

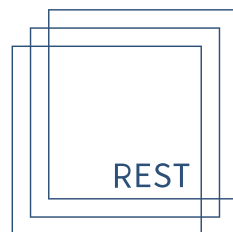
POLICY BRIEF

CHALLENGES IN REGULATING THE TEMPORARY RESIDENCE OF FOREIGN VICTIMS OF TRAFFICKING



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Introduction

Policy brief “Challenges in regulating the stay of foreign victims of human trafficking” was created within the second phase of the research conducted by ASTRA within the **REST: Residence Permit project as a way of improving the protection of victims of human trafficking** with the aim of identifying good practices in six countries¹, as well as defining the recommendations contained in the “*Guide for prospective practices in the long-term protection of victims of human trafficking*” edition LEFÖ – Interventionsstelle für Betroffene des Frauenhandels (LEFÖ-IBF).²

At this stage, the goal was to take a step further and **deepen the findings from the research**, especially in the segment related to the **use of legal institutes** that provide the basis for regulating temporary residence of different categories of foreigners, and which can be **a solution for victims of trafficking**. In this regard, in addition to the temporary residence for a foreigner presumed to be a victim of human trafficking, and temporary residence for victims of human trafficking, we also focused on the **asylum system** and **temporary residence** granted for humanitarian reasons, taking into account the characteristics of current migratory flows in Serbia and recorded examples from practice.

In addition to the provisions of the relevant regulations, we paid special attention to determining the **factors that influence the decision of service providers** to different categories of migrants to choose the legal procedure for acquiring legal status in individual cases, in order to first of all identify **key challenges**, but also **examples of good practice**. Our intention is to, starting from the analysis of the situation in the national framework, initiate the consideration **of the range of existing measures** and contribute to the process of **creating new measures**, i.e. changes of established practices that would contribute to improving the current situation and reaching standards of protection. Taking into account the current migratory flows in Serbia, certain parts of the analysis can also be considered through the prism of the position and treatment of migrants who are identified in mixed migratory flows in Serbia.

For the preparation of the analysis, available reports and data of the competent state authorities and civil society organizations were used, and in addition, interviews were conducted with civil society organizations dealing with the provision of legal assistance to migrants, asylum seekers and persons who have been granted asylum.³ We express our great gratitude to all those with whom we have spoken and who have provided us with valuable information.

1 The organisations involved in the REST project are: LEFÖ-IBF from Austria, as Consortium Leader, Comité Contre l’esclavage Moderne (CCEM) from France, Proyecto Esperanza from Spain, CoMensha from the Netherlands, International Centre “La Strada” from Moldova and Astra – Anti-trafficking action from Serbia.

2 Guide to Promising Practices, <https://www.astra.rs/prirucnici-izvestaji-studije/>

3 Migration flows of third-country nationals currently taking place in the territory of R. Serbia have the characteristics of mixed migratory flows. Several different categories of migrants can be identified, persons who formally apply for asylum and have asylum-seeker status, persons whose intention to seek asylum has been registered, persons who have regulated status, persons who have been granted some form of international protection. For the purpose of easier monitoring of the analysis, the term migrants will hereinafter be used collectively, unless there is a need to indicate specificities related to a particular category of persons

Key Statistical Indicators

The Center for the Protection of Victims of Trafficking in Human Beings (hereinafter: the Center) in its annual reports among other data also publishes data on applications and identification in mixed migration. Interestingly, according to the data on countries of origin of persons for whom applications have been submitted, it can be established that these are not only countries of origin related to mixed migration flows, but also citizens of certain neighboring countries. ⁴ **“During 2020, 23 reports of suspected human trafficking related to members of mixed migration were received.** The work also took place on the basis of one application transferred from 2019. A total of 24 applications were received, the identification procedure was initiated on the basis of 14 applications, and for 8 received applications it was concluded that there were no elements of trafficking in human beings, so these applications were dismissed, and 2 applications are being processed. The identification procedure was implemented in 23 cases – 14 cases based on new applications and 9 identification procedures that were started in 2019. During that year, all identification procedures were completed. 5 victims were identified, 10 presumed victims were found not to be victims of human trafficking, and in 8 cases the identification procedure was interrupted.”⁵ **In 2021, a total of 26 reports of suspected human trafficking were submitted, while statistical data on** initiated identification procedures, identified victims, and rejected applications are not available.⁶

