

**The Republic of Slovenia  
The Constitutional Court**

Number: U-I-200/00-6  
Date: 28.9. 2000

## **DECISION**

The Constitutional Court, in the proceeding initiated on the basis of the second section of Art. 59 of the Law on the Constitutional Court, on the session of 28 September 2000

### **HELD:**

1. Art. 30 of the Law on temporary refuge (Official Gazette of the Republic of Slovenia, no. 20/97) is hereby annulled.
2. The Regulation on Acquisition of Temporary Refuge for Citizens of Bosnia and Herzegovina (Official Gazette of the Republic of Slovenia, no. 41/97 and no. 31/98) is rescinded.
3. Any person who suffered harmful consequences due to the individual act issued on the basis of the rescinded Regulation mentioned in paragraph 2 of this holding, may request that it be rescinded by the competent authority within the period of three months after this decision is published in the Official Gazette of the Republic of Slovenia.

## **REASONING**

### **A**

1. The Constitutional Court, in the proceeding to review constitutional complaints filed by Fata Mujkiæ (case no. Up-322/99), Sakib Omanoviæ (case no. Up-75/00) and Vjekoslav Jurišiè (case no. Up-34/00), with the ruling of 6. 7. 2000 adopted on the basis of the second section of Art. 59 of the Law on the Constitutional Court (Official Gazette of the Republic of Slovenia, no. 15/94 – hereinafter referred to as: LCC), initiated the proceeding to review the constitutionality of Art. 30 of the Law on Temporary Refuge (hereinafter referred to as: LTR) and the proceeding to review the constitutionality and legality of the Regulation on Acquisition of Temporary Refuge for Citizens of Bosnia and Herzegovina (hereinafter referred to as: Regulation). It found that, before a decision concerning the constitutional complaints of the appellants is

taken, it has to review the constitutionality of Art. 30 of LTR, which authorises the government to determine, with a Regulation, which citizens of the Republic of Bosnia and Herzegovina (hereinafter referred to as: B&H citizens), registered with the Red Cross of Slovenia before the Law entered into force because of conditions in the Republic of Bosnia and Herzegovina (hereinafter referred to as: B&H), may obtain temporary refuge under the new LTR, according to what procedure, and for what amount of time, as well as a review of constitutionality and legality of the Regulation issued on the basis of this legislative authorisation. This is because judgements of the Supreme Court, challenged by the constitutional complaints, affirmed the positions of administrative authorities (administrative units and the Ministry of Internal Affairs) and the Administrative Court, that the time limit for filing a request for temporary refuge, stipulated in Art. 6 of the Regulation, is a preclusive time limit prescribed by law for enforcement of a certain right, and that, therefore, a *restitutio in integrum* is not allowed by the provisions of the Law on Administrative Procedure (Official Gazette of the Socialist Federal Republic of Yugoslavia, no. 47/86 et seq. – hereinafter referred to as: LAA-86), in force at the time of the decision, in case the time limit expired. Because of the aforementioned position, the appellants' requests for obtaining temporary refuge were rejected and a deadline was set for them to leave the Republic of Slovenia. Since an immediate return to their home country was not possible, they were, on the basis of Art. 7 and the second section of Art. 14 of LTR, placed in the Transit Home for Foreigners of the Republic of Slovenia .

#### B. I

2. In accordance with the second section of Art. 59 of LCC, the Constitutional Court sent the constitutional complaints, the rulings on admissibility of constitutional complaints and the ruling on initiating the proceeding to review the constitutionality of Art. 30 of LTR and the proceeding to review the constitutionality and legality of the Regulation, to the National Assembly and the Government for a response. The Constitutional Court did not receive a response from the National Assembly or the Government in the stipulated period.

3. In the process of considering the constitutional complaints, a response concerning the constitutional complaints under consideration was submitted by the Ministry of Interior (hereinafter referred to as: MI). It states that the legal status of citizens of Bosnia and Herzegovina, who sought refuge in the Republic of Slovenia in 1992, was not regulated by law. The Republic of Slovenia offered them “de facto” protection in accordance with non-binding recommendations of the Executive Committee of the United Nations High Commissioner for Refugees (hereinafter referred to as: UNHCR Executive Committee). It stresses that the appellant did not obtain “de iure” temporary refuge and that therefore her contention that the Regulation violated her acquired right isn't plausible. Since the LTR was adopted a year and a half after the signing of the peace agreement for Bosnia and Herzegovina, and during the time when the return of B&H citizens was “at its height”, an authorisation was provided in Art. 30 of LTR to the Government to determine which B&H citizens may obtain temporary refuge, according to what procedure and for what amount of time. When drafting the Regulation, the Government followed UNHCR recommendations, which appealed to the international community that states should not forcibly return certain categories of B&H citizens and that they should continue to provide them with temporary refuge. The MI is of the opinion that the provision setting a time limit for

