ASYLUM SEEKERS AND NATIONAL SECURITY CONSIDERATIONS IN GEORGIA

DEMOCRACY RESEARCH INSTITUTE 2020

Contributors to the Report: Tatia Koniashvili, Giorgi Tsikarishvili and Tamar Khidasheli

Responsible for the Publication: Ucha Nanuashvili

Editor: Teona Gogolashvili

The report is developed by the Democracy Research Institute (DRI), within the project Supporting Security Reform System in Georgia. The financial support of the project is provided by the National Endowment for Democracy (NED). The views and opinions expressed in the publication are those of the project team and do not necessarily reflect the official position of the donor organisation.

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INTRODUCTION

Hundreds of thousands of people leave their country every year because of violence, mass human rights violations and armed conflicts. For example, since 2011, more than five million people have fled Syria and sought asylum in dozens of countries around the world, including in Georgia. In 2019, 19 Syrians applied to the Migration Department of the Ministry of Internal Affairs of Georgia requesting international protection status. The State Security Service refused to grant international protection status for security reasons in 16 cases.[1] Despite the obvious humanitarian crisis in Syria that gives credibility to claims by Syrian asylum seekers, almost all of them are denied the status.

This, accordingly, gives rise to questions whether the State Security Service drafts stereotypical conclusions? How thoroughly are the specific circumstances of each status seeker's case examined?

The research aims at assessing the practice of denying international protection to asylum seekers for national security reasons and identifying the shortcomings in this regard. Accordingly, the present research studies the powers of the State Security Service of Georgia in the process of granting international protection status to aliens and stateless persons. In particular,

- whether the State Security Service's recommendations are indeed recommendatory;
- whether there is are signs of discrimination on the part of the Service when dealing with individuals of particular nationalities;
- whether asylum seekers have a realistic opportunity to defend their rights;

the research analyses court practice in this regard, and the compliance of Georgian legislation and jurisprudence of Georgian courts with international standards.

The first chapter of the report explains the essence of international status. The second chapter is the main part of the study and directly addresses the competences of the State Security Service to refuse foreign nationals and stateless persons to be granted status, as well as to deprive them of their status and expel from the country on the grounds of state security. The third chapter of the report reviews the court practice of

[1] Letter no. MIA 0 20 00633245 of the Migration Department of the Ministry of Internal Affairs of Georgia.

2019-2020, while the next chapter is devoted to the standards set by the best international practices. The final, concluding chapter offers recommendations developed by the Democracy Research Institute.

RESEARCH METHODOLOGY

To study the issue, the DRI requested public information from the State Security Service, the Migration Department of the Ministry of Internal Affairs, Tbilisi City Court and Tbilisi Court of Appeals. This research is also based on the analysis of data posted on the public agencies' websites. Furthermore, the report has cited documents and viewpoints of international organisations regarding the reform of the security system.

Notably, in terms of reforming the State Security Service, we studied the experience of those countries that, keeping the local context in view, can be considered to be the best examples. In particular, we selected the following four countries:

Latvia – the Ministry of Internal Affairs is the agency coordinating migration and asylum issues in Latvia. Under the Latvian law, the Department of Refugees under Citizenship and Migration Office examines the applications of asylum seekers. An asylum seeker has the right to appeal a decision of the Office of Citizenship and Migration Affairs.[2] The law also lays down the grounds for the refusal to grant refugee status. One of the preconditions is a conclusion prepared by competent authorities according to which there is a sufficient ground to believe that an asylum seeker poses a threat to national security.[3] It is noteworthy that the law does not specify whether this conclusion is recommendatory. The conclusion, however, must be credible and based on concrete facts.

Lithuania – The legal framework for the asylum procedure is created by the Lithuanian Law on Refugee Status.[4] The Migration Department under the Ministry of Internal Affairs among other important issues, decides on granting or revoking the status.[5] Irrespective

[2] Latvia, Asylum Law, Section 4.
[3] Ibid., Section 45.6.
[4] Lithuanian Law on Refugee Status.
[5] Ibid., Article 5.3, 9.2.

of whether an asylum seeker meets the criteria for refugee status, he/she will not be granted that status (will be excluded from refugee status) if he/she has committed a serious non-political crime or an act contrary to the purposes and principles of the United Nations.[6] The law also establishes the principle of non-expulsion of asylum seekers; however, this principle does not apply to those who pose a threat to the national security and public safety of the country and society.[7]

Estonia – The Ministry of Internal Affairs determines the asylum policy in Estonia. This agency is the largest public body in Estonia. Similar to other states studied in the report, the competent authorities of Estonia have the power to refuse to grant status to applicants if they pose a threat to state security or public order.[8]

Canada – under the Immigration and Refugee Protection Act of Canada, the Ministry of Public Safety and Emergency Preparedness, Ministry of Employment and Social Development and the Ministry of Citizenship and Immigration are responsible for the administration of this act.[9] Canadian legislation provides for refusing to grant asylum due to security reasons.[10] This issue is decided by the Ministry of Citizenship and Immigration, based on the opinion of the Canadian Security Intelligence Service.[11]

[6] Ibid., Article 4.2, 4.3.
[7] Ibid., Article 7.
[8] Estonia, Act on Granting International Protection to Aliens, Article 20, available at: https://www.riigiteataja.ee/en/eli/530102013009/consolide.
[9] Canada Immigration and Refugee Protection Act, section 4.
[10] Ibid., section 34-35.
[11] Ibid., section 15.2.

1. INTERNATIONAL PROTECTION AND ITS MEANING

In accordance with the Constitution of Georgia, Georgia shall grant asylum to citizens of other states and stateless persons in compliance with universally recognised norms of international law and the procedures established by law.[12]

The Law of Georgia on International Protection, which came into force in 2017, is based on the United Nations 1951 Convention Relating to the Status of Refugees and is mostly compatible with relevant international standards.