Statistical indicators recorded in the territory of R. Serbia also indicate that in the **last two years there have been no significant deviations in terms of the number of migrants whose presence in the territory of Serbia was recorded within the mixed migratory flow.** However, **changed trends were observed in terms of statistical indicators of the asylum system and indirectly the number of persons residing without regulated status in the territory of the Republic of Serbia, as well as significant increases in the number of persons residing in Serbia on the basis of work engagement.**

In 2020, according to the Serbian Commissariat for Refugees and **Migration**, 63,408 migrants passed through reception and asylum centres. The Ministry of the Interior reported for the same period that 33,772 migrants were present and 22,560 were intercepted at the border. 2,830 certificates of registration have been issued for persons who have expressed their intention to seek asylum. Comparatively, in 2019, there were 13,512 migrants present, while the number of certificates issued to persons who expressed their intention to seek asylum was about 12,900.⁷ In 2021, it was recorded that 60,075 newly arrived migrants passed through reception and asylum centres, and for 2,306 persons, a certificate of registration of the intention to seek asylum was issued.

A small number of migrants residing in the territory are officially registered and enter the procedures leading to the regulation of their legal status, all due to the decision of migrants to quickly leave the territory of the Republic of Serbia, which leads to their legal status not being resolved and their living in Serbia without a regulated legal status.⁸ In the asylum procedure, 43 decisions granting asylum were adopted. On the other hand, as stated in the European Commission’s Progress Report, 12,547 **return decisions** were made in 2020, with only data available on the number of persons returned through readmission agreements (92 migrants were returned to the countries of transit, Bulgaria, Montenegro and Romania).⁹ The practice of issuing a decision on the postponement of forced removal has not¹⁰ yet come to life in practice.

⁴ Ibid

⁵ Basic statistical report on the identification of victims of trafficking in human beings 2020, Center for the Protection of Victims of Trafficking in Human Beings

⁶ Basic statistical report on the identification of victims of trafficking in human beings 2021, Center for the Protection of Victims of Trafficking in Human Beings

⁷ Progress Report Republic of Serbia 2021, European Commission, https://ec.europa.eu/neighbourhood-enlargement/serbia-report-2021_en

⁸ Regulating the legal position of migrants in irregular status and access to the right to work and the right to education, Group 484, 2021

⁹ Ibid.

¹⁰ Article 84, Law on Foreigners (“Official Gazette of RS”, no. 24/2018 and 31/2019)

During 2020, 6 migrants were **granted temporary residence for humanitarian reasons**, and a total of 12 applications were submitted on this basis.¹¹ According to the data of the Ministry of the Interior of the Republic of Serbia, in **2021, a total of 65 applications for temporary residence were submitted for humanitarian reasons, 55 of which were approved on this basis.** These data certainly encourage and indicate a positive trend of greater use of this important institute of the Law on Foreigners.¹²

Data for 2021 (ending in 20. 12. 2021.) indicate that the **number of issued work permits** for foreigners **almost doubled** compared to 2020 (22,685 compared to 12,931 issued permits in 2020).¹³ In addition to official statistics, statements by representatives of individual trade unions should be taken into account, indicating that **a number of foreigners who engaged in illegal work was also recorded in Serbia.**¹⁴ In respect of these persons, too, the question of the legal basis of residence and legal status may also be called into question. In addition, these persons **also need due attention regarding suspected labour exploitation, which is** confirmed by the report of the Center for the Protection of Victims of Trafficking in Human Beings “three group reports, stating that a number of foreign nationals from India, China and Vietnam are suspected of being labor exploited”.¹⁵

The aforementioned statistical data leads to the conclusion that it is **necessary to systematically consider approaches** in resolving the status issues of the mentioned categories. In addition to the systemic solution, the starting premise should certainly be **an individual approach** to each individual case.

For all persons, *sine qua non* is legal status and legal residence, taking into account that the matter of protection, the corpus of guaranteed rights and obligations, is directly related to the matter of legal status. Regulation of legal status is also a matter of particular importance for the migration management system as a whole, bearing in mind not only the responsibility of the state in accordance with accepted protection standards, but also the efficiency of the system itself, the security and economic aspect of the topic of migration.¹⁶

In the context of victims of human trafficking, the matter of the grounds of residence/legal status gains additional importance, taking into account the legal consequences that may arise for the person, a more pronounced security risk, but also the social danger related to the commission of the criminal offence of human trafficking.