citizens of B&H to state whether they wish to continue to enjoy refuge does not violate general principles of international law. None of the ratified international instruments constrains the Republic of Slovenia in regulating the duties of an alien in connection with the filing of a request for temporary refuge. The Convention Relating to the Status of Refugees (Official Gazette of the Federal People's Republic of Yugoslavia, International Treaties, no. 7/60, and Official Gazette of the Republic of Slovenia, no. 35/2, International Treaties, no. 9/92 – hereinafter referred to as: the Geneva Convention), thus speaks, in the first section of Art. 37, about a reservation “that refugees should, without delay, register with authorities, presupposing an immediate or at least a prompt filing of a request for refugee status.” Moreover, the MI claims that B&H citizens were informed about their rights and duties under the Regulation. The Bureau of immigration and refugees (hereinafter referred to as: the Bureau) notified B&H citizens registered with the Red Cross how to obtain temporary refuge a day before the publication of the Regulation in the Official Gazette. The notice was also sent to the UNHCR, local chapters of the Red Cross of Slovenia, and other non-governmental organisations dealing with refugees, as well as to Slovene and Bosnian-Herzegovinian media. Concerning the question what kind of status do appellants have in the Republic of Slovenia, the MI explains that they cannot be considered as falling under the provision of Art. 26, which requires the Bureau to organise a return of persons with temporary refuge, but rather under the provision of Art. 7 of LTR and chapter VI. of the Law on Aliens (Official Gazette of the Republic of Slovenia, no. 61/99 – hereinafter referred to as: LA -1). As regards the giving of opinion on the existence of reasons referred to in paragraph 5 of government positions, the MI emphasises that the Bureau considered the applications promptly. In cases where a request was filed just before the time limit expired, or several days before 31. 7. 1997, it claims that the Bureau issued the applicant an acknowledgement of receipt for the filed request for an opinion, which the applicant attached to his request for obtaining temporary refuge. It explains that the competence of the Bureau was merely to assess whether an extension of temporary refuge was justified and that the administrative unit was not bound by its opinion.

#### B. – II

4. Persons who, due to conditions in the former republics of the Socialist Federal Republic of Yugoslavia, in particular the war in the Republic of Croatia and B&H, began to arrive in the Republic of Slovenia in great numbers, could not obtain the status of a refugee on the basis of the Law on Aliens (Official Gazette of the Republic of Slovenia, no. 1/91 – hereinafter referred to as: LA) in force at the time. This law provided that the status of a refugee could only be obtained by an alien who left the country whose citizen he was or in which he settled as a person without citizenship, in order to avoid persecution because of his political beliefs, cultural or scientific activities, or national, racial or religious affiliation. The Constitution, in Art. 48, guarantees a constitutional right to asylum, but not a right to temporary refuge. Art. 48 of the Constitution provides: »Within the limits of the law, a right to asylum is recognised for foreign citizens or persons without citizenship, who are persecuted because of their striving for human rights and fundamental freedoms.« The right to temporary refuge, on the other hand, refers to a large-scale influx of persons who escape into a country because of war, occupation, mass violations of human rights or similar reasons in their home country. The Republic of Slovenia, just as a large number of other European countries, adopted the position that the Geneva

Convention and the Protocol Relative to the Status of Refugees (Official Gazette of the Socialist Federal Republic of Yugoslavia, International Treaties, no. 15/67, Official Gazette of the Republic of Slovenia, International Treaties, no. 9/92 – hereinafter referred to as: the Protocol) cannot be directly applicable for persons who leave their country in large numbers because of war conditions.<sup>1</sup> When considering a large-scale refugee situation, the republic of Slovenia acted in accordance with the recommendations of the UNHCR Executive Committee concerning the actions of states when a large-scale influx of aliens occurs. These are two conclusions of the UNHCR Executive Committee, specifically, conclusion no. 19 concerning temporary refuge of 1980 and conclusion no. 22 concerning the protection of asylum seekers in situations of large-scale influx. The Government, in July 1992, established the Bureau (Decree on the establishment of the Bureau of immigration and refugees, Official Gazette of the Republic of Slovenia, no. 27/92). The Bureau has, as an independent expert agency of the Government, competence for consideration and resolution of the refugee problem. On the basis of Art. 7 of the Decree, the Bureau also took over housing and maintenance of temporary refugees from the Republic of Croatia and B&H. Maintenance of persons who enjoyed temporary refuge was shared by government authorities taking care of housing, food in refugee centres, health care and education on one hand, and the Red Cross and other non-governmental (e.g. Karitas), who organised distribution of humanitarian aid to temporary refuge seekers which did not live in centres and provided psycho-social aid. Since conditions in B&H began to improve with the conclusion of the peace agreement, the Government adopted positions concerning the return of B&H citizens with temporary refuge to their homeland (positions no. 260-03/94-3/4-8 of 25. 4. 1996 – hereinafter referred to as: Government positions). Citizens of B&H, who fled to the Republic of Slovenia had to register with the Red Cross of Slovenia, which kept a register. These registers had to be turned over to the MI after the adoption of the LTR (in accordance with the transitional provision of Art. 31 of LTR). They also carried a card – the temporary refugee record issued by the Bureau - with an expiration date.

