



**UPHOLDING THE RIGHTS OF THE FOREIGN CITIZENS IN
THE STATE CUSTODY**

THEMATIC STUDY

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Abbreviations

ECtHR– European Court of Human Rights

ECHR – European Convention of Human Rights

UNHCR - United Nations High Commissioner for Refugees

OO – Ombudsman's Office

LCA – Law Centre of Advocates

MIA – Ministry of Internal Affairs

BMA – Bureau Migration and Asylum of the Ministry of Internal Affairs

GIBP – General Inspectorate of Border Police of the Ministry of Internal Affairs

TPCF – Temporary Placement Centre for Foreigners of the Bureau Migration and Asylum

AID – Asylum and Integration Directorate of the Bureau Migration and Asylum

BCP – Border Crossing Point

NLAC – National Legal Aid Council

NAP – National Administration of Penitentiary

CMDPRC – Chisinau Municipal Directorate for the Protection of the Rights of the Child

Law 52/2014 – Law nr.52/2014 on the People's Advocate (Ombudsman)

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Introduction

The People's Advocate (Ombudsman) ensures the protection of all human rights and freedoms by the public authorities, by the organizations and companies, no matter of the type of property and the legal organizational form, by the non-commercial organizations and by decision makers at all levels. The People's Advocate contributes to the protection of the human rights and freedoms through the prevention of their violation, through monitoring and reporting on the modality of protection of the fundamental human rights and freedoms at the national level through the improvement of the legislation related to the human rights and freedoms, through international collaboration in this area, through the promotion of the human rights and freedoms and their protection mechanisms, through the application of the procedures provided by the Law No. 52/2014.

In his/her activity, the People's Advocate follows the principles of legality, equality, impartiality, transparency, social equity, democracy, humanism and follows own conscience.

Situation regarding the upholding the rights of the foreigners by the authorities from the Republic of Moldova have been permanently in the sight of Ombudsman. In 2018 the level of the violations of the rights of foreigners has increased dramatically. A group of six Turkish nationals have been abducted and handed to Turkish authorities in the form of a disguised expulsion despite all international commitments. The case has not been resolved by the responsible authorities, and the society expects strong reactions. In this context, the People's Advocate planned to carry out a comprehensive Study on the identifying the main gaps regarding the protection of foreigners. The research findings are worrying. It seems that the national mechanisms are focused on identifying reasons to remove foreigners from the Republic of Moldova, rather than providing and ensuring the necessary protection. The legal rules in force do not offer effective guarantees to applicants for protection, and administrative bodies often abuse the assigned prerogatives.

The People's Advocate mentions the efforts of public authorities in raising awareness of the need to ensure the rights of foreigners in the country and urges them to continue the initiated reforms and to strengthen their possibilities in accordance with international standards.

Purpose and research methodology

Considering the complexity of the issue of ensuring and upholding the rights of foreigners in the Republic of Moldova, the People's Advocate aimed to conduct an in-depth thematic research. The basic purpose of the research is to contribute to the assurance by national public authorities of the rights of foreigners in state custody. In this respect, The Ombudsman's Office hired experts, who, in cooperation with the OO team, monitored the situation of foreigners and prepared the Study. The investigated information includes the period 2018-2019.

The study included office work (analysis of existing national normative acts, international practice and ECtHR jurisprudence; analysis of system issues; development of the study; formulation of recommendations; taking part in regular meetings, etc.) and field activity (regular monitoring of the situation of foreigners in public custody; weekly visits to TPCF; interviews with foreigners and public actors based on predefined and confidential questionnaires; professional assistance in representing cases in national courts; analysis of individual and of major importance cases of OO and LCA; requesting official information and data; processing quantitative and qualitative data obtained from field activity; conducting 2 focus groups with the regional offices of GIBP and BMA in the North and South region, as well as 8 joint visits (OO / LCA) to monitor the Moldovan-Ukrainian and Moldovan-Romanian border, and eight sectors of GIBP. In addition, LCA experts carried out their monitoring work on the basis of the mandate delegated by UNHCR.

The paper reflects the analysis of the *de jure* and *de facto* situation regarding the entry, stay, removal, request for protection, public custody, as well as the departure of foreigners from Moldova. Likewise, the study includes the relevant jurisprudence of the European Court, the analysis of individual cases from the perspective of human rights defenders, in order to improve the national practice in the field. The thematic study is presented on the International Migrants' Day, marked annually on December 18.

We mention the willingness to cooperation of the regional offices of GIBP and BMA. Access to institutions, places of detention took place without impediments, during the monitoring period.

1. ENTRY OF THE FOREIGNERS ON THE TERRITORY OF THE REPUBLIC OF MOLDOVA

The legal regime regulating the borders of the Republic of Moldova was established by Law 215/2011 on the state border of the Republic of Moldova, in force since 2012. The norm regulates the methods of mapping the state borders; border area; state border guard; conditions for the movement of persons, their means of transport, goods across borders, as well as the conditions for carrying out economic and leisure activity in the border area.

Another normative act that regulates the entry, stay and departure from the territory of the Republic of Moldova, including the provision and prolongation of the right of stay, their repatriation and documentation is Law 200/2010 on the regime of foreigners in the Republic of Moldova. It also provides for enforcement measures in case of non-compliance with the laws on residence and specific measures for the registration and processing of personal data of foreigners, in accordance with the obligations assumed by the Republic of Moldova through the international treaties to which it is a party. For the purposes of that law, a foreigner is defined as a person who has no nationality of the Republic of Moldova or is person without citizenship.

We must mention that foreigners in the Republic of Moldova enjoy the same rights and freedoms as citizens of the Republic of Moldova, as guaranteed by the Constitution of the Republic of Moldova and other normative acts, as well as international treaties to which the Republic of Moldova is a party.

According to Law 283/2011 on Border Police, GIBP is the administrative authority, subordinated to the MIA, which exercises the powers and implements the State policy in the field of integrated state border management, combating irregular migration and cross-border crime. According to the competences assigned by Law 215/2011, GIBP carries out a range of measures for authorizing the crossing of the state border of persons and means of transport. Persons entering or leaving the Republic of Moldova may cross the state border only through crossing points during working hours. The Border Police may allow exceptions to the obligation to cross the state border only through crossing points:

- on the base of international treaties to which the Republic of Moldova is a party;
- cases laid down in legislative acts;
- in the event of recreational navigation;
- in the event of seamen coming ashore in the area of the port where their vessels are anchored or in adjacent localities;
- for persons or groups of persons, if there is a special need and who are in possession of state border crossing documents and there is no conflict of interest related to state security and public order;
- for persons and groups of persons, in exceptional circumstances.

In the field of surveillance and control of the crossing of the state border, the Border Police, among many other specific activities:

- ensures public order at the state border crossing points;
- performs border control and authorizes the crossing of the state border of the Republic of Moldova of persons;
- does not allow the entry into and departure from the Republic of Moldova of persons who, according to the legislation, are prohibited from entering the Republic of Moldova, who do not meet the conditions for entry into the Republic of Moldova or who are temporarily restricted in the right to leave the Republic of Moldova.

In the field of combating irregular migration and cross-border crime, the Border Police, among many other specific activities:

- carries out, within the limits of its competences, actions to prevent, detect and counteract irregular migration and other cross-border offenses related to the irregular movement of persons;
- notes, on the state border, the contraventions related to the irregular residence of foreigners and the irregular crossing of the state border by persons;
- performs special investigation measures;
- pursues criminal prosecution;
- applies the measure of non-entry of foreigners into the Republic of Moldova;
- ensures control over migration at state border crossing points.

In carrying out its duties, the Border Police, among many others, has the following obligations:

- not to allow the crossing of the state border through the crossing points to persons who do not have valid documents or who have violated the legislation governing entry, departure, transit and stay on the territory of the Republic of Moldova.;
- to detain, at the request of the competent authorities, the wanted persons in case they escape prosecution or criminal punishment, as well as to detain persons in other cases provided by law.

To ensure that the tasks of preventing and combating cross-border crime, including trafficking in human beings, organizing irregular migration, crossing the state border, smuggling, forging and fraudulent use of documents, the Border Police, within the established limits of legislation:

