SPECIAL ADMINISTRATIVE MEASURES TOWARDS FOREIGNERS IN B&H

Boris Kordić¹

Review paper

Mostar Field Office of the Service for Foreigners Affairs

Received: 26.05.2011

UDC: 342.717(497.6)

Accepted: 18.11.2011

351.756(497.6)

ABSTRACT

The intention of this paper is to give a positivistic legal overview of certain special administrative procedures applied to foreign citizens moving through and staying in Bosnia and Herzegovina opposite the legal rules prescribed by the state of Bosnia and Herzegovina. A review shall be made as to those administrative procedures relating to pronouncing certain penalties (measures) for offenders of imperative rules, such as: administrative measures of cancelling a stay to foreigners, measure of administrative removal (deportation), measures of putting a foreigner under surveillance. Apart from their divergence from the rules of general administrative procedure in nature of matter, in certain elements, these special administrative procedures are characteristic of the ways in which they are enforced. The enforcement of certain measures against foreigners sometimes implies the application of special powers, even the application of means of physical coercion and temporary detention of a foreigner in a specialised centre (immigration centre), with goal of final enforcement of a legitimate and legally-binding decision – removal of the foreigner from B&H to the country of his/her usual residence. By the issuance and enforcement of such decisions, the Service for Foreigners Affairs (hereinafter: the Service) assumes a significant position in security and informative system, significantly contributing to the level of security in B&H, although being limited by the Law on the Service for Foreigners Affairs (OG B&H No. 54/05 and 36/08, hereinafter: the LSFA), which defines the Service as an administrative organisation, independent in the performance of operative tasks. Even though the mentioned procedures have been established in line with models and positive practice applied in the countries of the European Union, hence they are extensively adjusted to the Community Acquis and Directives that address these problems and guarantee a wide scope of rights in order to assure legal actions, certain discrepancies and illogicality emerge, which we shall make in this paper an attempt elaborate and offer certain solutions de lege ferenda.

Key words: *foreigners, special administrative procedures, visas, cancellation of stay, deportation, putting under surveillance, forcible execution of measure, appeal, Immigration centre.*

1 Correspondence to:

Boris Kordić, Mostar Field Office of the Service for Foreigners Affairs
K.Zvonimira 22, Mostar, B&H
Phone: +387 63 313 459
E-mail: b_kordic@yahoo.com

SPECIAL ADMINISTRATIVE MEASURES AGAINST FOREIGNERS IN B&H

The foreigners who violate the regulations of Bosnia and Herzegovina, for such violations of the public order are held accountable in terms of criminal law, and for misdemeanours.

The Law on Movement and Stay of Foreigners and Asylum (SG 36/08, hereinafter: LMSFA) specifies minor offence liability of the foreigner and certain measures to be pronounced. Apart from fines, foreigners can be pronounced certain administrative measures, out of which we single out: cancellation of the visa, cancellation of the stay, expulsion (deportation), putting the foreigner under surveillance. The mentioned measures are applied by means of the application of general and special administrative procedures. The Law on Administrative Procedure of B&H (SG 29/02, 12/04 and 88/07, hereinafter: LAP) is applied as a *lex generalis* to all administrative procedures that are conducted in line with the LMSFA. In order to avoid the situations which can emerge by the application of some norms of the LAP that can be mutually completely or partially conflicting (contradictory), the contents of legal obligations prescribed by the LMSFA as a *lex specialis*, principle *lex specialis derogat generali* is applied. Concretely, this means that to the same legal matter, which LMSFA defines differently than the LAP, a special law is applied – LMSFA. The rules prescribed by general administrative procedure are applied supplementarily – subsidiarily. In this way antinomy is evaded and coherence of legal system is contributed by the enhancement of its unity.

“From another standpoint, these special clauses should not oppose primary legal principles of the legal procedure” (Tomić, 2009, p. 93). Practically, this means that all provisions of the LAP, which regulate

certain activities of the bodies of administration, must be consistently applied, in every actual case, unless a special law prescribes otherwise. This is how certain procedures which can diverge from the general administrative procedure emerge. Such legal normalisation is a result of specific quality of certain spheres that must be framed within administrative procedure, which is imposed by social needs for efficient conduction of certain procedures.

“Those different rules of administrative procedure are prescribed exceptionally when necessary for the resolution only of some administrative matters or some procedural issues that, due to certain specific qualities, are to be differently prescribed within the general administrative procedure” (Krijan, 1998, p. 17). To all legal issues that are not regulated by the rules of special administrative procedure, the rules of general administrative procedure are applied.

