 of the Criminal Code against asylum seekers who had illegally crossed the border. The outcome from this was that in 2011 the local district courts of justice convicted for illegal entry altogether 194 asylum seekers or 63% of all 305 asylum seekers who had filed asylum application at Elhovo and Smolyan border regions. In

November 2011, in the city of Svilengrad a meeting was held among UNHCR, BHC, Border Police and the Prosecutor's Office in order to discuss the practice on application of Article 31 of the 1951 Convention and Article 279, Paragraph 5 of the Criminal Code. As a result of this the Supreme Prosecutor's Office of Cassation initiated an inspection with the aim of investigating the reasons for the breach of Article 31 non-punishment principle from the said practice for convicting asylum seekers on account of their illegal entry to the national territory.

The inspection carried out by the Chief Prosecutor's Office was completed in May 2012 with the following working position: there is a definite lack of consistence in the assessment made by the pre-trial investigators and the prosecutors in terms of the status of asylum seekers convicted under Article 279, Paragraph 1, and in terms of the burden of proof standard applied in respect of that status, which resulted in the conviction of individuals who have filed an asylum application in the exercise of their right to seek international protection under the Constitution of the Republic of Bulgaria. Hence, the Chief Prosecutor's Office recommended the establishment of a working group with the involvement of all stakeholders – the prosecutor's offices, border police, the court, the academia, UNHCR and BHC. The task of the working group is to develop and coordinate a draft of methodological guidelines to be examined and discussed by experts and representatives of the academic community in the area of criminal law, criminal procedure and refugee law with a view to finding solutions to the controversial issues in the application of Article 279, Paragraph 5 of the Criminal Code in relation to Article 31 of the 1951 Convention relating to the Status of Refugees.

1.7. Methodology of border monitoring

In 2011 BHC conducted 225 visits within the framework of the regular monitoring of all the national borders, with a priority focused on the main entry points – at the land border: Kapitan Andreevo border check-point at the Bulgarian-Turkish border, and Novo selo border check-point at the Bulgarian-Greek border; and at the air border: Sofia Airport border check-point – which were subject to weekly monitoring. In the course of the year when needed it was also possible to monitor any national border and/or any facility for the 24-hour police detention without any limitation in terms of the number of visits.

Pursuant to the Memorandum, access was ensured without the need for obtaining permission in advance or without any conditions set in terms of time, frequency, duration or circumstances related to the detainee himself/herself (Article 15 of the Memorandum). The BHC staff who implemented the border monitoring were obligated to inform about their identity and mandate the monitored individuals, as well as about the purpose of the monitoring and the voluntary nature of the conducted interviews, including the right to refuse to be interviewed (Article 16 of the Memorandum).

BHC monitored the access ensured for all new arrivals at the border, and occasionally provided interpretation for mediating the communication between asylum seekers with the border officers, as well as the filing and registration of the asylum applications at Border Police's local structures.

II. SITUATION ANALYSIS

CHAPTER 2. PRINCIPLES OF INTERNATIONAL PROTECTION

2.1. The non-refoulement principle under Article 33 of the 1951 Convention

Article 33, Paragraph 1 of the 1951 Geneva Convention introduces one of the fundamental principles in international protection, i.e. the prohibition of expulsion or return (*non-refoulement*). Pursuant to this legal provision no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Therefore, the most important common task in the joint efforts for cooperation among the parties to the agreement – UNHCR, Border Police and BHC – was to safeguard the non-refoulement principle in a way that would guarantee that none of the persons filing asylum applications at the border is expelled, removed or returned to another country before his/her application has been examined and determined.

In 2011 there were 0 cases of registered refoulement in Bulgaria.

2.2. The principle of non-punishment under Article 31 of the 1951 Convention

Article 31 of the 1951 Geneva Convention stipulates that the authorities of the Contracting Parties shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. This principle has been incorporated in the domestic legislation in Article 279, Paragraph 5 of the Criminal Code.