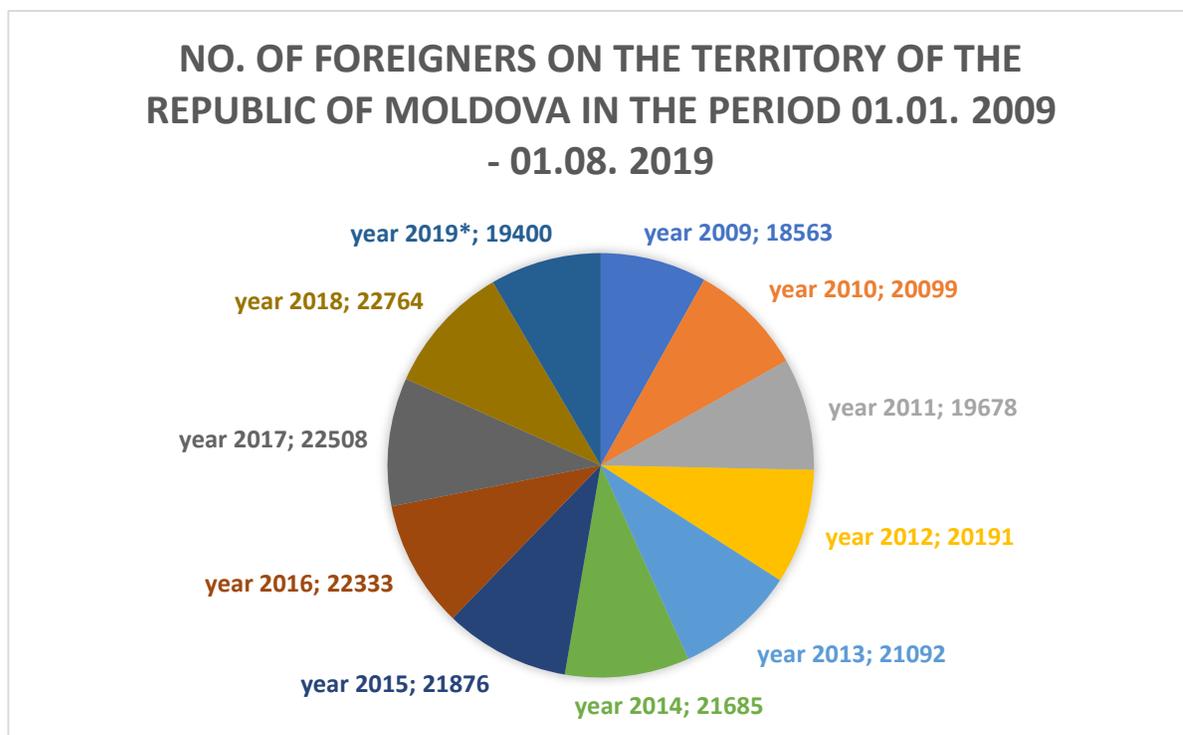
- pursues criminal prosecution;
- notes and examines the contraventions;
- undertakes legal expertise;
- performs special investigation measures.

The Border Police exercises its duties within the border area and state border crossing points, and in the case of combating irregular migration and cross-border crime - and outside this area.

The Border Police, among others, has the following rights:

- to control the documents of the persons, necessary for the crossing of the state border and to make in them the necessary notes;
- to pick up the invalid documents presented for control, as well as those that do not belong to the owner;
- to carry and use the provided weapons and the special means;
- to apply physical strength;
- to use working animals in the event and in the manner established by law.

According to official data, the number of foreigners on the territory of the Republic of Moldova in the period 2009-2019 is about 21,000 foreigners:



Another institution established in order to ensure the implementation of the policy in the field of migration, asylum, statelessness and integration of foreigners is the **Bureau Migration and Asylum** of the Ministry of Internal Affairs.

The basic functions of BMA are ¹:

- a. takes part in the development of state policy by making proposals in the field of migration, asylum, statelessness and integration of foreigners;
- b. implements and supervises the compliance with the legislation in the field of migration, asylum, integration and statelessness, with other legislative and normative acts related to these issues;
- c. ensures the management of migration processes;
- d. provides assistance and facilitates the process of integration of foreigners in the Republic of Moldova, in accordance with the provisions of the legislation in force;
- e. ensures the fight against the illegal stay of foreigners on the entire territory of the country and monitors the flow of foreigners;
- f. ensures the upholding of the rights and freedoms of foreigners on the territory of the Republic of Moldova.

The BMA has significant responsibilities in the field of migration management. These refer to: the organization of the data collection activity held by the central and local public administration authorities for use in the Integrated Automated Information System "Migration and Asylum" (IAISMA)², as well as the storage, processing, provision and exchange of information on migration processes on internal and external levels; development of the Extended Migration Profile (EMP) and dissemination of data on migration groups and flows, etc.

1.1. Legal entry of foreigners on the territory of the country

Entrance on the territory of the Republic of Moldova is allowed to foreigners if they meet the following conditions:

- a) have the valid travel documents approved or recognized by the Republic of Moldova if international treaties which party it is, do not provide other;
- b) have the visa issued according to this law or, on circumstances, the valid residence permit or the identity certificate for refugees or receivers of humanitarian protection;
- c) submit the documents proving the entrance purpose and provide proofs of availability of appropriate means both on content during stay, and for return to country of source or for transit to other country in the presence of guarantee of permission of entrance for its territory;

¹ Regulation on the organization and functioning of the structure and the limit staff of the BMA subordinated to the MIA, approved by Government Decision no. 914 from 07.11.2014.

² Integrated Automated Information System "Migration and Asylum" (IAISMA) represents the totality of automated information systems of state importance, which also ensures the control of migrants of different categories (except for internal migrants), integration of departmental information resources in the field of migration and asylum, as well as the development and release of the necessary analytical and statistical information.

d) represent guarantees of permission of entrance for the territory of the country of appointment or departure from the territory of the Republic of Moldova - for the foreigners passing en-route;

e) do not belong to the category of foreigners to whom entry into the Republic of Moldova is forbidden or who are declared undesirable persons;

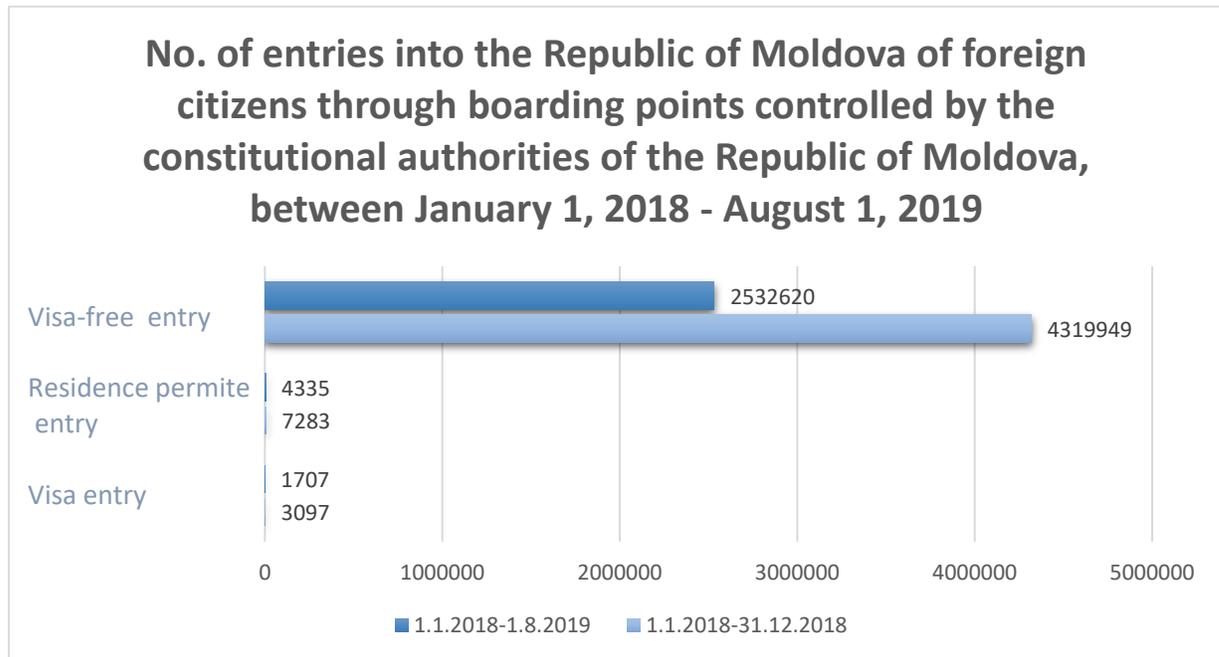
f) do not pose threat of homeland security, to public order and public health;

g) the personal mark for the purpose of not permission of entry into the Republic of Moldova is not brought.

According to art.17 of Law 215/2010, border guards have the right to request justification of the purpose of entering the Republic of Moldova:

- an invitation from an undertaking, organization or institution, power of attorney, employment contract, tickets, invitations to participate in exhibitions or documents confirming an economic interest in business travel;
- a document certifying enrolment in an educational institution or other form of training, student card or certificate of attendance at the study travel course or other types of training;
- tourist voucher, supporting document regarding hotel accommodation, the invitation from the host stating the guest's accommodation address, confirmation of booking a place for an organized trip or any other appropriate document indicating the plans of the trip to be undertaken, return or tour ticket for tourist trips or personal reasons;
- invitations, tickets, agenda stating, where possible, the name of the host organization and the duration of the visit or any other appropriate document indicating the purpose of the visit for travel undertaken for political, scientific, cultural, sport purposes, on the occasion of religious events or other purposes;
- the identity card of the passenger on purpose of boarding on vessel, landing and repatriation.

It is important to mention that the activity of the border police is to be carried out with full respect for human dignity, regardless of race, nationality, ethnic origin, language, sex, religion, opinion, political affiliation, wealth, social origin, disabilities, and age.



1.2. Visa-free entry on the territory of the state

For foreigners who are not required to obtain a visa to enter the Republic of Moldova, a period of stay on the territory of the Republic of Moldova is not expressly provided. They may stay for an uninterrupted stay or for several stays for a period that shall not exceed 90 days during the last period of 180 days, proceeding each day of stay.

1.2. Visa entry on the territory of the state

The Republic of Moldova issues the following types of visas:

- A. Type „A” – Airport Transit Visa**, allows foreigners to pass through the international transit area of an airport in the Republic of Moldova, without entering the territory of the State, during a stopover or a transfer between two sections of an international flight.
- B. Type „B” – Transit Visa**, shall be issued at the foreigner's request to transit through the territory of the Republic of Moldova in order to move to a third country for the period of validity of the visa of the state of destination and, where appropriate, for a period which shall not exceed the period of one year, with the right to reside on the territory of the country no more than 5 days in a transit. Transit visa can be a single or multiple entry and exit.
- C. Type „C” – Short Stay Visa**, Short stay visa shall be issued for a specified period, with one or more dwellings, whose duration does not exceed 90 days within 6 months from the date of first entry into the country. Short stay visa may be with a single or multiple entry and exit.

