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3 August 2011

Mr Nikola Gruevski
Prime Minister

Mrs. Teuta Arifi
Deputy Prime Minister for European Affairs

Mrs. Gordana Jankulovska
Minister of Interior

Mr. Blerim Bexheti
Minister of Justice

Mr. Nikola Popovski
Minister of Foreign Affairs

Mr. Neždet Mustafa
Minister without Portfolio

Human rights concerns in relation with the recent measures taken by your government aimed to restrict the alleged abuse of the visa-free regime

Honorable Ministers,

We are organisations working in the field of refugee and minority (Roma) rights protection. We are writing to you in order to express our concerns regarding the measures which have been taken by your government in order to reduce the number of Macedonian asylum seekers in EU member states.

According to media reports, several hundreds of Macedonian citizens have been prevented from leaving Macedonia, in the last months, on the suspicion that they may want to apply for asylum abroad.

Referring to a statement of the spokesman of the Macedonian police, the internet magazine *Balkan Insight* reported that 800 Macedonian citizens were prevented from leaving their country in June (Belgium Says Macedonia Curbing Asylum Seekers, *Balkan Insight*, 2 July 2011). Referring to statements made by Minister Gordana Janulovska at the Salzburg Forum, Macedonian media reported that 764 Macedonian citizens were returned at the Macedonian border, between 29 April and 27 June. (За два месеца вратени 764 македонски граѓани од граница, *ИИПРЕС*, 29 June 2011; Interior Minister Jankulovska Addresses Ministerial Forum in Austria, *Skopjediem*, without date)

According to other reports, Minister Jankulovska and former Minister of Justice Antonio Milošoski announced, during a press conference in May, that 447 Macedonian citizens had been prevented from leaving Macedonia between 29 April and 19 May. (ОКОЛУ 500 МАКЕДОНЦИ МЕСЕЦОВ ВРАТЕНИ ОД ГРАНИЧНИТЕ ПРЕМИНИ – НЕМАЛЕ ДОВОЛНО ДОКАЗИ ЗОШТО ЌЕ ПРЕСТОЈУВААТ ВО ЕУ, *Kanal 5*, 20.05.11, Macedonia steps up controls to end visa liberalisation abuses, *SETimes*, 22.05.2011)

In addition to these reports, we have also learned that those persons, who were prevented from leaving Macedonia, had their passports stamped. The Macedonian NGO ARKA reported that Roma, who were kept from leaving Macedonia, had the letters “AZ” stamped in their passport, indicating, that they cannot leave Macedonia. (ARKA: Monthly Report for the situation of the Roma Rights in Macedonia, May- June 2011) The Serbian public broadcaster RTS quoted statements by Minister Jankulovska according to which the purpose of this measure is to warn border guards, that the holders of these passports need to be subject to “additional controls, in order to prevent them from abusing the visa liberalisation and damage the reputation of Macedonia” (Makedonija: Pečati za lažne azilante, *Radio-televizija Srbije*, 23.05.11)

According to the information we received from your consular services, these measures are based on Article 15 of the Law on Border Surveillance, Законот за гранична контрола, of 30 December 2010,¹ which borrows elements of the Schengen Borders Code. However, this article merely defines the elements comprising so-called “minimum checks” as defined in Article 7 of the Schengen Borders Code (Regulation (EC) No. 562/2006), but does not lay down any criteria on the basis of which Macedonian citizens can be prevented from leaving their country.

From the information, we received it appears that the criteria for allowing a person to leave Macedonia are left at the discretion of the border guards. The Macedonian NGO ARKA reported, for instance, two cases of Roma who were prevented from visiting relatives in Serbia or attending a wedding. In another case, Roma were prevented from travelling to Serbia for seasonal work. (ARKA: Monthly Report for the situation of the Roma Rights in Macedonia, May- June 2011)

It also appears that the persons, who are rejected at the border, are not always informed about the reason, why they are not allowed to leave Macedonia, creating a strong suspicion that they are targeted by this measure due to their ethnicity. There is evidence suggesting that those predominantly affected by this measure are Roma and ethnic Albanians.