5. It appears from the above facts that the status of B&H citizens in the Republic of Slovenia was, before the adoption of LTR, regulated with acts of Government, and that they were not present on the territory of the Republic of Slovenia »illegally«. Because of the absence of statutory regulation, they could not, however, obtain the right to temporary refuge. Rights and duties of citizens and other persons can, pursuant to Art. 87 of the Constitution, only be stipulated by the National Assembly with a statute. The Republic of Slovenia therefore initiated a legislative procedure to adopt a law regulating the rights and duties of these persons as early as in 1994. This may be inferred from legislative materials (Draft Law on Temporary Refuge – EPA 805, Reporter of the National Assembly, no. 39/94, 39/95 and 15/96). The draft LTR, in the first, second and third readings, provided that a temporary refuge could be obtained by all B&H citizens who came to the Republic of Slovenia because of conditions in B&H. Three conditions were envisaged: first, that they had a valid registration record, second, that they are registered with the Red Cross of Slovenia, and third, that they file a valid registration record with the competent authority. Temporary refuge was also to be obtained by those B&H citizens who were not registered with the Red Cross of Slovenia, if they requested it within 30 days after the

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<sup>1</sup> Draft Law on Temporary Refuge – first reading – EPA 805, Reporter of the National Assembly, no. 39/94, page 26.

law entered into force. A change was effected with a government amendment in the third reading of the draft law. It appears from the explanation of the amendment in question, now in force as Art. 30 of LTR, that a different proposal was justified by changed conditions in B&H (a signed peace agreement, a declared amnesty, human rights and fundamental freedoms are gaining in importance, reconstruction has started and with it the creating of conditions for refugees' return to their homeland), and that it would therefore »not make sense to carry out previously envisaged administrative procedures and grant the status of persons with temporary refuge to refugees from Bosnia and Herzegovina registered with the Red Cross of Slovenia«.

6. According to the second section of Art. 120 of the Constitution, administrative authorities (the executive power – Government and administrative authorities) are, in performance of their duties, and therefore also when issuing regulations, bound by the framework laid down by the Constitution and statutes, and do not have a right to issue regulations without a substantive basis in a statute. Since the principle of separation of powers (second section of Art. 3 of the Constitution) excludes the possibility of administrative authorities altering or independently regulating legislative matters, the implementation clause may not include an authorisation which could provide grounds for executive regulations to include provisions that have no basis in a statute, and particularly, which would independently regulate rights and duties (see, e.g., Constitutional Court's view in the decision no. U-I-58/98 of 14.1.1999, Official Gazette of the Republic of Slovenia, no. 7/99 and OdlUS VII, 2).

7. The authorisation given in Article 30 of the LTR to the Government to determine, with the secondary legislation - Regulation -, the categories of citizens from B&H who have the right to enjoy temporary refuge, in fact transfers the power of regulating the acquisition of the right to temporary refuge, for those citizens of B&H who already enjoyed temporary refuge in the Republic of Slovenia, to the Government. An authorisation to the Government to determine with a Regulation which B&H citizens may obtain the right to temporary refuge is a so-called blank or bianco authorisation. The legislator regulated the acquisition of the right to temporary refuge (persons who may acquire it, procedure, and rights and duties) in detail with the LTR, while the acquisition of the same right for B&H citizens who were already present in the Republic of Slovenia was left entirely to the executive. The Law should have specified which B&H citizens, registered with the Red Cross of Slovenia because of conditions in B&H, could obtain the right to temporary refuge on the basis of the LTR and under what conditions. The Government, on the basis of the aforementioned authorisation, determined with the Regulation on its own and independently of the LTR, which B&H citizens who already enjoyed temporary refuge on the basis of Government's decrees and positions may obtain the right to temporary refuge and which ones may not. The second and third paragraph of Article 3 of the Regulation does not even stipulate conditions to be met by B&H citizens in order to obtain temporary refuge, but rather refers to certain decrees and positions adopted by the Government prior to the adoption of the LTR and which were not published in the Official Gazette. The regulation also independently sets time limits for B&H citizens to arrange their status on the basis of the new LTR, if they wish to obtain the right to temporary refuge. The time limit for acquiring a certain right is a part of the right itself, i.e. a condition for its acquisition. The expiration of the time limit provided for the acquisition of a certain right carries the consequence of the loss of the right. This is the reason why the appellants' requests for granting temporary refuge were rejected,

