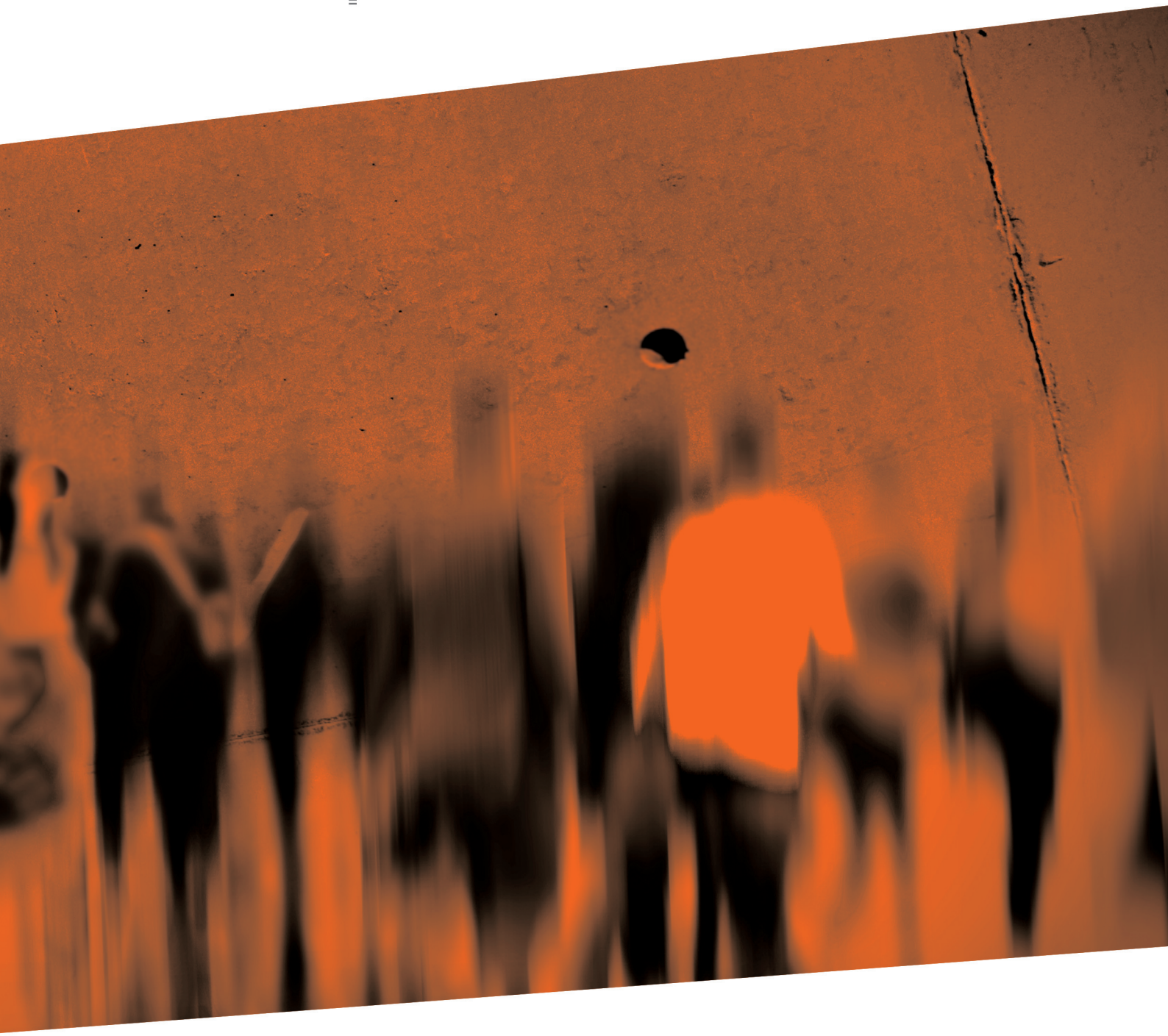
(IN)VISIBLE IN THE MIGRATION FLOW IN THE REPUBLIC OF SERBIA

The issue of registration of migrants' children in registry books and the protection of stateless persons



Grupa 484

CENTAR za MIGRACIJE
GRUPE 484
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INTRODUCTION

As a social category, statelessness has found its place both in the international and in the national legislation of every state. From the internal point of view - through the right to citizenship, that is, through the confirmation of the sovereignty of states, and from the international point of view, as the human rights legislation, a reaction of the international community to the specific status of stateless persons. Thus, with the entry of international legislation into the domain of this problem, the idea is "promoted" that states should commit themselves to find, by reforming the right to citizenship, appropriate instruments that will effectively influence the reduction of the number of stateless persons, as well as help decrease the number of new stateless persons. The international community is striving to use its legal instruments not only to improve the status and position of stateless persons by "extending" the list of available rights, but also to determine the modes and measures, the application of which would lead to the reduction of statelessness as a phenomenon, including direct involvement of states in taking measures with the aim of preventing the spread of statelessness.

This conclusion became particularly important in the second half of 2015, when the refugee-migrant crisis dominated European headlines, as a record number of 1.2 million refugees and migrants arrived to the region. In this context, another problem was identified by the international community - the risk of a "stateless generation" being born in the crisis. At a time when the international community is working to reduce statelessness at a global level, the refugee-migrant crisis poses a particular challenge to exercising the rights of every child, including the right to acquire citizenship.

According to statistics, about 3% of the total number of asylum seekers in the EU in 2015 faced the problem of statelessness. According to Eurostat data, 19,605 persons were registered as stateless persons, while 22,140 persons were of "unknown citizenship".[1] At the same time, it is well known that the majority of countries the largest number of refugees and migrants came from, already have a significant number of stateless persons or gender-discriminatory regulations on citizenship.

The Republic of Serbia also faced this issue, and its geographical position on the *West Balkan route* resulted in 577,995 expressed intentions to seek asylum in 2015,[2] 12,821 in 2016,[3] while in 2017 this number was 6,199.[4] Within these figures, there was a large number of children who were born on the territory of Serbia in the previous period, and whose birth had to be registered in the registry books, so that they could obtain the status and the rights and obligations they were entitled to.

In this document, the greatest attention will be paid to the issue of registering the birth of migrant children born on the territory of the Republic of Serbia in the registry books, as well as to potential risks and problems that can arise during this process, in order to define the proposals for further improvement of the registration practice, as well as for the regulation of the status of these individuals and their protection. Additionally, comparative solutions offered by countries concerning the recognition, protection and accompanying corpus of rights and obligations of persons who are identified as having the characteristics of stateless persons, will also be considered. Finally, proposals will be made to improve the legislative framework and practice established in R. Serbia.

1 http://www.worldsstateless.org/continents/europe/europes-refugee-crisis

2 www.unhcr.rs/.../2015/.../Asylum-seekers-current-situation-21-August-2017-SRB.xlsx

3 http://www.asylumineurope.org/reports/country/serbia/statistics

4 https://reliefweb.int/sites/reliefweb.int/files/resources/61703.pdf

OVERVIEW OF THE INTERNATIONAL LEGAL FRAMEWORK

Although there is a large number of sources of legislation regulating this matter, this document will provide an overview only of the most relevant international and regional instruments pertaining to the status and protection of stateless persons.

By all means, the most important instrument adopted internationally in this area is the ***Convention relating to the Status of Stateless Persons*** (1954),[5] which aims to regulate and improve the status of stateless persons, and to provide this category of persons with guarantees for exercising the basic rights and freedoms without discrimination. It has been emphasized that the ratification of the Convention by a state does not mean that persons born and having residence on the territory of that state would be granted or would acquire citizenship. Also, the Convention gives the definition of stateless persons, the so called *de iure* stateless persons, making a distinction from *de facto* stateless persons, that is, persons without effective citizenship.

A turning point in the international approach to the treatment of statelessness as a legal category was the ***Convention on the Reduction of Statelessness*** (1961),[6] the implementation of which required a change in the attitude of states towards the causes of statelessness, as well as concrete measures that states should introduce into legislation and practice. Several provisions of the Convention seek to avoid statelessness at birth, and to ensure the right of children to citizenship. Also, the Convention potentially resolves the conflicts between laws that result in an increase of persons in the abovementioned category. Namely, the causes of the occurrence of statelessness in this context arise from different regulation of certain situations, that is, the internal legislation of the state and its regulations on citizenship, which concern the individual, as well as the lack of simultaneous termination of one and acquisition of another citizenship.[7] If a change in personal status (marriage, divorce) would also bring about a change in citizenship status, the Convention "requires" that the mentioned loss or termination be possible only if it is conditional on the acquisition of another citizenship. This further means that depriving an individual of citizenship is not permitted if it would mean that this person becomes stateless. In this way, the Convention seeks to eliminate cases in which the loss of citizenship may occur (without being conditional on the acquisition of another), that is, to remove, as much as possible, the reasons for conflicts between laws, and to reduce future cases of stateless persons, as well as any consequences that such a status entails.

In this regard, when it comes to a child's citizenship, in addition to the aforementioned conventions, in particular the 1961 Convention, whose articles 1-4 are precisely aimed at preventing statelessness at birth, the provisions of the ***International Covenant on Civil and Political Rights***[8] are also important, as they stipulate that every child, immediately after birth, must be registered in the birth registry book and must bear a name, and that every child has the right to acquire a citizenship.