Evidence has come to light that your government is currently considering a law reform, which would make it possible to deprive failed asylum seekers or forcibly returned migrants of their passport. (Лажните азиланти ќе останат без пасоши?, *Utrinski Vesnik*, 14.04.11; ЧЕТИРИ

¹ Article 15 “Minimum border checks”:

(1) Minimum border checks are carried out over all persons crossing the state border in order to check and determine their identity based on a given travel document or other document prescribed for crossing the state border.

(2) The minimum border checks of paragraph 1 of this Article shall consist of a quick and simple check with the appropriate technical devices and by checking the appropriate records and electronic databases only to check travel documents, or other prescribed documents for crossing the state border, if stolen, misused, lost or invalid, to check its validity and to verify the presence of signs suggestive of abuse, forgery or alterations to the document.

(3) The minimum border checks of paragraph 2 of this Article shall apply to nationals of the Republic and those who enjoy the Community law on free movement.

(4) The implementation of minimum border checks on persons nationals of the Republic of Macedonia, and over those who enjoy the Community law on free movement, the police officer may, on a non systematic basis, check in the appropriate records and electronic databases if they pose a threat to people, national security, public policy, international relations or a threat to public health.

ГОДИНИ ЗАТВОР ЗА АЗИЛАНТИТЕ!, *Kapital*, 19.05.11) This measure has been announced during a meeting of the former Minister of Justice Milošoski with EU Commissioner Cecilia Malmström in Brussels (Macedonian Ministry of Foreign Affairs: Minister Milošoski meets European Commissioner for Home Affairs Cecilia Malmström, 24.06.11) During the same meeting, Minister Milošoski also announced a reform of the Criminal Code, introducing “the abuse of the visa-free regime with the EU” as a criminal offence. A draft proposal, ПРЕДЛОГ-ЗАКОН за изменување и дополнување на Кривичниот законик, has been presented in July. (Macedonian Ministry of Foreign Affairs: Minister Milošoski meets European Commissioner for Home Affairs Cecilia Malmström, 24.06.11; ПРЕДЛОГ- ЗАКОН за изменување и дополнување на Кривичниот законик, July 201)

Article 1 of this draft proposal introduces the new Article 418e according to which “(1) [a]ny person who recruits, encourages, organizes, harbors or transports persons into a Member State of the European Union and the Schengen Agreement, for the purpose of obtaining or exercising social, economic or other rights, contrary to the law of the European Union, regulations of the Member States of the European Union and to the Schengen Agreement and international law, shall be punished with imprisonment of at least four years.

(2) If the offender under paragraph (1) was obliged or could not know that the trip is made for the acquisition or exercise of rights [listed] under paragraph (1), contrary to the law of the European Union, regulations of the Member States of the European Union, the Schengen Agreement and International law, (the offender) shall be punished with imprisonment of one to five years.

(3) If the offence is committed out of self-interest, the offender shall be punished for the crime under paragraph (1) with at least eight years in prison and for the crime under paragraph (2) with at least four years in prison.

(4) If the crime is committed by a legal entity, [the offender] will be punished with a fine.

(5) The objects and vehicles used to perform the work will be confiscated.”