International protection implies ensuring the availability of an asylum procedure and the protection of the rights of refugee and humanitarian status holders, or persons under temporary protection, in accordance with the procedures provided for by relevant legislation.[13]

Refugee status shall be granted to an alien or a stateless person, who is outside the country of origin, and has a well-grounded fear that he/she may become a victim of persecution on the grounds of his/her race, religion, nationality, affiliation to a certain social group or political views, and who does not wish to, or cannot, return to his/her country of origin or enjoy the right to be protected from such a country due to such fear.[14]

According to the law, **Humanitarian status** shall be granted to an alien or a stateless person who does not comply with the conditions for granting refugee status but there is a real risk that, upon returning to the country of origin, he/she will face a serious threat of damage as provided for by law.[15]

The **status of a person under temporary protection** is granted to people entering as a group, who require international protection and cannot return to the country of their origin due to violence, aggression, international or internal armed conflict or due to mass violation of human rights.[16]

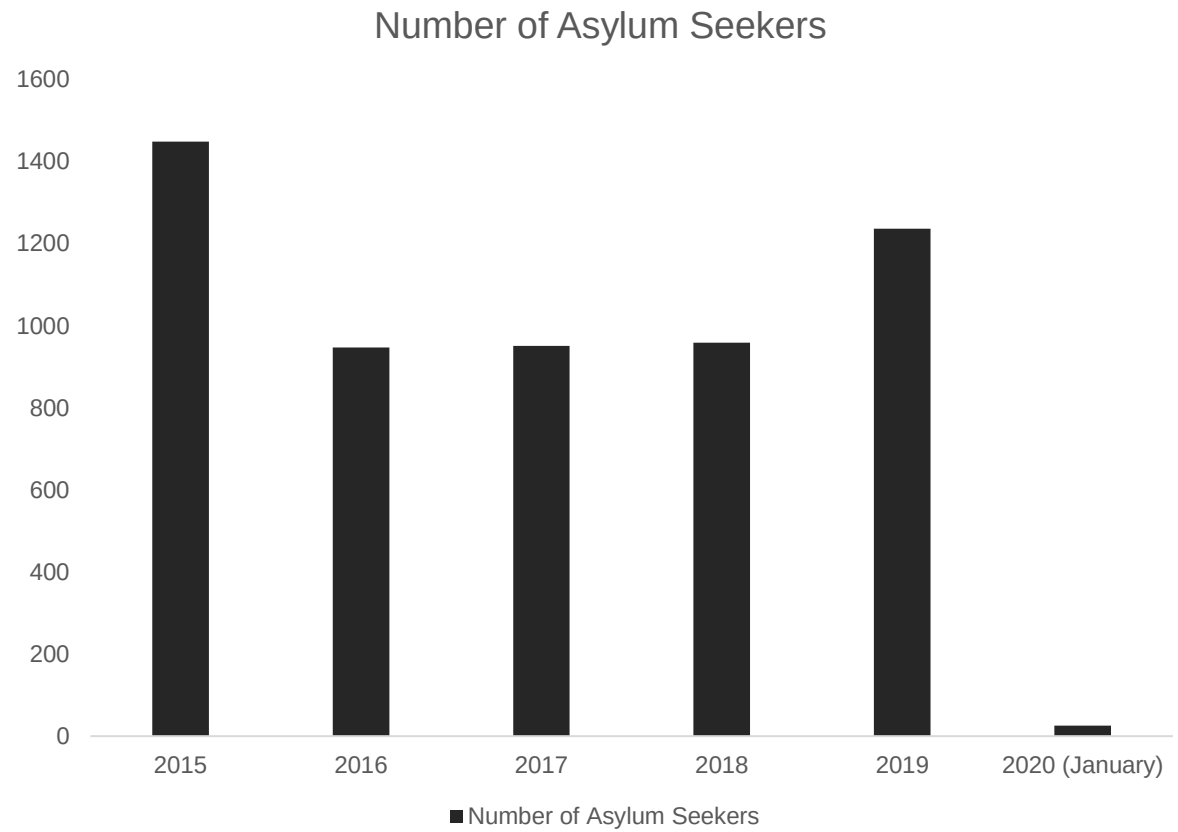
[12] The Constitution of Georgia, Article 33.3.
[13] The Law of Georgia on International Protection, Article 3.f).
[14] Ibid., Article 15.
[15] Ibid., Article 19.
[16] Ibid., Article 21.1.

The legislation lays down the time-frame, six months, for the consideration of applications requesting international protection, which starts upon their registration. This term may be extended for another nine months in cases stipulated by law. Where relevant justification exists, the term for the review of an application for international protection may be further extended for no more than three months. The term of review of an application for international protection cannot exceed 21 months from the date of submission of the application for international protection.[17] Until competent authorities reach a final decision, an individual is deemed an asylum seeker.

Under the legislation in force, the Migration Department of the Ministry of Internal Affairs of Georgia[18] or a court is in charge to examine and decide about granting international protection status in accordance with the procedure established by law. [19]

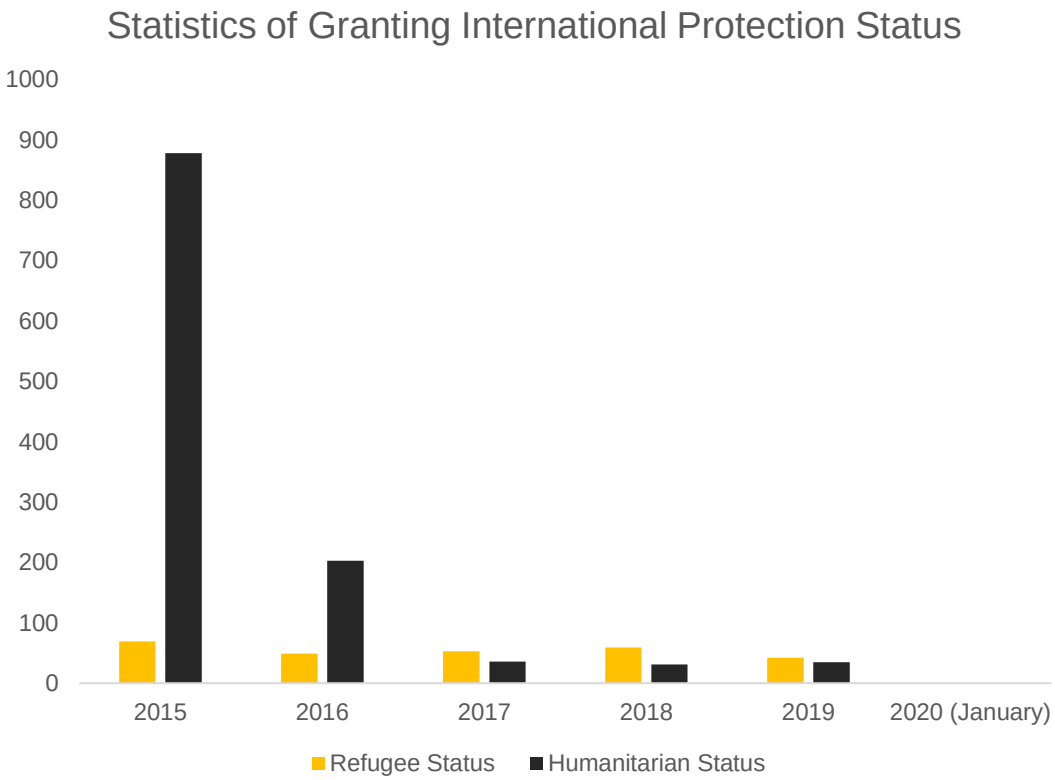
The DRI applied to the Migration Department of the Ministry of Internal Affairs of Georgia and requested statistics about asylum seekers, granting the refugee and humanitarian status.[20] According to the response, there were 1,449 asylum seekers in 2015; 947 asylum seekers in 2016; 951 in 2017; 959 in 2018; 1,237 in 2019, and 26 aliens and stateless persons as of January 2020.[21]