meaning that temporary refuge was not granted because they missed the time limit. The statutory authorisation in Art. 30 of LTR had the consequence that the Regulation formed a special right to temporary refuge for B&H citizens. This also follows from the Amended Regulation, which, in its new first paragraph of Art. 16 explicitly speaks of persons “who are entitled to temporary refuge under this Regulation”. Provisions of the Regulation specifying which B&H citizens may obtain the right to temporary refuge and conditions for its acquisition (Art. 1 to 5 of the Regulation), provisions of the first section of Art. 6 in the part which specifies a time limit for filing a request for temporary refuge, and provisions of Art. 7, 8 and 9, which provide for compulsory attachments to the request for temporary refuge (a valid temporary refugee registration record, a valid passport and opinion of the Bureau), cannot be reviewed from the perspective of their conformity with LTR, since they originally and completely independently of LTR provide which B&H citizens may obtain the right to temporary refuge and what the conditions are for its acquisition. The regulation could therefore, on the basis of Art. 30 of LTR, completely independently of LTR - for the implementation of which it was supposed to be issued - provide rights and duties of B&H citizens on its own. That is why this part of the authorisation is in contravention of the second section of Art. 3 and the second section of Art. 120 of the Constitution.

8. The part of the provision of Art. 30 of LTR, which gives the Government an authorisation to determine “according to what kind of procedure” B&H citizens may obtain temporary refuge under LTR, is also in contravention of the second section of Art. 3 and the second section of Art. 120 of the Constitution. The procedure for considering requests for a right to temporary refuge was already laid down in LTR. Its Art. 9 provides: “Procedures envisaged by this law are controlled by the provisions of the Law on General Administrative Procedure.” If the legislator thought that in the case under consideration concerning the procedure to obtain this right certain exceptions from the Law on General Administrative Procedure (Official Gazette of the Republic of Slovenia, no. 80/99 – hereinafter referred to as: LAP) were necessary, he should have provided so in the statute itself. Likewise, the authorisation to the Government to determine by a regulation for how long B&H citizens obtain the right to temporary refuge. The duration of a certain right is also a part of the right itself. If the legislator wanted to regulate the duration of the right to temporary refuge of B&H citizens differently from LTR, he should have done so with a statute. The right to temporary refuge is not, under the LTR, acquired for a specified period, because it is impossible to predict when the circumstances justifying acquisition of temporary refuge shall cease to exist. This is why Art. 5 of LTR provides the changing of conditions which justified the obtaining of temporary refuge as the primary reason for its termination. In case where conditions justifying temporary refuge have ceased to exist, the Government sets a date for leaving the country, while the Bureau has a duty to organise the return (Art. 26 of LTR). Temporary refuge may terminate due to other reasons as well, especially due to acquisition of a different status in the Republic of Slovenia or in another country. Temporary refuge can also be terminated with a cancellation, although LTR lays down reasons in Art. 6. If the legislator wanted to prescribe different reasons for termination of temporary refuge for B&H citizens, he should have done so himself. Hence, the Regulation, as an infra-statutory act, could regulate termination of temporary refuge only within the bounds of reasons stipulated by the LTR. The Constitutional Court, due to the reasons mentioned, finds that the

authorisation of Art. 30 of the LTR contravenes the Constitution in its entirety. This is why it was annulled (Paragraph 1. of the holding).