(ПРЕДЛОГ- ЗАКОН за изменување и дополнување на Кривичниот законик, Skorje, July 2011)

Over the last few months, travel companies have been repeatedly accused of being the source of the increase of asylum applications by Macedonian nationals in several EU member states. Macedonian media reported statements by Minister Jankulovska according to which “the asylum seekers are victims of the manipulation on the part of some tourist or quasi-tourist agencies” (Лажните азиланти ќе останат без пасоши? *Utrinski Vesnik*, 14.05.11) The same media also reported the closure of several travel companies amidst allegations of an “abuse” of the free-visa regime (see: Macedonia Investigates Asylum Schemes as Pressure Mounts, *Balkan Insight*, 26.10.10; Macedonia steps up penalties for visa abusers, *Balkan Insight*, 19.05.11; Околу 500 Македонци месецов вратени од граничните премини – немале доволно докази зошто ќе престојуваат во ЕУ, *Kanal 5*, 20.05.11) However, it appears, that these allegations have never been substantiated, and the sanctions imposed on the companies actually linked with management irregularities, which were uncovered during the investigation (see: Околу 500 Македонци месецов вратени од граничните премини – немале доволно докази зошто ќе престојуваат во ЕУ, *Kanal 5*, 20.05.11)

In addition, we have received several reports of concerned individuals who claimed that they lost their social benefits upon their return to Macedonia. This information coincides with NGO reports according to which they have warned their clients, that they might lose their social benefits and health insurance and be issued with a travel ban, if they would apply for asylum in the EU (ARKA: Monthly report for the situation of Roma rights in Macedonia, May – June 2011) Macedonian media have even reported that Roma NGOs have been requested to warn the

members of their community, that they may face imprisonment for this (see: Едукација - како да се користи визната либерализација, *Sitel*, 15.05.11)

The above measures not only violate several articles of the Macedonian Constitution; they also infringe basic principles of international human rights law:

The right to freedom of movement

The right to freedom of movement which is enshrined in Article 27 of the Macedonian Constitution as well as in Article 13 of the Universal Declaration of Human Rights (UDHR), Article 12 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of Protocol No. 4 to the European Convention on Human Rights (ECHR) protects the right of every person to leave any country including his/her own (Articles 27(2) of the Macedonian Constitution, 13(2) UDHR, 12(2) ICCPR, 2(2) of Protocol No. 4 to the ECHR). This year, Macedonian citizens have been repeatedly prevented from exercising this right and were returned at the border when trying to leave the country.

The right to freedom of movement also includes the right to obtain the necessary travel documents to undertake international travel such as a passport (see: Human Rights Committee - General Comment No. 27 para. 9) which has consistently been affirmed by the European Court of Human Rights (the Court) since *Baumann v. France* (no. 33592/96, § 63, 22 May 2001; see also *Batik v. Russia*, no. 55565/00, § 36, 21 December 2006 and *Napijalo v. Croatia*, no. 66485/01, §§ 69 and 73, 13 November 2003). The intention of the Macedonian government to confiscate the passports of Macedonian citizens who have been forcibly repatriated is therefore a violation of their freedom of movement. The same applies to measures undertaken by the Macedonian government such as stamping the passports of those citizens who were rejected by the border guards on the basis of the suspicion that they might try to seek asylum abroad which will make their passports useless for international border-crossing, depriving them of the necessary travel documents. A ruling condemning such practice is the judgment of *Sissanis v. Romania* (no. 23468/02, §§ 6 and 64, 25 January 2007).

Furthermore, the right to freedom of movement according to article 12(3) ICCPR only allows exceptional restrictions requiring that they “are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant” (see also article 2(3) of Protocol 4 to the ECHR). Restrictions that do not meet these standards violate freedom of movement (see Human Rights Committee - General Comment No. 27 para. 12). General Comment No. 27 clarifies that “[t]he law itself (authorizing the application of restrictions) has to establish the conditions under which the rights may be limited” (see para. 12) and that it should use “precise criteria and may not confer unfettered discretion on those charged with their execution” (see para 13; see also the Court in *Gochev v. Bulgaria*, no. 34383/03, § 46, 26 November 2009, *Sissanis v. Romania*, no. 23468/02, §§ 65-67, 25 January 2007 and ESC - Conclusions 2008, Bulgaria, p. 166, ESC – Conclusions 2005, Romania, p. 622).