[17] Ibid., Article 29, paras. 1, 2, and 4.
[18] The Statute of the Ministry of Internal Affairs, Article 10.x).
[19] The Law of Georgia on International Protection, Article 43.8.
[20] DRI application no. 20200217/46 on requesting public information.
[21] Letter no. MIA 0 20 00633245 of the Migration Department of the Ministry of Internal Affairs of Georgia addressed to the DRI.



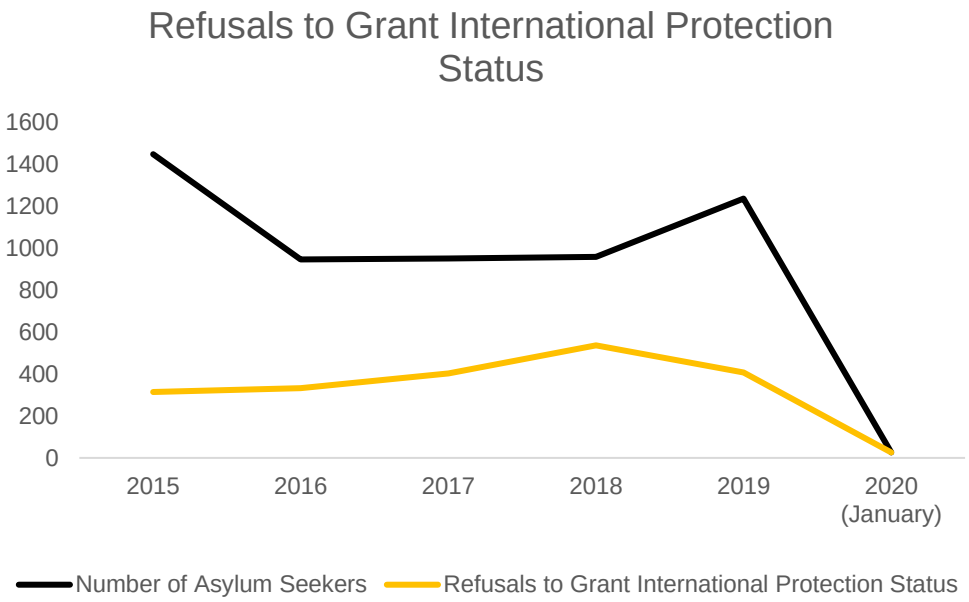
Analysis of the received information demonstrates that the opportunity for receiving international protection status has been tightened in the country. In particular, in 2015, 947 individuals were granted this status whereas their number amounts to 77 in 2019; and not a single application was approved in January 2020.[22]

[22] Letter no. MIA 0 20 00633245 of the Migration Department of the Ministry of Internal Affairs.



In 2015, out of 1,449 asylum seekers, 315 applicants were denied international protection status; in 2016, 332 applicants out of 947, in 2017, 403 applicants out of 951, in 2018, 537 applicants out of 959, and in 2019, 407 applicants out of 1,237 were denied the international protection status; not a single application was upheld as of January 2020.[23]

[23] Letter no. MIA 0 20 00633245 of the Migration Department of the Ministry of Internal Affairs to the DRI.



This diagram demonstrates that, the dynamics of granting international protection status is declining from year to year. The grounds for refusal to grant status are defined by law. For the purposes of the study, the report addresses only cases where the ground for refusing asylum seekers to be granted status was the protectction of state security.

2. GRANTING INTERNATIONAL PROTECTION STATUS AND THE MANDATE OF THE STATE SECURITY SERVICE

The procedure for granting refugee status, humanitarian status or temporary protection status is governed by the Law of Georgia on International Protection. Applications of asylum seekers are examined and decided upon by the Migration Department of the Ministry of Internal Affairs. Asylum seeker, who has been refused by the Ministry an international protection, has the right to apply to the court. A person is considered an asylum seeker and enjoys the rights and guarantees provided by law until the court decision does not take effect.[24]

One of the grounds for refusals to grant refugee status is the existence of sufficient grounds to believe that he/she will endanger the national security of Georgia, its territorial integrity or public order.[25]

Whether the asylum seeker poses a threat to the country shall be assessed by the State Security Service, for which it shall be applied by the Ministry of Internal Affairs, if necessary, to adopt a recommendation relating to the potential threat posed to national security by the asylum seeker who has entered the territory of Georgia illegally.[26]

The State Security Service of Georgia, within the scope of its authority, and based on an application from the ministry, identifies asylum seekers and while determining their relevant status, checks the facts described by such persons. It also provides recommendations to the ministry on matters related to a potential threat to the national security of Georgia posed by asylum-seekers or internationally protected persons.[27]

Furthermore, the recommendation provided by the State Security Service, to avert the danger to the state, may become a ground for revoking international protection status, [28] expulsion or return of an asylum seeker or person with international protection status[29] and detention of an asylum seeker.[30]

[24] The Law of Georgia on International Protection, Article 47.
[25] The Law of Georgia on International Protection, Article 17.1.b).
[26] Ibid., Article 67.2.b), Article 69.
[27] Article 69.1.
[28] Ibid., Article 52.2.
[29] Ibid., Article 8.2.
[30] Ibid., Article 9.2.c).

