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Determination of Residence Status of Displaced Persons in Western Balkans Countries
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Prerequisite for Access to and Exercise of Rights

September 2014

The OSCE supported project “Fostering NGO Human Rights Network in the Western Balkans Region” resulted in the establishment of a network of civil society organizations in 2009.

The goal of this initiative is to strengthen links between specialized civil society organizations in the region, dealing primarily with forced migration related issues, through fostering civil society dialogue in the region and supporting networking at the local, regional and international level.

The capacity building of CSOs, participating in the network, enhanced their expertise in the area of international human rights law and improved their lobbying and advocacy skills.

The regular flow of verified information on the implementation of the states’ commitments related to the protection of forced migrants in the region enables network to jointly react when, and if any, deficiency in the protection of human rights occur.

The members of the network are: Balkan Centre for Migration and Humanitarian Activities – Serbia; Centre for Peace, Legal Advice and Psychosocial Assistance – Croatia; Centre for Peace, Non-Violence and Human Rights – Croatia; Group 484 – Serbia; Humanitarian Centre for Integration and Tolerance – Serbia; Initiative for Development and Cooperation – Serbia; Legal Centre – Montenegro; Praxis – Serbia; Serbian Democratic Forum - Bosnia and Herzegovina; Your Rights Bosnia and Herzegovina.

Introduction

The right to freedom of movement and the right to choose permanent or temporary residence, that is: the right to establish residence in a locality within the borders of a state, is one of the fundamental rights of every human being. As such, this right is guaranteed by numerous international instruments for the protection of human rights. States have the obligation to observe and ensure the exercise and enjoyment of this right. The right of the state to place restrictions on the exercise of this right is just an exception, not a rule, and may only be applied when absolutely justified and necessary (e.g. in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of public health or morals, or for the protection of the rights and freedoms of others). Any such restrictions of rights must be placed in accordance with the law, and carried out without any discrimination whatsoever, in conformity with the principles and standards for the protection of human rights.

While it may be considered and discussed as a distinct human right, due to the fact that human rights are interrelated, interdependent and indivisible, it is necessary to view the right to freedom of movement and the right to choose domicile (place of permanent residence) in the context of the right to access to, and exercise and enjoyment of almost the entire range of human rights: political and civil rights, as well as economic, social and cultural rights. The right to freedom of movement and the right to choose domicile (place of permanent residence) is of particular importance in regulating access to and protection of rights of different types of forced migrants, such as refugees, internally displaced persons and asylum seekers.

Domicile (Permanent residence – place of permanent habitation)

Domicile is the relation which the law creates between an individual and a particular locality or country. It is the legal conception of home. The term domicile fully reflects this, as it is derived from the Latin term *domus*, which means a home or dwelling house.

Domicile is the place where one has established his or her true and fixed home, and place of his or her permanent habitation, to which he or she has the intention of returning, whenever he or she is absent. Domicile entails two elements: physical presence in a locality in a state, and the intent to remain there permanently, i.e. indefinitely - *animus manendi*.

Domicile is also the place where an individual exercises his or her political, civil, social, economic and cultural rights.

Source: <http://domicile.uslegal.com/>

Taking the still unresolved problems of forced migrants in the territory of Western Balkans and the importance of the right to freedom of movement and residence as a starting point, a

network of non-governmental organizations from Bosnia and Herzegovina, Montenegro, Croatia and Serbia set out to analyze the relevant national legal frameworks and, in accordance with these frameworks, the position of displaced persons when it comes to access to human rights in these countries. This joint analysis puts an emphasis on determination of the status and practicability of residence registration, that is: registration of places of permanent or temporary residence of displaced persons in Western Balkans countries, as the key prerequisite for rendering possible to these individuals adequate access to other human rights. Taken into consideration were the facts concerning the change in the state-legal, i.e. international status of former federal units of former Yugoslavia, that is, the creation of new national states, and the obligation of these newly established states to harmonize national legal frameworks with the relevant international standards for the protection of human rights, as well as to bear in mind the fact that conflicts of the recent past brought about mass displacement of population in this territory, which generated the specific situation and vulnerability of displaced persons.

This document contains the key findings of the joint regional analysis of current status and situation of displaced persons in four countries. The subject matter is not analyzed in relation to each individual state, but is viewed from regional perspective, with the emphasis on the obligation of states to ensure the exercise and enjoyment, and protection of human rights.

Principal international standards – freedom of movement and right to residence

The right to freedom of movement and residence is regulated and guaranteed in the United Nations *Universal Declaration of Human Rights*. Article 13 of the Universal Declaration stipulates that everyone has the right to freedom of movement and residence within the borders of each state, as well as the right to leave any country, including his own, and to return to his country. The same right is guaranteed in Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, and in Article 12 of the *International Covenant on Civil and Political Rights*. The right to freedom of movement is also established in Protocol IV to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* which, in Article 2, stipulates that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his or her residence, and that everyone shall be free to leave any country, including his or her own.