The Convention on the Rights of the Child (1997)[9] is also of particular importance, as it accepts almost universally the right of the child to acquire citizenship, a right the child is entitled to by birth. Also, the Convention stipulates that after birth the child will be immediately registered, and that it will have the right to a name. In addition, Article 7 provides for the enforcement of these rights by each signatory state, in particular in cases where the child would otherwise be stateless. This article specifically requires

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5 Regulation on ratification of the Convention relating to the Legal Status of Stateless Persons, *Official Gazette of the FPRY - International Treaties and Other Agreements*, no. 9/59

6 http://www.unhcr.rs/media/61ConventionStatelessnessSerbian.pdf

7 *Spone međunarodnog i uporednog prava* (Links between international and comparative law), V. Čok, Belgrade 2010, p. 122

8 International Covenant on Civil and Political Rights, *Official Gazette of SFRY*, no. 7/71

9 Law on Ratification of the UN Convention on the Rights of the Child, *Official Gazette of SFRY - International Treaties*, no. 15/90 and *Official Gazette of SFRY - International Treaties*, no. 4/96 and 2/97

the registration of the fact of the birth of every child, irrespective of citizenship, statelessness or the status of his/her parents in terms of residence.

The ***Convention relating to the Status of Refugees*** (1951),[10] in the very definition of the notion of refugee, emphasizes that a refugee may, but does not have to be a citizen of any state, but that it is crucial that such a person has a well-founded fear of persecution on any grounds provided for in the Convention. With the adoption of the Convention, stateless persons, that is, persons without citizenship, also "encounter" the definition of a refugee, that is, that by fulfillment of certain conditions, they may become beneficiaries of international protection regardless of their citizenship status.

Although not legally binding, the ***UNHCR guidelines*** on various aspects of statelessness are also of great importance, as one of the components that shape the legislation and practice of countries, by including the definition of stateless persons,[11] procedures for determining whether a person is stateless,[12] the status of a stateless person,[13] as well as the prevention of statelessness by birth,[14] thus interpreting the provisions of the 1954 Convention in the light of international human rights standards.

The ***European Convention on Nationality*** (1997),[15] although not ratified by the Republic of Serbia, contains a number of provisions on the prevention of statelessness. According to the provisions of the Convention, acquiring multiple citizenships is allowed to spouses who have different citizenship, as well as to their children. The Convention also contains provisions aimed at preventing statelessness. Concerning the definition of a stateless person, the Convention refers to the definition given in the Convention relating to the Status of Stateless Persons, which means that its provisions pertain only to *de iure* stateless persons. The obligation of avoiding statelessness, which is included in the basic principles, as well as the prohibition of arbitrary deprivation of citizenship (Article 4), is emphasized.[16]

OVERVIEW OF THE DOMESTIC LEGAL FRAMEWORK

The Law on Citizenship (2004)[17] (hereinafter: LoC) regulates the issues of acquiring and termination of citizenship of the Republic of Serbia, the procedure for acquiring and termination, the competence to conduct the procedure and pass decisions in the administrative procedure, as well as the manner and supervision of record keeping. Although the Law traditionally envisages *Ius sanguinis* (by origin) as the way of acquiring citizenship, it also gives the possibility of acquiring citizenship by birth, based on *ius soli* as a subsidiary/supplementary way of acquiring. Thus, in addition to the possibility of acquiring citizenship of the Republic of Serbia by origin, Article 13 of the Law, in order to prevent statelessness among children born in Serbia, stipulates the acquisition of citizenship based on the principle of "the right of the soil". Harmonization of regulations with international standards is a necessary step in ensuring and respecting a right, but the exercise of this right can be aggravated by inappropriate implementation of regulations. In the opinion of some authors, LoC provides broader protection than the one provided by the 1961 Convention. The Republic of Serbia is among the few European countries

10 The Convention relating to the Status of Refugees *Official Gazette of SFRY - International Treaties*, no. 7/60

11 http://www.refworld.org/docid/4f4371b82.html

12 http://www.refworld.org/docid/4f7dafb52.html

13 http://www.refworld.org/docid/5005520f2.html

14 http://www.refworld.org/docid/50d460c72.html

15 https://rm.coe.int/168007f2c8

16 Article 4 of the Convention states that the rules on the citizenship of each contracting state should be based on the principles that each person has the right to a citizenship, that statelessness should be avoided, that no one may arbitrarily be deprived of citizenship, and that neither marriage nor divorce of a national of a contracting state and a foreigner, or a change in citizenship of one of the spouses during marriage, may automatically affect the citizenship of the other spouse.

17 Law on Citizenship of the Republic of Serbia, *Official Gazette of RS*, nos. 135/04 and 90/07

whose citizenship regulations contain all the safeguards necessary for the prevention of statelessness.[18] Although pursuant to the Law, that is, on the basis of this Article, the citizenship of the Republic of Serbia is automatically acquired, the practice shows that difficulties arise in connection with the interpretation and application of the aforementioned Article of the Law, since the citizenship of the Republic of Serbia is not automatically acquired, that is, citizenship is not recorded at the moment when birth is entered in the records, and is rather preceded by the submission of a request, on the basis of which, subject to certain conditions, a constitutive act of the competent authority is passed, on the basis of which the child acquires the citizenship of the Republic of Serbia.

The Law on Asylum (2007),[19] prescribes the principles, conditions and procedure for obtaining and terminating asylum, as well as the position, rights and obligations of asylum seekers and persons who have been granted the right to asylum in the Republic of Serbia. When stateless persons are concerned, the provisions of this Law are relevant in the matter regulating the asylum procedure in the Republic of Serbia, as well as from the aspect of registering the birth of children of migrants or refugees that occurred on the territory of Serbia. In the definition of the term refugee given by the Law, it is stated that: "The refugee is... as well as a stateless person who is outside the state of his/her previous permanent residence and who cannot, or does not want to return to that country because of fear."

The Law on Foreigners (2008)[20] regulates the conditions for entry, movement and stay of foreigners, and the jurisdiction and tasks of the state administration authorities of the Republic of Serbia in connection with the entry, movement and stay of foreigners on the territory of the Republic of Serbia. Article 2 stipulates that the provisions of the Convention relating to the Status of Stateless Persons shall apply to stateless persons, if the Convention is more favorable to them. The provisions of the 1954 Convention relating to the issue of travel documents for stateless persons were implemented in the provisions of the Law on Foreigners, which stipulates, in Article 60, that a travel document for a stateless person shall be issued by the competent authority, according to the place of permanent residence or residence of the stateless person, in compliance with an international agreement, with a validity period of up to two years. However, the provisions of the Law have not yet found their application in the legislation of the Republic of Serbia, since no travel document has been issued so far for a stateless person.

The ***Law on Official Record Books*** (2009)[21] regulates the type and content of registry books, competence for their keeping, as well as for passing decisions in the administrative procedure in the field of registry books, the manner of storage of registry books and records and the procedure for insight into the registry books, renewal of registry books, registration in registry books on the basis of documents from a foreign authority, types of registry book certificates and issuing of certificates on the basis of registry books, conditions for performing the job of the registrar, supervision of the application of the registry books regulations and other issues related to the procedure preceding the registration in the registry books.

The provisions of the Law on General Administrative Procedure (2016)[22] are subsidiarily applied in procedures that are conducted upon the request of a party in accordance with the provisions of the aforementioned laws (Law on Citizenship, Law on Asylum and the Law on Registry Books), if they lack relevant provisions, or if issues that are not regulated by these laws refer to the application of regulations and provisions regulating the general administrative procedure.

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18 O.W. Vonk, M.P. Vink, G.R. De Groot, *Protection against Stetelessness: Tends and Regulation in Europe*, European University Institute, Florence Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 106-107.

19 The Law on Asylum, *Official Gazette of RS*, no. 109/07

20 The Law on Foreigners, *Official Gazette of RS*, no. 97/08

21 The Law on Registry Books, *Official Gazette of RS*, nos. 20/09 and 145/14

22 The Law on General Administrative Procedure, *Official Gazette of RS*, no. 18/16

The Law on Amendments to the Law on Extra-Judicial Proceedings (2012)[23] foresees the possibility of conducting special extra-judicial proceedings - proceedings for determining the time and place of birth, prescribing that a person who is not registered in the birth registry book, and who cannot prove the time and place of his/her birth in the manner prescribed in the regulations governing the keeping of registry books, may file to the court a proposal for determining his/her time and place of birth. Analyses of proceedings initiated pursuant to the provisions of this Law show that the proceedings represent an appropriate way of registration in the birth registry book in cases of persons for whom the Law on the Registry Books does not offer a solution. Also, the procedure proved more flexible as compared to the administrative procedure for subsequent registration in the birth registry book.[24] However, the reports and statistics which outline the analysis of the implementation of this Law indicate that the legislator's intent was primarily aimed at Roma people, that is, internally displaced Roma from the AP Kosovo and Metohija, since the reports note that persons faced with the problem of statelessness and untimely registration of the fact of birth in the Republic of Serbia almost exclusively belong to this category.[25] The provisions of this Law can have little influence on the issues that are elaborated in this document, which, on the other hand, does not exclude the possibility of its application in certain cases, that is, in the context of children from the aforementioned category.