2.1. REFUSAL TO GRANT REFUGEE/HUMANITARIAN STATUS ON THE GROUNDS OF POTENTIAL THREAT TO NATIONAL SECURITY

The Counterintelligence Department of the State Security Service[31] gathers information on the asylum seeker, which it submits as a recommendation to the Ministry. It should be noted that the conclusion of the State Security Service, regarding the asylum seeker, is only recommendatory.

It is noteworthy that each application needs to be examined, taking into account the situation of a particular individual, which may include the applicant's background, his/her religious beliefs, identity, lifestyle and enquiring what is at stake for him/her.[32] However, such a detailed examination of the case by the Migration Department makes no sense when it automatically accepts the recommendation of the service especially when the recommendation is a state secret and the asylum seeker and his/her lawyer do not have any access to it.[33]

Under the Law of Georgia on Counterintelligence, the above activity is confidential and documents, case-files and other data depicting such activities constitute state secrets.[34] On the other hand, under the Law of Georgia on International Protection, the State Security Service must provide specific information to the ministry in such a way that "the interests of state secrets, state security of Georgia and/or public safety are not harmed."[35] This means that the content of the recommendation is unknown not only to the public but also to the person for whom it was prepared. If a person appeals against the refusal of the ministry in court, the case will be considered in camera.[36] Accordingly, the party has no information as to why it was refused international protection status.

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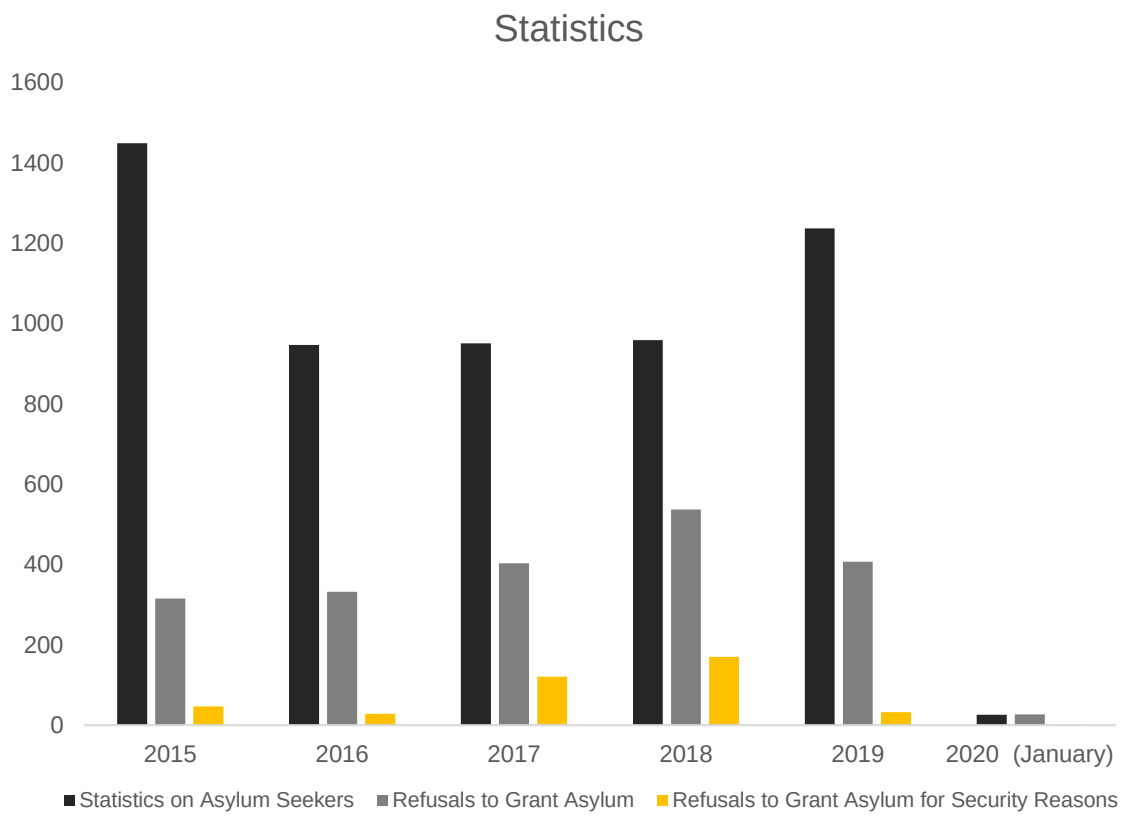
[31] Law of Georgia on Counterintelligence Activities.
[32] Handbook on Procedures and Criteria for Determining Refugee Status in Accordance with the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, available at: https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/UNHCR%20Handbook%20Reissued%2C%20December%202011.pdf, p. 142.
[33] The Institute for Development of Freedom of Information (IDFI), Procedures on Denying Asylum in Georgia are not Transparent, 2017, p. 5, available at: https://idfi.ge/public/upload/01Nino/mari/Article_IDFI_Refugees.pdf.
[34] The Law of Georgian on Counterintelligence, Article 6.1.
[35] The Law of Georgia on International Protection, Article 69.3.
[36] The Code of Georgia on Administrative Procedure, Article 20^1.1.