In 2011, 63 % of the asylum seekers who submitted asylum applications at the border were convicted for illegal entry into the area of the Regional Prosecutor's Office-Svilengrad and the Regional Prosecutor's Office-Smolyan. In addition to the substantial judicial costs, this practice contributed to delayed and postponed opening of the RSDP, and created prerequisites for repeated persecution and victimization, as the asylum seekers were charged for committing crimes and were convicted on that account, instead of having immediate access to the refugee status determination procedure.

2.3. Dublin Regulation

Council Regulation (EC) No 343/2003 establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The purpose of this legislative act is to ensure that actions are taken in conformity with the principle of subsidiarity defined in Article 5 of the Treaty on the EU. Pursuant to the Regulation the member states shall examine the asylum application of any third-country national who applies at their border or in their territory; the application shall be examined by a single member state and this state which shall be the one which the criteria set out in Chapter III indicate as responsible (Article 3, Paragraph 1 of the Regulation). Some of the criteria, for example, are the point of arrival or of filing the application, the factual or authorized residence of family members in another member state, documents issued or actions taken for forced removal by another member state, etc. The EURODAC system, being mandatory and with direct access, was the legal and institutional mechanism used to serve the purpose of the Dublin Regulation in determining the member state responsible in the event of detaining an asylum seeker for not having an ID or for illegal entry into the country.

Nevertheless, due to the lack of territorial units of SAR in the border area of responsibility of the regional Police Sector-Elhovo and the regional Police Sector-Smolyan in 2011 the asylum seekers who submitted an asylum application at the border had their fingerprints taken not for the purpose of the Dublin procedure, but only for the purpose of EURODAC, as the Border Police was taking only Category 2 fingerprints: persons detained in an attempt to illegally cross an external border, and Category 3: checks on persons residing illegally in a member state. In case an asylum application was registered by the Border Police's territorial structures with an incoming number and a date, this application was immediately sent by fax or by e-mail in a scanned form to the two asylum reception centers of SAR – in the city of Sofia and the village of Banya, Nova Zagora Municipality.

Border Police also delivered on its obligations in terms of admitting into the territory aliens who were returned into the country by other member states under the Dublin Regulation 2003/343/EC. In 2011 the finally rejected asylum seekers returned to Bulgaria under the Dublin procedure were admitted into the territory, but detained, while asylum seekers with respect to whom the RSDP had not been completed were transferred to the State Agency for Refugees in order to complete the determination.

2.4. Cross-border cooperation with neighbouring countries

As the border area among the Republic of Turkey, the Republic of Greece and the Republic of Bulgaria is the main route used by asylum seekers for entry into the country and is one of the main routes for entry into the EU territory, Bulgaria committed to exploring the possibilities for establishing a trilateral cooperation with the participation of UNHCR, border authorities and non-governmental organizations from these three countries. This cooperation is aimed at facilitating the subsequent gathering of information about individual cases of refoulement, and an overview of the situation in the area of international protection and asylum in each of the three countries.

In 2009 BHC organized a trilateral meeting with the Helsinki Citizens' Assembly-Turkey and the Greek Group Lawyers for the Rights of Migrants and Refugees, whose representatives reached an agreement on the need to further strengthen the cooperation and communication in response to the specific protection issues in the region related to asylum seekers' access to the territory and the procedure.

In 2010 delegations from all the three countries, including the Border Police, UNHCR and non-governmental organizations, gathered in Budapest at the Regional Conference on border management and refugee protection, organized by the UNHCR Regional Representation for Central Europe.

In February 2011 UNHCR and BHC attended the trilateral meeting of representatives of UNHCR and NGOs from Turkey, Greece and Bulgaria organized in Istanbul; the meeting discussed the Bulgarian experience in border monitoring; negotiating the trilateral memorandum with the Border Police administration and the practical implementation of border monitoring on the basis of that memorandum; as well as the options for cross-border cooperation, risk analysis and exchange of information among the agencies, institutions and organization from the three countries.