For example, general deadline to appeal against the first-instance decision in line with the Law on Administrative Procedure is 15 days, whereas the Law on Movement and Stay of Foreigners and Asylum prescribes in special procedures special deadlines for appeal – deadline to appeal against the decision on expulsion of the foreigner that is accepted based on the international agreement on cooperation in the transfer and reception of a person whose stay is illegal, and does not have a granted stay is the same as in the case of an appeal against the decision putting the foreigner under 24-hour-surveillance, the deadline for the appeal against the decision on expulsion in 8 days. “Hence, in a concrete application of substantive regulation the rules of the special administrative procedure are always abided by, because as regards the issue they prescribe, they are adequate for the application of that substantive regulation, not the rules of general administrative procedure” (Krijan, 1998, p. 18).

CANCELLATION OF VISA (VISA STAY CANCELLATION)

Visa is an authorisation permitting a foreigner to enter Bosnia and Herzegovina and a permit to stay during the period for which the visa is granted. It is prescribed which countries are in the visa regime with B&H (Decision on visas, SG B&H 100/08). As a rule, visas are issued by the diplomatic consular department of B&H (hereinafter: DCD) in line with the prescribed procedure, and in particular cases Border Police is authorised to issue a visa on the border.

The number of issued visas by the DCD in 2001 amounted to 23,458. The next decade saw a continued decrease in the issued visas which in 2010 amounted to 9,623. The number of visas issued at the border in 2001 amounted to 3,706, then continually declined and in 2010 amounted to 327. The reason for such rapid decrease in the number of issued visas is to be sought in the fact that many countries that were in the visa regime imposed a non-visa regime with B&H (Migration profile of the Ministry of Security, Sector for Immigration for 2010).

The Border Police may cancel a foreigner's visa at the entrance to B&H, if the visa is forged or the foreigner is pronounced the measure of removal from B&H. The Service may at any moment cancel the visa, hence denying a foreigner a visa stay (visa) in B&H and order him to leave the territory of B&H provided that the legal conditions are met. On the cancellation of visa is issued a special decision that becomes final at the moment of delivery, because the foreigner is not entitled to appeal against such decision.

Legal reasons according to which a visa can be cancelled to a foreign national are: threat, disrespecting or jeopardising safety and good order in B&H, criminal activity or conviction

for a criminal act over a year, participation in the activities relating to illegal migrations or trafficking, any violation of the regulations on crossing the state border, change in the circumstances based on which the visa was issued which exclude any possibility of the issuance of a visa, giving wrong information when applying for a visa, work in B&H without a work permit, falsifying a travel document based on which the visa was granted (LMSF, Article 42). In certain above-mentioned cases a foreigner may be pronounced a measure of expulsion (denying entrance to B&H, ranging from one to five years) and a measure of putting the foreigner under surveillance in the specialised institution – Immigration Centre² in order to enforce the decision on banishment. If the foreigner is not banished, and his visa stay is cancelled, he is granted a deadline to voluntarily leave B&H. This period cannot be longer than 8 days. It is important to mention that the Service can shorten the validity of the issued visa if the foreigner does not have sufficient means of sustenance necessary during his stay in B&H.

The measure of cancelling a non-visa and temporary stay. The right to a non-visa stay provides a foreigner with possibility to stay in B&H up to 90 days, within the period of 180 days. Foreigners often use this type of stay in B&H, mainly for touristic purposes.

The approval of such stay does not require the issuance of a special administrative decision, but registration of residence with the relevant organisational unit of the Service or the police station in the place of residence is sufficient.

² Immigration Centre is a specialised institution of the Service for the reception and accommodation of the foreigner. Foreigners stay in the immigration centre until the conditions for their safe return to their homeland or the country from which they arrived are met.

As a rule, a foreigner is granted/extended a temporary stay up to one year, provided that all the conditions prescribed in the LMSFA. A measure of cancellation of a non-visa and temporary stay is pronounced to a foreign national under the LMSFA-stipulated cases (SG 36/08, Article 68).

This measure results in the obligation of the foreigner to leave the territory of B&H within the granted period, which cannot be longer than 15 days, as of the day the irrevocable stay cancellation decision is served. Certainly, the foreigner is entitled to appeal in line with the LAP against the stay cancellation decision. The appeal hinders the decision enforcement.