The right to freedom of movement and residence is guaranteed to forced migrants with refugee status in Article 26 of the *Convention relating to the Status of Refugees*, which prescribes that each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Due to the specific situation of displaced persons in the territory of Western Balkans, taking into consideration the changes in state-legal status, as well as the conflicts and mass

displacement of population in the territory of former Socialist Federal Republic of Yugoslavia, also relevant for this target group is the *European Convention on Nationality*.¹

Rights dependent on previous determination of temporary residence/domicile

National legislation of countries successors of former Yugoslavia differentiate between the conceptions of permanent residence (domicile) and temporary residence. The nature, scope and manner of exercise of particular rights are directly dependent on the type of residence. The type of residence indicates the degree of the relation between an individual and the territory of a particular country; and the stronger this relation is, the greater is the scope of rights the individual can enjoy. Namely, by determining his/her temporary/permanent residence in accordance with the law, an individual establishes a certain, stronger or weaker, relation between him/herself and a particular country, as well as a certain place in the territory of the country where he/she established residence. The scope of this relation established between an individual and a particular place of his/her residence, and ipso facto the scope of exercise of particular rights depend on the type of determined residence, namely whether an individual established and acquired the status of permanent residence (domicile), or some other type of residence. Certain types of residence, e.g. permanent residence (domicile), have become the attribute and determinant of nationals of that particular country.

A distinction has become evident between the scope of rights enjoyed by individuals who are nationals of the country and have registered domicile (permanent residence) there, in relation to that of individuals who have been granted some other legal basis for determining their residence within the territory of that country (temporary residence, or permanent residence permit). Fundamental civil and political rights conditioned by previous determination of permanent residence (domicile) of displaced persons who are nationals of the country within the territory of which they wish to register domicile (permanent residence) encompass the right to vote and to be elected at genuine periodic elections, to take part in the government and conduct of public affairs, as well as the right to access to public service. In that sense, determination of permanent residence (domicile) status is of particular importance and represents a key prerequisite for the exercise of these rights at the local level, that is, in the local self-government unit in the region where the individual has registered permanent residence (domicile)

National legislations define permanent residence (domicile) as a place (and address) within which an individual establishes his/her habitual place of living with the intent to remain there permanently and satisfy his/her vital interests, and *ipso facto* to exercise his/her rights. In the countries of western Balkans, the conditions prescribed by law for permanent residence (domicile) registration require that the applicant, in addition to expressing his/her intent to

¹ Until September 2014, European Convention on Nationality was ratified by Bosnia and Herzegovina and Montenegro, in which countries the Convention is in force. Croatia signed the Convention in 2005, but did not ratify it, while Serbia neither signed, nor ratified the Convention. See at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=166&CM=&DF=&CL=ENG> (accessed on 12 September, 2014)

permanently settle in a particular locality, submit documentation proving his/her ownership of an apartment or house, or some other legal basis for the use of that accommodation.

Unlike domicile (permanent residence), the conception of temporary residence is characterized by the intention and fact of residing temporarily in a certain locality, which is located outside of the place of domicile. In accordance with the law, every country national, as well as every foreign national staying in the territory of that country may register temporary residence. Relevant national legislation stipulates that a person who is a national of that country, may, in addition to registered domicile, also have registered temporary residence, but may not have two registered domiciles at the same time.

Numerous difficulties when it comes to the access to rights were caused by the fact that individuals belonging to some categories of citizens, especially those most in social need, were unable to meet the requirements for domicile and temporary residence registration, due to the fact that they did not own property and had no means to afford to use accommodation in accordance with some other legal basis. As local jurisdiction of national authorities is in most cases based on the place of permanent residence (domicile), numerous aspects of citizens' lives are linked to that very place, and registration of permanent residence (domicile) is of utmost importance for their access to rights. Issuance of identification card, registering for health insurance, exercise of the right to social protection, registration at the employment bureau and assistance in finding employment are only some of the segments of life where permanent residence (domicile) plays a key role and which may have huge impact on each individual's life.

In some countries, registration of permanent residence (domicile) is also important in order to exercise the right to be entered into birth registry, and *ipso facto* to exercise the right to citizenship, so as to prevent statelessness.

National public policies and control mechanisms

With regard to permanent residence (domicile) of citizens, national public policies and relevant legislation of the countries which were the subject of this analysis are aimed at determination and establishment of the actual relation between an individual and his/her registered permanent residence (domicile). The intent of the state is evident to take action and start de-registering "fictitious" domicile, that is, registrations of permanent residences where registered individuals do not actually reside. The most frequently stated key reasons for such action are problems which are related to exercise of rights and fulfillment of obligations deriving from domicile registration, including the right to vote and be elected at local elections for local authority representatives held in the places where such individuals "fictitiously" reside. In connection with this, legislation in some countries provides for the possibility that the competent authority may *ex officio* de-register permanent residence (domicile) of individuals who do not actually reside at their registered domicile address, even without the request of the individual in question to do so, which previously was not the case.