2.5. Exchange of information through the mechanisms of cross-border cooperation

On 1-2 August 2011 a trilateral meeting was held in Svilengrad, Bulgaria among representatives of UNHCR-Sofia, Border Police, Migration Directorate and BHC, as well as representatives of same agencies, institutions and organizations from Turkey and Greece. The meeting overviewed the situation in the three countries and the specifics of their national asylum systems, as well as detailed statistical data about the number of asylum applications, countries of origin and other relevant data. The opportunities for the

exchange of information and cooperation were addressed, including by seminars to introduce the Bulgarian tripartite cooperation to the government agencies of the neighboring countries. It was agreed that the discussions on the potential for cooperation will continue in the course of 2012.

Next trilateral meeting from these countries was scheduled to take place in Bulgaria during the second half of 2012 as a follow-up to the dialogue on establishing cross-border cooperation in the area of international protection and identifying the specific actions and measures for information exchange.

CHAPTER 3. DESCRIPTION OF THE MONITORED FACILITIES

The facilities for the accommodation of detainees were established in conformity with Instruction I3-1711 of 15 Sept. 2009¹ regarding the equipment of the premises for the accommodation of detained persons within Ministry of Interior structures. The monitoring consisted of regular monthly visits to the facilities and the premises, as indicated on the list (Annex D), the purpose being to establish the conformity with standards for ensuring *de jure* and *de facto* access to the territory and the RSDP.

BHC observers had access to all Border Police units, monitoring was held on a weekly basis and included the following: interviewing the detained persons, identifying the person as an asylum seeker in case the latter explicitly declares himself/herself as such, assistance with writing an asylum application, and registering it at the administration of the Border police station. As the lack of interpreters/translators with rare languages in the border areas was the most serious concern in 2011, the interpretation needed for registration of the asylum application at the border under Article 58, Paragraph 4 of LAR was ensured entirely by BHC on the grounds of Article 20 of the Trilateral Memorandum.

3.1. Land border facilities

3.1.1. The Kapitan Andreevo Patrol Base – located in the vicinity of Kapitan Andreevo border check-point at the Bulgarian-Turkish border. The border detention facility consists of 6 rooms with 19 beds, of which 1 room for mothers with children, 1 room for unaccompanied minors, 1 room for asylum seekers, 2 rooms for illegal migrants, and 1 bathroom with a toilet. All the rooms have daylight inside, and 5 of them have air-conditioning.

3.1.2. Novo Selo border check-point – located in the area of responsibility of Border Police Unit-Novo Selo for border control over most of the Bulgarian-Greek border. The facility for the accommodation of detainees consists of 2 rooms with 4 beds and 1 bathroom with a toilet. It should be emphasized that migrants and asylum seekers are accommodated in that facility by way of exception; they are usually referred immediately to the facility at the Kapitan Andreevo Patrol Base which offers better living conditions.

3.2. Air border facilities

3.2.1. Sofia international airport – there are accommodation facilities at the two terminals: *Terminal 1* – the facility consists of 4 rooms equipped with 10 beds and 1 bathroom with a toilet. Two of the rooms have daylight inside; *Terminal 2* – the facilities for the accommodation of detainees at the Sofia Airport BCP have been subject to *ad hoc* monitoring since 1998, and to regular monitoring since 2005. It consists of 2 rooms with 4 beds; there is no daylight, no air-conditioning and no possibility for airing the rooms, either. They are designed for short-term detention of migrants who have not been admitted into the territory of the country and are to be deported by air within 24 hours.

¹ Issued by the Minister of Interior, prom. SG, issue 78 of 2 Oct. 2009.

CHAPTER 4. RIGHTS OF ASYLUM SEEKERS

4.1. Right to international protection

The asylum seekers registered their applications only with the support of lawyers and interpreters ensured by UNHCR through BHC. Nevertheless, even the ones whose applications were registered at the border were placed in detention centers of the Migration Directorate instead of being accommodated in asylum reception centers.

In 2011 Border Police's staff were not able to adequately communicate with asylum seekers, either to ensure their timely transfer to the SAR units due to the delayed opening of Pastrogor Transit asylum center and the insufficient capacity of the other two asylum reception centers in Sofia and Banya village.