The second-instance body, deciding on the appeal may refuse to examine the appeal or dismiss it after consideration, thereby rendering such a decision irrevocable and enforceable on the day it is served. If the second-instance body decides that the appeal is founded, hence a legal provision is wrongfully applied; it can completely or partially acknowledge the appeal, revoke the appellate decision and solve the merits of the matter. In practice, however, when a second-instance body revokes a first-instance decision, such case is remitted to the first-instance body for new trial, enlisting the omissions in the procedure. It is essential to point out that the second-instance body, when resolving the appeal against the stay cancellation decision, but also in all other appellate procedures that may emerge in the procedures of banishment or putting a foreigner under surveillance, should use the authority vested in it by the LAP, thus decide on the merits itself and issue final decisions which replace the first-instance decisions. This does not occur in practice; in this way, however, a unified jurisprudence could be easier established, rendering the same/similar cases unified at the level of B&H.

Such actions would undeniably contribute to legal safety as well. In a repeated procedure, the first-instance body, although bound by the directions of the second-instance body still appraises all facts itself and delivers a new decision that can but does not have to be in line with the directions issued by the second-instance body, depending on the established facts in a concrete case. Theoretically, but also in practice, in this way some cases can incessantly “travel” between the first-instance body and the second-instance body, due to a reason that the second-instance body does not use the possibility to adjudicate the procedure irrevocably. Against a negative decision issued by the second-instance body a foreigner can lodge a lawsuit with the Court of B&H, instigating an administrative dispute against such a decision, the lawsuit however does not hinder the enforcement of the decision. In his appeal the plaintiff, however, can demand from the Court of B&H or the body that issued the decision to delay the enforcement of the decision if the law-envisaged conditions are met (The Law on Administrative Disputes in B&H, SG B&H 19/02, Article 18). If the foreigner does not want to voluntarily implement the legally-binding measure, e.g. to leave the territory of B&H, a forcible enforcement is done.

In order to ensure such enforcement, the foreigner can be pronounced a measure of surveillance and lodging in a specialised institution – Immigration centre whose officers enforce the measure when the technical conditions for that are met.

The enforcement of the measure of stay cancellation, either voluntary or forcible involves the foreigner’s obligation to leave the territory of B&H, at the defined border crossing at the specified time.

Although the foreigner who has been pronounced the measure of stay cancellation is entered in special, LMSFA-prescribed registers, that fact as regards the stay cancellation is taken into account when issuing a decision on a future approval of a temporary stay, the measure of stay cancellation has no grave consequences for the foreigners, especially nationals of the states that are in a non-visa regime with B&H. Practically, this means that, after the enforcement of the measure, the foreigner referred to in the above-mentioned situation can return to B&H with no disturbances even on the very same day when the measure is enforced. For such reasons, these legal solutions must be changed, because in a concrete case they have no practical purpose. In cases of a non-visa stay cancellation, more meticulous (relevant) would be to pronounce foreigners a measure of prohibition to return to B&H for a certain period not shorter than 30 days. In this way only, the measure of non-visa stay cancellation would have a practical purpose.

REASONS FOR THE ISSUANCE OF THE STAY CANCELLATION MEASURE

The LMSFA has enlisted the reasons for which a stay cancellation measure is pronounced:

- a) If a foreigner does not respect the public order³ in B&H or undertakes an activity undermining the security in B&H or is a member of an organisation undertaking such activity. This provision is set very widely and can include an extensive range of acts and actions that can be a burden on the foreigner when issuing a decision on the waiver of the right to stay.

³ "Public order is a collection of legal rules of the internal law of a country, which contains and defends its (basic)" (Đelmo, et al., 2009).

- b) The LMSFA considers the disregard of the laws and other regulations in B&H and non-abiding by the decisions of the bodies of administration in B&H to be the violation of the public order. It is logical that the violation of public order by foreign citizens should be established in a non-appealable decision of a court of law or some other body of state authority in B&H, consequently to be particularly appraised when issuing a decision on the cancellation of stay to a foreign national. The Law does not elaborate the provision defining which body is competent to establish that a foreigner has violated the security of B&H, logically, however, that can be Intelligence and Security Agency of Bosnia and Herzegovina⁴;
- c) If a foreigner puts at risk the interests of B&H, by taking any part in illegal trade in weapons or military equipment, in radioactive or other hazardous substances or narcotics, or in illicit transportation or trade in materials for the production of arms or other weapon of mass destruction, or in the production or possession of narcotics with purpose of sale, or is a member of an organisation participating in such an activity in any way; the LMSFA stipulates a rather mild sanction for culprits of such grave criminal acts which in certain cases does not have a practical meaning and enables the foreigner culprit of such criminal acts to return unrestrainedly to B&H. In my opinion, for such transgressions should be pronounced a measure of expulsion in duration of at least 5 year by the force of law;