Short stay visa shall be granted for the following purposes:

- a. *mission* - foreigners who fulfil duties within Governments, public administrations or international organizations, as well as those who, by purpose of their stay in the Republic of

Moldova, of interest for relations between it and the state of belonging. This type of visa may be issued to members of the family accompanying them;

- b. *tourism* - foreigners to travel in the Republic of Moldova for touristic purposes;
- c. *visit* - the foreigners who intend to travel in the Republic of Moldova in visit to Moldovan citizens or foreign nationals holding valid residence permits;
- d. *business* - foreigners who intend to travel to the Republic of Moldova for economic or commercial purposes, for contracts or negotiations, to verify the use and functioning of the goods purchased or sold under commercial contracts and industrial cooperation, as well as foreigners who are or are to become partners or shareholders of a company from the Republic of Moldova;
- e. *transport* - foreigners to travel in short periods, in order to carry out professional activities related to the carriage of goods or public transport of persons;
- f. *sports* - foreigners to enter the country on a limited period of time in order to participate in sports competitions;
- g. *cultural, scientific, humanitarian, religious activities, short-term medical treatment, other activities which do not contravene the laws of the Republic of Moldova* - under the justification of the presence in the Republic of Moldova.

Short stay visa by which has been granted a stay of less than 90 days may be extended with new time limits, so that the total duration of the stay granted does not exceed 90 days within 6 months from the date of first entry into the country. Visa prolongation may only take place for the same purpose for which it was given.

D. Type „D” – Long Stay Visa.

Long stay visa shall be issued for a period not exceeding 12 months, for one or more staying times whose duration will not exceed 90 days within 6 months from the date of first entry into the country, which allows foreigners to apply for grant of right of residence. Long stay visa may be with a single or multiple entry and exit.

Long stay visa shall be granted for the following purposes:

- a) *conducting entrepreneurial activity* - to foreigners who carry out investment in the national economy, which are or are to become shareholders or associates involved in the management and administration of companies in the Republic of Moldova;
- b) *employment* - foreigners to enter the country in order to get employed, foreigners posted temporarily by foreign companies, interns or seasonal workers. In such a purpose visas are also issued to athletes to evolve within the framework of clubs or teams from the Republic of Moldova, on the basis of an individual contract of employment;
- c) *studies* - foreigners entering the country to study in pre-university education, university or postgraduate education;
- d) *family reunification* - the foreigners entering the country for reunification and preservation of its integrity. Family may include: wife (husband), minor children, parents,

and persons over which guardianship or trusteeship is established. Visa request shall be accompanied by the approval of the competent authority for foreigners;

- e) *humanitarian or religious activities* - foreigners entering the country to carry out humanitarian activities in the field of religion or recognized in the territory of the Republic of Moldova;
- f) *diplomatic and professional activities* - foreigners holding diplomatic or service passport, who will fulfil official positions as members of a diplomatic mission or a consular office in the Republic of Moldova of the state of belonging. These types of visas are issued to holders of diplomatic passports, service or treated as such, upon request of the competent authority of the sending country or his/her diplomatic mission or of his/her consular office, as well as members of the family with whom he/she lives, and are valid for the period of the mission or in accordance with the bilateral treaties to which Moldova is a party;
- g) *treatment* – foreigners following long medical, balneal-sanatorium and recovery treatment;
- h) *activities in the field of information technology* - foreigners who are to enter the Republic of Moldova to carry out the activity of manager or one of the activities provided in art. 8 of Law no. 77/2016 on information technology parks to a legal entity resident of an information technology park;
- i) *temporary transfer of personnel within the same legal entity* - to foreigners who are to enter the Republic of Moldova for carrying out an activity as a person with a management position or specialist;
- j) *internship activities* - foreigners temporarily transferred within the same legal entity, who are to enter the Republic of Moldova for the purpose of professional development or technical training.

Visas can be issued to foreigners by the diplomatic missions and consular offices of the Republic of Moldova. In cases when foreigners access the "e Visa" platform for obtaining electronic visas, these are granted by the General Directorate on Consular Affairs of the Ministry of Foreign Affairs and European Integration. The issuance of electronic visas through the e-Visa system is regulated by the Regulation on issuing visas, approved by GD no. 50 from 15.01.2013. Foreigners can apply exclusively for a short-stay visa through the electronic visa portal – <http://evisa.gov.md>.

1.4. Entry on the territory of the state on the base of temporary and permanent residence right

The foreigner may request to the Bureau Migration and Asylum granting the right to temporary residence in the Republic of Moldova for the following purposes:

- Family reunification;
- Protection of victims of trafficking in human beings;

- Foreign investors;
- Work;
- Study;
- Humanitarian, volunteer or religious activities;
- Long medical treatment.

In order to obtain the right of temporary residence in the Republic of Moldova, the foreigner is to submit to the BMA an application accompanied by a set of documents that would demonstrate the purpose of applying for the right of temporary residence in the Republic of Moldova. Information on the set of documents required to obtain the right of temporary residence is available on the BMA website, the information is available only in Romanian.

The Ombudsman's Office recommends the BMA to translate the information on the respective procedures, on the information website and any other sources, into the languages of international circulation as an element of ensuring human rights.

Foreigners holding the right of temporary residence, with the exception of foreigners enrolled in studies and immigrant workers, may apply for the right of permanent residence under the following conditions:

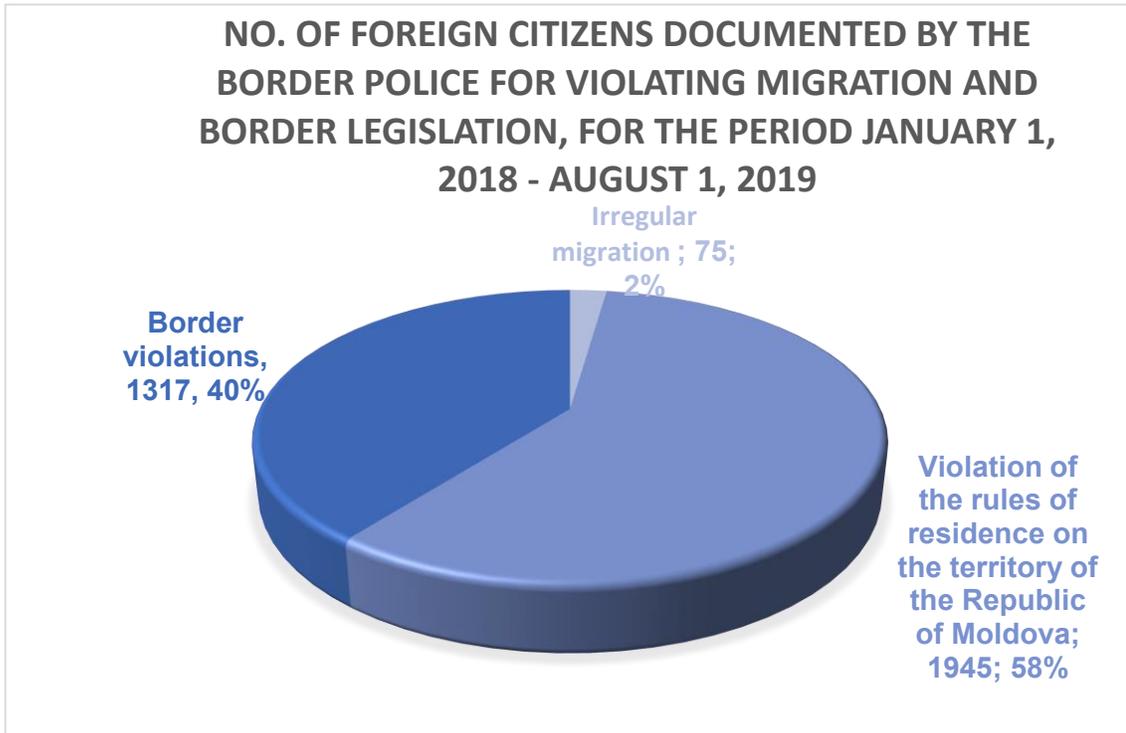
- entitled to legal temporary and continuous residence in the territory of the Republic of Moldova for at least 3 years- in the case of an foreigner married to a citizen of the Republic of Moldova;
- entitled to legal temporary and continuous residence in the territory of the Republic of Moldova for at least 5- years in the case of foreigners from other categories.

Stateless persons, foreign nationals with the right of permanent or temporary residence in the Republic of Moldova who are abroad and do not have a travel document valid for returning to the Republic of Moldova have the right to enter the Republic of Moldova based on the travel document issued by the diplomatic missions or consular offices of the Republic of Moldova.

1.5. Entry on the basis of the identity card for refugees or beneficiaries of humanitarian protection

Stateless persons, refugees and beneficiaries of humanitarian protection have the right to enter the Republic of Moldova on the basis of a travel document issued by the competent bodies of the Republic of Moldova or on the basis of its national passport accompanied by the identity card for refugees or beneficiaries of humanitarian protection issued by the authorities of the Republic of Moldova. This right presupposes the obligation of the national authorities to allow the departure and / or entry of foreigners from the territory of the country.