The Rulebook on the Registration of the Fact of Citizenship in the Birth Registry Book, Forms for Keeping Records on Decisions on Acquisition and Termination of Citizenship and the Citizenship Certificate Form (2005)[26] prescribes the method of registering the fact of citizenship in the birth registry book, forms for keeping records on decisions on acquisition and termination of citizenship, and the citizenship certificate form.

Guidelines for Keeping Registry Books (2009),[27] regulate, in a more detailed way, the method of keeping registry books, storage of registry books and records, the method of insight into registry books and records, the method of restoring destroyed or missing registry books, the method of issuing extracts from registry books and certificates of facts and data recorded in the registry books, content and manner of keeping records on issued extracts from registry books and certificates of facts and data entered in the registry books, etc., as stipulated by the provisions of the Law on Registry Books.

ENTRY OF THE FACT OF BIRTH OF MIGRANTS' CHILDREN INTO CIVIL REGISTERS IN THE REPUBLIC OF SERBIA

It is well known that the problem of statelessness is in particular related to the citizenship of children, refugees, women and other especially vulnerable categories, and that statelessness may arise both as a result of migration and in situations where there is no migration.

When statelessness from the moment of birth is concerned, one of the causes that can impede further enjoyment of certain rights is the inadequate registration system for newborns. When registering the birth of a child, the data of key importance, such as first and last name, the child's place of birth, as well as data on parents, is entered in the registry books. Failure to register a particular birth in the registry

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23 Law on Amendments to the Law on Extra-Judicial Proceedings, *Official Gazette of RS*, no. 85/12

24 Analysis of the application of the Law on Extra-Judicial Proceedings - determining the time and place of birth in practice, PRAXIS, 2013, https://www.praxis.org.rs/images/praxis_downloads/Analiza_primena_Zakona_o_vanparnicnom_postupku_-_utvrdjivanje_vremena_i_mesta_rodjenja_u_praksi.pdf

25 ibid

26 The Rulebook on the Registration of the Fact of Citizenship in the Birth Registry Book, Forms for Keeping Records on Decisions on Acquisition and Termination of Citizenship and Form of Citizenship Certificate, *Official Gazette of RS*, nos. 84/05, 121/07

27 Guidelines for Keeping Registry Books and Forms of Registry Books, *Official Gazette of RS*, nos. 109/09, 4/10 -corr. and 10/10

books, cannot be equated with the absence of citizenship, nor does it necessarily lead to statelessness. However, in some cases, it may become the cause of statelessness, for example, if the requirement to acquire citizenship up to a certain age requires providing an extract from the birth registry book, a person who fails to register in birth records can become a stateless person.

In addition to the abovementioned example, there are many other cases in which birth registration is omitted, due to migratory movements, unlawful stay (of parents) on the territory of the child's birth, or due to the fact that the parents themselves do not possess appropriate identification documents. It is important to note that exercising the rights of stateless persons has been greatly hampered by the fact that many countries, including the Republic of Serbia, have not adopted the statelessness determination procedure, nor other mechanisms for the protection of this category of persons. Additionally, few countries issue travel documents and other identification documents for stateless persons, which additionally impedes their enjoyment of certain rights. Of the total number of the 1954 Convention signatory countries, 48% do not issue travel documents to stateless persons.[28] This highlights the vulnerability of this category, and any effort to prevent or reduce the number of such cases is not only important for ensuring the right to citizenship, but also closely related to respecting human rights in general. Observed in the light of the rights of the child, statelessness that occurs on the occasion of birth, represents a fundamental negation of the best interest of the child.[29] Migrant children are at an increased risk of statelessness, either by the country of nationality of the parents, or by the country of birth/host.

According to the positive regulations of the Republic of Serbia, registration in the birth registry books is either a prerequisite or a preliminary issue for acquiring status rights, and it is thus particularly worrying that the practice of registering birth in the Republic of Serbia is uneven and inconsistent when it comes to migrant children.

Although the established practice of the competent registry services in the process of registering children can, at first glance, be assessed as positive and "favorable" for children of migrants born in the Republic of Serbia whose parents do not have proper identification documents with them, this practice also creates a specific legal uncertainty. The most frequently recorded cases pertain to the situations in which, while the birth of a child was being registered in the birth registry book, data on parents was entered on the basis of their expressed intention to seek asylum in the Republic of Serbia, despite the fact that Article 59 of the Law on Asylum stipulates that: "a certificate for a person who has expressed the intention to seek asylum is issued on a prescribed form that ***cannot serve as an identification document***." In addition, cases were recorded in practice, in which, during registration, foreign citizenship of both the child and the parents was recorded or noted, by the competent authority, precisely on the basis of expressed intention, that is, without valid documents or passports, on basis of which it could be presumed that their holders were citizens of the state/country that issued them, or other documents that could prove their citizenship.[30]

The fact of (non)registration of a foreign citizenship by a competent authority does not mean that the child is stateless, or that he/she does not possess the citizenship of any state and will not have the possibility, one day, to acquire citizenship of the Republic of Serbia under certain conditions. "One feature of the citizenship norms is that each state is sovereign in adopting and applying them. This means that only the home state, on the basis of its norms, can grant its citizenship to an individual, or revoke it. It is

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28 https://www.icao.int/Meetings/TRIP-HongKong-2017/Documents/CHIU%20AMBROISE%20UNHCR.pdf

29 African Committee of Experts on the Rights and Welfare of the Child, *General Comment on Art. 6 of the African Charter on the Rights and Welfare of the Child*, 2014. par. 86.

30 Such data were registered, among other things, in the birth registry book kept for the registry of *Zvezdara Municipality*, curr. no. 1089 for 2017, in the birth registry book kept for the registry region of Subotica, curr. no. 912 for 2017, as well as in the birth registry book kept for the registry region of *Novi Pazar*, curr. no. 428 for 2017; see the annex to this document for more details

inadmissible, for Serbian authorities, or according to the criteria of Serbian law, to assess which citizenship a person has, the same way it is impossible for Serbian authorities to declare someone an American. Serbian authorities, on the basis of Serbian regulations, decide on the citizenship of Serbia only."[31]

A "consequence" of such manner of registration, in addition to issuing an extract from the birth registry books, can be issuing an extract on an international form, which represent a logical chain of events, since parents are migrants, who most often continue their journey to other European countries. The issue of the legal effect of registration can arise, if the data was entered on the basis of a document that cannot serve as an identification document, and if, during the registration process, it was not recorded on the basis of which data the registration was made. Additionally, given that the largest number of migrants opt for integration in one of the European countries as preferred destination countries, the dilemma arises whether the country of destination in which the child will attempt to integrate has the right to examine such a registration. As for example, in the process of determining the status of a stateless person, when it scrutinizes every relevant contact with the countries with which the child could have a relationship (the country of birth of the child), and whether the persons who declared themselves child's parents at the time of registration, are in fact his/her parents, since they could not prove their identity, or if it was not established or confirmed by the competent authority, in accordance with the positive legal regulations of the Republic of Serbia.

It should be noted that the principle of authenticity is applied to the keeping of registry books, which implies that the data recorded in the records is considered accurate, until the decision of the competent authority proves otherwise. Data entered in the birth registry books at the time of registration can always be supplemented or corrected. Namely, Articles 30 to 32 of the Law on Registry Books regulate the procedure of entering corrections into registry books. Thus, mistakes in the registries that were noticed before the conclusion of the registration are corrected by the registrar, in accordance with the regulations on the method of keeping registry books. Mistakes in the registry books that are noticed after a registration is concluded, can be corrected by the registrar only on the basis of a decision of the competent authority. The procedure for correcting an error is conducted *ex officio* or at the request of a party, that is, a person who has direct and legal interest pursuant to the law, in accordance with the regulations on the general administrative procedure.[32]

It is indisputable that the fact that a child was born on the territory of the Republic of Serbia creates an obligation for the competent authority to register this child in the registry books. Invoking Article 7 of the Convention on the Rights of the Child, the Committee on the Rights of the Child points out that the Republic of Serbia is obliged to ensure the registration of the birth of children, throughout its territory, regardless of the citizenship and status of their parents. It is recommended that steps be taken to remove obstacles to universal registration and to ensure the registration of children so that they may enjoy the rights guaranteed by the Convention.[33] This is especially important given the fact that migrant parents are often without documents and are unable to prove their identity. Also, in the final deliberations, the Committee reiterates, especially in the context of children of migrants and refugees, a recommendation that Serbia must ensure the registration of birth of children regardless of the citizenship and status of parents, that is, parents who do not possess identification documents, and initiate procedures for acquiring citizenship of the Republic of Serbia for children whose parents are stateless or whose citizenship is unknown.[34]

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31 T. Varadi, B. Bordaš, G. Knežević, V. Pavić, *Međunarodno privatno pravo (International Private Law),* Belgrade 2012, p.264

32 Law on Registry Books, *Official Gazette of RS*, nos. 20/09, 145/14

33 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSRB%2fCO%2f1&Lang=en

34 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/SRB/CO/2-3&Lang=En

However, this does not imply that the registration of birth, that is, registration of a child in the birth registry book, should be carried out without documents, since such an approach to the problem would allow numerous abuses, and the benefit resulting from such registration would be less than the damage that would be caused by the possible abuse of this approach.