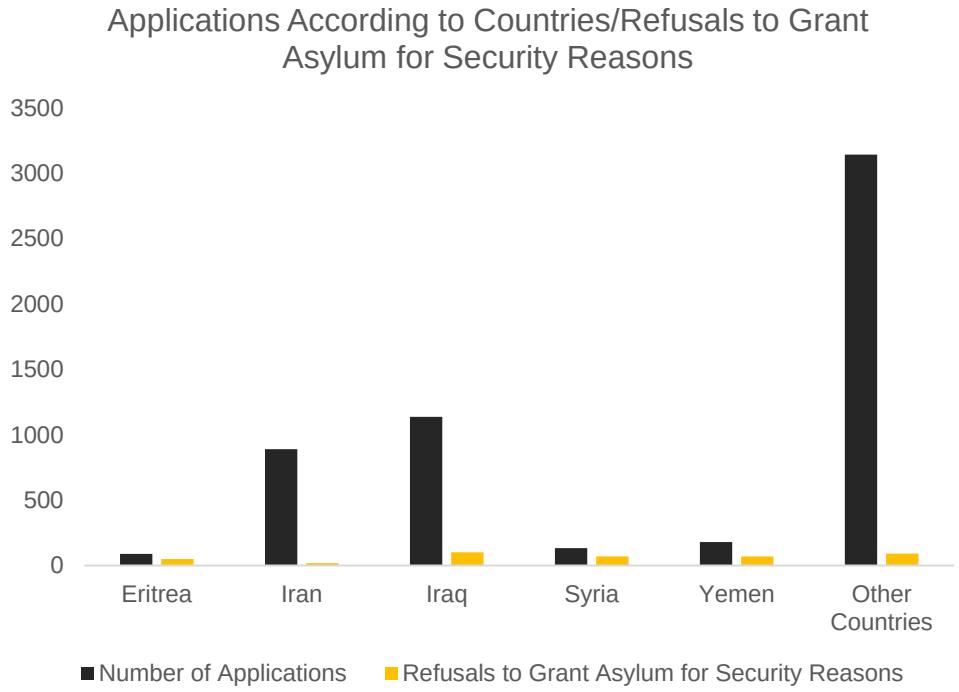
Consequently, it is impossible to oversee the legality of refusals to grant asylum on security grounds to applicants.

The DRI requested public information, according to which[37] from 2015 to January 2020, the ministry issued most refusals to grant asylum based on security reasons in 2018 (170 cases).



[37] Letter no. MIA 0 20 00633245 of the Migration Department of the Ministry of Internal Affairs of Georgia.

In 2015-2019, representatives of the following countries were denied refugee/humanitarian status for security reasons: Afghanistan, Azerbaijan, Egypt, Eritrea, Iran, Iraq, Kazakhstan, Kenya, Lebanon, Nigeria, Pakistan, Russia, Somalia, Sudan, Syria, Tanzania, Turkey, United Arab Emirates, Ukraine, Uzbekistan, Yemen, etc. (74 countries in total):



As demonstrated above, within the respective period, most refusals for security reasons were issued concerning asylum seekers from Iraq. However, if compared to the rate of applications, most refusals for security reasons are made concerning Eritrea and Syria. It is also noteworthy that the number of applications from the said five countries are lower (2,428) compared to other countries (3,141). However, the number of for refusals to grant asylum for security reasons is lower (92) in the cases of these 69 countries than in the cases of Eritrea, Iran, Iraq, Syria and Yemen (305).

Therefore, the question arises whether the citizenship/country of origin of the asylum seeker is a decisive factor for the State Security Service when refusing to grant the status on security grounds.

Under the Law of Georgia on International Protection, discrimination is impermissible.[38] It is evident that obtaining the status is more difficult for citizens of Asian and African countries. Furthermore, asylum seekers and their representatives do not have the opportunity to get acquainted with the recommendation issued by the State Security Service and therefore does not have the opportunity to adequately defend their rights.[39]

A person who, owing to a well-founded fear of persecution on the grounds of race, religion, nationality, membership in a particular social group, or political opinion, is unable or unwilling to return to his or her country of origin[40] can be denied the status by the ministry for the reasons that are completely beyond oversight mechanisms. This casts doubt about the commitment taken by the state "to give asylum to aliens and stateless persons in accordance with universally recognised norms of international law, in accordance with the procedures established by law."[41]

2.2. REVOKING INTERNATIONAL PROTECTION STATUS FOR PROTECTING NATIONAL SECURITY

Under the Law of Georgia on International Protection, international protection status shall be withdrawn from an internationally protected person if, *inter alia*, he/she poses a threat to the public or there are sufficient grounds to believe that he/she may threaten the state security of Georgia, its territorial integrity or public order.[42] Establishment of

[38] The Law of Georgia on International Protection, Article 10.
[39] The Equality Coalition, Open Society Foundation, Exercising the Right of Non-Discrimination by Various Groups in Georgia, the 2019 report, available at: http://equalitycoalition.ge/files/shares/FINAL.pdf, p. 77.
[40] According to the United Nations High Commissioner for Human Rights, individuals in such situations should be granted refugee status. See the United Nations High Commissioner for Human Rights Centre for Human Rights, International Human Rights Standards for Law Enforcement, Geneva, p. 14. A similar clause is contained in the Law of Georgia on International Protection, see Article 15.1.
[41] The Constitution of Georgia, Article 33.3.
[42] The Law of Georgia on International Protection, Article 52.2.

these circumstances falls within the competence of the State Security Service. Revocation of status granted to an internationally protected person will serve as a ground also for the revocation of a residence permit and a refugee travel document/travel passport issued to such person.[43]

The DRI applied to the Migration Department of the Ministry of Internal Affairs[44] and requested the following public information: how many individuals had their status revoked for security reasons from 1 August 2015 to 2020. According to the response received,[45] no such decisions were made in the reporting period of 2015, 2016, whereas in 2017, the status was revoked in seven cases. Among these, there were three Iraqi nationals, three Russian nationals and one Tajiki national. In 2018, the status was revoked in 34 cases, which included 32 Iraqi nationals and two individuals from Russia and Egypt. Similarly, in 2019, most cases of revocation of the status involved Iraqi nationals (11) and one person's nationality could not be established.

Article 53 of the Law of Georgia on International Protection determines the procedures of the status revocation. An individual interview with an internationally protected adult is held within a month after the commencement of the procedure for revocation. This wording could have some effective connotation for the cases not involving national security. Considering the confidentiality of the State Security Service's recommendation, it is impossible for the person concerned to defend his/her rights effectively as he/she is not aware of the reasons for the revocation of the status and unable to submit information or explanations concerning those circumstances that triggered the procedure. Given the fact that a lawyer is not authorised to have access to the State Security Service's recommendation when national security is invoked, the provision allowing a status holder to have a lawyer's assistance during the interview does not have any effect. [46]

[43] Ibid., para. 3.
[44] DRI statement no. 20200624/77.
[45] Letter no. MIA 9 20 02046820 of the Migration Department of the Ministry of Internal Affairs, dated 1 September 2020.
[46] The Law of Georgia on International Protection, Article, Article 52.7.