While the reasons given for the necessity to reconcile the data contained in registries of permanent and temporary residence of citizens with the actual state of things may be considered justified, a question arises of the purpose and true objective for the implementation of said national policies at this point in time, bearing in mind that problems of displaced persons in the territories of Western Balkans countries still remain unsolved. Namely, those forced migrants who expressed their interest and wish to return are still unable to return and re-establish permanent residence in the places of their pre-conflict domiciles, because long-lasting solutions and sustainable return to those places have still not been made possible. By taking this approach some countries ignore the special needs of forced migrants, refugees or displaced persons, including their guaranteed right to freedom of movement and to choose a place of residence.

After the relations between the newly created states in the territory of Western Balkans were normalized, displaced persons were, in most cases, able to obtain personal documents containing their pre-conflict permanent residence address. The states were issuing new personal documents on the basis of registered domicile to refugees and displaced persons who are their nationals, despite the fact that these individuals did not actually live, that is, reside at those addresses at that point of time. The reason behind such actions was the fact that the conflicts caused massive destruction or damage of housing properties, rendering them inhabitable. Some houses were temporarily occupied because other displaced persons were living in them. In some countries displaced persons were permanently deprived of the legal basis to use a number of housing units. It is practically impossible to determine with any accuracy the true number of real, let alone potential, returnees to their former places of permanent residence (domicile) and the addresses where they are formally registered to this date. The reason for this lies in the fact that a number of formally registered returnees never actually returned because long-lasting housing solutions and sustainable return were not secured. In connection with this, already completed as well as announced changes of legislations regulating the matters of permanent residence (domicile) and temporary residence of citizens have caused controversy and raised concerns among one part of the public because of radical changes made to the so far distinctly liberal provisions concerning domicile and temporary residence registration, as these changes are deemed to produce negative effects on the exercise of rights based on domicile for certain groups of displaced persons residing outside of their country of origin (refugees and former refugees), but also those living in their countries of origin (internally displaced persons). At this moment, based on current national legislations, it is not possible to determine with absolute certainty how their implementation will affect the exercise of the right of displaced persons to freedom of movement, on their domicile and temporary residence registration, and ipso facto, the enjoyment of all other rights in the territory of Western Balkans. In many cases, the very quality of the relevant legislation is disputable, first and foremost because it leaves room for different interpretation of provisions and because of inconsistencies in their application. Consequently, it is not possible to adequately envisage the impact of their implementation on the exercise of rights for different categories of displaced persons. Thus, for instance, in some countries where essential breakthrough has been made in relation to individuals who do not own property to make it possible for them to register permanent residence (domicile), the relevant regulation,

as has been demonstrated in practice, does not allow domicile registration to displaced persons who still have registered domicile in the place of their pre-conflict permanent residence, irrespective of their expressed wishes or possibility to return. On the other hand, in relation to access to rights based on permanent or temporary residence, it has been known that in some countries different administrative and politico-territorial regions in the country have the right to autonomously regulate matters within their exclusive competences, or within those competences which they execute jointly with higher government authorities. Consequently, this leads to different treatment of citizens who are in the same situation, which causes legal insecurity and creates room for arbitrary actions of competent authorities.

Quite a distinct problem is that related to the return of individuals who prior to the conflicts permanently resided in the territories of particular countries, but who do not meet the requirements for the acquisition of citizenship in accordance with the laws of newly created countries. Although it may be pointed out as an example of good practice that, when it comes to provision of necessary evidence for permanent residence permits, the states have recognized their particular position in relation to other categories of foreigners, so that these individuals have been exempt from the obligation to provide evidence that they have secured accommodation, means to support themselves and health insurance. In some countries administrative fees have also been lowered, as they used to be too high and hindered the exercise of right to permanent residence. However, it has been known that some countries obstruct or make impossible the return of individuals who, in former Yugoslavia, had registered domicile in their territory. Namely, national legislation does not allow for them to establish the status of foreigners who have been granted permanent residence permit. Consequently, their chances for the acquisition of citizenship of the country in question have been limited. Most often, the main reason given for such practice by some states is that the individual did not pass security checks. As there is no access to the facts based on which the (unfavorable) decision has been issued, nor are there effective mechanisms in place for the control of legality of such individual acts, a door remains wide open for the competent authorities to base their decisions on arbitrary assessment of the fulfillment of security check criteria.

In lieu of conclusion

Bearing in mind this overview of the exercise of the right to freedom of movement and freedom to choose residence (whether permanent or temporary) in the countries of West Balkans, the key question remains whether, and to what extent, national public policies meet the main objectives they set out? Also, it only seems justified to ask whether the interests satisfied through the implementation of these public policies and legislations are in proportion with other proclaimed public interests and objectives, having in mind the still existent vulnerability of various groups of displaced persons in Western Balkans, and impeded exercise of their right to freedom of movement and freedom to choose residence, including the right to free and sustainable return? The question arises what the real reasons are for the adoption and implementation of new legislation regulating the matters of permanent and temporary residence of citizens, knowing that the efforts of Western Balkans countries aimed

at finding a long-lasting and final solution for the status of displaced persons have still not been brought to an end?