1.6. Illegal entry on the territory of the Republic of Moldova



The legislation of the Republic of Moldova defines:

1. **Irregular migration** represents the phenomenon of movement or displacement of the population outside the norms of the border legislation of the countries of origin, transit and destination. From the perspective of border security, illegality occurs when a certain person tries to cross an international border without having a valid travel document.
2. **Border violations** represents a series of actions that contravene the provisions of the legislation on the state border, the state border regime, the BCP regime, the border area regime, as well as the rules for crossing the state border.

Regarding the profile of people crossing the Moldovan-Ukrainian border illegally, the surveyed border police officers reiterated that most people are residents of border areas who cross the border to visit relatives in the border area of the neighbouring state:

Excerpt from the interview:

... They cross the border illegally so as not to complicate its legal crossing; it is more convenient for them to go directly to the destination town, than to surround the road through the border crossing points.

Another reason was the fact that many of the residents of the border area do not have a passport to cross the border legally. This problem would have arisen with the establishment of the border between the Republic of Moldova and Ukraine, which put an end to the uncontrolled movement between the former republics of the USSR.

The legislator included crimes of violation of the state border regime by foreign citizens in the Criminal and Contravention Code. Therefore, for crossing the state border of the Republic of Moldova by evading or evading the control performed at its crossing, the foreigner can be criminally punished with a fine of up to 750 conventional units or unpaid work for the benefit of the community from 150 to 200 hours, or with imprisonment for up to 2 years. The same actions that are accompanied by violence, are committed with the application of a weapon, are punishable by imprisonment from 5 to 8 years. **These provisions do not extend** to persons who have illegally crossed the border for the purpose of seeking asylum and to persons who are victims of trafficking in human beings³. **In practice, GIBP and / or BMA have often communicated to the public the cases of entry of foreigners into the Republic of Moldova as illegal, without informing whether they have applied for asylum or were victims of trafficking in human beings. Here, we mention that the authorities are obliged to inform foreigners about the protection offered by the Republic of Moldova, the way in which they entered the territory of the country being less important. Given these premises, but also the intention of the authorities to defend the border by "not protecting" asylum-seeking foreigner or victims of trafficking in human beings,**

Ombudsman recommends that the GIBP and the BMA thoroughly examine any case of (especially illegal) entry of foreigners into the country in terms of the obligation to grant international protection, subsequently - as a ground for illegal border crossing.

At the same time, for violating the state border regime, the border zone regime, the state border crossing regime and the state border crossing rules, the person can be sanctioned with a fine of 6 to 12 conventional units applied to natural person, with a fine from 9 to 18 conventional units applied to the person in charge. Crossing the state border by BCP without a passport or without authorization from the respective authorities is sanctioned with a fine from 12 to 30 conventional units applied to the natural person, with a fine from 60 to 90 conventional units applied to the person in charge⁴.

The assessment of the degree of violation (criminal or misdemeanour) belongs to the border policeman. The heads of sectors of the Border Police, their deputies, the heads of exchange, the senior officers, as well as the heads of the mobile teams, according to art.400 of the Contravention Code are entitled to examine and apply sanctions in the contravention cases referred to in:

³ Art.362 Criminal Code of the Republic of Moldova ;

⁴ Art.332 Contravention Code of the Republic of Moldova;

- Art. 287³ “Violation of the rules on the vignette”;
- Art. 331 “Deterioration, destruction, intentional permutation of village border signs, installation of false border signs”;
- Art. 332 “Violation of the state border regime, the border area regime, the state border crossing point regime and the state border crossing rules”;
- Art. 332¹ “Violation of the rules for the transport of foreigners and the obligation to present data on transported passengers”;
- Art. 333 (1), (2) and (4) “Violation of the rules of residence in the Republic of Moldova”;
- Art. 228–245 “Road traffic offenses”;
- Art. 354 “Hooliganism not too severe”;
- Art. 355 “Consumption of alcoholic beverages in public places and the appearance in such places in a state of intoxication produced by alcohol”.

The border guards may detain persons, in cases of violation of the state border regime, the regime of the border area or the regime of state border crossing points, in compliance with the fundamental guarantees, a detention shall be drawn up without delay upon detention, which shall record the date and place of termination, the position, name and surname of the person who drew up the report, data relating to the detained person, the date, time, place and reason for the detention. The minutes of the detention shall be signed by the person who drew it up and by the detained person. The refusal of the detained person to sign the report is mentioned in it, with the proof of the fact by at least of two witnesses.

The detained person shall be informed without delay, in a language he understands, against signature of the following:

- about the reasons for the detention;
- the rights provided in art. 384 Contravention Code;
- he/she is given the opportunity to communicate with two persons, at his/her choice, about the detention;
- will have access to a public lawyer or defender chosen in order to ensure the right to defence.

The contravention detention may not exceed 3 hours, from the moment of detention. Detention for a term of more than 3 hours, but not more than 24 hours, is possible only with the authorization of the investigating judge, in the following cases:

- until the examination of the contravention case - to the person suspected of committing a contravention for which the sanction provides for the contravention arrest;
- to identify the person and clarify the circumstances of the contravention - persons who have violated the rules of residence of foreign nationals and stateless persons in the Republic of Moldova, state border regime, border area regime or state border crossing points regime.

The detained person shall be provided with at least the conditions provided in the Enforcement Code for persons subject to pre-trial detention. The administratively detained person is to be released in the following cases:

- the probable reasons for suspecting that he/she committed the contravention have not been confirmed;
- the detention period has expired;
- there are no grounds for further deprivation of liberty.

The released person cannot be detained again on the same grounds. Upon release, the detained person shall be given a copy of the report stating by whom and on what grounds he was detained, the place and time of detention, the reason and time of release.

The assessment of the situation regarding the observance of the detention guarantees by the police bodies was carried out by the Ombudsman's Office in 2019 within the Special Report "Situation of persons detained and in police custody".⁵ **The OO's observations following the field visits show that the GIBP subdivisions apply the process of detaining people at the border differently. The police sectors carry out the de facto detention, they can place the people in the temporary detention rooms, later they escort them to the GIBP Regional Directorates / or vice versa. Those departments shall act as ascertaining or procedural body. There is no certainty that the person detained in the local police sectors is provided with anti-torture guarantees (lawyer / doctor / information / relative information / interpreter / right to remain silent, etc.) until the period of *de jure* documentation, even if the police stated that these procedures are strictly followed.**

In this regard, but also in order to prevent any form of abuse, GIBP is to apply standard operating procedures regarding detention, escort and transportation, information, ensuring the fundamental guarantees of uniform detention for all police employees. Likewise, the GIBP is to adopt conditions of detention in the local and regional police sectors in accordance with the minimum standards of detention, including a clear mechanism for redirecting detainees to the General Inspectorate of Police and the National Administration of Penitentiaries or other institutions. Following these ideas, GIBP / BMA is to inform the Ombudsman's Office and / or the prosecution bodies about cases of excess / abuse / application of physical force and / or other special means / suicide attempts / deaths while detaining foreigners within 24 hours in as fundamental guarantees against ill-treatment.

The Criminal Code of the Republic of Moldova provides for the organization, in order to obtain, directly or indirectly, a financial or material benefit, the illegal entry, stay, transit of the territory of the state or the exit from this territory of the person who is not a citizen, nor a resident of this state

⁵ Special Report of the Ombudsman's Office "The situation of persons detained and in police custody, 2019"
<http://ombudsman.md/wp-content/uploads/2019/06/Raport-Situatia-persoanelor-retinute-RO-Web.pdf>

or the recruitment, transport, transfer, accommodation or reception of an adult, with or without their consent, for the purpose of commercial or non-commercial sexual exploitation, exploitation through forced labour or services, begging, appropriation of aid, allowances or social benefits, illegal use in medical or scientific testing or experiments, exploitation in slavery or slavery-like conditions, use in armed conflict or criminal activity, sampling of human organs, tissues and / or cells, as well as the use of the woman as a surrogate mother or for the purpose of reproduction, committed by the application of violence that is not dangerous for the life or health of the person or with the threat of the application of violence; abduction; theft, concealment, degradation or destruction of documents; servitude, in order to return a debt; threat to disclose confidential information to the victim's family or other natural or legal persons; deception; abuse of a position of vulnerability or abuse of power, giving or receiving payments or benefits in order to obtain the consent of a person in control of another person.⁶

The victim of irregular migration or trafficking in human beings is acquitted of this form of criminal liability for entering, staying, illegally transiting or leaving the territory of the state, as well as for possession and use of false official documents in order to organize the migration. The profile authorities have the task of finding out the profile of the victim in order to grant them legal protection.

According to the GIBP in 2018-2019, several illegal migration routes were identified. Groups of people were brought from the People's Republic of Bangladesh, India and the Republic of Uzbekistan.⁷

⁶ Art. 362/1, 165 Criminal Code of the Republic of Moldova.

⁷ <http://www.border.gov.md/index.php/ro/4867-retea-de-migratie-ilegala-destructurata-la-frontiera-de-stat>

2. ASYLUM CLAIMS AT THE BORDER

An asylum application is a manifestation of will, expressed in writing or orally before the competent authorities, which shows that a form of international protection is required in the territory of a State. **The very declaration of the fear of returning to the country of origin on grounds of persecution - is the request for a form of international protection on the territory of a state.**

The basic legislative act on asylum, which also regulates the application for asylum at the border, is Law no. 270 on asylum in the Republic of Moldova, of December 18, 2008. Other normative acts regulate the status of identity documents with which the beneficiaries of international protection are documented - Law no. 273 regarding the identity documents from the national passport system, from November 9, 1994 and the Government Decision no. 626 of 28 June 2005 on the identity documents of refugees.