11 Response of the Ministry of the Interior of the Republic of Serbia, Police Directorate, Border Police Directorate from February 8, 2021, letter No. 03.05.10.1 No. 07-9/22

12 Law on Foreigners (“Official Gazette of RS”, no. 24/2018 and 31/2019)

13 Data from the Ministry of Labour, Employment, Veteran and Social Affairs, Conference Challenges and Potentials of Mixed Migration in R. Serbia, Group 484, December 21, 2021

14 <https://nova.rs/vesti/biznis/invazija-radnika-iz-ruralnih-delova-azije-na-gradilista-u-srbiji/>, <https://rs.n1info.com/biznis/a640302-nezavisnost-gradilista-u-srbiji-puna-strana-radnika-bez-ikakvih-dozvola/>
<https://www.dw.com/en/indijci-gastarbajteri-u-srbiji/a-59120084>

15 Basic statistical report on the identification of victims of trafficking in human beings 2021, Center for the Protection of Victims of Trafficking in Human Beings

16 Regulation of the legal position of migrants in irregular status and access to the right to work and the right to education, Group 484, 2021; Foreigners’ identification documents and the matter of determining the identity of a foreigner in the national framework, Group 484, 2021

Regulation of temporary residence of foreign victims of trafficking in human beings according to the provisions of the Law on Foreigners

Generally speaking, it is assessed positively that the legislation of R. Serbia recognizes the exercise of the right to temporary residence of victims of trafficking in human beings. As a positive aspect, it is pointed out that, in addition to temporary residence for victims of trafficking in human beings (Article 63), the Law on Foreigners in Article 62 regulates **temporary residence for a foreigner who is assumed to be a victim of trafficking in human beings.**

Article 62, paragraph 1 of the Law on Foreigners provides that “If, during the implementation of the procedure for determining the identity of a foreigner, on the basis of special indicators it is assumed that the foreigner is a victim of trafficking in human beings, the competent state authority for the identification and coordination of protection of victims of trafficking shall assess the situation and needs of the victim, as well as the identification of the victim, in accordance with legal powers in the domain of registered activity.” Furthermore, paragraph 2 provides that “the competent state authority for the identification and coordination of protection of victims of trafficking in human beings shall inform the Ministry of the Interior of the initiation of the procedure referred to in paragraph 1 of this Article and inform the foreigner of the conditions for granting temporary residence and other rights”. It is positive that the same article also stipulates that temporary residence for a foreigner who is presumed to be a victim of trafficking in human beings may be granted without meeting the general conditions referred to **in Article 43 of this Law, and that no return decision may be issued during the validity of the temporary residence on this basis.**

On this basis, the residence may be granted for a maximum of 90 days and no extension to a longer period of time is foreseen. The article provides for a whole range of guarantees and support measures for a foreigner presumed to be a victim of trafficking in human beings (paragraphs 4, 6 and 7), as well as provisions specifically regulating the treatment of foreign minors presumed to be victims of trafficking in human beings and found not to have parents, guardians or legal representatives. (paragraphs 8-10).

In interpreting Article 62 and looking at the possibilities for its application in practice, it is necessary to start from the question of **who is authorized to initiate the procedure for granting temporary residence?** The Law on Foreigners in Article 41, paragraph 1 stipulates that the application for approval or extension of temporary residence shall be submitted in person or electronically to the competent authority on the prescribed form, without providing for an exception. The systemic interpretation leads to the conclusion that the temporary residence procedure for the presumed victim **is initiated at the request of the party.** On the other hand, given that the provision of Article 62, paragraph 2 provides that the competent state authority for the identification and coordination of protection of victims of trafficking in human beings informs the Ministry of the Interior about the initiation of the procedure referred to in paragraph 1 of this Article (about the identification procedure observed by the author), leaves room for interpretation that the intention of the legislator was to provide for the **possibility of conducting the procedure ex officio?** The Law on General Administrative Procedure¹⁷ in Article 90, paragraph 2 stipulates that the procedure is initiated ex officio when it is determined by the regulation or when the authority determines or learns that, given the factual situation, it is necessary to protect the public interest. Paragraph 5 further provides that proceedings may not be instituted ex officio in administrative matters in which, by law or in the nature of the matter, proceedings may be instituted only by application of a party. If the position is that the procedure is

¹⁷ Law on General Administrative Procedure, "Official Gazette of RS", no. 18/2016 and 95/2018 - authentic interpretation

initiated at the request of the party, **it is unclear at what point the request for temporary residence could be submitted?** In such circumstances, would the Center be obliged to inform the person in question that the identification process has started, in addition to the competent organizational unit of the Ministry of Interior? Should the Center start the identification procedure by adopting a certain administrative act or is it a material action of the administration¹⁸? That is, should the competent organizational unit of the Ministry of the Interior, which decides on the submitted application, in accordance with the principle of efficiency and cost-effectiveness of the procedure, obtain the necessary information from the Center if the party personally submits the application?