Due to these circumstances, the border applicants were detained in immigration detention centers for an average of 2 to 5 weeks. While in the beginning of 2011 due to the BHC's regular detention monitoring the detention duration of asylum seekers was reduced from 36 to 31 days compared to 2010, the detainees yet were not fully guaranteed automatic and direct access to the RSDP. Furthermore, in late 2011 the detention duration of asylum seekers started to increase drastically, thus reaching 90 days and over in some individual cases, in particular at the Lubimets detention center.

In 2011, a total of 890 asylum seekers were registered in Bulgaria. 305 of them, or 34%, submitted 146 applications at the border – the difference in the figures results from the fact that spouses and parents with minor children were registered with one application; 159 persons were transferred, without registered applications, from the Border Police to the Migration Directorate and detained in immigration detention centers; a total of 78% (239 asylum applicants in the border area) were accommodated in a detention center of the Migration Directorate, while only 21% (66 persons) were directly accommodated in any of the two asylum reception centers of SAR in Sofia or Banya village, which constituted an alarming decrease compared to the 39% (113 persons) in 2010. Even more alarming was the increased number of criminal convictions in 2011, in breach of Article 31 of the Convention and Article 279, Paragraph 5 of the Criminal Code: sanctions were imposed on 63% (194 border applicants) compared to the 25% (74 persons out of all 296 border applicants) in 2010.

4.2. Right to information

While the right to information was by and large ensured in the course of 2011, this was made possible due to BHC's commitments under the mandate of UNHCR. Dispensers with information brochures were distributed in all Border Police units with priority being given to EU external borders and the border with Greece. The materials were produced by means of the joint efforts of the competent institutions and organizations. They were edited in the languages spoken in the countries of origin from which the highest number of asylum seekers and migrants reach Bulgaria: Arabic, Farsi, Persian, Dari, Pushtu, Kurdish, English, French, etc.

In terms of the border control at the *land border* – pursuant to Article 2, Paragraphs 1 and 2 of the Ordinance, the border check-points (BCP) are isolated territories with a special entry and security regime; the areas of BCPs encompass the territory on which the buildings, premises, working stations, underground and surface facilities, technical facilities and points for crossing, waiting and checking on persons, vehicles and commodities are located. The management of the check-points and the detention facilities, which are public ownership, has been assigned to the Border Police General Directorate; therefore, Border Police is entitled to determine the location of any information dispensers, boards and materials.

The terms and conditions for crossing the *sea border* are regulated in the Ordinance on the organization and implementation of border, passport, customs, health, veterinary medical and phytosanitary control, and the control on vehicles at the ports of the Republic of Bulgaria which service international navigation¹. Similar to the above arrangements, the management of detention facilities, while being public ownership, has been entrusted to Border Police General Directorate; therefore, the Border Police is entitled to determine the location of information boards and materials.

As regards the control over *air transport*, pursuant to Article 43 and 43a of the Law on Air Navigation the airports on the territory of the Republic of Bulgaria are public and private ownership. Sofia, Varna and Bourgas airports are civil airports for public use within the meaning of the law; the right to use them has been conceded, by means of a contract under the procedure laid down in the Concession Act, to the relevant airport operator or a commercial company where the state is a sole trader of the equity. By an Order РД-08-544/28.07.2000 of the Minister of Transport and Communications the land on which the buildings have been constructed, and the buildings themselves and the adjacent facilities – all of them constituting the Sofia airport complex – have been taken out of the equity of the Sofia Airport EAD company. The entire complex built on the ground is public state ownership; its use has been granted to the airport operator Sofia Airport Ltd whose equity is 100% state ownership, and the airport administration and operator being assigned with the management and maintenance of the airport infrastructure. Therefore, the location of any dispensers, information boards and materials is determined jointly by the Border Police and Sofia Airport Ltd.

In 2011, Border Police units (check-points and 24-hours border detention facilities) were equipped with dispensers containing leaflets and brochures designed to meet the needs of asylum seekers. Information is supplied with the financial support of UNHCR Representation in Bulgaria. According to BHC, the information board at the Sofia international airport check-point is not accessible to asylum seekers, as it is placed beyond the border line, in the baggage reclaim area; thus, the board should be moved close to the premises for 24-hours detention in the airport transit hall.