This issue needs to be considered primarily from the aspect of the state, which issues certificates and extracts based on official records through administrative authorities, but also from the aspect of the person who will use such a certificate or extract for future actions in a legal procedure.

One of the features of an administrative act is its **legality**, that is, that it is based on the law, which creates the presumption that such an act is legal at the time of its adoption. Otherwise, in the absence of such a property, such act must cease to produce legal consequences and must be removed from legal procedure through administrative or judicial proceedings. The effect of such a registration is also reflected in relation to other states, which may examine such an entry in the cases similar to the abovementioned example - the integration of a child into the legal system of the respective state, and which can assess the credibility and accuracy of this data in view of the regulations of the state in which the entry in the registry books was made.

On the other hand, a certificate issued on the basis of official records creates only apparent **legal security** for the person in question, since he/she can later, for example, submit a request for acquiring citizenship; in this case, the competent authority, during the preliminary procedure of examining the conditions and evidence upon the submitted request, as the supervisory authority, will examine the **legal basis** of such a registration and in accordance with that, order its **annulment** or some other action to abolish the effects of such registration if it has not been carried out in accordance with regulations. "From this standpoint, official records are the basis for analyzing the implementation of laws and other regulations in practice, as well as for planning appropriate legal policy in certain areas. Official records enable the processing and establishment of facts in the administrative procedure, that is, the formalization of the appropriate conditions that are of significance for legal relations."[35]

Let us recall that item 24 of the Regulations on Keeping Registry Books and Forms of Registry Books,[36] defines, in more detail, the procedure for registering a birth, stating, among other things, the following: "Data on parents is entered in the birth registry book..., **and for foreigners**, from a travel document and extract from birth or marriage registry book." The question arises as to how to act when parents, in this case migrants, do not have identification documents or any other document that could prove their identity or status except, for example, their expressed intention to seek asylum in the RS, which, as already mentioned, cannot be used for this purpose, that is, cannot be used as an identification document?

It was pointed out that one of the possibilities, the registration in the birth registry books without documents, is not an option, given the possibilities of abuse of such a way of proceeding. Another possibility lies in alleviating the solution provided by the Guidelines, that is, by looking for other, subsidiary solutions, which might "overcome" the pertinent challenges and problems arising during the procedure of registering children of migrants into the birth registry books in the absence of appropriate (identification) documents of the parents.

A statement of two witnesses (who have valid documents) about the identity of the person is by all means a possible solution for establishing identity. This type of evidence is used and has legal force in a large

35 S. Lilić, *Posebno upravno pravo* (Special administrative law), Law Faculty of the University of Belgrade, Belgrade 2010, p. 78

36 Guidelines for Keeping Registry Books and Forms of Registry Books, *Official Gazette of RS*, nos. 109/09, 4/10 - corr. and 10/10

number of procedures that apply (in a subsidiary way) the rules and regulations governing the general administrative procedure. Thus, Article 134 of the Law on General Administrative Procedure (LGAP) stipulates that if a fact cannot be determined by other evidence, the authority may take an oral statement from the party. An oral statement of the party is also taken if obtaining other evidence would aggravate the exercise of the party's rights.[37] This means that whether a statement of the party will be taken as evidence will be decided by the official person conducting the proceedings. Such a standpoint was confirmed in court practice, in the ruling of the Supreme Court of Serbia, U 3691/2007 of 10.04. 2008, which states: *"Pursuant to the LGAP a party's statement is taken if there is no immediate evidence for the determination of a particular fact, or such a fact cannot be established on the basis of other evidence."* Bearing in mind the specific position of the party, the legislator stipulated that the credibility of this evidence will be assessed by the official person conducting the proceedings, in accordance with the principles of administrative procedure. Additionally, it was stipulated that the obligation of the official conducting the proceedings is to warn the party of criminal and material responsibility for giving a false statement, as well as the possibility of filing a motion for reopening the proceedings in accordance with the provisions of the LGAP.[38]

Furthermore, the ***Law on Police***,[39] Article 64, paragraph 2, item 2, stipulates that police employees, in the status of authorized officials, shall exercise police competences, including the verification and establishing of a person's identity. In this regard, we believe that such a statement, given in the presence of a police employee, on the identity of a person or regarding other circumstances and facts, would be the most effective. Also, in addition to the aforementioned, such a statement could also be given before the judicial authorities, with their accompanying verification, for example, if parents give a statement before the judicial authority on the relevant facts of the birth of a child that are necessary for registering that child in the birth registry books in accordance with the existing solutions and regulations. Finally, the fact that an intention to seek asylum is expressed/exists should not be ignored, as it can serve as an "auxiliary tool" in the process of proving relevant facts for registering a child, whose parents are foreign nationals, in the registry books in the Republic of Serbia.

For persons who decide to apply for asylum, the situation is far more favorable, since, pursuant to Article 60 of the Law on Asylum, after the **submission of a formal application** for asylum, a **personal ID card** for asylum seekers is issued, **which serves as an identification document** and as a residence permit in the Republic of Serbia until the finalization of the asylum procedure. It should be kept in mind that the number of persons from the migrant population who opt for obtaining some form of protection through the asylum procedure in the Republic of Serbia is pretty low, and that this option based on regulations should not be foreseen as the only one for the possible registration of children. A solution where individuals are referred to the asylum procedure only for the purpose of obtaining an identification document, in order to legally register their children, should not be an option.

Comparative practice on registration in birth registry books

Registration in birth registry book is defined as "continuous, permanent and universal recording, within the civil registry, of the occurrence and characteristics of birth in accordiance with the national legal requirements of a country".[40] Although the practice of registration varies from country to country, the mere act of entry in a birth registry book results in an official registration in the registry books, and the issuance of an extract from the birth registry book. The minimum data to be entered are: the name of

37 The Law on General Administrative Procedure, *Official Gazette of RS*, no. 18/16

38 Komentar Zakona o opštem upravnom postupku po članovima (*Comments on the Law on General Administrative Procedure by Articles*), Paragraf Lex, Belgrade 2017, p. 144

39 The Law on Police, *Official Gazette of RS*, no. 6/16

40 United Nations, Department of Economic and Social Affairs, *Principles and Recommendations for a Vital Statistics System (Revision 2, Series M/19, 2001*), more at: https://unstats.un.org/unsd/demographic/standmeth/principles/M19Rev3en.pdf

the child, the time and place of birth, as well as the name, that is, information about the child's parents. In legal systems that stipulate that citizenship is acquired by origin, the birth certificate also contains data on parents, that is, data on their citizenship, while in the systems in which citizenship is acquired by birth, the child's place of birth is proved by the extract.

Each state, in accordance with its regulations, registers the fact of birth, but also, accordingly, implements a different practice when registering the birth of children in cases where parents are without identification documents than could prove their identity or status.

Practice (of particular) member countries[41] of the International Commission on Civil Status[42]

The system established in *Germany* implies that the process of registering a child is carried out on the basis of statements from parents, midwives and doctors, and that it is necessary to enclose extracts from parents' registry books, that is, extracts from parents' birth or marriage registry books, as well as documentation confirming the identity of the parents. If any of the above documents are missing or cannot be obtained, the registrar may not refuse to register the child in civil registries. On that occasion he/she is obliged to enter the data presented, with a note stating the reasons and/or facts that caused the incomplete entry. If the entry is not completed with the relevant data in a given period, or if this data remain unestablished, and an application for issuing an extract is submitted, only a copy of the extract based on the integral entry can be issued, in which it is noted that it is not complete. The consequence of the issuance of such extracts, in view of the data that they (do not) contain, is that they have a limited, **restrictive probative** effect and cannot be used in further legal procedure with respect to the exercise of any other right, such as the right to conclude a marriage.

On the other hand, a more liberal registration system is being implemented in *France*, at least in terms of the probative value of the extract. Namely, the competent registrar may not refuse to register the child in the registry books, especially if a medical report from the hospital on the child's birth is enclosed. The registrar enters information about the child on the basis of relevant documentation, as well as on the basis of parents' statements. It is important to note that, in the event that the child's registration was performed solely on the basis of parents' statements, such registration or subsequent extract **cannot have a probative force inferior** to the one carried put on the basis of all documentation that is requested. The lack of documentation (parents' certificates, identification documents) has no effect on whether the registration will be considered complete or not, or on the future extracts that will be issued on the basis of the data entered in the child's registration records.

A similar procedure is being carried out in *Hungary*, where, when registering the child, facts that are known, that is, data obtained on the basis of mother's/parents' statements, are noted. If the identity of the mother is "under suspicion", or more precisely, if it cannot be established, the case may be brought before a competent judicial authority in order to establish her identity. Hungarian law **does not make a distinction as to whether the mother's civil status has been established or just noted**. Also, the process of registration carried out in this manner cannot affect the issuance of extracts or copies from civil registry books.