Law no. 270 on asylum in the Republic of Moldova establishes the legal framework for foreign citizens, stateless persons and beneficiaries of protection in the Republic of Moldova, as well as the procedure for granting, refusing or revoking protection. Based on the legislative provisions, the competent authorities must ensure access to the territory of the Republic of Moldova for each foreign citizen at the border from the moment the foreigner has expressed in writing or verbally his will to enter the country to request protection. The law also regulates the principle of *non-refoulement*, according to which no asylum seeker or beneficiary of any form of protection may be returned or expelled from the border or from the territory of the Republic of Moldova, without a proper examination of the circumstances, in order to determine whether he/she faces the risk of persecution.

In the Republic of Moldova, asylum - is a legal institution, through which the State offers protection to foreigners, granting him/her one of the following forms of protection:

- **refugee status** - is granted upon request to a foreigner who, by virtue of a well-founded fear of persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of which he/she is a national he/she owns it and cannot or, because of this fear, does not want to put himself/herself under the protection of this country.

Acts of persecution can be:

- acts of physical and mental violence, including those of sexual violence;
- legal, administrative, police and / or judicial measures which are discriminatory or which are applied in a discriminatory manner;
- discriminatory or disproportionate accusation or punishment;
- the impossibility of retrial as a result of a discriminatory or disproportionate sentence;

- prosecution or punishment as a result of refusal to perform military service in the event of a conflict, when the performance of military service would involve the commission of offenses or acts falling within the exclusion clauses provided by law;
- acts or abuses of discrimination based on gender identity, as well as acts or abuses of discrimination specific to minors.
- **humanitarian protection** - is granted to a foreigner who does not meet the conditions for recognition of refugee status and in respect of whom there are reasons to believe that, on his return to his country of origin, he will be exposed to a serious risk and because of this risk cannot or cannot he wants to get the protection of that country.
 - Serious risk means the existence of one of the following situations:
 - conviction to capital punishment or the existence of a danger of execution;
 - torture or inhuman or degrading treatment or punishment of the applicant in his country of origin;
 - serious and individual threat to the life or bodily integrity of a civilian due to widespread violence in situations of international or internal armed conflict.
- **temporary protection** - exceptional protection, designed to ensure, in the event of a massive and spontaneous influx of displaced persons who cannot return to their country of origin, immediate and temporary protection of such persons, if there is a risk that the asylum system it cannot process this influx without adverse effects on its efficient operation, in the interests of the persons concerned and other persons in need of protection. Temporary protection is granted for a period of one year. If the grounds for temporary protection persist, the period of the temporary protection may be extended by 6 months, not exceeding one year, but not exceeding 2 years, or
- **political asylum** - is granted in exceptional cases, to persons who have held political, diplomatic or public interest positions in other states or in international bodies, to persons who have demonstrated a special attachment, respect and interest for the Republic of Moldova, and other prominent personalities, who are persecuted in their country of origin and ask the President of the Republic of Moldova for political asylum.

According to Law no. 270 of 18.12.2008 on asylum in the Republic of Moldova, the authorities competent to receive asylum applications are:

- a. AID, as well as the structural and territorial subdivisions of the BMA;
- b. GIBP;
- c. Police bodies;
- d. The structures of the National Administration of Penitentiaries of the Ministry of Justice or the subdivisions of provisional detention within the law enforcement bodies.

According to the Instruction on the procedure for receiving asylum applications submitted by foreigners at the state border of the Republic of Moldova⁸, if the foreigner comes to the border of the Republic of Moldova and seeks asylum from the Border Police officers, the following steps must be taken:

1. The foreigner who presents himself at the state border (either border crossing point or green border), and who expresses a written or verbal will to request a form of protection on the territory of the Republic of Moldova, will fill in the asylum application form provided by Border Police officers.
2. If the asylum seeker does not know how to write, the application will be completed by the border guard receiving the application, from the asylum seeker's statements and will make appropriate entries in the minutes about the reasons for not fulfilling or not signing the application by the applicant;
3. The border policeman will not refuse to receive the asylum application on the grounds that it was submitted late;
4. After submitting the asylum application, the border policeman will draw up in confidential conditions a report that will include, *data on the identity of the foreigner, and in case the person cannot be documented, the declared identity will be indicated; the person's country of origin; the circumstances which led the person to seek asylum; other data declared by the asylum seeker or data of which the competent authorities are aware;*
5. The Border Police sector must immediately inform the BMA's AID of the application for asylum at the state border. AID is to be informed of the situation in which the asylum seeker is suffering from illness and the presence of a doctor or a special vehicle is required for his transportation;
6. The Border Police will ensure the access on the territory of the Republic of Moldova of asylum seekers, only after informing the BMA and with its permission, which is obliged to take over the applicant within 24 hours from the state border to examine the submitted application;
7. After receiving the asylum application from the foreigner, he acquires the status of asylum seeker and is temporarily maintained, for up to 24 hours, in rooms specially designed for asylum seekers or if such rooms are missing, in another room with minimal human conditions, under the protection and supervision of border guards;
8. An asylum seeker at the state border will be issued a provisional certificate, which will not exceed 48 hours. The provisional certificate is issued in order to take the place of the

⁸ Order of the Border Police Department no. 782 from 29.12.2016

temporary identity document and allows the holder to travel to the AID. This model of temporary certificate is approved by order of the Minister of Internal Affairs and is considered state property; therefore the applicant is to return it to AID for documentation with another type of document issued by the competent authority.

During the investigation period, no cases of documentation with such a certificate were certified, the asylum seekers being taken over from the border and accompanied to the BMA headquarters by the employees of this institution.

Asylum seekers have the following rights:

- not to be returned or expelled until his / her asylum application has been resolved;
- to stay in the Republic of Moldova until the expiration of a period of 15 days from the date of the irrevocability of the decision on the rejection of the application;
- to be informed in writing of his / her rights and obligations during the asylum procedure;
- to benefit from legal assistance at any stage of the asylum procedure, in accordance with the law;
- to be issued a free temporary identity document;
- to work;
- to be accommodated in the accommodation centre during the procedure;
- to receive primary and emergency medical assistance;
- to have access to compulsory general education (in the case of the minor applicant)

In accordance with Article 9 of Law 270/2008 on asylum in the Republic of Moldova, **asylum seekers must not be sanctioned for illegal entry or stay in the territory of the Republic of Moldova.** These people are to be treated in accordance with international human rights standards.

2.1. Principle „non-refoulement”

In the field of refugee protection, the key element is the *principle of "non-refoulement"* or the *principle of non-return*. This means that, in principle, refugees should not be returned to a country where they have reason to fear persecution.

The 1951 Geneva Convention expressly stipulates, in Article 33, that: *“...No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”*

The principle of non-refoulement applies both to returns to the country of origin, to the country where the refugee would face persecution, but also to the country from which the refugee would have returned to such territories.

During the monitoring period, no violations of the right to seek asylum at land BCPs were identified. Such cases have been identified at the BCP "Chisinau International Airport", such as: ignoring asylum applications; failure to provide access to the asylum procedure; immediate return to the country of origin or take-off; detention on the territory of the airport for a long period; failure to inform the BMA of the arrival of applicants for protection or late information on this fact, etc.:

Case no.1

Two Pakistani citizens arrived in Chisinau and returned from Italy. For 4 days they were placed in the transit room of Chisinau International Airport. There, they slept on chairs, having no access to minimum conditions. Both applied for asylum, but were ignored by the border police. After several attempts, the GIBP admitted the entry of foreigners into the country.

Case no.2

In June 2018, a young woman landed at Chisinau International Airport. She was agitated and scared. She told police that she had been raped in her home country and that she was in danger of being killed if she returned. The young woman was constantly seeking asylum. During the talks, she was hurt. The airport called the emergency service. The gynaecologists confirmed that the young woman was pregnant, but she was at risk of abortion and acute pancreatitis. The young woman was given medication and injections. She was later transported back to the airport. The border policeman who accompanied the young woman, asked the doctors to speed up the procedures, in order to succeed in the procedure of returning to Turkey in a few hours. The BMA was not notified by the Border Police of the existence of an asylum application.

Case no.3

On the evening of November 7, 2018, a couple from Afghanistan landed on the territory of Chisinau International Airport. They did not know a language of international circulation, but they managed to mention "refugee" on a page. Those arguments were not sufficient for border police employees to make a decision to grant protection. Instead, they left them in the barren area until morning. Later in the morning, the couple was returned to Istanbul, without any decision in this regard. For several hours, people were kept in the condition of the sterile area, without commodities and without informing the BMA.

In 2018, 11 people applied for asylum at the border, of which 6 people applied for asylum at the BCP "Chisinau International Airport". And between January 1, 2019 and September 1, 2019, 8 people applied for asylum at the border, of which 4 people applied for asylum at the BCP "Chisinau International Airport".

Most respondents stated that they avoided seeking protection from joint BCPs on the border with Ukraine on the grounds of *insecurity*. It seems that the exercise of joint border control is to the detriment of asylum seekers coming from the Ukrainian state. This omission should be minimized so that the beneficiaries of protection feel safe when crossing the common border.