2.3. EXPULSION OF INTERNATIONALLY PROTECTED PERSONS FOR SECURITY REASONS

One of the grounds for applying for asylum in another country is indeed the existence of a threat to the person in the country of origin. Article 8 of the Law of Georgia on International Protection lays down a safeguard for an asylum seeker and/or an internationally protected person not to be returned or expelled to the border of the country where his/her life or freedom is endangered on the grounds of his/her race, religion, nationality, affiliation to a certain social group or political views. However, this safeguard does not apply to an asylum seeker or an internationally protected person, in connection with whom there are sufficient grounds to believe that he/she poses a threat to the state security.[47] The prohibition of expulsion or return (non-refoulement) in the Convention Relating to the Status of Refugees contains a similar clause.[48]

However, this approach is not shared by the European Court of Human Rights. According to its case law, expulsion of a person to the frontiers of territories where there is a real threat that s/he would face death and/or torture, may give rise to the violation of the right to life (Article 2 of the Convention) and the right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3 of the Convention).[49]

According to the UN Commissioner for Human Rights,[50] no person with international protection status may be expelled from the country except based on national security or public order. It is important to note that, unlike the Georgian legislation, the recommendation of the Commissioner for Human Rights also prohibits the expulsion of a person to the country of his/her origin, if he/she may become a victim of torture, regardless of the grounds of expulsion.[51]

According to the letter of the Migration Department of the Ministry of Internal Affairs, there were no expulsions of persons benefiting from international protection or asylum

[47] Ibid., Article 8.2
[48] The Convention Relating to the Status of Refugees of 28 July 1951, Article 33.
[49] Guide on the case-law of the European Convention on Human Rights, Immigration, 30 April, 2020, p. 15, accessible at https://rm.coe.int/court-case-law-guide-immigration-eng/16809f1556
[50] International Human Rights Standards for Law Enforcement, United Nations High Commissioner for Human Rights, Centre for Human Rights, Geneva, 14.
[51] Ibid.

seekers from 1 August 2015 to 1 June 2020.[52] This, however, does not exclude the possibility of active use of this provision in the future and, thereby, human rights violations.

It should be noted that according to the legislation in force, the Ministry of Internal Affairs discusses the issue of posing a threat to the security of the country only after determining that the asylum seeker inevitably needs to be granted the status.[53] Obviously, automatical acceptance of the State Security Service's recommendations by the Ministry, may put asylum seekers under the real threat of torture, inhuman and degrading treatment.

According to the recommendation of the UN Commissioner for Human Rights, the decision on expulsion must be made only in accordance with the procedures established by law - the person concerned should be able to adduce appropriate evidence, to be represented and to appeal the decision on expulsion.[54] According to the practice of the European Court of Human Rights, it is necessary to take into account all the difficulties that asylum seekers face when gathering evidence. Due to the current practice and legislation, it is impossible for a person facing expulsion to effectively protect his/her right due to the confidentiality of the recommendation issued by the State Security Service and the obstacles faced during gathering evidence.

[52] Letter no. MIA 9 20 02046820 of the Migration Department of the Ministry of Internal Affairs, dated 1 September 2020.
[53] The Institute for Development of Freedom of Information (IDFI), Procedures on Denying Asylum in Georgia Are not Transparent, 2017, p. 4, available at: https://idfi.ge/public/upload/01Nino/mari/Article_IDFI_Refugees.pdf.
[54] International Human Rights Standards for Law Enforcement, the United Nations High Commissioner For Human Rights Centre For Human Rights, Geneva, p. 14.

3. ASYLUM SEEKERS DEFENDING THEIR RIGHTS BEFORE COURT

An asylum seeker may be denied international protection status on the grounds of national security but, due to the secret nature of the recommendation, he/she is not given a detailed explanation of the circumstances that led to the refusal. This, in turn, deprives an asylum seeker a possibility to protect himself/herself.

According to the Convention Relating to the Status of Refugees, posing threat to national security is one of the grounds for not granting the status. However, under the convention, decisions adopted on this issue cannot be based on confidential evidence that an applicant is unable to challenge.[55] While the legislation of Georgia allows an asylum seeker to appeal a decision on refusal to grant asylum, the effectiveness of this remedy is questionable.

Under the Geneva convention, it is imperative to introduce procedural safeguards for the realisation of asylum seekers' rights when national security is involved. The current legislation makes it clear that an asylum seeker is not able to protect his/her right even by resorting to proper procedures, one of the examples of which is that court hearing is held in camera without the presence of the parties. Furthermore, the recommendation given by the service cannot be accessed by a lawyer of either party. This is another example of a breach of procedural rights. Following the 1996 case law of the European Court of Human Rights,[56] a special lawyer institute was set up in the United Kingdom that has access to confidential information. The same rule applies in Canada.

Although the court has access to the recommendation made by the Counterintelligence Department, its decisions do not refer to the actual reasons for refusal.

The DRI applied to Tbilisi City Court and Tbilisi Court of Appeals and requested copies of those decisions/judgments that concerned repealing individual administrative acts refusing to grant international protection status for security reasons and instructing the competent authorities to re-issue new individual administrative acts. According to Tbilisi

[55] UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, reissued, Geneva, December, 2011, para.36, p.122, accessible at https://www.refworld.org/pdfid/4f33c8d92.pdf (last accessed on 25.10.20).
[56] Chahal v. the United Kingdom (application. no. 22414/93), 15 November 1996.

Court of Appeals, it does not process such decisions/judgments for archiving purposes and Tbilisi City Court cited confidentiality for refusing to impart the requested information.

Therefore, the DRI used decisions/judgments of Tbilisi City Court and Tbilisi Court of Appeals adopted in 2019-2020 and published in the database of court acts.[57]

The analysis of the court rulings of 2019-2020 showed that:

- In 9 cases, the Chamber of Administrative Cases of Tbilisi Court of Appeals did not grant the applicants' request for status and indicated that, in the presence of a relevant written conclusion from the State Security Service's Counter-intelligence Department, the administrative authority was empowered to decide about granting asylum to the appellant.
- In one case, Tbilisi Court of Appeals upheld a decision refusing both refugee and humanitarian statuses for security reasons.
- Tbilisi Court of Appeals accepted the reasoning of the first instance court only in one case and agreed that information requested from the Counterintelligence Department of the State Security Service was not comprehensive or reasoned which served as the basis to invalidate the administrative body's decision.