The Macedonian Law on Border Surveillance (Законот за надзор на државната граница) of December 2010 only defines “minimum checks” for individuals enjoying visa-free travel within the European Union, which includes Macedonian citizens, and fails to define the conditions under which their freedom of movement can be restricted, in particular there is no statements providing for the stamping of passports, or precise criteria to identify these conditions. It leaves the identification of these conditions and criteria at the discretion of the border personnel, who in many cases fail to communicate to the affected individuals the reasons for the restrictions placed on their freedom of movement. This does not only create an environment which is

conducive to corruption and discrimination at the border-crossings, but also an unlawful restriction of the freedom of movement in violation of Article 27(2) of the Constitution of Macedonia as well as Articles 13(2) of the UDHR, 12(2) of the ICCPR and 2(2) of Protocol 4 to the ECHR.

The right to freedom of movement and prohibition of discrimination

The fact that due to their marginalization in society Macedonian Roma and to a lesser extent ethnic Albanians are the mostly affected by the above mentioned measures leads to their indirect discrimination on the basis of ethnicity with regard to their right to freedom of movement in violation of article 9 of the Macedonian Constitution as well as article 13(2) together with article 2 of the UDHR, article 12(2) together with article 2 of the ICCPR and article 2 of Protocol No. 4 to the ECHR, together with articles 6 of Protocol No. 4 to the ECHR and article 14 of the ECHR.

Right to asylum

The restrictive measures taken and planned by your government do not only violate the right to freedom of movement of the citizens of the Former Yugoslav Republic of Macedonia but are also directly aimed at preventing them from exercising their right to seek asylum abroad, which is protected under article 14(1) of the UDHR and the Refugee Convention. The same applies to your proposed plans to fine and imprison failed asylum seekers upon their return to Macedonia intending to scare them away from exercising their right abroad. The fact that most of the asylum applications filed by Macedonian citizens in the EU have been rejected as unfounded does not imply that Macedonian citizens can be deprived of a fair chance to have their application for asylum assessed by their country of destination.

In this context, we would like to stress that international organisations and governments remain concerned about the situation of Roma in your country. They have consistently reported the widespread discrimination against Roma, who remain socially marginalized. They have also reported several cases of alleged mistreatment of Roma from the side of the Macedonian police.² The same has been observed by the UN Human Rights Committee who has expressed its concerns about “reports of police violence against members of minority groups, in particular against Roma, and the lack of effective investigation of such cases”.³

We are also very concerned about the introduction of article 418e(3) in the Criminal Code as far as it refers to article 418e(2) aiming at criminalizing tour operators for transporting persons who later seek asylum in the country of destination, even though the operator was neither aware of their intention nor negligent for not knowing their intention. This will force honorable tour operators, in fear of punishment, to be very discriminating in the selection of their passengers,

² See : European Commission : Staff working document: The former Yugoslav Republic of Macedonia – 2010 Progress Report, SEC (2010) 1332, 9 November 2019; European Commission staff working paper on the post-visa liberalisation monitoring for the Western Balkan countries in accordance with the Commission Statement of 8 November 2010, 30 May 2011; U.S. Department of State/Bureau of Democracy, Human Rights, and Labor: 2010 Country Reports on Human Rights Practices, April 8, 2011; ECRI Report on « The Former Yugoslav Republic of Macedonia » (fourth monitoring cycle), adopted on 28 April 2010 , published on 15 June 2010, CRI (2010) 19; Committee against Torture: Fortieth session, Geneva, 28 April – 16 May 2008: Consideration of the reports submitted by states parties under article 19 of the Convention: Concluding observations of the Committee against Torture: The former Yugoslav Republic of Macedonia; Civil Rights Defenders: Human Rights in Macedonia, updated report of November 2010

³ Concluding observations of the Human Rights Committee: The Former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/2, 17 April 2008

depriving those who they deem to be potential asylum seekers from their right to seek asylum abroad.

