

European parliament
LIBE Committee

European Commission
DG Migration and Home Affairs

Amnesty International
Transparency International
Human Rights Watch
European Council on Refugees and Exiles

Zagreb, 26 April 2017

To Whom It May Concern,

Please find enclosed **“Report on arbitrary and unlawful practices by the Ministry of Interior and the Security and Intelligence Agency of the Republic of Croatia related to (non)approval of international protection or status of foreigners in Croatia”**.

We would be grateful if you could react on the report findings according to your authorities and competencies.

Sincerely yours,

Are You Syrious?

Center for Peace Studies

President of the Republic of Croatia
President of the Government of the Republic of Croatia
Speaker of the Croatian Parliament
Parliamentary Committee on the Interior Affairs and National Safety
Parliamentary Committee on Human and National Minority Rights
Ombudsperson
Ombudsperson for Children
Ombudsperson for Disabled Persons
Ministry of Foreign Affairs
The Security and Intelligence Agency
Committee on Citizens' Monitoring of Security and Intelligence Agencies
The State Attorney's Office

Zagreb, 26 April 2017

To Whom It May Concern,

Please find enclosed **“Report on unlawful and arbitrary practices by the Security and Intelligence Agency (SIA) and Ministry of Interior of the Republic of Croatia (MOI) in the procedures of (non) approval of international protection or foreigner status in Croatia”** prepared by Are You Syrious? and the Center for Peace Studies associations.

We would be grateful if you could react on the report findings according to your authorities and competencies.

Sincerely yours,

Are You Syrious?

Center for Peace Studies

To the attention of:

- The Administrative Court

Report on arbitrary and unlawful practices by the Ministry of Interior and the Security and Intelligence Agency of the Republic of Croatia related to (non)approval of international protection or status of foreigners in Croatia

Prepared by: Are You Syrious?, Center for Peace Studies

Date: 26 April 2017

Introduction

Throughout the last couple of months, particularly in April 2017, civil society organizations (hereinafter: CSO) Are You Syrious? (hereinafter: AYS) and Center for Peace Studies (hereinafter: CPS) have observed a sudden increase in the number of rejections of applications for international protection made by applicants from Syria and Iraq, as well as rejections of requests to regulate foreigner status in Croatia (citizenship, temporary or permanent stay). What is common to all of the above-mentioned rejections is the Ministry of Interior (hereinafter: MOI) invocation of the Article 41 of the Security Vetting Act (Official Gazette 85/08, 86/12), i.e. the rejection of the request due to a so-called 'security obstacle' based on the assessment of the Security and Intelligence Agency (hereinafter: SIA).

After a detailed analysis of individual decisions, the legislative framework and national, European and international case law, AYS and CPS alert to a number of illegal and arbitrary practices conducted by MOI and SIA. Our CSOs are currently aware of at least 30 people whose status as a foreigner/refugee was denied due to the 'security obstacle' over the past 90 days. Without questioning the need of the state apparatus to carry out security checks of individual foreigners for the purpose of national security, this report aims to raise the problem of arbitrary and overarching interpretation of the so-called "security obstacle", the lack of independent supervision over the qualification of the "security obstacle", as well as the increasingly difficult legal position of people whose application for international protection or foreigner status in the Republic of Croatia was denied. These practices undoubtedly lead to violations of human rights of refugees and foreigners in the Republic of Croatia, and it is necessary to suspend these practices as soon as possible.

Brief description of SIA and MOI practices related to security vetting of refugees and foreigners

In accordance with Article 42 of the Security Intelligence Act and Article 5 of the Aliens Act, SIA, conducts a security vetting of persons who are being admitted to Croatian citizenship and foreigners in the Republic of Croatia whose residence is important for the security of the state, i.e. carries out vetting aimed at identifying potential threat to national security.

In accordance with Article 41 of the Security Vetting Act, SIA "presents the applicant with only the opinion on the existence or non-existence of a security obstacle" for foreigners to be residing or residing in the Republic of Croatia and for persons who are being admitted to Croatian citizenship. The MOI makes a decision regarding the foreigner's status based on SIA's opinion, which may or may not have to be taken into consideration.

In practice, the MOI, upon receiving applications for international protection or status regulation, almost regularly submits a request to SIA, which then carries out the so-called 'security vetting'. In most cases covered by this report, after the alleged security vetting has been carried out, SIA has submitted an opinion stating only the following:

"Based on the classified information marked with a "LIMITED" confidentiality degree, [SIA] establishes that there are obstacles in reaching a positive decision with regards to the application [...]."