4.3. Right to interpretation

In 2011 asylum seekers at the national borders were not ensured the right to interpretation due to the lack of translators with the so-called “rare languages” - Arabic, Persian, Dari, Urdu, Pushtu, Kurdish, Tamil, Somali, etc. The lack of interpretation services was the most serious gap in terms of the access to the territory and procedure as a safeguard for the non-refoulement principle.

Within the scope of its competences in terms of the access to the territory and the procedure under Article 58, Paragraph 4 of LAR, the Border Police was not able to ensure any translation and interpretation in order for the border police officers to communicate with the detained aliens, and vice versa – in order for the detained aliens to communicate with the border police officers and be able to declare their need of international protection and to apply for asylum.

The legal standards in terms of administrative proceedings, in particular the RSDP under LAR, do not allow the officials implementing the administrative procedure to also act as interpreters in the same procedure; as such combination of functions does not guarantee the independence of the interpretation, it makes the relevant procedure unlawful. Thus, except for the pre-trial proceedings under the Code of Criminal Procedure, the actions carried out by the Border Police without due interpretation from and into a language

¹ Adopted by a Decree of COM 2/06. 01.2006 issued on the grounds of Article 101, Paragraph 2 of the Law on Maritime Spaces, Internal Waters and the Adjacent Area of the Republic of Bulgaria.

spoken by the asylum seekers were not in conformity with the standard, as laid down in Article 14, Paragraph 2 of the national Code of Administrative Procedure.

4.4. Right of access to court

In Bulgaria legal aid outside the court can be provided only in criminal proceedings. As for any other cases, legal aid can be requested only before and by a court (an argument under Article 21 of the Legal Aid Act).

Thus, legal aid funded from the state budget and provided by the National Bureau for Legal Aid, is not granted in administrative proceedings, either, in the event of administrative detention in spite of the serious restriction of the right to liberty and freedom of movement. Thus, the asylum seekers detained either in 24-hours border facilities or in immigration detention centers of the Migration Directorate (in Busmantsi or Lubimets) could receive access to judicial review only through non-governmental organizations, i.e. in supplement to the general national system for legal aid.

4.5. Right to medical care

Any alien detained at the border is subject to an initial medical screening in the medical facilities within the jurisdiction of MOI's Medical Institute – the territorial units thereof within the Border Police's structures: for example, the territorial medical unit at the border check-point in Svilengrad which operates with two general practitioners. Where further treatment was needed, the doctors referred the asylum seekers to the local healthcare establishments for examination and treatment, and, where the need for that was proved, to the Medical Institute of the Ministry of Interior in Sofia.

The asylum seekers detained at the border also received medical care and treatment under the terms and procedure of the Health Act within the framework of emergency aid – i.e. in the event of a sudden deterioration of a person's health status requiring urgent healthcare (Article 99, Paragraph 2 of Health Care Act). Patients with emergency or serious health problems, however, cannot be treated in conditions of detention; therefore, the needed to be transferred to external hospitals/clinics, which could have negative repercussion on their health due to the delayed provision of healthcare, which was usually the case as an argument as to whether the case is urgent or chronic was always involved between the Border Police and the hospitals.

Thus, the law did not address the need for healthcare for detainees who had chronic ailments and were, by definition, deprived of access to general health and medical services. It is recommendable to develop a regulation similar to the one with regard to persons with effective imprisonment convictions – the state has an obligation to ensure the payment of the health insurance for all prisoners (Article 40, Paragraph 3, item 6 of the Health Insurance Act).

4.6. Protection of vulnerable categories (unaccompanied minors, women, etc.)

In conformity with the generally recognized standards for international protection, there should be a special focus on individuals from the so-called "vulnerable" categories – unaccompanied minors, single women, individuals with physical or mental disabilities – who are not in an equal situation with the rest of border applicants.