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41 International Commission on Civil Status, *Persons deprived of civil status and identity documents*, Strasbourg, 2010, more at: http://www.ciec1.org/SITECIEC/PAGE_Etudes/wFEAAEQ8LDJvb3dQWXpGdWp3QAA

42 The International Commission on Civil Status is an intergovernmental organization established to facilitate international cooperation in matters of civil status, as well as to improve the work of the registries, that is, authorities competent for keeping civil registers. In this context, it updates the member states' legislation and practices, provides relevant information and data, prepares publications and drafts of conventions, and makes relevant recommendations on these issues. It also cooperates and coordinates its activities with the Council of Europe, the European Union and the competent UN bodies. Member States of the Commission are: Belgium, Croatia, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, Switzerland, Turkey and the United Kingdom.

It can be noted that in *Switzerland*, the established system is considerably more stringent in comparison to the procedures foreseen by the aforementioned countries. Namely, if parents are not able to submit appropriate documentation, their statements on certain data and facts are, effectively, *insufficient*. This means that, as long as the information on the child being entered does not have the status of litigation, that is, they cannot be the subject of civil proceedings, the competent Cantonal authorities may invite any third party concerned to give a **substitutive statement** based on data or evidence collected by other competent authorities (for example, immigration authorities). Article 41 of the Civil Code of Switzerland,[43] stipulates that, in cases where certain information or evidence of civil status cannot be obtained, the competent authority *may* accept a specific statement as evidence in the event that such information, that is, data, is not disputable. Also, in such cases, the party is warned of a certain type of liability for giving a false statement (paragraph 2). The said statement has the status of verification, that is, authentication, in the sense that it must not contain any contradictions in relation to the above mentioned records maintained by the competent (immigration) authorities. In that sense, in the records of the registration of a child into civil registers, there will be no remark or comment that the documentation submitted at the time of enrollment was incomplete, that is, that in the absence of certain evidence or document, a substitutive statement was taken, in accordance with the national regulations. If it is later proved that such data is not authentic, the correction and/or supplementation of data entered during the registration of a child is possible only on the basis of the decision of the competent court.

In cases where the identity of parents cannot be established, *Italian* law requires that the child's enrollment must be performed regardless of the nationality and/or status of the parents. In order to register the child, in addition to the birth statement issued by the hospital (containing information about the mother, the place, the time, the date of birth, and the child's sex), it is necessary that the parent, doctor, or any other person present at the occasion of the birth of the child, is also present during the process of entering the mentioned fact into the registry book. If a child is born outside a medical facility, the person who attended the birth also completes the request for the entry of data on the child, in the form of a **substitutive declaration**. The registrar is obliged to enter the data related to the child that is obtained on the basis of parents' statements in the registry books, while the identity of the parents can be confirmed based on the **statement of two witnesses** who guarantee or confirm their identity.

Although not a member of the International Commission on Civil Status, *Armenia*, akin to Switzerland, applies more restrictive child registration procedures, given that the current legislation provides that, if the identity of the mother cannot be determined when the child is born, that is, if there is a lack of any identification document, the competent registrar will refuse the registration, as the data necessary for the implementation of the registration is incomplete, and consequently does not comply with the provisions envisaged in the Law on Civil Statuses. A special problem may arise if a mother who does not have identification documents gives birth to a child outside a medical institution. Based on this, it can be concluded that, in situations where there are no legal possibilities to overcome such situations, children born on the territory of Armenia, from parents who do not have (identification) documents, are at risk of not being registered at birth at all.[44]

Regarding the issue of establishing and verifying the identity of a person, the majority of European countries also implement various procedures for establishing or verifying the identity of persons who have applied for some form of international protection. On the one hand, a number of such persons actually do not possess, or have never possessed identification documents, while a number of persons in this category either present forged documents or give statements about their multiple identity.

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43 More at: https://www.admin.ch/opc/en/classified-compilation/19070042/201801010000/210.pdf

44 *Study on Birth Registration Procedure in the Republic of Armenia, Problems and Prospects for Overcoming Them*, UNHCR Armenia, 2013, more at: http://www.un.am/up/library/Birth%20Registration_Armenia_eng.pdf

In such situations, countries, whose competent authorities decide on submitted requests, face the procedure of verifying the authenticity of the presented documents, especially in situations where applicants come from countries where there are no official or recognized governments or other state institutions, when there are weaknesses in the functioning of national and local authorities, where there is a lack of cooperation between individuals and the national authorities, or in cases where identification documents are authentic, but do not belong to a specific person, that is, their carrier. Also, according to the practice of certain countries (Belgium, Czech Republic, Germany and Finland), asylum seekers generally claim that they are unable to provide identification or travel documents, with the aim of avoiding or interfering with the forced return procedure.[45]

The list of methods applied by EU countries in situations where documents that serve to establish and/or verify the identity of a particular person do not exist, is exhaustive. Almost all countries use similar methods, among which, primarily, conducting an interview with the asylum seeker in order to determine his/her country of origin. With some exceptions, all countries are mainly comparing fingerprints, as well as photos, with databases established for the territory of the European Union. In addition to the aforementioned identification measure, member states may also, among other things, implement the following measures: check the language a person speaks to determine the region or country of origin, carry out a procedure for determining the age of the applicant, obtain documentation that may be related to electronic transactions (bank statements, decisions on taxation...), (temporary) confiscate phones and smart devices, carry out DNA analysis, make contact with third country authorities with the goal of cooperation, including liaison officers and competent authorities from the country of origin, and other methods (inspection of personal belongings, inquiries to Interpol, various types of investigations and interviews, etc.).[46]

Some countries combine the above procedures and methods; for example, the competent German authorities may contact the consular authorities of the country of origin of a person, in order to determine the identity of the "undocumented" migrant. In situations where a person illegally entered the territory of Germany without identification documents, and did not apply for asylum, the German authorities may resort to more restrictive measures, in accordance with the law, such as: interviewing, taking photographs, taking fingerprints, medical examination, as well as conducting a search of the person, if he/she is suspected of possessing relevant (identification) documents.[47]

The French competent authority (the French Office for the Protection of Refugees and Stateless Persons, OFPRA), in cases where individuals do not possess identification documents, may seek to locate certain documents, conduct an interview or carry out a particular type of investigation. When it comes to minors whose age cannot be established, the competent authority may implement the measure of bone examination of the minor.[48]

In Hungary, when establishing identity, the authorities responsible for refugee issues base their assessment on the statements given, and may, in case of doubt, carry out appropriate investigations. Immigration authorities also base their decision on the statements, but they may also resort to taking fingerprints, photographs, as well as checking in various records. In certain situations, anthropological investigations may also be carried out, and consular and/or diplomatic authorities of the applicant's country of origin may be contacted.[49]

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45 *Challenges and Practices for establishing the identity of third-country nationals in migration procedures*, EMN Synthesis Report for the EMN Focused Study, European Commission, 2017, more at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_identity_study_final_en_1.pdf

46 ibid

47 International Commission on Civil Status, *Persons deprived of civil status and identity documents*, Strasbourg, 2010, p. 8

48 Ibid, p. 9

49 Ibid

Practices of particular countries in the region

In accordance with the provisions of the Register on Deaths, Births and Marriages Act of the Republic of Slovenia, every child born on the territory of this country has access to the procedure of registration in the registry books. If the parents do not possess any identification documents, the process of establishing their identity is carried out in accordance with the provisions of the General Administration Procedure Act, as an issue that precedes the procedure for registering the newborn. If a child is born in a medical institution, the institution is obliged to produce a certificate of birth, and if the child is born outside a medical institution, anyone present at birth may produce such a certificate. Although according to Slovenian legislation, an extract from the birth registry books is, at the same time, a proof of citizenship (for citizens of Slovenia), in the case of foreign citizens, the information on (foreign) citizenship is not recorded during registration, as the registrar is not competent to determine foreign citizenship. What may pose a particular problem is the fact that a child born on the territory of Slovenia, from parents who are foreign nationals and whose nationality cannot be proven, does not qualify for the protection in accordance with regulations protecting stateless persons, since an assumption of the child's foreign citizenship, that is, (foreign) citizenship that a child can acquire, is created. Consequently, the assumption is also that such a child cannot be identified as stateless, and a sort of contradiction is created, with regard to the definition of statelessness, as well as the implementation of protective mechanisms against children's statelessness, recognized by Slovenian legislation.[50]

On the other hand, the Albanian authorities apply a procedure of enrollment in registry books based on a certificate of birth, a medical report certified by the medical staff who attended the birth of the child, in which the relevant data is provided. The certificate, which serves as evidence that the fact of birth has occurred, is given to the mother of the child, who brings it to the competent registry service to carry out the registration. It is important to note that children born in Albania to foreign nationals who reside irregularly in Albania cannot acquire Albanian citizenship, that is, when such children are registered, the citizenship of the parents is noted. On the other hand, children born to parents registered in Albania as asylum seekers or refugees (persons who are considered residents in Albania include asylum seekers and refugees) are registered in birth records, that is, when the fact of birth is recorded, the fact of Albanian citizenship is also recorded, if the child's parents are staying in accordance with legal regulations governing the right of residence in Albania. However, if parents cannot prove their relationship with the child due to the lack of appropriate documentation, consequently, they cannot even register their child.[51]