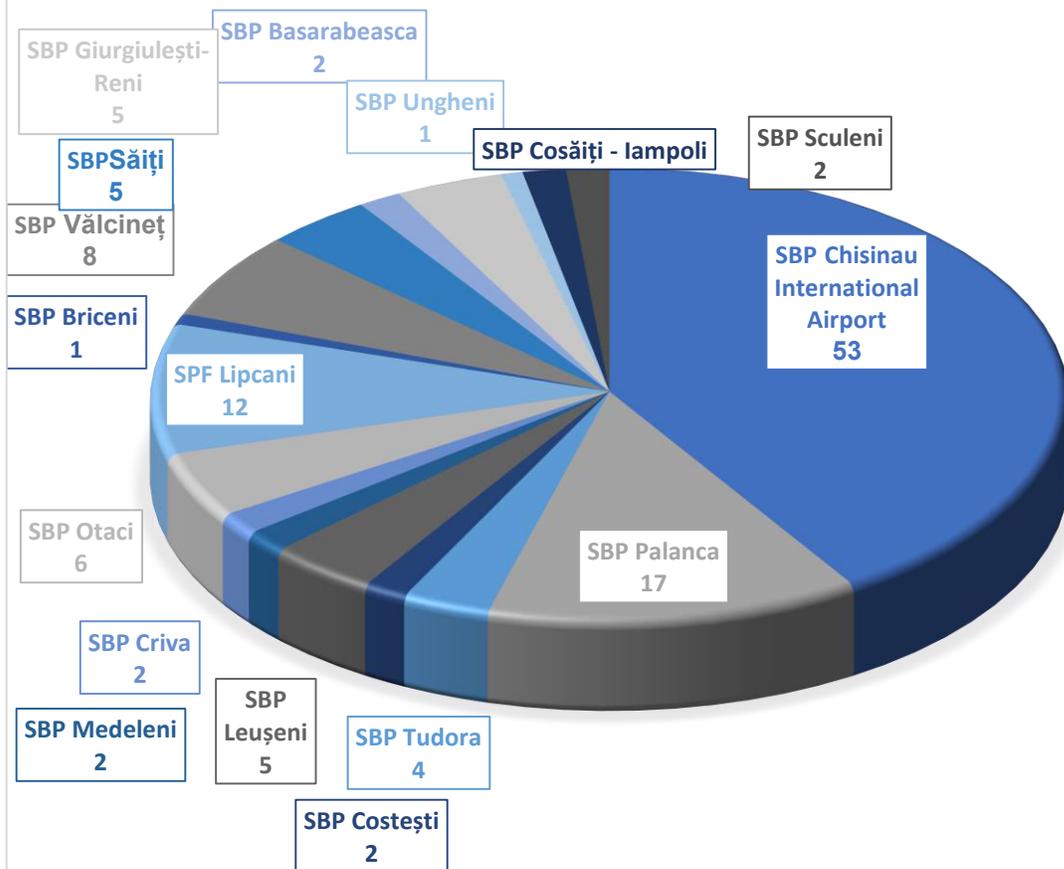
Excerpt from the interview:

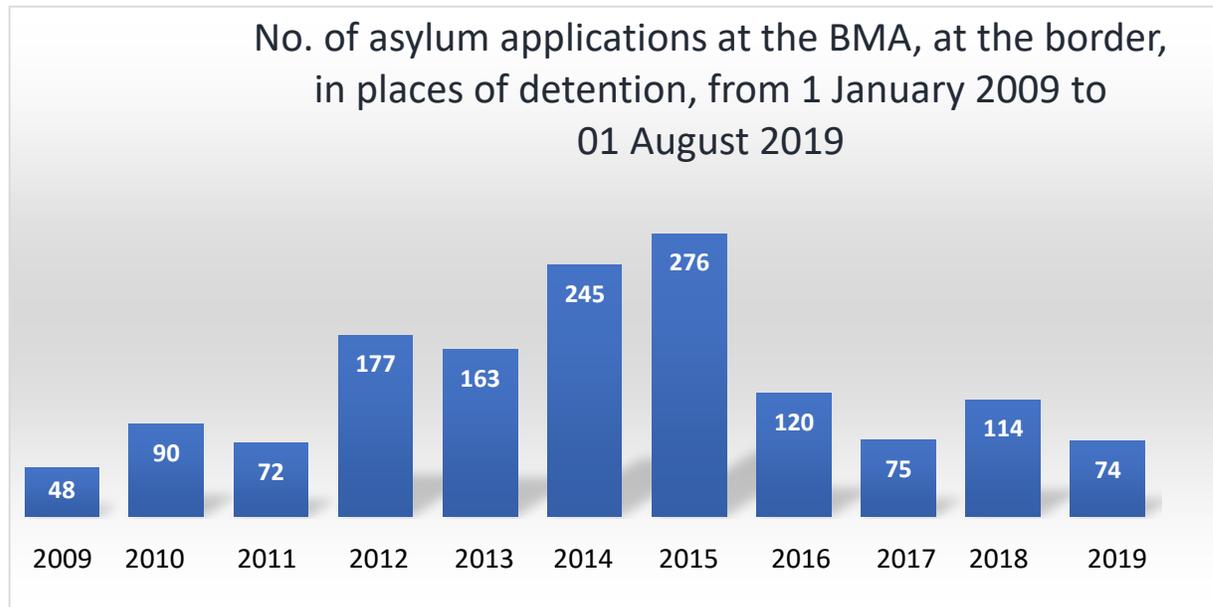
We do not feel protected by the Republic of Moldova since we observe Ukrainian officers on the same crossing point. We are afraid of the involvement of the Ukrainian authorities in the asylum application process from the Moldovan border authorities.

The above circumstances conclude that the competent authorities do not always comply with the principle of non-refoulement as stated in the 1951 Geneva Convention. This trend is dangerous. Consequently, the Republic of Moldova can be accused of violating the provisions of Article 33 of the Geneva Convention.

The Ombudsman's Office recommends the BMA to delegate to the BCP "Chisinau International Airport" its representatives - in order to immediately receive asylum applications received from applicants arriving in the Republic of Moldova through the airspace.

NO. OF ASYLUM APPLICATIONS ON THE TERRITORY OF THE REPUBLIC OF MOLDOVA AT THE SUBDIVISIONS OF THE BORDER POLICE (SBP), FOR THE PERIOD 01.01.2008- 01.08.2019





2.2. Ensuring the right to information entering the Republic of Moldova

During the monitoring visits at the border and following discussions with asylum seekers, it was established that the right to information is respected. Information panels on the asylum procedure in the Republic of Moldova are located in most BCPs. Information brochures on the rights of asylum seekers are also available. Thanks to UNHCR support, the information is available in 6 languages: Romanian, Russian, English, French, Farsi, Arabic, and Turkish. However, those panels do not contain information about the Ombudsman's Office, and some information is to be reviewed.

Given that the information obligation rests with the BMA and GIBP - they are to adjust / update the information related to ensuring the right to information of foreigners.

2.3. Ensuring the right to an interpreter entering the Republic of Moldova

At the BCP "Chisinau International Airport" most police officers know English, Russian, some speak Turkish and French. In the other BCP there is at least one person who speaks English.

Knowledge of foreign languages by border police officers facilitates communication with foreigners, without the need to use the services of an interpreter. From the discussions with the border police officers we found that the Border Police sectors did not budget for translation services. When they needed translations related to asylum applications, Border Police officers contacted the LCA or UNHCR or found other solutions.

Following discussions with asylum seekers, 2 cases were identified in which self-employed

applicants paid for translation services in the asylum application procedure at the border.

According to the research, major difficulties are encountered by the authorities, when the asylum seeker speaks a rare language and there are no certified translators in the Republic of Moldova.

For this reason, we consider it important the BMA / GIBP to adopt clear procedures for ensuring the right to an interpreter / translator for foreigners.

2.4. Ensuring the right to legal aid entering the Republic of Moldova

The right to legal aid in the asylum procedure is realized through National Legal Aid Council (NLAC). It provides free legal assistance to asylum seekers in the administrative and judicial stages. In 2018, the NLAC, with the support of the UN Refugee Agency (UNHCR) and the LCA, developed tools to assess the quality of legal aid provided to asylum seekers by state-guaranteed lawyers. At the time of the study, this criterion was not examined.

3. DEPARTURE OF THE FOREIGNERS FROM THE REPUBLIC OF MOLDOVA

Foreigners may leave the territory of the Republic of Moldova on the basis of a valid travel document on the basis of which they entered the country, or a new valid travel document issued by the foreign diplomatic mission or consular post or other competent body, according to legislation in force. The Border Police can also allow the foreigner to leave the Republic of Moldova based on the document attesting another citizenship, in case of loss, theft or damage of the document with which they entered the Republic of Moldova. Stateless persons, refugees and beneficiaries of humanitarian protection have the right to leave the Republic of Moldova on the basis of a travel document, issued by the competent bodies.

The foreigner is not allowed to leave the country due to the suspension of the right to free movement abroad for the following reasons:

- the foreigner executes a custodial sentence based on a decision of the court of the Republic of Moldova;
 - in a process of criminal investigation or trial of the criminal case on the territory of the Republic of Moldova, the foreigner is notified in search by the competent body or one of the following preventive measures has been applied, according to the Code of Criminal Procedure: the obligation not to leave the city; the obligation not to leave the country; the transmission under supervision of the minor; house arrest; pre-trial detention; provisional release under judicial control or on bail, with the obligation not to leave the city;
- medical coercive measures were applied to the foreigner, under the conditions of the criminal law;
- the foreigner is prohibited from leaving the country on the basis of a court decision, according to the Enforcement Code.