SIA does not provide for explanations of the reason for the "safety obstacles" to MOI, and the applicants as well as their attorneys have not been informed of the reasons either. Based on this opinion, the MOI dismisses the applicant's application and instructs them to submit an administrative complaint to the Administrative Court of Croatia within 30 days. This practice leads to a series of irregularities and arbitrariness resulting in violations of the human rights of refugees and foreigners in the Republic of Croatia.

Examples of recent rejections of refugee status or regulation of foreigner status in the Republic of Croatia

In the period from 1 January 2017 to 15 April 2017, our CSOs have acquired a minimum of 30 examples of refusals of applications for international protection, residence or citizenship to refugees/foreigners residing in the Republic of Croatia, based on the existence of a 'security obstacle' as stated by SIA. Despite the fact that, over the past year, there has been a rise in the number of refugees seeking international protection in the Republic of Croatia, this abrupt increase in rejected applications due to '(security) obstacles' opens up suspicions of violations of human rights of refugees and foreigners in the Republic of Croatia. It is particularly distressing that this happens only a few months after our CSOs have documented and reported on the violent behavior of the police towards refugees, as well as numerous cases of their illegal expulsion from the territory of the Republic of Croatia. The cases we are citing are also interesting because by and large they relate to refugees and foreigners who have met all the formal conditions for granting international protection or foreigner status. Their status was denied only because of the existence of the so-called '(security) obstacles'.

Among the reported cases, there are also three minors whose parents received the 'security obstacles' and who are included in the negative opinions assigned by SIA to their mother, a wheelchair-bound woman.

Fifteen people included in this report are refugees returned on the basis of the Dublin III Regulation: from Austria (11 cases including children), Germany (2 cases) and Norway (1 case). In one case of return (S. A. - full identity known to reporters), the person claims that he/she has never previously been on the territory of the Republic of Croatia (her/his testimony is available in the MOI's decision to reject the application).

All the persons mentioned have been returned to Croatia since September 2016 and have applied for international protection. The first negative decision within this group of the applicants is dated 20 February 2017 and the decision was delivered in early April 2017.

Seekers of international protection who received such decisions are primarily from Iraq and Syria, from areas that are currently embroiled in armed conflicts (Baghdad, Mosul and Aleppo). In all these decisions, the MOI has found that there are grounds for granting asylum/subsidiary protection status, but as a result of the SIA assessment (classified by the lowest level of classification - 'LIMITED') stating the existence of '(security) obstacles' (without any additional explanation), the applications are automatically rejected. According to the Article 4 and 9 of the Data Secrecy Act (Official Gazette 79/2007) 'LIMITED' is the lowest of secrecy degrees and it should be used *to classify data which unauthorised disclosure „would be damaging to the functioning of state authorities in carrying out tasks in areas of security intelligence system; foreign affairs, public security, criminal proceedings, science, technology, public finances, and economy insofar these date are of significance for the security of the Republic of Croatia.* Therefore, the negative decisions based on the alleged results of the security vetting, which are classified and delivered only in the form of (negative) opinion by SIA, without evidence and arguments disclosed to the lawyers (seekers of international protection), imply that a person in some way participated in committing an act which poses some sort a threat to the Republic of Croatia. At the same time, the attorneys do not have security certificates, allowing an access to the classified files and, thus, cannot ascertain just procedures for their clients.

Most applicants have filed administrative lawsuits against these decisions to the Administrative Court, but did not have the opportunity to dispute SIA's opinion because neither they nor their attorneys were allowed access to the files.

We are also in possession of documentation of cases in which foreigners, whose stay in the Republic of Croatia is already regulated, either through subsidiary protection or temporary and permanent residence, have been denied a request for further residence regulation (e.g. citizenship or some other form of residence), again on the basis of the Article 41 of the Security Vetting Act. In these cases, the person fulfilled all the formal requirements for acquiring citizenship/residence but were denied due to unsubstantiated 'security obstacles'. The people concerned here have been living and working in the Republic of Croatia for a longer, substantial period of time, and some of them have started families and have children.

The authors of the report believe that there is no need to further explain to what extent the arbitrary decisions by MOI and SIA affect the lives of refugees and foreigners, their mental

health and well-being. Proclaiming a person a security threat without any arguments or explanation is an inhumane act that brings a person to great danger.