⁴ In line with the Law on Intelligence and Security Agency (ISA) ("B&H Official Gazette", Nos. 12/04, 20/04 and 56/06) – ISA is responsible for collection, analysis and distribution of intelligence information with purpose of protecting security, including sovereignty, territorial integrity and constitutional order of Bosnia and Herzegovina.

- d) If he organises or is related to the organisation of illicit entry, stay or departure of an individual or groups in or out of B&H, or if he organises or in any way participates in trafficking in human beings. Also, as mentioned in the previous text, for these grave violations of the law harsh sanctions should be prescribed, implying the expulsion of the foreigner from the territory of B&H in as long as possible legal duration;
 - e) If the Service establishes that a marriage or common-law marriage has been concluded out of interest or that adoption is based solely for the reason of entry and/or stay of a foreigner in B&H, or if the Service establishes that the foreigner who issued an invitation letter has not fulfilled his obligations referred to in the invitation letter, and has reissued an invitation letter, or issues invitations letters for untruthful purpose or abuses them otherwise;
 - f) If the foreigner deliberately provided wrong information or concealed the circumstances significant for the issuance of stay approval;
 - g) If the foreigner refuses to enforce a final, i.e. irrevocable decision issued by a relevant body in B&H; A logical question is raised how the decision shall be enforced – implemented if the stay is annulled to the foreigner? This provision is to be redefined;
 - h) If the foreigner in B&H stays opposite the purpose based on which the stay was approved;
 - i) If the foreigner entered and/or stays based on a forged travel document; Obviously, the fact of forging is established by the authorised body;
 - j) If the foreigner in B&H performs the activity for which he needs a work permit that he does not have, or works in a working position or performs the type of activities different from those for which he has the work permit;
- This offence should be pronounced the measure of expulsion because the measure of cancelling the stay to foreign nationals, especially those who are in a visa-free regime with B&H in such cases has no greater practical significance;
- k) If he violated or attempted to violate the regulations stipulating the crossing of the state border of B&H, regardless of whether the violation of the regulations occurred when entering or leaving B&H; These facts are usually established by the Border Police and it submits a proposal for the cancellation of stay with the Service for Foreigners Affairs for further actions;
 - l) If the circumstances based on which the approval of stay have changed to such extent that it would be impossible to issue approval; These facts are established by the Service and it issues a decision;
 - m) If the foreigner is convicted of a criminal act for which can be pronounced imprisonment of one year or a more severe punishment; The legislator should consider whether the presence of convicted foreigners in B&H is desirable or not. A possibility of stipulating a measure of expulsion in such cases should be considered;
 - n) If the presence of the foreigner in B&H represents a threat to public order or security in B&H; This legal provision is debatable from the aspect who can undoubtedly evaluate whether the foreigner is a threat or not, is the foreigner entitled to see the documents that is characterise him as a threat, can he and in which way prove otherwise or lodge some legal redress. On the other hand, the right of a state to approve the stay or not is discretionary right of the state, not in the scope of the rights of the foreigners to which he is entitled based on civic or some other rights;

- o) If the foreigner runs out of means of sustenance. This provision might appear inhumane, but it is usual in the states of the EU. Legal assumption of foreigner's entering into the country is his solvency and ability to support himself;
- p) If the foreigner is absent from B&H continually for at least 12 months, and based on the circumstances it can be undoubtedly established that he has no intention to return and temporary stay in B&H. This paragraph is one of the greatest illogical facts in the LMSFA. A foreigner can be granted a temporary stay for the maximum of 12 months. Thus, this legal provision is not completely defined. In order to establish a reason for the application of some of the mentioned foundations for the issuance of a decision on stay cancellation, they are substantiated by the existence of an international wanted notice, irrevocable court decision, as well as the data and information at disposal of the bodies that issue a concrete decision or other relevant bodies. The Service may grant the foreigner a deadline to enforce the irrevocable measure of stay cancellation that cannot be longer than 15 days.