The right to work

It is evident from the reports we received that Macedonian citizens have been prevented from commuting to their workplace in neighboring countries as a result of these measures. The right to work is protected under article 32(1) of the Macedonian Constitution and articles 23(1) of the UDHR and 6(1) of the ICESCR. As General Comment 18 states “the right to work requires states parties to refrain from interfering directly or indirectly with the enjoyment of that right” (see Committee on Economic, Social and Cultural Rights - General Comment 18 para. 22).

Moreover, these measures also violate the right of every worker “to earn his living in an occupation freely entered upon”, article 1(2) ESC as well as the right of every citizen “to leave the country to engage in a gainful occupation in the territories of the other Contracting Parties”, article 18(4) of the ESC.

Right to social security

Withholding the social assistance of failed asylum seekers who are returned to Macedonia in order to punish them also violates their right to social security guaranteed in articles 34 and 35 of the Macedonian Constitution as well as articles 22 and 25(1) of the UDHR, article 9 of the ICESCR. General Comment 19 clarifies that “the measures that are to be used to provide social security benefits cannot be defined narrowly and, in any event, must guarantee all peoples a minimum enjoyment of this human right” (see Committee on Economic, Social and Cultural Rights - General Comment 19 para. 4; see also para. 59 for clarification and interpretation of the minimum standard). This is not provided if the social assistance is, as it is for several affected individuals, their only means to survive. Moreover, retrogressive measures are specifically allowed only as a general measure to cut state expenses, but are not permitted as a means of punishment (see paras. 42 and 64).

These measures also violate the right to social assistance benefits provided by article 13 of the European Social Charter (ESC). According to article 13(1) The Former Yugoslav Republic of Macedonia is obliged “to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources ... be granted adequate assistance”. The European Social Committee has consistently clarified that “[r]educing or suspending social assistance benefits can only be in conformity with the Charter if it does not deprive the person concerned of his/her means of subsistence” (see: ESC - Conclusions XI, The Former Yugoslav Republic of Macedonia, p. 471).

Prohibition of torture, inhuman or degrading treatment

Withholding their social assistance in many cases would deprive failed asylum seekers and returned migrants of the only income they have. Especially for Roma and ethnic Albanians due to their marginalized position in society this inevitably could lead to such damage to their psychological and physical conditions “capable of attaining the minimum level of severity” amounting to inhuman or degrading treatment in violation of articles 5 of the UDHR, article 7 ICCPR and article 3 ECHR. This has also been established by the Court as early as in *Larioshina v. Russia* (no. 56869/00, § 3, 23 April 2002) and *Pancenکو v. Latvia* (no. 40772/98, 28 October 1999) the court’s recent judgments are consistent with this (see for example, *Kutepov and Anikevko v. Russia*, no. 68029/01, § 62, 25 October 2005).

Right to liberty

We are concerned that the intended reform of the criminal code with the aim of punishing those who have applied for asylum abroad will lead to further abuse of the rights of the Macedonian citizens.

Threatening potential asylum seekers with imprisonment if their claims fail and the threat of being returned to Macedonia, punishes them for exercising their internationally recognized right to seek asylum (14(1) of the UDHR and Refugee Convention) and is therefore unreasonable and disproportionate leading to arbitrary arrests in violation of articles 9 of the UDHR, 9(1) of the ICCPR and article 5 of the ECHR.

Furthermore, introducing article 418e(1) in the criminal code with a punishment of imprisonment of a minimum of four years for those helping potential asylum seekers to exercise their human right to seek asylum by facilitating their travel to the country of destination without obtaining a personal profit such as payment for their aid is unreasonable and disproportionate and therefore would lead to arbitrary arrests violating articles 9 of the UDHR, 9(1) of the ICCPR and article 5 of the ECHR. The same applies to article 418(2) which punishes with imprisonment from one to five years those facilitating the travel of persons who subsequently seek asylum even though the facilitator was neither aware nor could have known their intention lacks any objective criterion in terms of intent or negligence, an essential legal element for a criminal offence, and is therefore also unreasonable and disproportionate in violation of articles 9 of the UDHR, 9(1) of the ICCPR and article 5 of the ECHR.