The observed unlawful and arbitrary practices:

1. Extensive interpretation of the Article 5 of the Foreigners Act and the Article 42 of the Act on the Security Intelligence System

Extensive interpretation of the Article 5 of the Foreigners Act and the Article 42 of the Act on the Security Intelligence System, based on which an international protection request or a request for the regulation of stay is sent to SIA by MOI almost as a rule, is highly problematic. The Article 42 of the Act on the Security Intelligence System gives the authority to SIA to conduct security vetting for persons who are granted Croatian citizenship (i.e. not the seekers of international protection nor a foreigner requesting a temporary or a permanent stay) and for the foreigners in the Republic of Croatia, whose residence is relevant for the state security. The Article 5 of the Foreigners Act states that a security vetting on a foreigner for the purpose of determining reasons of national security shall be carried out by the SIA.

The fact that the MOI sends almost all requests for international protection to SIA tells us that the MOI assumes that every foreigner who seeks international protection is 'important for state security', that is - represents a threat to national security. This is an unnecessary generalization and stereotyping of the seekers of international protection in the Republic of Croatia.

MOI or SIA, should have grounds for suspicion that each individual foreigner could be 'important for state security' and only in that case initiate the security vetting process.

2. The unlawful practice of the MOI regarding the rejection of the requests for international protection or status based on the non-existent legal basis of the 'security obstacle'

MOI, when rejecting an application for international protection, stay or citizenship based on 'the existence of an obstacle in reaching a positive decision' violates the Foreigners Act as well as the Act on International and Temporary Protection. Namely, both these acts clearly state in which cases a request for international protection or residence may be denied (e.g. danger to public order or national security, crimes against peace, war crimes or crimes against humanity, serious crime, violations of the goals and principles of the United Nations, etc.). Therefore, the MOI is obliged to explicitly state in its decision to which of the listed reasons for the exclusion a certain 'obstacle in reaching a positive decision' is linked to. It is significant that, in its decisions, the MOI uses only the term 'obstacle', while the Article 41 of the Security Vetting Act refers to a 'security obstacle'. It remains unclear why the term 'security obstacle' is not consistently used in decisions. The term 'security obstacle', and especially the term 'obstacle' is very vague and does not have to be linked to any exclusionary reasons mentioned in the acts. Stating only the 'existence of (security) obstacles' does not represent the legal grounds for rejecting the request.

3. MOI and SOA refusal to act on the basis of the Administrative High Court decision - continuation of possible arbitrary and unsubstantiated allocation of 'security-related obstacles' to foreigners and refugees

Having in mind that SOA, pursuant to Article 41 of the Security Vetting Act, only communicates an opinion on the existence or non-existence of a security obstacle to MOI, it is evident that MOI cannot establish whether a security obstacle is or is not relevant to the claim. This very provision allows for an arbitrary procedure of SIA regarding the qualification of the existence of a security obstacle putting MOI in the position where it reaches unlawful decisions. This is a paradox to which the Administrative Court pointed out in its decision Us-10359/2011-7 of 12 June 2014¹ where the court held that the *explanation of the contested decision according to which the defendant finds that the plaintiff does not respect the legal order of the Republic of Croatia*. Regardless of this decision of the High Administrative Court, SIA has not acted in line with the court's order in that procedure as well. Rather, SIA continues to apply this contradictory legal situation by adopting evaluations on safety obstacles without any elaboration. This opens a large field of arbitrarily for the work of both SIA and the MOI.

4. Proofs regarding the arbitrariness and unlawfulness of attributing 'security-related obstacles' to a refugee or a foreigner and unlawfulness of the practices undertaken by the Ministry in relation to reaching decisions concerning applications for international protection or the status based on documents classified as "LIMITED"

'Security obstacles' are defined in the Security Vetting Act (Articles 3 and 4) as well as in the Data Secrecy Act (Article 18). Article 3 of the data Secrecy Act stipulates that *safety obstacles during the implementation of the basic security vetting imply facts that ascertain the abuse or existence of risks from the abuse of a job or a duty, i.e. of certain rights or authorities that are harmful for the national security or interests of the Republic of Croatia*. Article 18 of the Data Secrecy Act defines safety obstacles (in the sense of that Act) as: *false statement of information contained in the questionnaire for the safety vetting, facts that are regulated as obstacles for the admission in the state service under special regulation and disciplinary sanctions stated as well as other facts that form the basis for doubt in the confidentiality or reliability of a person to deal with classified information*.

In the cases listed in this report we have noted a paradox: when SIA establishes a 'security obstacle' for a foreigner/refugee, it classifies it as "LIMITED" which is, pursuant to the Data Secrecy Act, the lowest category of the classification. As a degree of secrecy, *the term 'LIMITED' shall be used to classify information which unauthorized revealing might harm the activities and tasks of the state bodies performing their tasks as set out in Article 5² of this Act* (Article 9, The Data Secrecy Act). Therefore, 'security obstacle' that SIA attributes to a foreigner/refugee certainly is not related to the categories such as „national security and vital interests of the Republic of Croatia“(information regarding those terms are classified either as

¹ In the case U-IIIB-7838/2014 the Constitutional Court also refers to this decision of the High Administrative Court concerning the refusal of citizenship based on unexplained security obstacles.