If the foreigner does not voluntarily enforce the measure of the stay cancellation within the granted deadline, he can be pronounced a measure of expulsion from B&H and such measure is enforced ex officio. In cases enlisted under a), b), c), d), e), g), h), l) or m), apart from the stay cancellation the foreigner may be pronounced the measure of expulsion from B&H (so-called cancellation with expulsion).

5 Decision on the lowest amount of resources necessary for the support of the foreigner during the intended stay in B&H ("B&H Official Gazette", No. 13/11) stipulates that the foreigner must possess the amount of KM 150 or equivalent value in foreign currency for every day of the intended stay in B&H (This decision is in force for 2011).

In 2010, 397 measures of cancelling visa-free or temporary stay were pronounced and 73 measures of stay cancellation with expulsion⁶. The largest number of such measures was pronounced to the nationals of the Republic of Serbia from the territory of Kosovo who illegally stayed and worked in B&H.

REVOCATION OF PERMANENT STAY

The right to permanent stay in B&H can be acquired if the foreigner has had an approved temporary stay in B&H in the period of 5 years continually.

After having acquired the right to permanent stay, the foreigner acquires all rights and obligations that nationals of B&H are entitled to. A foreigner's granted permanent stay can be revoked in cases enlisted as the reasons for the cancellation of stay, in the cases described under a), b), c), d), e) or h). The LMSFA (SG 36/08, Article, 69) has anticipated special reasons for the revocation of permanent stay, and those are non-consumption of the right to stay in the period longer than 1 year or even a shorter period if it can be established that the foreigner has no intention of staying in B&H. In case of issuing a non-appealable decision on the revocation of permanent stay⁷ the foreigner is obliged to leave B&H and is entitled to re-enter and apply for approval of temporary stay. If the foreigner does not enforce the decision voluntarily, the Service shall enforce it ex officio.

6 The highest number of measures of stay cancellation was pronounced to the nationals of the Republic of Serbia 185, Republic of Croatia 29, National Republic of China 20 and so on, whereas cancellation with expulsion was pronounced in the highest number to the national of the Republic of Serbia 66 – source– Migration profile of B&H.

7 In such a way, in 2007 were revoked 20 permanent stays, in 2008 32, in 2009 36, and in 2010 a total of 106 – source – Migration profile of B&H 2010.

MEASURE OF ADMINISTRATIVE EXPULSION (DEPORTATION) OF A FOREIGNER FROM B&H

The most severe measure envisaged for foreigners, violators of the LMSFA is the measure of administrative expulsion of the foreigner from B&H⁸. The LMSFA (SG. 36/08, article 87) has anticipated the cases in which this measure is pronounced. They refer to the cases when a foreigner illicitly enters (or attempts to enter!) and/or illegally stays in B&H, if he has not left B&H based on the pronounced measure of stay cancellation. Also, it anticipates the pronouncement of this measure even when the foreigner has stayed as a refugee or asylum seeker who has not regulated his stay in B&H after the expiry of refugee or asylum-seeker status. The foreigner is banished from B&H if he stays longer than the validity period of: the right to a visa-free stay, visa, or the approval of the right to temporary stay, non-implementation of the decision on leaving B&H due to: cancellation of visa, cancellation of stay, cancellation of certain status such as refugee or asylum-seeker, revocation of the citizenship of B&H.

Also banished shall be a foreigner irrevocably convicted of a criminal act marked by a trade in narcotics, weaponry, human beings, trafficking in human beings, terrorism, money laundering or any form of organised, cross-border or transnational crime or has been irrevocably convicted of a crime for which can be pronounced imprisonment of one year or a severe punishment, and if the presence of the foreigner is a threat to public order or security of B&H.

⁸ According to the data of the Service published in annual reports on work in 2007 from the territory of B&H 822 foreign nationals were banished, in 2008 787, in 2009 474 and in 2010 410. The highest number of banished persons in 2010 were the nationals of the Republic of Serbia 190, Albania 105, Turkey 39 and so on.