In addition to the question of when and who is authorized to initiate the procedure, the **question arises - in relation to which persons such proceedings could be applied?** Available statistical data indicate that in the period 2020-2021 alone, applications for almost 50 persons were submitted to the Center, which raises the question of whether it was appropriate to apply the said institute in relation to all these persons or the institute should be applied only in situations when the identification procedure/i.e. the application is submitted for a person who does not have a legal basis of residence? Also, given the vulnerable position of these persons, in certain cases, the basis for a temporary residence may also be in relation to the criminal offence (a person who resides on the basis of family reunification with a person who performs exploitation, residence on the basis of work, etc.), and it is questionable whether it can be considered justified to act on the basis of which the person remains “attached” to such a residence?

ASTRA provides support to a female foreign national who entered Serbia in a lawful manner during 2021 on the basis of a long-stay work visa (visa D).¹⁹ As of November 2021, the foreign national has no legal basis for stay. At the end of December, a person accompanied by a legal representative stated about the circumstances that indicate trafficking in human beings to the competent organizational unit of the local competent police administration, and representatives of the Center also attended the implementation of the action. The second interview took place at the Centre in early February. At the interview at the Center, the victim’s legal representative was asked to leave, since her presence was not in accordance with the Center’s procedures. The day after the interview was made, ASTRA’s client was notified by phone that she had not been identified as the victim. Neither ASTRA, nor the client nor the legal representative were informed about the “initiation of the identification procedure”, nor did the Center inform the person in accordance with Article 62, paragraph 2 about the conditions for granting temporary residence and other rights (whether she can apply for temporary residence herself, or the Center will “inform ‘the competent organizational unit of the Ministry of the Interior’ about the risk of illegal stay, etc., the author observed).

The open questions point to the conclusion that the **legal norm is not sufficiently clear or precise, and it is questionable whether certain deficiencies could be remedied by authentic interpretation or whether it would be necessary to initiate a procedure for amending a number of provisions of the Law on Foreigners and/or other acts regulating the work of competent authorities and treatment of victims of trafficking in human beings in** order to apply this legal institute and achieve a higher degree of legal certainty.²⁰

As stated above, in addition to temporary residence for a foreigner presumed to be a victim of trafficking in human beings, the Law on Foreigners also provides for **temporary residence for victims**

18 Law on General Administrative Procedure, Article 27: “Administrative actions are material acts of the authorities that affect the rights, obligations or legal interests of the parties, such as keeping records, issuing certificates, providing information, receiving statements and other actions that execute legal acts”.

19 Due to the sensitivity of the case itself, as well as the fact that the ASTRA team continues to take legal action, neither initials nor the country of origin will be mentioned in this case.

20 ASTRA, Challenges of Granting Status to Victims of Trafficking in Human Beings in the Republic of Serbia, 2022 (document to be published in March 2022)

of trafficking in human beings in Article 63. It is positive that in relation to both grounds of stay, in addition to the exemption from the obligation to meet the general conditions for granting temporary residence (Article 43 of the Law on Foreigners), an exemption from prescribed administrative fees is foreseen as well.²¹

Article 63, paragraph 1, stipulates that: “If, in the procedure referred to in Article 62, paragraph 1 of this Law, it is established that a foreigner victim of trafficking in human beings has made an independent decision on further cooperation with the competent state authority for the identification and coordination of protection of victims of trafficking in human beings, court, prosecutor’s office or police, the competent authority for the protection of victims of trafficking in human beings shall inform the Ministry of the Interior thereof in the form of an expert opinion.” Furthermore, paragraph 3 provides that “victims of trafficking, including minors who are victims, shall be granted a temporary residence if the competent state authority for the identification and coordination of protection of victims of trafficking considers his/her stay necessary for the protection, recovery and security of victims or if the court, prosecutor’s office or police consider his/her presence necessary for the purpose of cooperation in criminal proceedings”. The temporary residence shall be granted for a period of one year, with the possibility of extension under the same conditions. Paragraphs 5, 6 and 7 prescribe more closely the rights of the person granted temporary residence, as well as the treatment of unaccompanied minors.