We are therefore calling on you and your government to immediately abandon these measures and to assume your responsibility to protect and respect the human rights of the Macedonian citizens. Furthermore, we urge you to work towards combating poverty and discrimination which are the root causes which lead people to apply for asylum abroad.

We therefore call on you and your government:

- To reform the Law on Border Surveillance to be in full compliance with the right to freedom of movement of the Macedonian citizens and to allow restrictions only in accordance with international human rights standards;
- In particular, to create a legislative base in accordance with International human rights standards legitimizing Macedonian border personnel to restrict the freedom of movement of the Macedonian citizens, to stamp and deprive them of their passports as well as refuse them to leave the country;
- To redraft the proposal for the reform of the Criminal Code respecting International human rights standards with a particular focus on avoiding violations of the right to liberty;
- To assure that all Macedonian citizens in need are at least guaranteed a minimum standard of social assistance in full respect of their human rights, even if their amount of social assistance is reduced as a means of punishment;
- To use the financial resources available to your government to reduce poverty instead of investing them in the construction of monuments and other prestige projects;
- To provide a durable solution to the situation of Kosovo Roma asylum seekers and facilitate their integration into the Macedonian society;

- To eradicate discrimination and marginalization of ethnic minorities in your country, in particular the most affected Roma;
- To refrain from any statements which nurture interethnic tensions and to promote tolerance and a peaceful coexistence of all people of Macedonia.

We respectfully request you to inform us of any action you have undertaken in response to the concerns expressed in this letter.

Respectfully,

Chachipe a.s.b.l., Luxembourg

Roma Union Grenzland e.V., Aachen/Germany

Project Roma Center e.V., Göttingen/Germany

Union des Roms d'Ex-Yougoslavie en Diaspora (URYD), France

Union française des Roms du Kosovo, Saint Etienne/France

Rom e.V., Cologne/Germany

Förderverein Roma e.V., Frankfurt am Main/Germany

Pro Asyl e.V., Frankfurt am Main/Germany

Migreurop network

Flüchtlingsrat Niedersachsen e.V., Hildesheim/Germany

Centre de Médiation des Gens du Voyage et des Roms en Wallonie, Namur/Belgium

Romane Aglonipe e.V., Hannover/Germany

Hessischer Flüchtlingsrat e.V., Frankfurt am Main/Germany

CC : Mr. Donald Tusk, President of the Council of the European Union
 Mrs. Viviane Reding, Vice-President of the European Commission and Commissioner responsible for justice, fundamental rights and citizenship
 Mrs. Cecilia Malmström, Commissioner for Home Affairs
 Mr. Štefan Füle, Commissioner for Enlargement and Neighbourhood Policy
 Mrs. Navanethem Pillay, UN High Commissioner for Human Rights
 Mrs. Gay McDougall, United Nations Independent Expert on Minority Issues
 Mrs Zonke Zanele Majodina, Chairperson of the Human Rights Committee
 Mrs. Ariranga Govindasamy Pillay, Chairperson of the Committee on Economic, Social and Cultural Rights
 Mr. Thomas Hammarberg, Council of Europe Commissioner for Human Rights
 Mr. Luis Jimena Quesada, President of the European Committee of Social Rights
 Mr. Janez Lenarčič, Director of the OSCE Office for Democratic Institutions and Human Rights
 Mr. Knut Vollebaek, OSCE High Commissioner on National Minorities
 Mr Peter Sørensen, Head of the Delegation of the European Union
 Mr. Jorgo Chatzimarkakis, Chair of the Delegation to the EU-Former Yugoslav Republic of Macedonia Joint Parliamentary Committee
 Mr. Richard Howitt, European Parliament Rapporteur for the former Yugoslav Republic of Macedonia