A singled out case of pronouncing the measure of expulsion is the so-called reception of a foreigner based on an international contract on readmission of a person whose stay is illegal, and does not have an approved stay in B&H. If based on this paragraph a foreigner is pronounced a measure of expulsion from B&H, the deadline to appeal against the decision on expulsion which usually is 8 days has been reduced to only 24 hours. Such actions do not have a strong legal foundation (reason), justification and need for prescribing this extremely short deadline for appeal, especially if it is a common knowledge that as a rule foreigners are legally ignorant and that the state of B&H does not have a developed free legal aid system. The right to free legal assistance is a significant obligation of the state, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Also, the right to legal assistance and representation is anticipated in Directive 2008/115/EU issued by the European Parliament and Council in Article 13, Paragraphs 3 and 4. If foreigners are not assured these rights or they are not notified of their rights, that fact can be a reason for dismissal of any decision and a strong argument in a possible dispute before the Constitutional Court of B&H and the European Court of Human Rights. The state substitutes and overcomes this by signing protocols on cooperation with nongovernmental organisations that provide free legal assistance services. The obligations, however, cannot be resolved by improvisations, but by a systematic resolution at the level of the state of B&H, that would assure the access to free legal assistance and representation.

Organisational units of the Service appraise discretionarily all evidence, facts and circumstance relevant for the issuance of decision when deciding

on the duration of the measure of expulsion, in line with the principles of the LAP. Given the wide range of duration of the measure that is pronounced (from one to five years), the legislator should have stipulated which circumstances are to be taken into account as mitigating, i.e. aggravating, exclude the application of the measures against children, vulnerable groups, mentally incompetent persons and similar.

Also, there could be prescribed a possibility of mitigating the measure below legal minimum, even pronouncement of certain conditional measures and warning when justified reasons exist.

The foreigner is granted a deadline for the voluntary enforcement of measure (leaving B&H), which cannot be longer than 15 days as of the irrevocable decision delivery day. Against every decision on expulsion, however, (similarly as mentioned in the case of stay cancellation), an appeal can be lodged with the second-instance body as a rule within 8 days. Against a negative second-instance decision a foreigner is entitled to instigate an administrative dispute. A lawsuit in administrative procedure does not hinder decision enforcement, but the plaintiff can request from the Court of B&H or the body that issued the decision to delay the enforcement of the decision until the court issues a decision. If the foreigner does not voluntarily enforce the irrevocable measure, the Service approaches to official duty of forcible enforcement, and if necessary other agencies are involved in the decision enforcement. The Service issues a conclusion on the approval of enforcement immediately, but if assumptions for enforcement are not present then within 8 days; against this conclusion can be lodged an appeal which does not delay the implementation of the conclusion. Raised is the question, when this conclusion is served on

the foreigner, immediately prior to conclusion enforcement or something else.

This legislator must resolve this doubt in order to avoid putting the legality of the procedure at risk hence making it the foundation for challenging the entire procedure. The LMSFA envisages certain cases, when forcible enforcement of the decision on expulsion shall not occur, which relate to the obligations of the foreigner as regards serving imprisonment, or that is in interest of conducting some court proceedings, as well as some certain cases when assumptions for voluntary departure from B&H are met.

A special and most rigorous case of expulsion is the possibility of the Council of Ministers of B&H to issue a decision on expulsion of foreigner from B&H with permanent prohibition of returning to B&H upon a specified proposal of the relevant body, provided that the conditions prescribed in the LMSFA⁹ are met.

In neither case the decision on expulsion shall be enforced, i.e. the foreigner shall not be returned to the country where his life or freedom would be jeopardised, for reason of discrimination or political orientation or the existence of danger that this person would be subject to torture or other inhumane or humiliation treatment or punishment. The foreigner also cannot be banished or returned to the country in which he is not protected from sending to such territory.¹⁰ In these cases, the decision on expulsion is enforced only when legal conditions for that are met.

9 If appraised that expulsion is necessary in the interest of public order or is based on the reasons of security in B&H, in line with Article 1 Paragraph 2 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol 11.

10 In such cases, when the foreigner points out requests comprised under *principle of prohibition of return*, "*non-refoulement*" a special procedure for the establishment of foundation of the allegations and existence of conditions for approval of international protection (asylum) is implemented.

MEASURE OF PUTTING THE FOREIGNER UNDER SURVEILLANCE

The foreigner is lodged in an institution of closed type – Immigration centre when it is necessary in order to assure the enforcement of the aforementioned measures pronounced against foreigners or when a foreigner's identity cannot be established. The reasons for which the foreigner is lodged in the immigration centre is suspicion that the foreigner shall not enforce the pronounced measures, but flee from the relevant bodies, i.e. suspicion that free movement of the foreigner would be harmful to the public order. The pronounced measure based on which the foreigner is lodged in the Immigration centre does not have to be non-appealable, it can be enforced immediately.