A similar practice of registration is implemented in Macedonia, with the difference that, when registering the birth of a child, parents, especially the mother, must provide an appropriate identification document, as well as extracts from civil registers. Akin to Slovenia, Macedonian regulations do not contain provisions that precisely define which evidence must be submitted, or which administrative procedures must be followed when registering a child. The practice regarding the relevant evidence varies, depending on the discretionary decision of the registrar, given that the provisions of the Law on General Administrative Procedure (as *lex generalis*) of Macedonia allow the persons conducting the procedure to demand a specific type of evidence on the basis of their personal assessment. In practice, this entails, in the majority of cases, the presence of one of the parents, identification documents for both parents, extract from the marriage registry book for parents, medical documentation, etc. When it comes to asylum seekers, persons with recognized refugee status or subsidiary protection, the registration of children whose parents are in this status is performed with an identification document issued by the ministry in charge of the asylum procedure (identity card for asylum seekers, identity card for persons who have been granted refugee status or subsidiary protection). It has been noted that the

50 Ending Childhood Statelessness: A Study on Slovenia, ENS, Working paper 8/15

51 Ending Childhood Statelessness: *A Study on Albania*, ENS, Working paper 6/15

registration of children born in Macedonia still encounters certain challenges, given the fact that it is not possible to complete the registration of the child at the moment when the competent authorities are notified of the birth, which additionally complicates access to this right, if parents are members of marginalized groups, or in the situation where parents cannot provide identification documents to prove their identity when registering their child. Although it is not noted in any legal provision, the lack of an established identity of the mother completely "blocks" the registration of both parents, and the process of registering the child's name, which emphasizes that it is essential that the child's mother be properly documented. Children born to parents who do not have documents or have unverified or unknown citizenship, cannot be fully enrolled in the registry books in Macedonia.[52]

Based on all of the above, it can be concluded that countries, especially those in the region, are implementing the practice of entering the fact of birth in the registry book by using auxiliary methods, in situations where "undocumented" parents are in question, whose identity has to be identified in the absence of identification documents. In these cases, when the laws of the state do not provide a clear solution to overcome such situations, children born to parents who cannot prove their identity are at risk of not being registered from birth, which further complicates their enjoyment of the rights of the child.

In this regard, the United Nations Statistical Commission recommends that, in cases of non-possession of documents or inability to prove the identity of a person, the mechanism of confirming and establishing the identity of that person **on the basis of the statement of two witnesses** is invoked. A handbook issued by the Commission may help United Nations member states enhance and improve their citizens' registry systems, especially in cases where a lack of identification documents exists, when the mechanism of statements of two witnesses should be applied, which would be sufficient to confirm the identity of the person making a specific statement, as for example in the procedure of registering relevant facts in the registry books.[53]

POSSIBLE SOLUTIONS IN THE CONTEXT OF PROTECTION OF STATELESS PERSONS IN THE REPUBLIC OF SERBIA

The practice of registry services on the territory of Serbia and, consequently, its effects on further acquisition of certain status rights, the fact that positive legal regulations recognize the category of stateless persons and guarantee certain rights to these persons, as well as that a certain number of persons was recorded, though relatively small, who claimed to be stateless persons, open the dilemma about who, in the Republic of Serbia, and in what way, can qualify for the status, or some kind of protection, and which is the accompanying corpus of rights and obligations.

Furthermore, the issue of the status of these children is raised, that is, the way in which this category of children is granted enjoyment of the specific set of rights in the country. This issue is addressed in particular when parents are unable to "transfer" their nationality to their child, which is the case for children born in a number of European countries, to migrant and refugee parents. The national laws of 60 countries worldwide do not allow the acquisition or "transfer" of citizenship from mother to child, of which 27 are countries of origin of the majority of refugees and migrants (Iran, Iraq, Kuwait, Lebanon, Libya, Syria, etc.), and hence these children are born as stateless, or to fathers who are stateless, or to unknown fathers, or fathers who are unable to prove their nationality or paternity, and thus these children may be unable to acquire citizenship in the country of birth, since most European countries

52 Ending Childhood Statelessness: *A Study on Macedonia*, ENS, Working paper 2/15

53 *Handbook on Civil Registration and Vital Statistics Systems, Preparation of Legal Framework*, United Nations, Department of Economics and Social Affairs, 1998, more at: https://unstats.un.org/unsd/publication/SeriesF/SeriesF_71E.pdf

apply *Ius sanguinis* as the basic principle for acquiring citizenship.[54] It is also important to take into account the fact that, in most cases, migrant parents are in question, whose status is irregular, and who, in the majority of cases, are unable to prove, or effectively use their citizenship.

The Republic of Serbia has not yet passed and adopted the statelessness determination procedure, or other mechanisms to recognize this status and protect the rights of persons recognized as stateless. Also, as it was previously mentioned, according to the reports from several organizations, the problem of statelessness and untimely registration of the fact of birth in Serbia is almost exclusively encountered by members of the Roma population, who are considered to be *in situ* population, that is, population that is born and that has been residing for many years in the territory of the Republic of Serbia. It is considered that for those groups, the procedure for determining the status is not appropriate, due to long established relationships, involving long-lasting habitual stay. In such cases, states are advised to pursue targeted campaigns regarding the acquisition of citizenship, or efforts to verify citizenship, rather than the statelessness determination procedure.[55]

In the context of the protection of migrant children born in Serbia, such "treatment" of verification or acquisition of citizenship is not possible at this time, because these children can acquire citizenship of the Republic of Serbia in accordance with the provisions of the Law on Citizenship regulating the admission of foreigners and their descendants, but not in accordance with Article 13 of the Law, due to, as it has previously been pointed out, the practical challenges that arise in terms of the application of this Article, that is, (non) automatic acquisition of citizenship of the Republic of Serbia by applying the principle of *ius soli*. Certain unresolved issues and challenges for countries, when it comes to the protection of stateless persons, especially those in migratory status, stem in the first place from the absence of statistical data, that is, the way in which stateless persons are registered. For example, in Latvia and Estonia, this implies persons who are not considered citizens, as well as persons with undetermined citizenship, who enjoy the rights set forth in the Convention (1954). Some countries record individuals as stateless persons solely on the basis of their statements, some only on the basis of a decision founded on solid evidence, while some treat them in the asylum procedure as nationals of specific states.[56] In this regard, the practice shows that most persons, in countries where neither adequate identification of stateless persons, nor appropriate mechanisms for their protection exist, seek international protection through the asylum procedure, although no reasons for persecution envisioned by the 1951 Convention exist. Although there are no objective and subjective reasons for seeking some form of international protection, individuals decide on such a step - abusing the asylum system, precisely because of the lack of specific mechanisms for the protection against statelessness.

The possibility that stateless persons enjoy certain rights under ***"alternative statuses"*** such as, for example, tolerated stay, is conditioned on the enjoyment of certain rights provided by such alternative modes that guarantee a lower level of protection compared to the rights envisaged by the 1954 Convention.

States fear that they will be "overwhelmed" with requests to determine the status of a stateless person, or that those whose asylum applications have been rejected or refused will find alternatives by filing this request (for determining the status of a stateless person). On the contrary, the experience of the countries that have established procedures to determine stateless status shows that this fear is unfounded. The statistics show that there is a significantly higher number of asylum seekers than the number of persons submitting such a request.[57]

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55 More at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2877368

55 More at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=55f7e8d14

56 More at: http://www.refworld.org/pdfid/5911d8c34.pdf

57 More at: http://www.refworld.org/pdfid/5911d8c34.pdf

For the Republic of Serbia, one of the possible solutions is precisely the passing/adoption of procedures for determining the status of stateless persons (Statelessness Determination Procedures), either in the form of a new, special law, or by their integration into existing laws governing this matter/area.

International instruments directly or indirectly regulating this issue, in particular the 1954 Convention, define who stateless persons are, but, on the other hand, fail to explain the procedure to determine who is stateless. States parties are called to adopt, in their legislation, the provisions governing the manner in which it is determined who is a stateless person.[58]

Comparative practice regarding procedures, protection and available rights

Examples of comparative practice indicate that countries that have adopted procedures, define the rules of these proceedings in different ways when meeting the obligations set forth in the Convention.[59]

Thus, in *France*, after the submission of a request, a certificate is issued, which does not imply a regulated stay in France until the competent authority decides upon the submitted request. One should also point the solution regarding ***the burden of proof, or the (im)possibility of contact with the consular authorities of the country to which the applicant can be linked.*** Namely, the French Office for the Protection of Refugees and Stateless Persons, as the competent authority for this issue, may, at certain stages of the procedure, contact the diplomatic and consular missions of specific countries. When the applicant claims that there is no fear of persecution in such countries, the Office contacts the authorities of the foreign country directly, in order to verify and establish the relevant facts. A person granted the status of a stateless person shall be granted a stay of one year, which may be renewed for a maximum of three years, after which that person is granted a permanent residence for a period of ten years, on the basis of which he/she can apply for a travel document. In the event that the applicant is unable to obtain certain documents during and after the completion of the procedure, for example, an extract from the birth registry book, the French authorities will issue documents that allow stateless persons to enjoy other rights. The Office informs the person with the defined status if and when the conditions for acquiring French citizenship are met, so that he/she can apply to the authorities competent for citizenship affairs.