The standards for special attention and care towards those vulnerable categories at the 24-hours border detention facilities was ensured by means of their accommodation in individual rooms specially designed and equipped for that category of persons and under conditions of securing their safety. Where necessary, at the request of the border police officers, food, clothing, sanitary and hygienic materials and medication was provided with the support of Bulgarian Red Cross.

III. SUMMARY

CHAPTER 5. CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions

- The right to interpretation is not guaranteed to asylum seekers at the borders. Pursuant to the provisions of the Code Of Administrative Procedure the staff of the Border Police do not have the entitlement either in the pre-trial proceedings or in the administrative procedure to simultaneously interview the persons detained at the border and interpret to them in these procedures, as in the event of combining these functions legal safeguards for the impartiality of interpretation is not observed.
- Due to the lack of interpretation services in border areas, in particular from and into rare languages, there are considerable difficulties in the communication between the Border Police staff and the asylum seekers detained at the border; therefore, the facts and circumstances used to justify the need for protection and, respectively, the legal status of a person seeking asylum, are not duly and fully investigated and documented in the interrogation protocols; instead, the only facts properly handled are the ones serving as grounds for criminal liability for illegal entry into the territory of the country under Article 279, Paragraph 1 of the Criminal Code, as interpretation is ensured only in the pre-trial procedure.
- As a result of this, asylum seekers who have entered into the territory of the country illegally are faced with criminal charges raised against them and penal proceedings initiated before the criminal courts; therefore, the individuals of concern are convicted under the provision of Article 279, Paragraph 1 of the Criminal Code in breach of Paragraph 5 of the same article and Article 31, Paragraph 1 of the 1951 Geneva Convention relating to the Status of Refugees.
- Legal aid for asylum seekers is not regulated in the law and, therefore, it is not provided to detained asylum seekers who duly declared before the Border Police authorities that they have entered the national territory to exercise their right to seek and enjoy asylum and international protection in conformity with human rights obligations of Bulgaria and Article 27 of its Constitution.
- The asylum seekers detained at the border can receive medical care from the emergency healthcare system only in cases of an urgent need. Those who have chronic diseases are deprived of access to general health services and medication due to the lack of adequate provisions in the national legislation.

5.3. Recommendations

- The interpretation from and into languages spoken by asylum seekers to be ensured by the Border Police and should be financed by means of targeted funds in the budget of the Ministry of Interior as a minimum standard required to safeguard access to the territory and the status determination under Article 58, Paragraph 4 of the Law on Asylum and Refugees; in particular for the purpose of communication and registration of asylum applications according to the requirements of the Code of Administrative Procedures.
- The Ministry of Justice should be notified on the need to ensure amendments to the Legal Aid Act in order to introduce legal aid provision to all aliens detained in 24-hours border detention facilities from the initial moment of their detention as well as to all detainees in immigration detention centers of the Migration Directorate; this should be achieved by supplementing the legal conditions for the mandatory legal aid provided by the National Bureau for Legal Aid and by expanding the range of persons eligible for legal aid to include therein the category of asylum seekers, in particular.
- Further coordinated actions among the responsible agencies, institutions and organizations - Chief Prosecutor's Office, Border Police Directorate General, United Nations High Commissioner for Refugees and the Bulgarian Helsinki Committee – should be taken in order to eliminate the reasons for violation of the non-punishment principle of Article 31, Paragraph 1 of the 1951 Geneva Convention relating to the Status of Refugees and to ensure the due implementation of the depenalization provision of Article 279, Paragraph 5 of the Criminal Code.
- Border Police Directorate General should take actions aimed at safeguards for the immediate registration of each and every asylum application filed before their staff, in view of meeting the obligation under Article 58, Paragraph 4 of the Law on Asylum and Refugees and ensuring access to the territory and the status determination procedures for individuals in need of international protection.
- The provision of healthcare in cases of chronic diseases should be regulated in a manner similar to the health insurance status of prisoners deprived of their liberty by virtue of an effective conviction; therefore, the state will have the legal obligation to plan for funds in the budget of the Ministry of Interior for the health insurance of persons placed in the facilities for the accommodation of detained persons within the Border Police Directorate General and Migration Directorate structures.

Sofia, 31 May 2012