² Article 5: With regard to the degree of endangering the protected values by the security classification levels referred to in Article 4 of this Act may be classified information among governmental bodies in the fields of defence, security and intelligence system, foreign affairs, public security, criminal proceedings and science, technology, public finances and the economy if the data are in the security interests of the Republic of Croatia.

VERY SECRET, SECRET or TOP SECRET)³. This raises concerns that SIA interprets 'security obstacle' extensively and arbitrarily, while MOI reaches unlawful decisions based on unreasoned decisions refusing the applications for international protection or the status in the Republic of Croatia filed by refugees/foreigners. If such 'security obstacles' were detected in the case of refugees/foreigners regarding the issue of national safety or the legal order in the Republic of Croatia (which would form the basis for MUP to reject the claim), they would have to be classified with the higher degree of secrecy (VERY SECRET, SECRET or TOP SECRET).

5. Violation of the Principle of Fairness and previous decisions of the Constitutional Court in similar cases

The inability of a foreigner or a refugee (as well as his attorney) to find out the reasons why the Republic of Croatia declares him/her as a certain security threat, puts the person in an unequal position to defend the charges. This opens up additional options for the arbitrary assignment of a security barrier.

The violation was also noted by the Constitutional Court in 1996, which in its decision number U-I-248/94 (Official Gazette 103/96) repeals parts of the provisions of Article 209 of the Act on General Administrative Procedure (Official Gazette 53/91) insofar as it provided for the possibility that the reasons do not have to be stated in the decision when it is in the public interest or explicitly provided by law or by decree. According to the Constitutional Court's assessment, the explanation of a particular decision *strengthens the principle of legality and acts against eventual arbitrariness. The explanation is the most suited mean to determine whether the administrative body has been guided by the principle of legality and has acted in such a way as to facilitate the protection of rights in the conduct of the proceedings and in the decision-making process and to ensure all parties that the exercise of their rights is not contrary to the public interest established by law.*

Also, by the decision No. UI-206/92 et al. of the Constitutional Court of 8 December 1993 (Official Gazette 113/93), the provision of Article 26 para. 3 of the Croatian Citizenship Act (Official Gazette 23/91 and 28/92) was repealed, which stated that the reasons for rejecting the application do not have to be stated in the explanation of the decision of rejection of the application for citizenship. In that decision, the Constitutional Court has already found that *by carrying out constitutional guarantees of appeal and controlling the legality of individual acts of administrative authorities, the administrative court is unable to perform its duty in the course of the administrative dispute if the decision does not contain a valid explanation, since it defines by way of explanation whether the administrative bodies have made a decision governed by the principle of constitutionality and legality and acted in such a way as to facilitate the protection of rights of the parties in the conduct of the proceedings and the decision-making process, in particular by ensuring that the realization of their rights is not in contradiction with the law.* Thus, in that decision, the Constitutional Court has warned that the effectiveness of a complaint cannot be expected in the case where the decision does not contain an explanation

³ Art. 7-9 of the Law on Classified Dana.

as to the essential reasons for rejecting the application, and also warned against the provision of international treaties which are contrary to such practice.⁴

The Principle of Fairness in the procedures described is also guaranteed by relevant EU legal instruments (e.g. Article 23 of Directive 2013/32/EU) and elaborated by the case law of the EU courts and the European Court of Human Rights. These courts in cases involving secret data require balancing the right to the protection of national security and the right to a fair trial.⁵ The necessity of balancing these rights and interests is also underlined by UNHCR referring to the principles of international law.⁶ It is envisaged that while activities in the interest of national security may, due to susceptibility of cases and potential implications to security justify less protective mechanisms for individuals, proceedings with less risk require greater protection mechanisms for individuals.⁷ The degree of data protection in these cases indicates that it is the lowest level of risk, which implies maximum protection mechanisms. Under the protection of the Principle of Fairness, the right to a hearing, the right to an effective remedy and the right to explain the decision are included.⁸ If these rights cannot be protected in full scope, compensation techniques are foreseen, such as the use of specially certified agents, unprotected summaries or a list of all documentation in a protected file.⁹

Contrary to international law, the UNHCR guidelines, the EU and European law and practices of domestic high courts, the principle of fairness is completely neglected and absolute protection is provided to classified data.

⁴ This paragraph is also cited by the Constitutional Court and in its recent decision U-III B-7838/2014 of 28 January 2015.