Unlike Article 62, paragraph 1 stipulates that the Centre shall inform the Ministry of the Interior **in the form of an expert opinion**. Although less problematic than the wording “informs”, deciding on the status of a victim of trafficking in human beings in the form of an expert opinion may be subject to review from the point of view of guaranteeing an effective legal remedy, protection of sensitive data, multiple victimization, legal consequences that may arise, etc.²² With regard to Article 63, attention is also drawn to the formulation of paragraph 1 in the part stipulating the condition for the adoption of an independent decision of the victim on “further cooperation with the competent state authority for the identification and coordination of protection of victims of trafficking in human beings, court, prosecutor’s office or police”. The linguistic interpretation can lead to a conclusion that the victim must be to an extent willing to cooperate, which raises the question **whether the absence of such a will relieves the competent state authorities of the obligation to provide adequate protection, which certainly includes the right to temporary residence?** Especially considering that the matter of cooperation concerns not only the judicial authorities and the police, but also the Centre. Furthermore, the interpretation of paragraph 3 and the correlation existing with paragraph 1 in the part of the provision stipulating that a temporary residence shall be granted if the competent state authority in charge of identification and coordination of protection of victims of trafficking in human beings considers that the victim’s stay is necessary for the protection, recovery and security assurance. Thus, the basis for granting temporary residence **is not related to the element of willingness**, but rather to the assessment of circumstances related to protection, recovery and security assurance. We believe that the formulation of paragraph 3 should be the starting point of action **because the obligation to provide protection to victims should not be linked to the element of willingness, i.e. willingness to cooperate with the competent authorities**. Certainly, we are not talking here about the free will and choice of the victim whether to use such protection or not, but about **the obligation of the state** to provide such protection. Finally, with regard to the application of Article 63, there is room for different interpretations of the manner in which the procedure is initiated, the powers to initiate proceedings, the circumstances in which this institute is applied, and the application of Article 62.

²¹ <http://mup.gov.rs/wps/wcm/connect/13f25fce-95e0-4e86-8917-208e23b1fdca/RAT%2B1.7.2021.+SAJT.pdf?MOD=AJPERES&CVID=nFy7wXf>

²² ASTRA, Challenges of Granting Status to Victims of Trafficking in Human Beings in the Republic of Serbia, 2022 (document to be published in March 2022)

Alternative Solutions for Trafficking Victims

Experience from the practice of the free legal aid service provider for different categories of migrants indicates that, with regard to presumed or identified victims of trafficking in human beings, within mixed migratory flows **in most cases the** solution that has been applied has been to refer the persons to apply for **and grant protection through the asylum system**. *Such a* solution a priori cannot be considered wrong, because international law recognizes that, in certain situations, victims of human trafficking, or persons at risk of human trafficking, may have the right to refugee status.²³ In each individual case, **there must be a well-founded fear of persecution on one of the grounds prescribed in the 1951 UN Convention relating to the Status of Refugees, if he/she returns to his/her country of citizenship and that person must be unable or unwilling to seek protection in the country of citizenship**, which may include, for example, the absence of specialized assistance in that country. Although trafficking in human beings for the purpose of sexual exploitation is more commonly recognized as a basis for an asylum application, it is essential to recognise that the definition of trafficking is also relevant for other forms of exploitation which may also be the basis for an asylum application.²⁴ This means that **not every person identified as a victim of trafficking will necessarily be granted asylum in the country of destination**. The obligation of the state is to enable the application for asylum while presumed victims of trafficking in human beings are in the process of identification, but the question arises whether it can be considered justified that the **first choice should be an asylum system and on the basis of which crucial facts such a decision is made?** Certainly, for a comprehensive assessment, it is necessary to perform **a detailed analysis of each individual case** in which the asylum system was chosen as the preferred option. Due to the limited scope of this analysis, without assessing individual cases, only general observations will be made that can provide a broader framework for consideration of established practice.

According to the information collected from the provider of the free legal aid service, in a number of cases, the selection of the asylum procedure was a consequence of a pragmatic approach because persons who were later identified as victims of trafficking were already in the asylum procedure at the time of identification by the Centre. In such cases, the circumstance of identification was only an additional argument in the asylum procedure. Also, some participants pointed out that an important aspect of the decision was the established practice and understanding of the principle of the prohibition of return. At the current level of development of the migration system in Serbia, they believe that the asylum system shows **the highest degree of understanding of the obligation to respect the prohibition of return** compared to other competent authorities which are also obliged to comply with this extremely important postulate of the international system of human rights protection. Additionally, the selection of a procedure is often conditioned by both flexibility and donor support requirements with the assistance of which the activities are implemented. On the other hand, **when the** circumstances of the corpus of available rights and obligations within the asylum procedure **are considered**, permanent solutions were not among the factors considered in the context of decision-making.²⁵