It is noteworthy that, when examining appeals of asylum seekers, the court has held on numerous occasions that an appellant had failed to adduce evidence to substantiate factual and legal circumstances in accordance with Article 102.3 of the Civil Procedure Code of Georgia that would rebut the circumstances established by the first instance court and legal findings reached by it. In those circumstances where an asylum seeker is not given an opportunity to study the State Security Service's conclusions, where neither the ministry nor the court mentions any circumstances in their decisions that have served as the basis for refusing to grant asylum, naturally, appellants will be unable to comprehend the existing circumstance completely. The legal remedy is only formalistic in such cases.

At the same time, the analysis of the studied court decisions and statistical data demonstrates that court decisions do not reflect and do not give reasons why a person is believed to pose a threat to the state's national security. In most cases, the court automatically accepts the State Security Service's recommendation and asylum seekers

[57] http://ecd.court.ge

have no opportunity to argue their position or present arguments to rebut the service's position.

3.1. BALANCING THE LEGITIMATE INTEREST OF THE ASYLUM SEEKER WITH THE INTERESTS OF NATIONAL SECURITY

When reviewing the annulment of the act of the Ministry on the refusal to grant refugee or humanitarian status and examining the legality of the administrative-legal acts appealed, both the national legislation and the compliance of the act with the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, which regulate the legal relations arisen relating to the refugee status, shall be taken into account.[58]

At the same time, according to the European Court of Human Rights, for protecting their national security, states have some discretion to establish the need for interference and the measure used. However, even in such cases, a balance must be struck among the measure used by the state, the legitimate aim and the legitimate interest of the person.[59]

Thus, when assessing the refusal to grant the status for national security reasons, the competent administrative body should strike a balance and consider what kind of threat may be posed to the country by granting asylum should the issue be resolved positively as well as the seriousness of the threat to the status seeker in case of his/her return.

Despite the above-mentioned, the analysis of the court decisions demonstrates that, on a number of occasions, the Migration Department of the Ministry of Internal Affairs fails to comprehend the gist of its discretionary powers appropriately when juxtaposing state interests versus individual interests and gives priority to the former by circumventing the proportionality principle.[60] In two cases, the Migration Department of the Ministry of Internal Affairs, when appealing the decision of the first instance court on granting refugee status, indicated that, since the issue concerned the national interests of the

[58] The decision by the Administrative Chamber of the Tbilisi Court of Appeal #3b/1196-18, 20 September 2018.
[59] Leander v. Sweden (Application no.9248/81), 59.
[60] The decision by the Administrative Chamber of the Tbilisi Court of Appeal #3b/988-19, 27 February 2020. The decision by the Administrative Chamber of the Tbilisi Court of Appeal #3b/1974-19, 9 October 2020.

state and the relevant agency had considered that the presence of asylum seekers in Georgia, due to their activities, lifestyle, worldview or a number of other circumstances, was against the interests of the country, the interests of the state should be given priority.[61]

It is noteworthy that, under the Law of Georgia on International Protection, a potential threat to the state security of Georgia involves such cases where there are sufficient grounds to believe that an asylum seeker or an internationally protected person has connections with: the armed forces of a country and/or an organisation which has a hostile attitude towards the defence and security of Georgia; the intelligence services of other countries; terrorist and/or extremist organisations; other criminal organisations (including, transnational criminal organisations) and/or connections with the illegal trafficking of armaments, and/or weapons of mass destruction or their components.[62] A person's opinions that are not manifested in concrete extremist/criminal actions or support for such actions do not constitute a threat to the state and refusal to grant status based on this ground could amount to discrimination.

Contrary to the position taken by the Migration Department of the Ministry of Internal Affairs, Tbilisi Court of Appeals stated in its decisions of 9 October and 4 December, 2019 mentioned above that the delegation of discretionary power to an administrative body by the legislature means giving it the freedom to act on a certain issue, determining the power within its discretion to opt for two or more alternatives at its disposal for resolving a certain issue. The possible options for an administrative action within the discretion of an administrative body generally meet the requirements of legality, although the task of the administrative body is to tailor impartially and in good faith the optimal solution of each case to an individual concerned, without any discrimination or arbitrariness.[63] The court also observed that affording certain leeway to an administrative body determines effective discharge of state powers. This, however, does not imply that granting unregulated, unreasonably broad and absolute discretion to an administrative body would be accepted automatically. [64]

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[61] The decision by the Administrative Chamber of the Tbilisi Court of Appeal #3b/2516-19, 5 December 2019.
[62] The Law of Georgia on International Protection, Article 69.2.
[63] The decision by the Administrative Chamber of the Tbilisi Court of Appeal #3b/2613-19, 4 December, 2019.
[64] The decision by the Administrative Chamber of the Tbilisi Court of Appeal #3b/1974-19, 9 October 2019.

Thus, Tbilisi Court of Appeals did not agree with the Migration Department of the Ministry of Internal Affairs and observed that state security can be given priority compared to the individual interest of an appellant. However, the issue at stake should be resolved by striking a balance between respective risks. The measure applied should be proportionate and necessary for achieving the public interest sought while ensuring universally recognised rights for asylum seekers and affording legal safeguards with due regard for state interests.

3.2. JUDICIAL REVIEW OF RECOMMENDATIONS MADE IN THE INTERESTS OF NATIONAL SECURITY

The State Security Service, based on the application of the ministry, within its competence, identifies an asylum seeker and, in the process of determination of respective status, verifies the facts presented by this individual; the service gives a recommendation to the ministry about the potential threat, if any, posed by an asylum seeker or a person granted international protection to the national security of Georgia.

Under the legislation, the Counterintelligence Department of the State Security Service is entrusted with this task. Therefore, when it is required to assess whether a particular person poses a threat to the state's national security, this should be established through counterintelligence activities (which are confidential).