The measure of not leaving the country ceases de jure if it is proved that:

- with regard to the foreigner, it was ordered not to start the criminal investigation, to remove him from the criminal investigation or to stop the criminal investigation, to pay or end the criminal trial or to revoke the preventive measure of the obligation not to leave the country;
- the foreigner has executed the sentence, has been pardoned, benefits from an amnesty or has been sentenced, by a final court decision, with the conditional suspension of the execution of the sentence.

The legislation in force does not provide for the possibility of prohibiting the departure from the territory of the Republic of Moldova of foreigners, who have unpaid administrative fines or arrears to the state budget or budgets of territorial administrative units. Thus, **the foreigner cannot be detained when leaving the country on the grounds that he has not paid the fines or has debts to the public budget.**

4. REMOVAL OF THE FOREIGNERS FROM THE TERRITORY OF THE REPUBLIC OF MOLDOVA

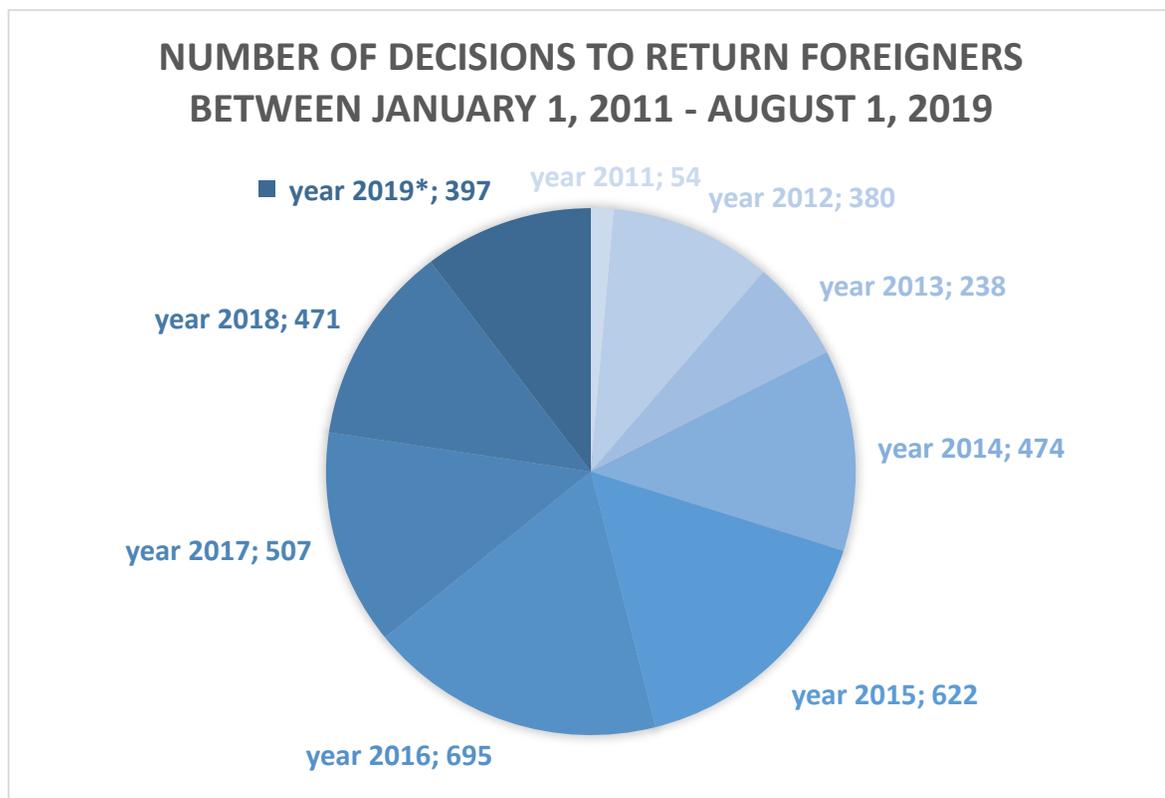
Law no. 200/2010 on regime of foreigners in the Republic of Moldova stipulates the following removal methods:

- ✓ Return,
- ✓ Declaration of a foreigner as undesirable person,
- ✓ Expulsion.

The competence to carry out the stated removal measures belongs to the BMA.

Extradition, which we can also qualify as a form of removal of foreigners from the territory of the Republic of Moldova, is regulated by the rules of the Code of Criminal Procedure of the Republic of Moldova and is the competence of the General Prosecutor's Office of the Republic of Moldova or, as the case may be, of the Ministry of Justice of the Republic of Moldova.

4.1. Return:



The BMA, by its decision, orders the measure of return from the territory of the Republic of Moldova and applies the ban on entry into the Republic of Moldova for a certain period. By the return decision, the stay of a foreigner is declared illegal and the foreigner is obliged to leave the territory of the Republic of Moldova within a certain period. The return decision can be issued against the following categories of foreigners:

- who entered the territory of the Republic of Moldova illegally,
- whose stay in this territory has become illegal,
- whose visa or right of residence has been cancelled or revoked,
- who were denied the prolongation of the right of temporary residence,
- whose right of permanent residence has ceased,
- whose application for recognition of stateless status has been rejected, the procedure has been ceased or whose stateless status has been cancelled,
- former asylum seekers.

The return decision shall be drawn up in two copies, in the official language and in an international language and shall contain the factual and legal grounds, as well as information on possible remedies. If the foreigner is present, a copy of the decision on return is handed to him to put his signature on the copy that remains at the competent authority for foreigners. If the foreigner is present, a copy of the decision on return is handed to him/her to put his signature on the copy that remains at the competent authority for foreigners by mail, with acknowledgement of receipt, to the address stated by the foreigner as his place of residence or by display at the headquarters of the BMA, if it is not known the address to which the foreigner resides.

The return decision may be appealed in the Court in which jurisdiction is the territorial subdivision of the BMA that issued the return decision, within 5 working days from the date of communication. The complaint of the return decision has a suspensive effect of execution of the decision, unless the return decision is issued at the request of the foreigner. The complaint of the return decision, drawn up by the foreigner taken into public custody, is made at the court in whose jurisdiction the Temporary Placement Centre for Foreigners is located (Chisinau Court, Riscani headquarters). The complaint of the return decisions takes place in the administrative court.

4.2. Declaration of a foreigner as undesirable person

The declaration of the foreigner as an undesirable person is a measure ordered by the competent authority for foreigners (BMA) against an foreigner who has carried out, carries out or in respect of whom there are strong indications that he intends to carry out activities likely to endanger national security or public order.

The BMA, by a reasonable decision, ex officio or on the proposal of other authorities with competences in the field of public order and national security, which have thorough data or

indications within the meaning of those indicated above, declares the foreigner an undesirable person. Where the decision to declare the foreigner an undesirable person is based on grounds of national security, the decision shall not state the reasons on which it is based. The period for which a foreigner can be declared an undesirable person is from 5 to 15 years, with the possibility of extending the term with a new period between these limits, if it is found that the reasons that led to this measure have not ceased.



In practice, decisions to declare the person undesirable are limited to:

"In accordance with Art.55 of Law 200 of 2010 on the regime of foreigners in the Republic of Moldova, DECIDE: To declare the citizen (country of origin, name, surname, date of birth), undesirable person on the territory of the Republic of Moldova for a period of ___ years. "

At the date of issuing the decision regarding the declaration as an undesirable person, the foreigner's right of residence ceases de jure.

The decision to declare the foreigner an undesirable person shall be drawn up in duplicate, in the state language and in a language of international circulation, and shall contain the reasons of fact and law, as well as information on possible remedies. If the foreigner is present, a copy of the decision is handed to him to put his signature on the copy that remains at the competent authority for foreigners. If the foreigner is present, a copy of the decision on return is handed to him to put his signature on the copy that remains at the competent authority for foreigners by mail, with acknowledgement of receipt, to the address stated by the foreigner as his place of residence or by display at the headquarters of the BMA, if it is not known the address to which the foreigner resides.

Article 56 of Law no. 200/2010 on the regime of foreigners in the Republic of Moldova prohibits informing the foreigner declared an undesirable person, on the data and information that were the basis for the decision. The law also maintains this prohibition for the phase of the examination in court of the complaint of the decision regarding the declaration of the foreigner as an undesirable person.

The decision regarding the declaration of the foreigner as an undesirable person can be appealed by him in court, within 5 working days from the date of communication. The lawsuit does not have the suspensive effect of executing the decision on declaring the foreigner an undesirable person.

The case regarding the complaint of the decision to declare the foreigner an undesirable person is examined within 30 days from the date of receipt. The decision of the first instance is final and enforceable, but can be appealed in the Court of Appeal.

In justified cases and in order to prevent the occurrence of imminent damages, the court may, at the request of the plaintiff, order the suspension of the execution of the decision until the resolution of the action on the merits. The court will urgently examine the request for suspension, the decision rendered in this case being legally enforceable.