The foreigner can reside in the immigration centre until the conditions for his safe return to the country of origin or the country whose national he is are provided. The foreigner is issued a special decision¹¹ in which the duration of this measure is marked, which cannot be longer than 30 days. Upon the expiry of 30 days, the foreigner can be kept under surveillance based on the decision on the extension of surveillance which is issued by the Service, for the maximum of 30 days. In total, the duration of surveillance of the foreigner cannot last more than 180 days. Exceptionally, however, in case when foreigner hinders his removal from the country, or it is not possible to remove the foreigner for other reasons within 180 days, total duration of surveillance can be prolonged to more than 180 days.

¹¹ In 2008, under surveillance were put 198 foreigners, in 2009, 191 foreigners and in 2010, 312 foreigners. In 2010, the highest number of foreigners put under surveillance was from the Republic of Serbia – 113, from Albania 99, from Turkey 17 and so on.

Practically, that means that the decision on putting the foreigner under surveillance can be prolonged infinitely in certain cases.

Example for such practice is the case of Syrian Imad al Husina, (Abu Hamza), who has been in the Immigration Centre since October 2008, waiting for the final court decision on the appeal on extradition. Directives of EU¹² prescribe that the detention for reason of enforcing a measure cannot last longer than 6 months, and that it cannot be prolonged for more than 12 months. The LMSFA should prescribe the maximum duration for which this measure can prolong. The foreigner is entitled to lodge an appeal within 24 hours with the second-instance body, which as stated does not hinder the enforcement of decision. Similarly, as described in case of pronouncing a measure of expulsion based on the contract on readmission, this deadline is too short and inadequate.

FORCIBLE REMOVAL OF A FOREIGNER FROM B&H

If a foreigner does not voluntarily enforce the pronounced irrevocable and enforceable measure of leaving B&H, the Service approaches to forcible enforcement of the decision – removal of the foreigner from B&H. According to the report on work of the Service for 2010, in this way 19 foreigners were forcibly removed, out of 7 were forcibly removed from the Immigration centre and 12 were removed by the organisations units of the Service in the field.

¹² Directive 2008/115/EU issued by the European Parliament and Council dated 16 December 2008 on joint standards and practice in the member states as regards the returning of persons of third countries whose stay is illegal Article 15, Paragraphs 5 and 6.

As compared with 2009, when 109 foreigners were forcibly removed from B&H, or 2008 172 foreigners, noticeable is the decrease in the application of force in the enforcement of measures. Reasons for this are to be credited to the employees of the Service, who in a humane approach encourage foreigners to voluntarily leave B&H. In this way, procedure is more efficient, more humane and more economic. Also, Directives of the European Union¹³ favour possibility of voluntary return. If foreigners voluntarily leave B&H, and they did not have a previously pronounced measure of removal, they can submit a request for reduction or dismissal of the measure. If foreigners decide on voluntary return, and they do not have resources for that, they can return to their country with aid of International Organisation for Migrations (IOM), which assisted in 341 returns of foreigners in 2010 and in 1644 returns in 2001.

CONCLUSION

The issue of migrations and asylum in B&H is a constitutional category. The Constitution of B&H in Article III Paragraph 1.(f) prescribe that migrations and asylum are under direct competence of the institutions of B&H. Incorporating these issues in constitutional categories, the state of B&H has prioritised them. The LMSFA defines many procedures and rules that regulate this substance, as well as competence of certain institutions of authority to enforce this law. The issuance and efficient enforcement in practice, within reasonable deadlines, of administrative measures pronounced

to foreigners for the violations of the LMSFA which regulates their movement and stay, has undoubtedly confirmed that the state of B&H, having transferred the competence for the resolution of these issues from cantonal and entity level to the state level, has created an integral and modern system, that can meet all given tasks in any part of the territory at any moment. All the aforementioned has been accomplished at relatively low expenses and resources, and B&H has assured the fulfilment of the conditions for admission to the EU, as regard the foreigners' affairs and acquiring free-visa regime for the countries signatories to the Schengen agreement. Through the implementation of the LMSFA within a short period, excellent results and high-level coordination between all institutions that pronounce the measures to foreigners in the entire B&H have been accomplished.

Based on all the mentioned, the enlisted measures that are taken against the foreigners in B&H are an unavoidable factor in the security system of the state that assures a peaceful life of the B&H citizens.