In *Hungary*, the requirement for filing a request is somewhat different, since a person is required to stay regularly in the territory of Hungary. Also, the request cannot be filed *ex officio*, but the competent authorities may notify the person about the possibility of filing such a request. In the event that both the asylum procedure and the procedure for determining the status of stateless person are conducted, the latter shall be suspended until the decision of the competent authority on the asylum application is made. During the procedure, the applicant is guaranteed a temporary stay in Hungary. The burden of proof in the Hungarian process of determining the status is shared. However, **the competent authorities may contact consular and other authorities in the relevant countries in the event of the applicant's consent**. Persons who have been granted the status of stateless persons or for whom this status was established, are granted a humanitarian stay for a period of three years, with the possibility of extension. The stay also includes the right of access to the labor market, education and health insurance. After five years, a stateless person can apply for permanent residence, and after the expiration of three years of permanent residence, that person can submit a request for naturalization, in which case this category is "favored" in relation to other foreigners who apply for citizenship after five years of permanent residence in Hungary.

58 Nationality and Statelessness, Handbook for Parliamentarians, UNHCR, 2008

59 More at: http://www.refworld.org/docid/57836cff4.html

Although Latin American country, *Mexico* offers an interesting example of how to carry out the procedure in the case of a request for determining the status, because this country offers the possibility of filing a request for the "legalization" of status, such as a residence permit, for humanitarian reasons, related to unaccompanied children/minors, family reunion with a member who is in a serious medical condition and resides in Mexico, victims of human trafficking, etc.

Procedures established in *Moldova* provide special protection to unaccompanied minors and persons with disabilities. During the course of the proceedings, the persons who filed the request are granted the right to stay, and may be expelled from the territory of Moldova only in cases of national security and of threat to the public order. The authority in charge of proceedings is obliged to examine all information relevant for deciding on the request, **including contact with foreign authorities**. If the foreign authority fails to respond within the appropriate period to specific demands of the state deciding on the request, it is assumed that the particular country does not regard the applicant as its national. Persons with established status are issued relevant documents, and can enjoy all rights and freedoms, but also obligations, determined by the Moldovan legislation. Finally, a large number of individuals in this category, after a certain period of time, are given the opportunity to acquire citizenship by naturalization, and are accordingly referred to the authority competent for deciding on this issue.

By adopting the Procedures, states primarily fulfill the obligations set forth in the Convention (1954), but also identify the problem of statelessness, and the number of stateless persons on their territory. It is generally considered not desirable to apply the Procedures to all categories of stateless persons, differentiating between various causes for the occurrence of statelessness, that is, whether it happened in a migratory, or in a non-migratory context. Regarding the category of persons who are in non-migratory movement, the application of Procedures is sometimes not the most adequate solution, due to long-established ties with the state in which these individuals "habitually" reside, namely, it is recommended that the Procedures be applied precisely to persons in migratory movement. Another issue, closely related to this one, is - which authority is competent to decide on these requests, especially if the applicant for asylum is also a stateless person. The issue of the competence of the authority is also important if two status proceedings are conducted simultaneously - the proceedings upon the application for asylum and the proceedings upon the request for determining the status of a stateless person. In the opinion of some authors, in situations where stateless persons are in a country where they have "habitually" resided for a longer period of time, the authority competent to act upon requests for acquiring citizenship is considered the most adequate authority for determining the status (taking into account the fact that, by applying its legislation, a state aims to reduce the number of stateless persons in its territory). Also, in a migratory context, when there is a certain number of people who are at risk of statelessness or who are stateless persons in a country, the protection of these persons takes on the form of international protection. In such cases, competence for determining the status is granted to the authorities in charge of asylum procedures, or immigration authorities, as is the case in Hungary or Moldova.[60] The same text states that asylum and statelessness share the same characteristics based on the obligation of international protection.[61] It is considered that the authorities in charge of asylum procedures are specialized in this matter/area and can more effectively "handle" the rules of these proceedings, with regard to the standards of proof, or in cases where there is a lack of specific evidence.

The importance of the procedures is reflected, on the one hand, in fulfilling the obligation stipulated by the Convention, and on the other, in identifying stateless persons in the territory of a state, that is, perceiving and reducing the risk of statelessness, especially among refugees and migrants. It is in the interest of each state to have information on the number of identified cases of stateless persons, that

60 A. Edwards, L. V. Waas, *Nationality and Statelessness under International Law*, Cambridge University Press 2014, 133-134

61 Ibid, p. 134

is, to obtain information on who exactly resides on its territory. The importance of introducing the procedures is also reflected in the conclusions adopted by Council of the European Union, which stated, inter alia, that it is necessary to recognize the importance of the exchange of good practices between States in relation to the collection of reliable data on stateless persons, as well as in relation to the procedures for determining the status of a stateless person.[62]

Regarding the corpus of available rights of persons with established status, at this time, all the countries that have adopted procedures guarantee the right to stay, except in cases of jeopardizing national security and public order. In France, this stay is one year with the possibility of extension. In Turkey, an identity card is issued for a stateless person, which allows for a stay of two years. The right to stay "entails" the right to work, that is, provides access to the labor market, health care, education, as well as travel documents and other identification documents. In accordance with Art. 32. of the Convention, the states are called to facilitate the naturalization and assimilation of stateless persons and, in particular, to make efforts to speed up the procedure for acquiring citizenship.

In addition to the aforementioned mechanism, as one of the methods for determining the status of stateless persons and their protection, implemented through the proceedings upon a submitted request, the legislation and practices existing in certain countries point to the possibility that, in certain situations, stateless persons can have protection and enjoy certain rights without going through the aforementioned proceedings, but rather through alternative forms of protection, established by regulations governing immigration, which vary from country to country, that is, depending on the laws of the countries concerned. Although the basic "feature" of the 1954 Convention is to represent a crucial agreement protecting the rights and freedoms of stateless persons, not all the countries that ratified it have adopted the Procedures - mechanisms for the protection of this category of persons.

In Germany, for example, although no mechanisms of this kind exist, stateless persons can find "protection" through various instruments and types of stay that can be granted to them. In accordance with the provisions of the Law which ratified the 1954 Convention, each of the 16 states is competent for **investigating** whether a person is stateless. The practice of the German courts shows that, if citizenship of a state cannot be established, the person is considered stateless. Among many types of stay, those that can be applied, that is, granted to stateless persons, are the suspension of deportation or the so-called "toleration certificate", and temporary stay due to the obstacles and inability to leave the country. A toleration certificate is most often issued to persons whose request for asylum has been rejected or denied, but are unable to leave the country they are currently staying in, that is, the country which has decided on the request for asylum. The inability to leave the country has two aspects: legal and factual. The legal aspect is reflected in the danger of political persecution, or inhuman treatment, a serious risk of suicide, or even care for a family member. The factual aspect includes unconfirmed citizenship, unconfirmed identity, non-possession of travel documents, or non-cooperation with authorities from the country of origin.

The characteristic of this form of stay is that it is not a stay - as such. It has to be renewed and does not entail any rights based on a stay. It cannot even be considered as protection in the true sense of the word, and the years of "certificate duration" are not counted in the time required for naturalization. In the light of such a stay, it is considered that the person with the certificate is "legalized" in this country only for the purposes of the rights conferred by the Convention.[63]

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62 http://www.consilium.europa.eu/en/press/press-releases/2015/12/04/council-adopts-conclusions-on-statelessness-89315/pdf

63 More at: http://booksandjournals.brillonline.com/content/journals/10.1163/22112596-01902005;jsessionid=mKMCMLfidt_TH0ZoJmxMrbA4.x-brill-live-02

As to the positive aspects of this solution - it is considered that by this kind of protection the legal limbo, these individuals can find themselves in, is avoided. On the other hand, stateless persons remain unidentified as such, that is, in terms of protection, and, further on, this solution does not remove the dilemma regarding the manner in which the competent authorities should act on issues of residence, issuance of travel documents or in the matter of naturalization. The protection afforded by this solution is inferior to the protection granted to refugees in one of the forms of international protection, or to persons with established status of statelessness, in countries that have passed and adopted mechanisms for determining the status. Such a solution further slows down future solutions for stateless persons, such as proceedings for issuing travel and other identification documents, registration of relevant facts into registry books, and recognition of the right to a regular stay.

Although only a few countries have adopted the mechanisms for the protection of these persons in their legal regime, they increase the visibility of this challenge and of the tendency of rapid increase in the number of these persons.

On the other hand, the option reserved for these persons, especially those in migratory movement, who find themselves in countries that have not adopted the preventive protection mechanisms, is the following: recognition through a tolerated or humanitarian status, which offers protection in view of the impossibility to return to the country of origin or country of habitual residence. This instrument provides a de facto solution for a large number of stateless migrants, by providing them with "legalized" stay, and ensuring that such persons cannot be treated as long-term immigration detainees. Finally, it should be reiterated that this form of tolerated status offers an inferior form of protection compared to the abovementioned, and additionally slows down the adoption of future and long-term solutions for the protection of stateless persons, offering a far narrower corpus of available rights, as well. It follows that stateless persons, who do not qualify for some form of international protection, can obtain protection through some other mechanisms.