The **assessment that the asylum system is recognized as a means of “last” defence cannot be avoided**, especially in situations when the **possibilities for acquiring a legal basis of temporary residence on some other basis have been exhausted**. Such a practice can hardly be completely avoided, but it should be kept to a minimum, that is, it should be used if it is assessed that the

23 UNHCR, Guidelines on International Protection: Application of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, 7 April 2006, HCR/GIP/06/07; AZ (trafficked Women) Thailand CG (Country Guide) [2010] UKUT 118 (ICA), in particular paragraphs 140-142; AM and BM (Trafficked Women) Albania CG [2010] UKUT 80 (ICA), paragraph 219.

24 GRETA, Guidance note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection, available at <https://rm.coe.int/hf26-note-entitlement-rights-of-victims-srp/1680a302e2>

25 Permanent residence and access to the citizenship of persons granted asylum, Preliminary Agreement (Group 484), 2019.

circumstances of a particular case can lead to the recognition of the right to asylum.

Such an approach to the provision of services and protection is significant not only from the point of view of providing adequate protection to victims of trafficking, but also generally to persons in mixed migratory flows. In this regard, it is extremely positive that **providers of free legal aid increasingly initiate procedures for obtaining legal residence in accordance with the provisions of the Law on Foreigners**, i.e. consider the possibilities of obtaining legal residence and acquiring legal status outside the asylum system. In this sense, the first choice certainly will be **temporary residence for humanitarian reasons**, regulated by Article 61 of the Law on Foreigners. In accordance with Article 61 of the Law on Foreigners, a temporary residence for humanitarian reasons shall be granted to a foreigner who meets (or does not meet) all the general conditions to be granted temporary residence, even if he/she has not entered Serbia legally, i.e. is staying in Serbia illegally.

Humanitarian reasons that form the **basis** for granting this form of temporary residence are alternatively defined and include: 1) the existence of family, cultural or social ties with Serbia, the degree of integration into the social life of the Republic of Serbia in the previous period, especially in terms of education, work activities or knowledge of the language; 2) the postponement of the forced removal of a foreigner due to the observance of the prohibition of return for a period of one year or more; 3) if the foreigner is a victim of a serious crime, including persons who were involved in an action to facilitate irregular migration and who cooperate with the police and judicial authorities, and their presence is necessary in criminal proceedings, or if they participate in an investigation as a witness or aggrieved party; 4) if the foreigner is a minor and abandoned, is a victim of organized crime, or for other reasons has been left without parental custody or without escort; or 5) the existence of serious and justified personal reasons of humanitarian nature, the existence of interests of the Republic of Serbia or internationally assumed obligations.²⁶ The Rulebook on Detailed Conditions of Temporary Residence Approval regulates²⁷ in more detail only certain grounds for granting humanitarian stay, but not all.²⁸ Pursuant to Article 26, paragraph 1 of the Rulebook on Detailed Conditions of Temporary Residence Approval, if a foreigner submits an application for temporary residence approval for humanitarian reasons due to family, cultural or social ties he/she establishes with the Republic of Serbia, and due to specific circumstances related to his/her previous stay in Serbia, he/she has not been able to submit an application for temporary residence approval in the previous period in a lawful manner, and for at least two years he/she has been continuously staying in the Republic of Serbia, on the justification of the application for the approval of humanitarian stay, the foreigner submits one or more pieces of evidence on the basis of which it can be established that in the previous period in the Republic of Serbia he/she has completed school, has been employed, that he/she has close relatives in the Republic of Serbia along the right line, that is, to the second degree of kinship with whom he/she maintains close contacts, that he/she has formed a marital union, understands and speaks Serbian, and that due to the above circumstances that there are reasonable prospects that after regulating the residence in the Republic of Serbia, he/she fully integrates into social life.

Paragraph 3 stipulates that the **justification of the application for the approval of humanitarian stay** for a foreigner who cooperates with the police or judicial authorities, and whose presence is necessary in the proceedings before those authorities, shall be proved by the certificate of the authority on his/her participation in that proceedings, which is obtained by official duty.