9. The Constitutional Court may either annul or rescind unconstitutional or illegal regulations (first section of Art. 45 of the LCC). It may rescind unconstitutional or illegal regulations when it finds that it has to remedy harmful consequences caused by unconstitutionality and illegality. As was already explained, the Regulation, in addition to stipulating short time limits for filing a request, also stipulated numerous other limitations for granting temporary residence to B&H citizens, not provided in the LTR, such as: a valid passport (Art. 2 and 9), the filing of a request in specified time for certain categories of B&H citizens (Art. 3), reference to unpublished Government decrees and positions, a prohibition of obtaining temporary refuge for B&H citizens in Art. 5 of the Regulation, compulsory obtaining of an opinion of the Bureau of Immigration and Refugees (Art. 8). It was possible, therefore, to deny the right to temporary refuge on the basis of the Regulation, for reasons not stipulated in the LTR. B&H citizens who did not obtain temporary refuge because they did not satisfy one or more of the conditions set in the Regulation, undoubtedly suffered harmful consequences, since they lost all rights granted to persons with temporary refuge by the LTR. This is why the Constitutional Court rescinded the Regulation. Although certain provisions of the Regulation do implement the LTR for B&H citizens (e.g. prescribed forms, specified administrative unit for filing of the request) and would not need a special statutory authorisation for their issue, the majority of provisions of the Regulations directly or indirectly interfere with the right to temporary refuge of B&H citizens and should have their basis in statutory provisions. This is why a partial annulment of the Regulation was not possible (paragraph 2 of the Regulation).

10. The provision of Art. 46 of LCC provides when entitled persons may demand that harmful consequences brought about by unconstitutional or illegal infra-statutory regulation be remedied. Anyone who shows that he suffered harmful consequences on the basis of a rescinded infra-statutory regulation, may demand their remedy. If the consequences were brought about with an individual act, adopted on the basis of a rescinded regulation, the entitled person may request its alteration or rescission with the competent authority which decided on the first instance (first section of Art. 46). The mentioned request must be filed within the period stipulated in the second section of Art. 46 of LCC. This section provides that an entitled person may request an alteration or rescission of the individual act within three months from the publication of the decision, provided that no more than a year passed between the time when the act was served and the time of the filing of the initiative or request for a review. Since, in the case under consideration, the Constitutional Court didn't initiate the proceeding on the basis of an initiative or a request, but instead initiated it on its own on the basis of the second section of Art 59 of LCC, the one-year time limit as a condition for filing of a request for alteration or rescission of an individual act under the first section of Art. 46 of LCC cannot be applicable. The Constitutional Court therefore, on the basis of the second section of Art. 40 of LCC, as a means of implementing this decision, stipulated a time limit for B&H citizens to request an alteration or rescission of individual acts issued on the basis of the rescinded Regulation. To do so, it construed the second section of Art. 46 of LCC, which provides, for the filing of a request, a time limit of three months from the time the decision of the Constitutional Court is published (paragraph 3. of the holding).

11. With the annulment of Art. 30 of LTR and rescission of the Regulation for B&H citizens who had a valid temporary refugee registration record on the day of entry into force of the LTR, conditions for obtaining temporary refuge laid down by the Regulation ceased to apply. The aforementioned B&H citizens may obtain temporary refuge if they meet conditions laid down in LTR, i.e. if conditions of Art. 4 of LTR do not exist in their case. Neither can they obtain temporary refuge if reasons for terminating temporary refuge stipulated in Art. 5 become applicable in their case. Since the legislator didn't specify a time limit for B&H citizens to rearrange their status in line with provisions of LTR, i.e. he did it in contravention of the Constitution, all stipulated time limits for B&H citizens to obtain temporary refuge became void with the rescission of the Regulation. It has to be taken into account, moreover, that B&H citizens could not obtain temporary refuge due to the fact that the Republic of Slovenia did not have statutory regulation and that they, at the time of their arrival, already did all that state authorities demanded from them to arrange their status in the Republic of Slovenia. It is therefore impossible to apply the time limit laid down in the sixth section of Art. 10 and which is cited by the Supreme Court in the challenged judgements. LTR provides, in the second paragraph of the first section of Art. 3, a possibility of obtaining temporary refuge for persons who were lawfully present in the Republic of Slovenia when conditions specified in the first section of Art. 2 occur and were temporarily unable to return to their home country after the period of their lawful stay expired, if they request it from the competent authority before the period of permitted residence expires (sixth section of Art. 10). B&H citizens who had a valid temporary refugee registration record on the day the LTR entered into force cannot be considered persons whose lawful residence in the Republic of Slovenia expired. This is so because B&H citizens' lawful residence in the Republic of Slovenia wasn't terminated with the adoption of the LTR. The adoption of the LTR merely meant that, from its entry into force, the situation of B&H citizens as temporary refugees was regulated by statute.

### C.

12. The Constitutional Court adopted this decision on the basis of Art. 43, second section of Art. 45 and second section of Art. 40 of LCC, in a panel composed of deputy president dr. Lojze Ude and judges dr. Janez Èebulj, dr. Zvonko Fišer, dr. Miroslava Geè Korošec, Lojze Janko, Milojka Modrijan, dr. Mirjam Škrk and dr. Dragica Wedam Lukiè. The decision was adopted unanimously.

Deputy president  
dr. Lojze Ude