FINAL REMARKS AND RECOMMENDATIONS

As previously noted, the registration of the fact of birth of migrant children born on the territory of the Republic of Serbia into the registry books is a prerequisite for acquiring a status and the accompanying corpus of rights, but also represents the state's commitment to the implementation of certain international regulations governing this issue. The most explicit provision is provided for by the *Convention on the Rights of the Child*, which stipulates that a child must be registered immediately after birth, regardless of citizenship, statelessness or status of parents with regard to stay, as well as the *International Covenant on Civil and Political Rights*, which stipulates that every child must be registered in the registry book and bear a name, and that every child has the right to acquire a citizenship.

After analyzing the practice of the competent registry offices in the Republic of Serbia, it can be stated that the practice of registering the fact of birth is rather uneven, especially taking into account the recommendations of the Committee on the Rights of the Child, according to which Serbia must ensure the registration of the birth of a child irrespective of the citizenship and status of parents, within its entire territory. It is further recommended that the necessary steps be taken to remove obstacles to universal registration, and to ensure the registration of children, so that they may enjoy the rights guaranteed by the Convention. Also, an inappropriate child registration system does not necessarily mean that a child does not have a citizenship, or necessarily leads to statelessness, but in specific situations it can become its cause.

On the other hand, after analyzing the regulations governing the issue of citizenship, it was pointed out that currently, a child born on the territory of the Republic of Serbia (whose parents are foreign citizens), cannot acquire the citizenship of the Republic of Serbia by the application of the principle of *ius soli*, which is prescribed by the Law on Citizenship of the Republic of Serbia as a subsidiary way of acquiring citizenship of the Republic of Serbia, and which does not indicate that the child can automatically acquire the citizenship of Serbia, but rather on the basis of a constitutive decision of the competent authority. Based on all of the above, it can be concluded that children born on the territory of the Republic of Serbia, from parents who are foreign nationals, cannot acquire the citizenship of the Republic of Serbia by default, although the Republic of Serbia is a signatory of a large number of conventions and other documents directly related to this issue, with the aim of finding suitable instruments that will adequately affect the reduction in the number of stateless persons, that is, of avoiding and preventing the emergence of new stateless persons.

However, the situation is further complicated by the fact that, in the case of these children, a clearly defined procedure for determining their status is not available, nor are there alternative forms of protection that do not imply the asylum procedure and the granting of one of the forms of protection established in the Serbian legislation.

Passing or adopting mechanisms for the protection of stateless persons, either through the adoption of procedures, or by granting some other form of alternative protection, implies that the State assumes the obligations envisioned by the 1954 Convention, that is, to implement reforms aimed at identifying and protecting stateless persons, which is still an *unknown territory* for many countries and participants. This is also due to the interest of each state to possess information on the number of identified cases of statelessness, that is, to possess the information on who exactly is staying on its territory. It is also reflected in the recommendations and conclusions of the international community bodies, which recognized the importance of sharing good practices among countries, regarding the collection of reliable data on stateless persons, as well as in relation to the procedures for determining the status of a stateless person.

Recommendations:

» It is of crucial importance that the competent authorities, in the most recent future, and relying on the provisions of the Law on General Administrative Procedure, define, in a more precise manner, the procedure for registering children of migrants into the registry books of the Republic of Serbia, either through amendments to the relevant by-laws, or through a legally binding instruction.

» For the purpose of efficient implementation, it is desirable that all registry services, as well as legal representatives, be informed about defined procedures, as well as the conditions for registering children of migrants, in a timely manner.

» It is desirable that the competent authorities of the Republic of Serbia, through a dialogue with a wider range of interested actors, and relying on solutions from comparative practice, consider options for the introduction of the Statelessness Determination Procedure, or the introduction of a model which would provide protection to stateless persons, through some kind of alternative form of protection, regardless of the asylum procedure.

» If the option of introducing the Procedure is accepted, it is crucial to regulate, in detail, the issue of the rights and obligations available, by carrying out a realistic assessment of rights the Republic of Serbia has the capacity to ensure on a full scale at this time.

» In the case of opting for the second model, consideration should be given to the possibility of introducing an explicit condition, in relation to this category of persons, in existing legal framework, in the provisions stipulating the conditions for temporary stay.

» It is important to take into consideration the possibility of introducing the Procedure, or an alternative form of protection, including the issue of the authority responsible for the proceedings, while taking into account the currently established competencies, the expected changes in the relevant regulations, the real capacities available to the authorities, the solutions accepted, and the comparative practice, as well as the recommendations of the UNHCR.

ANNEX I

Examples of collected birth certificates

МКР

РЕПУБЛИКА СРБИЈА

ГРАД БЕОГРАД

ОПШТИНА

ИЗВОД ИЗ МАТИЧНЕ КЊИГЕ РОЂЕНИХ

У матичну књигу рођених која се води за матично подручје ЗВЕЗДАРА, под текућим бројем 1089 за годину 2017 извршен је упис рођења:

Име		мушки (пол)
Презиме		
Дан, месец, година и час рођења	28. (ДВАДЕСЕТОСМИ) МАРТ 2017. ГОДИНЕ У 13:35 ЧАС.	
Место и општина-град рођења, а ако је лице рођено у иностранству и држава	БЕОГРАД	
Јединствени матични број грађана		
Држављанство		

Подаци о родитељима	оца	мајке
Име		
Презиме (и презиме пре закључења брака)		
Јединствени матични број грађана		
Дан, месец и година рођења	12.08.1992.	17.08.1993.
Место и општина-град рођења, а ако је лице рођено у иностранству и држава	ХИЛМАНД	ХИЛМАНД
Држављанство	АВГАНИСТАНА	АВГАНИСТАНА
Пребивалиште и адреса		

Накнадни уписи и забелешке:

Број 1 6169149

У БЕОГРАДУ

Дана 19.04.2017

(М.П.)

Потпис матичара

ДАНИЈЕЛА ЈЕВТОВИЋ

МКР

РЕПУБЛИКА СРБИЈА

ГРАД Суботица

ОПШТИНА

ИЗВОД ИЗ МАТИЧНЕ КЊИГЕ РОЂЕНИХ

У матичну књигу рођених која се води за матично подручје Суботица, под текућим бројем 912 за годину 2017. извршен је упис рођења:

Име	[redacted]	мушки (пол)
Презиме	[redacted]	
Дан, месец, година и час рођења	28. (двадесетосми) мај 2017. године у 20:20	
Место и општина-град рођења, а ако је лице рођено у иностранству и држава	Суботица, Суботица	
Јединствени матични број грађана	[redacted]	
Држављанство	Авганистана	
Подаци о родитељима	оца	мајке
Име	[redacted]	[redacted]
Презиме (и презиме пре закључења брака)	[redacted]	[redacted]
Јединствени матични број грађана	[redacted]	[redacted]
Дан, месец и година рођења	01.01.1987.	01.01.1991.
Место и општина-град рођења, а ако је лице рођено у иностранству и држава	Херат, Агванистан ~~Herat~~	Херат, Авганистан ~~Herat~~
Држављанство	Авганистана	Авганистана
Пребивалиште и адреса	----------	----------

~~Накнадни~~ уписи и забелешке:

Број: ~~IV-03/VI-200-3/2017~~ 1055

У ~~Суботици~~

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Потпис матичара

Неорчић Наталија

Штампа: НБС - Завод за израду новчаница и кованог новца - Топчидер

GRAD NOVI PAZAR
GRADSKA UPRAVA ZA IZVORNE I POVERENE POSLOVE
SLUŽBENA EVIDENCIJA MATIČNIH KNJIGA

IZVOD IZ MATIČNE KNJIGE ROĐENIH

U **matičnu knjigu rođenih** koja se vodi za matično područje N o v i P a z a r		
pod tekućim brojem >> 428 << za godinu >> 2017 << izvršen upis rođenja:		
I m e	[redacted]	
P r e z i m e	[redacted]	
Dan, mesec, godina i čas rođenja	07.02.2017, 12/35	
Mesto i opština-grad rođenja, a ako je lice rođeno u inostranstvu i država	Novi Pazar	
Jedinstveni matični broj građanina		
Državljanstvo	Avganistana	
Podaci o roditeljima	oca	majke
Ime	[redacted]	[redacted]
Prezime (i prezime pre zaključenja braka)	[redacted]	[redacted]
Jedinstveni matični broj građanina		
Dan, mesec, godina i čas rođenja	01.01.1981	01.01.1991
Mesto i opština-grad rođenja, a ako je lice rođeno u inostranstvu i država	Avganistan .	Avganistan .
Državljanstvo	Avganistana	Avganistana
Prebivalište i adresa	Tutin Centar za azil	Tutin Centar za azil
Naknadni upis i zabeleške		

Broj: IV-200-1-1
u Novom Pazaru
dana 25.08.2017

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