



**Implementation of the International Convention on the Protection of the
Rights of All Migrant Workers and Members
of Their Families, Initial Report of Bosnia and Herzegovina:
Statement by the Ombudsmen of Bosnia and Herzegovina**

**A. GENERAL COMMENTS: Introduction, Constitutional Framework and
Data Collection**

1. Many of the problems relating to the status and enjoyment of rights of migrant workers and members of their families are related to the political and administrative structure and the general context for human rights protection in Bosnia and Herzegovina (BiH). To illustrate the impact of this in practice, the Ombudsmen of BiH will focus on the lack of harmonization of the legislation on citizenship; movement and residency of foreigners and asylum and legislation which regulates the rights on work, health, education and social protection of migrant workers and members of their families.

2. The Initial State report reflects the complexity of the constitutional framework of the country. The Dayton Peace Agreement (DPA) has served both as a peace agreement and a constitutional framework for BiH (BiH is composed of two entities). The result was a complex administrative structure with inadequate and unclear division of responsibilities. One of the entities is centralised – The Republika Srpska (RS), while the other is a highly decentralised federation of ten Cantons - the Federation of BiH (FBiH).

3. The Constitutional framework provides full state responsibility for the issue of movement and stay of aliens while the entities are responsible for the issue of economic and social rights, including regulation of employment of aliens. Whilst in legal terms the State has liability for promotion and protection of those rights, the two entities have real and primary authority in that respect. Responsibilities, including financial responsibilities, are then allocated further down to Cantons and/or municipalities. This results in a complex division of power between the various levels of authority, and a lack of coherence and equity in policy, law and implementation. This is particularly visible in the lack of harmonization of The Law on Movement and Stay Aliens and Asylum of BiH and the legislation on economical and social rights of foreigners, including their rights on employment which is entity responsibility.

4. As it was pointed out in the Initial Report, there is a problem with data collection related to the migrant workers rights and rights of their family members. Particularly, this can be seen from the answer of the BiH authorities on the question No. 1 of the Committee. The state reported that in 2008, 1779 residency statuses based on issued working permits were given, while at the same time in Federation of BiH 1.650 working permits to aliens were issued and 129

residency statutes based on working permits in the Republika Srpska and Brčko District, which indicates to a certain disproportion of migrant workers' residences in particular parts of BiH.

B. MAJOR CONCERNS

I Concerns related to Articles 2,3,4,5 and 6 of the Convention

1. In the legislation of BiH which regulates rights of aliens in the period after ratification of The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families significant changes that did not include provisions ensuring application of provisions of Articles 2,3,4,5 and 6 of The Convention which regulates the issue of definition were made. In this way terminological confusion that in practice negatively reflects on a different treatment of migrant workers due to lack of a precise legislation definition was created. This fact has a significant dimension especially taking into account a number of normative documents which were adopted by a member state¹, which clearly shows that activities on raising either public awareness regarding the Convention or awareness of competent institutions in order to ensure implementation of the Convention were not taken.

II Concerns related to ensuring fundamental human rights (Article 8-56 of The Convention)

2. Certain specificities concerning BiH which can not be observed individually because of their complexity directly reflect on rights of migrant workers and members of their families. This is primarily related to naturalised citizens of BiH who entered into certain family and business relations by obtaining citizenship.² By reviewing of citizenship, a significant number of naturalised citizens, especially of Asian African origin were stripped of their citizenship, and after they were denied of their residence and a decision on their expulsion was brought or a status of an alien was determined again.

3. Court protection is ensured for the persons stripped of their citizenship, but it has to be noted that such kind of protection is not effective, because of a long duration of proceedings along with often remanding of cases for reconsideration to administrative organs, in this concrete case to Ministry of Security of BiH. Aliens that approach Ombudsmen of BiH emphasized that there was violation of the right to public hearing, since they were neither allowed to personally investigate allegations which represent basis for depriving them of their right to residence or bringing a decision on placing them under supervision nor to personally explain reasons of bringing the charges in administrative dispute, as a form of court protection.³

4. Even though changes and amendments in The Labour Law of the Republika Srpska were made after ratification of The Convention, these changes did not

¹ The member state reported on interventions in legislation via response to question no. 2 of The Committee

² A large number of naturalised BiH citizens got married with BiH citizens, got children, acquired property, got employed or started their business

³ Frendi Omar and Imad Al Husin cases

ensure harmonisation of The Labour Law with the Convention. In Federation of BiH The Labour Law was not amended at all after ratification of The Convention, which means that a certain level of incompatibility between entity legislation regulating the labour field also exists, that is certain issues are not defined in legislation in the same way, which may lead to different treatment of aliens.⁴

5. The fact that a Decision on Quotes, whose legal basis is The Law on Movement and Stay Aliens and Asylum of BiH, not the law regulating the issue of employment of aliens, is brought represents a special concern. In fact, minimum of mutual standards related to employment of aliens are not established on the level of BiH, but this issue is regulated by entity laws on employment of foreigners and The Law on Employment of Foreigners of Brčko District⁵. These laws are not mutually harmonised, also their harmonisation with The Law on Movement and Stay Aliens and Asylum of BiH failed, so that alien is required to have a regular status in order to get a working licence, and in the same time an alien has to have an issued working licence for regulating residency status. This kind of legislative regulation gives a possibility for various misuses.