Tbilisi City Court, in one of its decisions,[65] indicated that documents, case-files and other data obtained in counterintelligence activities through operative and operative-technical measures could not be used for law-enforcement purposes.[66] In this regard, it is noteworthy that the body authorised by the Law on Counterintelligence Activities carries out only operative and operative-technical measures to obtain information on intelligence and/or terrorist activities of foreign special services, organisations, groups of individuals and individuals.[67] It is therefore unclear whether the service can use such methods to obtain information about an asylum seeker who may be involved in extremist activities or other (including transnational) criminal organisations.

[65] The decision by the Administrative Chamber of the Tbilisi Court of Appeal #3b/2613-19, 4 December 2019.
[66] Ibid.
[67] Law of Georgia on Counterintelligence Activities, Article 9.

In the same decision, the court pointed out that the letter from the State Security Service should contain a justification of the potential nature of the threat and the kind of threat that may be posed to the country granting asylum and the severity of the threat should be analysed.

In addition, in one of the cases[68] of refusal to grant refugee status, Tbilisi Court of Appeals found that the State Security Service's report on the person did not contain any substantiation of the potential nature of the threat if the issue was to be resolved positively and it did not contain any analysis of the threat posed to the country giving asylum. There was no analysis of the seriousness of the threat, proportionality, the likelihood of realisation of the threat, whether that threat would be eliminated or reduced in the event of expulsion or the nature or severity of the risk.

The Court of Appeals clarifies that the recommendation issued by the State Security Service should include justification for the potential nature of the threat, the nature of the risk and its seriousness. In addition, the analysis of the decisions showed that not only the decisions of the Migration Department of the Ministry of Internal Affairs but also the written recommendation of the State Security Service should include justification for proportionality.

Nevertheless, in the above-mentioned cases, based on the analysis of both statistical data and the studied court decisions, the position of the court can be deemed to be exceptional.

[68] The decision by the Administrative Chamber of the Tbilisi Court of Appeal #3b/1974-19, 9 October 2019.

4. INTERNATIONAL STANDARDS AND EXPERIENCE

The European Convention on Human Rights does not guarantee the right to asylum. Despite this, some human rights and fundamental freedoms under the ECHR are still applicable to asylum seekers, including:

- Article 3 (prohibition of torture);
- Article 5 (right to liberty and security);
- Article 8 (right to respect for private and family life); and
- Article 13 (right to an effective remedy).

The majority of the states studied by us provide in their legislation for refusals to grant international protection for security reasons.

However, the way asylum is denied in Georgian legislation and practice clearly violates the ECtHR standards and good practice. The European Court of Human Rights has held that the requirement of foreseeability does not go as far as to compel states to enact legal provisions listing in detail all conduct that may prompt a decision to expel an individual on national security grounds. However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual concerned must be able to challenge the executive's assertion that national security is at stake.[69] These individuals are not able to present their cases adequately in the ensuing judicial review proceedings as they lack even basic facts, which were used to justify the refusal.[70]

It is impermissible to restrict Article 3 of the ECHR for security reasons. According to the European Court of Human Rights, Article 3 enshrines one of the most fundamental values of a democratic society. The Court is well aware of the immense difficulties faced by states in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute

[69] The case of Ljatifi v. the former Yugoslav Republic of Macedonia (application no. 19017/16), para. 35.
[70] Ibid., para. 39.

terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.[71] It is similarly impermissible for a state to subject an individual to a risk of torture, inhuman or degrading treatment based on the argument that an individual presents a threat to national security.[72]

The right to a fair trial does not apply to asylum and expulsion procedures.[73] The European Court of Human Rights notes that Article 1 of Protocol No. 7 contains procedural guarantees applicable to the expulsion of aliens. The Court, therefore, considers that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention.[74] Despite this, it is particularly important that a person had an effective remedy against alleged violations of Article 3.

In this context, it is important to discuss the jurisprudence of Georgian courts concerning individuals who have been denied asylum for security reasons. Under the legislation in force, decisions adopted by the ministry, including denying international protection for security reasons, can be challenged before the courts.[75] However, the analysis of the court decisions demonstrates that this mechanism is formal only and asylum seekers do not have any effective remedy before national authorities.[76]

[71] The case of Chahal v. the United Kingdom, para. 79.
[72] Saadi v. Italy, para. 140.
[73] European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights, Updated on 30 April 2020, p. 19.
[74] The case of Maaouia v. France (Application no. 39652/98), para. 36.
[75] The Law of Georgia on International Protection, Article 47.
[76] See https://idfi.ge/public/upload/01Nino/mari/Article_IDFI_Refugees.pdf.

CONCLUSIONS

Thus, the Georgian legislation and court practice regarding refusal to grant asylum to asylum seekers due to security reasons is in need of improvement:

The requested information demonstrated that there could be cases of discrimination on the part of the State Security Service against individuals of certain nationalities. The confidential nature of the refusal for security reasons calls into question the realization of the right to a fair trial for asylum seekers. Court decisions adopted about this issue are general as well and fail to indicate those actual reasons as to why a person was denied international protection. Individuals are not allowed to study case-files, adduce rebutting evidence or to argue their position. It can be therefore concluded that in these cases asylum seekers do not have access to an effective remedy and legal provisions are formal. The legislation by failing to ensure sufficient oversight of the State Security Service and an effective remedy for asylum seekers gives rise to the violation of Article 3 of the ECHR. In particular, there is a risk that an individual could be transferred for security reasons to a state where he/she would be subjected to torture, inhuman or degrading treatment.

RECOMMENDATIONS

In light of the above-mentioned, the DRI has made these recommendations:

- An asylum seeker (especially one whose return would endanger his or her life or liberty on account of his/her race, religion, nationality, social affiliation or political opinion) has the right to be familiar with the State Security Service's recommendation so that he/she can adduce appropriate evidence to the relevant authority and have access to an effective remedy
- Asylum seekers and/or their representatives should be able to attend the trial and defend the rights effectively where the refusal of status on security reasons is being considered
- The Migration Department of the Ministry of Internal Affairs and courts should examine thoroughly the actual situation of the party and its refusal should not be automatically based on the State Security Service's recommendation
- To prevent discrimination, the Public Defender should be allowed to examine the State Security Service's recommendation on the refusal to grant refugee or humanitarian status
- In case of refusal to grant the status, at least a general reference should be made in the court decisions and judgments regarding the reasons for refusal.