⁵ See, ECHR 10.07.1998., *Tinnely and McElduff et al. v. the UK*, no. 20390/92 i 21322/92, paragraph 77, ECHR 16.02.2000., *Fitt v. the UK*, no. 29777/96, paragraph 45.

⁶ Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, UN High Commissioner for Refugees (UNHCR), 2003.

⁷ ECHR 24.04.2008., *C.G. et al. v. Bulgaria*, no. 1365/07, paragraph 45.

⁸ Case T-85/09, *Kadi v. Commission* [2010], paragraph 151, *Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat v Council and Commission* [2008], paragraph 35 and 344, *Case T-85/09, Kadi v Commission* [2010], paragraph 151, *Case C-525/04 P, Spain v Lenzing* [2007]

⁹ ECHR; 19.02.2009., *A et al. v the UK*, no. 3455/05, paragraph 220, ECHR 16.02.2000., *Fitt V. the UK*, no. 29777/96, paragraph 47, ECHR 25.10.1996., *Chahal v. the UK*, no. 22414/94, paragraph 144.

Conclusion

Recently noticed increase in the number of rejections of applications for international protection and applications for regulating foreign status in Croatia is based on unlawful and arbitrary practices of SIA and MOI. It is to our greatest concern that these rejections are coming only few months after our organisations have documented violent treatment against refugees and push backs from Croatian territory. This might indicate continuation of repressive refugee policies directed to decrease the number of International protection applications and to lower possibilities to regulate legal residential status as refugee or foreigner in Republic of Croatia. In this report we have indicated many of unlawful, illogical and arbitrary practices conducted primarily by SIA and MOI which have to be suspended. Further, we would like to address all relevant authorities to take immediate steps and to reject any unlawful and arbitrary methods in work of security agencies. It is necessary to point out that arbitrary practices without providing explanations why applicants are considered to be threat for the security of the state have been applied not only to foreigners. Same practice has been related to security checks of citizens of Republic of Croatia in the past, where (security) obstacles were stated in the opinions. This is why it is even more important to approach this issue not only in the context of number of refugees applying for asylum, but also to consider the role of security service in democratic society.

Recommendations

1. We are calling on the President of Republic of Croatia and Prime Minister of Republic of Croatia to initiate investigation on unlawful and arbitrary practices of SIA regarding the 'security obstacles' in opinions regarding applications of the foreigners and refugees in Croatia.
2. We are asking the Internal Policy and National Security Committee at Croatian parliament to conduct supervision of practices of MOI and SIA based on this report, and to inform the public on its finding within 15 days.
3. We are asking The Croatian Parliament to appoint by the end of April 2017 a competent and uncompromised Committee for Citizens Oversight of security-intelligence agencies to finally secure citizens oversight of security services.
4. We are asking SIA to comply with the High Court's decision Us-10359/2011-7 of June 12, 2014, by which it is required to explain its assessment of the existence of a security obstacle to an individual.
5. We demand that the MOI, in accordance with the Act on Courts, respects the decisions of the Administrative Court that previously canceled the MOI's resolution after the court had inspected the SIA file and concluded that the security obstacle did not correspond to the reason for not granting the status.¹⁰
6. We demand MOI to incorporate to the current amendments to the Aliens Act the amendment of Art. 5 (pursuant to Constitutional Court decisions UI-248/94, UI-406/1994, UI-907/1994, UI-418/1995 and UI-206/92) to abolish the provision that gives SIA the legal possibility to without explanation, make a decision for refusing or terminating a stay for a foreigners for reasons of national security.
7. We request that the Security Vetting Act (Article 41) be promptly amended in part where SIA is not required to provide an explanation of its opinion on the existence or absence of a security barrier for aliens so that SOA is obliged to provide elaboration of its opinion (also in accordance with the decisions Constitutional Court UI-248/94 and UI-206/92 as well as the decision Us-10359 / 2011-7 of the High Administrative Court of 12 June 2014)
8. We call on MOI that as long as SIA does not explain its opinion about the (security-) obstacle for obtaining international protection or status of residence in the Republic of Croatia, the same opinion does not take into account.
9. We ask the MOI to comply with the provisions of the Aliens Act as well as the Act on International and Temporary Protection by specifying precisely the grounds for refusing appeals of refugees/aliens as stated in the relevant Laws (the basic security obstacle is not grounds for rejecting the application).
10. We call on the State Attorney's Office to take action on the basis of the findings of this report in order to sanction responsible persons for the detected illegality in the treatment of state bodies.

¹⁰ More on this case, see in the Report of the Ombudsperson for the year 2016, p. 56-57.