On the occasion of the issuance of the LMSFA, however, not all situations and problems could have been anticipated, which arise in the practical application of the law and its full harmonisation with the relevant EU Directives. Because of this, it is necessary to, including and not limiting to, take the actions as follow:

- Legally limit the duration of the measure of putting a foreigner under surveillance to a reasonable deadline, in line with the Directives of the EU, to a maximum of 18 months, without possibility of extending the measure infinitely;
- Appellate deadlines in appellate procedure relating to the issuance of a decision on putting a foreigner under surveillance, and to a decision on expulsion based on admission of a person

¹³ Directive 2008/115/EU, in Article 10 of Preamble recommends the prioritising voluntary return over forced one; and envisages the possibility of prolonging the deadlines for voluntary enforcement of measure when specific circumstances for that exist.

who does not have a legal stay in B&H should be prolonged from the current 24 hours to an adequate deadline of at least 3 days.

- Foreigners who have been pronounced certain measures are to be assured the right to free legal assistance and representation (especially those in state of social need, and introduce them to the rules and costs of the procedure,
- Exclude the pronouncement of a measure against “vulnerable” persons, i.e. treat with special care persons such as underage persons without escort, disabled persons, elder persons, pregnant women, single mothers with underage children and persons who suffered torture, rape or other severe form of psychological, physical or sexual violence.
- A measure of cancellation of stay should be redefined/reformed, in terms that a foreigner should be forbidden a new entrance to B&H for at least 30 days. In this way, the functionality of his measure will be assured. Also, it is necessary to tighten certain reasons for the pronouncement of measure of cancellation, e.g. it should be made possible that a foreigner found to be working without a work permit is pronounced a measure of stay cancellation with expulsion, and foreigners who were convicted of criminal acts or jeopardise the security in B&H should be pronounced the measure of expulsion.
- For reasons of legal security it is necessary to prescribe a precise way and time of the delivery of conclusion on the permission of decision enforcement to the foreigner. It would be even justified to deliver such decision at the moment of issuance.

Certain lacks in the system that have been mentioned are removable and during the oncoming period they can be significantly improved. As the

state of B&H contributes to its security in the affairs with foreigners it will make its environment more secure.

REFERENCES

- Odluka o najmanjem iznosu sredstava potrebnom za izdržavanje stranaca za vrijeme namjeravanog boravka u BiH [Decision on the lowest amount of resources necessary for the support of the foreigner during the intended stay in B&H], *Službeni glasnik BiH*, br. 13/11.
- Odluka o vizama [Decision on Visas]. *Službeni glasnik BiH*, br. 100/08.
- Direktiva 2008/115/EZ Europskog Parlamenta i Vijeća od 16. prosinca 2008. o zajedničkim standardima i postupanjima u državama članicama u vezi s vraćanjem osoba trećih zemalja čiji je boravak nezakonit. [Directive 2008/115/EU of the European Parliament and Council on joint standards and actions in member states as regards the return of persons of third countries whose stay is illegal, 16 December 2008.]
- Đelmo, Z., Kulaš, M., Avdagić, A., Kordić, B., Humačkić, T., Đelmo, Đ. (2009). *Leksikon upravnog prava* [Lexicon of administrative law]. Službeni list BiH. Sarajevo, B&H: JP NIO.
- Krijan, P. (1998). *Upravni postupak i upravni spor* [Administrative procedure and administrative dispute]. Mostar, B&H: Pravni institut Sveučilišta u Mostaru.
- *Migracioni profil za 2010. godinu* [Migration profile for 2010]. Ministarstvo sigurnosti BiH, Sektor za imigraciju.
- Zakon o kretanju i boravku stranaca i azilu [The Law on Movement and Stay of Foreigners and Asylum]. *Službeni glasnik BiH*, br. 36/08 od 16.04.2008. godine.
- Zakon o Službi za poslove sa strancima [The Law on the Service for Foreigners Affairs]. *Službeni glasnik BiH*, br. 54/05 i 36/08.
- Zakona o upravnim sporovima BiH [The Law on Administrative Disputes of B&H]. *Službeni glasnik BiH*, br. 19/02.
- Zakon o upravnom postupku [The Law on Administrative Procedure]. *Službeni glasnik BiH*, br. 29/02, 12/04 i 88/07.
- Tomić, R. Z., (2009). *Upravno pravo, 2. prošireno izdanje* [Administrative Law, 2nd extended issue]. Službeni glasnik, Belgrade, Serbia.