III Concerns related to Immigration centre

6. Aliens under supervision in Immigration Centre are not provided with minimal human rights standards. It is necessary to emphasize that the Centre is of temporary character which does not provide a separate accommodation on the basis of gender, age, family situation.⁶ There is only a separateness of barracks for men and women. In the Centre there is no space intended for intimate contacts, which has a significant effect on the family life of the accommodated person, and also on health, taking into account that some persons are in the Centre for longer than 16 months. There is no space intended for performing religious rituals, accommodated persons are solely able to perform them in the premises in which they are accommodated, which represents the obstacle reasoning that there are several persons with different cultural, religious and other habits accommodated in one premise.

7. In the Centre, the access to legal aid is made more difficult since an accommodated person has a right to one phone call, and a problem occurs if a diplomatic-consular representative body of a country of origin of an alien accommodated in the Centre is located outside BiH territory, since additional administrative procedure is necessary for international phone call to be approved, which takes additional time. Time represents a significant factor considering the fact that deadlines regulated by the law in relation to the procedure of expulsion are short and strictly set.

⁴ In B&H there is The Labor law for Institutions of BiH. According to their Constitutions, the entities of the Federation of B&H and Republika Srpska have adapted the laws from the field of labor relations – the FB&H Labor Law (Official Gazette of the Federation B& H no.43/99) Having in mind that the Labor Law of RS since adoption of a basic text has been changed many times (Official Gazette of RS, No. 38/00, 40/00, 47/02, 38/03, 66/03 and 20/07), the Government of Republika Srpska made a final text of the Law (Official Gazette of RS, No. 55/07) incorporating all changes.

⁵ The Law on Employment of Foreigners, (Official Gazette of the Federation of BiH, No. 8/9). The Law on Employment of Foreigners of the Republika Srpska, Official Gazette of the Republika Srpska, No. 97/04, 96/05 and 126/06, The Law on Employment of Foreigners of Brčko District, adopted in November 2002).

⁶ BiH ombudsmen visited the Immigration Centre on March 12, 2009 upon complaint of Al Husin

8. An obscurity in the application of Article 102 paragraph 5 of The Law on Movement and Stay Aliens and Asylum of BiH which regulates a possibility of bringing “ A Decision on exceptional extension of supervision” ensuring an extension of supervision under an alien for longer than 180 days, without clearly defined criteria, represents a great concern. In administrative dispute initiated by an alien after using a regular legal remedy for a decision on exceptional extension of supervision, the rights of a representative are limited and a procedure is unclear.⁷

9. Aliens put under supervision in the Centre are not able to use computer as a tool in making written application, unless they have a lawyer.⁸

10. Aliens deprived of residence are not provided with free legal aid unless they applied for asylum.

11. In proceedings against aliens, retaining of aliens’ personal documentation is visible

IV Concerns related to informing the public of the Convention (Article 33 of The convention)

12. In its response to the question no. 6 to the Committee, the competent organ point to measures undertaken in relation to provisions of the Convention on the Protection of the Rights of All Migrant Workers which shows that these measures were mainly directed towards police forces, while it failed to carry out the activity regarding informing legislative and executive authorities of the importance and obligations from the Convention, considering that these bodies are responsible for issues of economic, social and cultural rights, resulting in more difficult access to those rights, especially when it comes to employment, health care and education.⁹

C. RECOMMENDATIONS

Bearing in mind all expressed concerns related to application of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and with the aim of enhancing the rights of a mentioned group, ombudsmen of BiH are of the opinion that the following should be considered necessary:

⁷ A decision on exceptional extension of supervision of Ministry of Security -The Alien Affairs Service No. UP-1/19.4.1-07.3-12-7/08 dated March 26, 2009, in the instruction of legal remedy; it is pointed to a possibility of lodging a complaint to Ministry of Security of BiH within 24 hours since a receipt of decision, what Imad Al Husid used. Considering that second instance organ did not act upon a complaint within 24 hours, plaintiff brought an action in administrative dispute, in accordance with Article 101, paragraph 3 of the Law on Movement and Stay Aliens and Asylum of BiH. However, in administrative dispute, representative of a plaintiff was refused to ask questions, just a hearing was held what is in contrary with a Decision of the Constitutional Court of BiH, AP 236/03 dated April 15, 2004, where Court found violation of right to public hearing from the Article 6 of the European Convention

⁸ While visiting the Centre, Ombudsmen were informed that in the Centre there is neither computer that could be used by aliens, nor they were allowed to use their own laptops. Aliens placed in the Centre did not ask for internet connection, but solely to use computer as a technical tool.

⁹ BiH Ombudsmen, Special report regarding complaints related to application of The Law on Movement and Stay Aliens and Asylum of BiH, Banjaluka, October 14, 2005

1.To immediately undertake measures with the aim of eliminating all obstacles in enjoyment of fundamental human rights of aliens located in the Immigration Centre, and to clearly define criteria under which an alien may reside in the Centre for longer than 6 months.

2.To start with legal regulation of issues of employment of foreigners while creating principles which will guarantee the equal treatment in process of employment in BiH, and ensure harmonisation of a process of employment of foreigners with provisions of The Law on Movement and Stay Aliens and Asylum of BiH.

3. The assessment of harmonization of legislation which regulated rights of migrant workers with the Convention should be taken and based on analysis; steps for its harmonization should be also undertaken.

4. The State party should regulate migrants workers rights, using the definitions prescribed by the Convention

5. The state party should undertake action for harmonization of the Law on movement and Stay Aliens and Asylum with the Convention;

6. Increasing public awareness on Convention is one of the priorities; particularly government officials should be a target group.