When it comes **to minors unaccompanied by parents or guardians**, whether they are victims of organised crime or not, the Rulebook does not envisage additional conditions for determining the

26 See: Regulation of the legal position of migrants in irregular status and access to the right to work and the right to education, Group 484, 2021

27 Rulebook on more detailed conditions for granting temporary residence, appearance of applications for temporary residence, appearance and manner of entering the temporary residence sticker in a foreign travel document ("Official Gazette of RS", no. 72/2018)

28 See: Regulation of the legal position of migrants in irregular status and access to the right to work and the right to education, Group 484, 2021

justification of the application for granting temporary residence for humanitarian reasons. With regard to the approval procedure itself, it is only stipulated that the application is submitted by a social worker in the presence of a minor.

The provisions of the Law on Foreigners and the Rulebook do not envisage special conditions for other humanitarian reasons, then do not further determine what “serious and justified personal reasons of a humanitarian nature” are, circumstances of interest to the Republic of Serbia, nor regulate in more detail which obligations of international law entail the possibility/obligation to regulate legal status, or be granted legal residence. This leaves the competent authority with considerable discretion when deciding.²⁹

Past **experience from the practice of civil society organizations** shows that in most cases, the basis of the degree of integration into Serbian society was used, i.e. the existence of family, cultural or social ties with Serbia, as well as the basis related to minors unaccompanied by parents or guardians. **The practice of granting the first residence for humanitarian reasons is generally assessed as positive after a certain period of application of this institute**, in particular due to the fact that certain doubts regarding the interpretation of the conditions were eliminated by the actions of the competent organizational units of the Ministry of the Interior (for example, the necessity of fulfilling the conditions of the passage of time for minors without accompanying parents or guardians, evidence proving the degree of integration, etc.). It is also positive that the Law on National Administrative Fees³⁰ provides for exemptions from temporary residence fee for foreigners who are granted or extend temporary residence because they could not be forcibly removed from the Republic of Serbia for a period of one year or more, who cooperate with the police or judicial authorities, or because of the necessary presence in criminal proceedings or participation in the investigation as a witness or the aggrieved party, minors who have been abandoned and have been victims of organized crime, or for other reasons have been left without parental custody or escort, or foreign citizens who perform humanitarian activities in the Republic of Serbia.³¹ The activities of civil society organizations have also eliminated doubts regarding the application of this exemption recorded in practice, through **obtaining the opinion of the Ministry of Finance of the Republic of Serbia**.³²

In the context of the protection of presumed victims and victims of trafficking, the **institute of temporary residence for humanitarian reasons may be relevant in cases where the presumed victims have not been formally identified as victims of trafficking**. In this regard, it seems particularly important to consider the possibility of using the grounds referred to in Article 61, paragraph 3 of the Law on³³ Foreigners “if a foreigner is a victim of a serious criminal offence, including persons who were involved in an action to facilitate irregular migration and who cooperate with the police and judicial authorities, and their presence is necessary in criminal proceedings, or if they take part

29 Ibid.

30 Law on Republic Administrative Fees (“Official Gazette of RS”, no. 43/2003, 51/2003 - corr., 61/2005, 101/2005 - other law, 5/2009, 54/2009, 50/2011, 70/2011 - reconciled din. amount, 55/2012 - reconciled din. amount, 93/2012, 47/2013 - reconciled din. amount, 65/2013 - other law, 57/2014 - reconciled din. amount, 45/2015 - reconciled din. amount, 83/2015, 112/2015, 50/2016 - reconciled din. amount, 61/2017 - reconciled din. amount, 113/2017, 3/2018 - corr., 50/2018 - reconciled din. amount, 95/2018, 38/2019 - reconciled din. amount, 86/2019, 90/2019 - corr., 98/2020 - reconciled din. amount, 144/2020 and 62/2021 - reconciled din. amount)

31 Law on Republic Administrative Fees (“Official Gazette of RS”, no. 43/2003, 51/2003 - corr., 61/2005, 101/2005 - other law, 5/2009, 54/2009, 50/2011, 70/2011 - reconciled din. amount, 55/2012 - reconciled din. amount, 93/2012, 47/2013 - reconciled din. amount, 65/2013 - other law, 57/2014 - reconciled din. amount, 45/2015 - reconciled din. amount, 83/2015, 112/2015, 50/2016 - reconciled din. amount, 61/2017 - reconciled din. amount, 113/2017, 3/2018 - corr., 50/2018 - reconciled din. amount, 95/2018, 38/2019 - reconciled din. amount, 86/2019, 90/2019 - corr., 98/2020 - reconciled din. amount, 144/2020 and 62/2021 - reconciled din. amount)

32 The Balkan Centre for Migration and Group 484 submitted a request for an opinion on 9 November 2021.

33 Law on Criminal Procedure (“Official Gazette of RS”, no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 - CC decision and 62/2021 - CC decision) does not define the notion of victim but the aggrieved party. National Strategy for the Exercise of the Rights of Victims and Witnesses of Criminal Offences in the Republic of Serbia for the period 2020-2025, states that “..for the purposes of the Strategy, the term *victim* shall be interpreted in accordance with Article 2 of the Directive, which determines: The victim is a physical person who has suffered damage, including physical, psychological or emotional damage or economic loss directly caused by a criminal offence, as well as family members of a person whose death is directly caused by a criminal offence and who have suffered damage as a result of the death of that person, i.e. the immediate victim. Family members are a wife or spouse, a person who lives with the immediate victim in a permanent living community, in a joint household and on a stable and permanent basis, relatives in the direct line of descent, brothers and sisters, and persons who are dependent on the immediate victim...”

in an investigation as a witness or aggrieved party”, as well as the grounds referred to in paragraph 5 “the existence of serious and justified personal reasons of a humanitarian nature, the existence of interests of the Republic of Serbia or internationally assumed obligations”. Regarding Article 5, we believe it is necessary to **seek a closer interpretation** or opinion of the competent state authority, given the **large discretionary space for different interpretations of** the said alternatively set conditions. In addition, it is questionable whether a closer understanding of these criteria could be achieved by **strategically** litigating cases on this basis.

In order to determine the possibility of using paragraph 3, the initial question is whether the absence of a formal identification of the victim necessarily leads to the cessation of the investigation, i.e. the abandonment of the criminal prosecution of the perpetrator of the criminal offence of trafficking in human beings? In addition, can such a person participate in the investigation or criminal proceedings as a witness, i.e. the aggrieved party, especially in cases of criminal offences? If the answer is positive, we believe that there are **enough grounds to initiate the procedure of granting temporary residence for humanitarian reasons** for presumed victims and victims of trafficking who have not been formally identified, while fulfilling the conditions for the competent authority to assess that the presence is necessary in the procedure being conducted before these authorities, as evidenced by the certificate of the authority, which is obtained by official duty.

Concluding considerations and recommendations

The question of the legal basis of residence of victims of trafficking in human beings who are foreign nationals has not preoccupied attention of practitioners and theoreticians, given the dominant trend of identifying predominantly domestic citizens victims. The available statistics, as well as the identified challenges, indicate that **there is undoubtedly a need** to put this topic on the list of priorities of institutional and non-institutional actors dedicated to the fight against trafficking in human beings and the protection of victims. In addition, the analysis points to the interdependence and impact of the migration management system, so even **closer cooperation of all actors** and **decision-making at the systemic level** is necessary, which will eliminate certain challenges. The limited scope and time period for carrying out the analysis influenced its content and the possibility for individual cases from practice to be analysed in more detail, together with the segment of guaranteed rights and obligations with each basis of residence, in order to obtain an even more comprehensive insight. In addition, the position of unaccompanied minors without parents, guardians and representatives was not the subject of a more detailed analysis. In this regard, the findings of this analysis should be interpreted as **an initial contribution to launching a broader debate on improving legislation and practice**.

In this regard, we would also like to highlight a few specific **recommendations** that can be a starting point for considering further directions for strengthening the system of protection of victims of trafficking:

1. With regard to the statistical data published in the annual reports by the Centre for the Protection of Victims of Trafficking in Human Beings, it is desirable to consider the possibility of **separating statistical data** on applications relating to categories of foreigners from mixed migration and foreigners whose countries of origin are neighboring countries/third country.
2. In this regard, it is desirable that the published reports also contain **an overview of data on legal statuses/grounds of residence/permanent solutions** for persons identified as victims of trafficking;
3. It is desirable to consider the manner in which the Law on Foreigners regulates the exercise of residence for presumed victims and victims of trafficking in human beings and to take appropriate steps to amend the legislative framework/ established practice of treatment;
4. It is desirable to conduct **continuous training** for providers of free legal assistance/ legal representatives and decision makers on positive legal regulations governing the acquisition of various legal status/ legal bases of residence. Preferably, such training sessions should also be organized in a format that allows for an exchange of views between different actors;
5. It is desirable to submit a **request for an opinion** regarding the interpretation of the provisions of Article 61 of the Law on Foreigners governing the exercise of residence for humanitarian reasons, or to **initiate the conduct of strategic cases** with the aim of determining the meaning and goal of the norm by the competent authority for its application.