In the practice of the LCA, there have been situations where, at the initiative of the SIS, asylum seekers who were still in the administrative procedure for examining their asylum applications have been declared undesirable, or immediately after an administrative decision rejecting the asylum application, but during the period offered by the legislation, for contesting in the administrative contentious courts. **These situations violate the provisions of Law 270 of 2008 on Asylum in the Republic of Moldova, which, in paragraph 1) of Article 11 provides: "No asylum seeker shall be expelled or returned from the border or from the territory of the Republic of Moldova." The legislator did not provide for any exception to the enunciated legal norm.**

It is worth mentioning that the Constitutional Court, at point 31 of its decision no. 3 of 14.01.2019, stated that if the SIS considers that an asylum seeker poses a danger to national security or public order: *"The Office for Migration and Asylum is responsible for examining whether poses a danger to national security or public order, without formally approving the conclusion of the Intelligence and Security Service"*.

Likewise, the Ombudsman in one of his reaction acts no. 06-2 / 35 of 31.10.2018 to the Supreme Court of Justice, BMA and SIS warned that persons in the asylum procedure are protected by international and national rules and on refugees. Therefore, the requirements of the Convention relating to the Status of Refugees, which in art.33 stipulates *"No Contracting State shall expel or return in any way a refugee across the borders of territories where his life or liberty is threatened on the grounds of race, religion, nationality, membership of a particular social group or political opinion."* *This protection applies to both refugees and asylum seekers located in or on the border of*

*the country and should be understood in terms of risks that may arise in any country to which the person may be sent and not only in their country of origin. **The SIS must not abuse the return obligation when the BMA has not completed the protection procedures.***

The principle of *non-refoulement* is the key element of refugee protection under this Convention. This principle applies to the return of persons who are in the territory of the state, both for those who entered legally and for those who entered illegally. In the context of torture, the principle of non-refoulement means that no state will expel, return or extradite a person to another state when there are serious grounds for believing that he or she would be exposed to the danger of torture. **In his opinion, the Ombudsman reiterated that no derogations from the principle of non-refoulement were allowed under any circumstances.**

The Ombudsman recalled the ECtHR's position - when the human right in question is an absolute right (prohibition of torture or the right to life), non-return becomes an absolute right and cannot be the subject of any exception, either in law or in practice. This practice applies **regardless of national security considerations, other public interests, economic pressures or large flows of migrants.**

Cases of declaring undesirable persons have also been certified, in order to camouflage an extradition or "illegal transfer of persons". The most publicized case is the case of Turkish citizens, removed from the Republic of Moldova, without observing any legal procedure, on September 6, 2018. See the ECtHR in *Ozdil and Others v. Republic of Moldova*, p. 54-57 (application 42305/18).

The People's Advocate (Ombudsman), at pp. 44 - 45 of his opinion no. 06-2 / 35 of 31.10.2018 explained the following: *Stricto sensu, according to Law no. 112/2008 for the approval of the Concept of national security of the Republic of Moldova, the only act that provides the notion of "national security" - National security is the fundamental condition of existence the people of the Republic of Moldova, the Moldovan state and is an objective of the country. The objectives of the national security of the Republic of Moldova are: ensuring and defending the independence, sovereignty, territorial integrity, constitutional order, democratic development, internal security, strengthening the statehood of the Republic of Moldova. A special place in this sense belongs to the defence and promotion of national values, interests and objectives. National security is not only the security of the state, but also the security of society and the citizens of the Republic of Moldova, both on the territory of the Republic of Moldova and abroad. The national security of the Republic of Moldova is achieved through appropriate measures of a political, economic, diplomatic, social, legal, educational, administrative and military nature, through intelligence, counter-intelligence, and through the effective overcoming of crises, in accordance with the legislation in force and with international law. Therefore, foreign citizens can be declared undesirable at any time based on the wording of Law no. 112/2008. Respectively, there is a need for sufficient and plausible arguments for any approach to national security conditions. The justification that "national interest" is the*

exclusive prerogative of the SIS bodies is not a plausible one, or "national" reveals that it affects the general public, i.e. these decisions must and can be known to society, part of the State. "

4.3. Expulsion

Although Law no. 200 of 16.07.2010 on the regime of foreigners in the Republic of Moldova provides that against the foreigner who committed a contravention or crime on the territory of the Republic of Moldova may be ordered the measure of expulsion under the conditions provided by the Criminal Code and the Contravention Code, currently expulsion may be ordered only under the conditions provided by the Criminal Code, the "contravention" expulsion being abrogated by Law no. 208 of 17.11.2016.

Courts, convicting foreign nationals and / or stateless persons for committing crimes, may order their expulsion. If the expulsion accompanies the prison sentence, the expulsion shall take place after the execution of the sentence. The right to respect for their privacy must be taken into account when deciding on the expulsion of persons.

In accordance with the provisions of Joint Order no. 20 / no. 264, penitentiary institutions have the obligation to inform the BMA:

- about placing the foreign citizen in the penitentiary - within one month from the date of placement;
- about the release or the date of the expected release of the foreign citizen.

In practice, criminally convicted foreigners, in whose sentences the expulsion is provided, after the execution of the criminal sentence are transferred from the penitentiary to the Temporary Placement Center for Foreigners, where BMA employees take the necessary measures to remove the foreigner from the territory of the Republic of Moldova (travel documents, tickets).

4.4. Prohibition of expulsion

Except in situations of danger to national security and public order, they cannot be expelled from the Republic of Moldova:

- a foreigner may not be expelled to a state, if there are justified concerns that his life would be under threat there or that he/she will be subjected to torture, inhuman or degrading treatment;
- stateless persons legally located on the territory of the Republic of Moldova;
- a foreigner who executes a criminal sentence of deprivation of liberty based on a decision of the court of the Republic of Moldova;
- in a process of criminal investigation or trial of the criminal case on the territory of the Republic of Moldova, the alien is notified in search by the competent body or one of the

following preventive measures has been applied, according to the Code of Criminal Procedure:

- the obligation not to leave the locality;
- the obligation not to leave the country;
- the transmission under supervision of the minor;
- house arrest;
- pre-trial detention;
- provisional release under judicial control or on bail, with the obligation not to leave the locality;
- medical coercive measures were applied to the foreigner, under the conditions of the criminal law;
- the foreigner is prohibited from leaving the country on the basis of a court decision, according to the Enforcement Code.

The ban on expulsion lasts until the grounds on which it was based disappear.

Expulsion is a security measure, provided for by the Criminal Code and ordered by court rulings. Cancellation, suspension of execution, revocation of expulsion can be ordered only by the court, according to the rules of the Special Part of the Code of Criminal Procedure.

4.5. Prohibition and suspension of removal

Removal / return are prohibited in the following situations:

- the foreigner is a minor and the parents have the right to reside in the Republic of Moldova;
- the foreigner has minor children or children unable to work, common with citizens of the Republic of Moldova, if the minor is dependent on him or if there is an obligation to pay alimony, an obligation that the foreigner regularly fulfils;
- the foreigner benefits from the right to acquire the citizenship of the Republic of Moldova through recognition;
- removal is prohibited by international treaties for the care of the Republic of Moldova is a party.

Except in cases where the foreigner is a danger to public order, national security or suffering from diseases that threaten public health and refuses to follow the treatment established by the medical authorities, removal / return is prohibited in the following situations:

- the foreigner is married to a citizen of the Republic of Moldova and the marriage is not fictitious,
- the foreigner is married to another foreigner with the right of permanent residence in the Republic of Moldova and the marriage is not fictitious,

- there are justified fears that the alien's life is endangered or that he will be subjected to torture, inhuman or degrading treatment in the state to which he is to be returned,
- the foreigner who is or has been a victim of trafficking in human beings, during the reflection period, unless the foreigner has resumed on his own initiative and actively maintains contact with the persons suspected of committing the crime of which he is a victim.

Unless the foreigner poses a danger to public order, national security or suffers from diseases that threaten public health and refuses to follow the treatment established by the medical authorities, the enforcement of the removal measure is suspended if the foreigner:

- is the parent of a minor who attends the courses of a state or private educational institution, accredited according to the law - until the end of the school year;
- is married to a foreigner who has the permission to remain on the territory of the Republic of Moldova, granted under the conditions of this law or by the court - until the date on which the permission expires;
- executes a custodial sentence based on a decision of the court of the Republic of Moldova;
- in a process of criminal investigation or trial of the criminal case on the territory of the Republic of Moldova, the foreigner is notified in search by the competent body or one of the following preventive measures has been applied, according to the Code of Criminal Procedure:
 - the obligation not to leave the locality;
 - the obligation not to leave the country;
 - the transmission under supervision of the minor;
 - house arrest;
 - pre-trial detention;
 - provisional release under judicial control or on bail, with the obligation not to leave the locality;
 - medical coercive measures were applied to him, under the conditions of the criminal law;
 - the foreigner is prohibited from leaving the country on the basis of a court decision, according to the Enforcement Code;
 - has a state of health that makes it impossible to implement the removal measure - until it is improved.

As a rule, the BMA does not order the removal of foreigners in situations that prohibit their removal, but in cases where the removal was ordered, the cancellation or suspension of the removal may be ordered by the BMA at the motivated request of the foreigner or the authority concerned.

4.6. Methods of removal foreigners

Foreigners, to be removed from the territory of the Republic of Moldova, can be removed by the following methods:

- Voluntary execution of the return decision;
- Assisted voluntary return,
- Removal under escort,
- Removal based on readmission agreements.

4.7. Voluntary execution of the return decision

In the case of certain categories of aliens, the return decisions are granted a period within which they are obliged to leave the territory of the Republic of Moldova:

- **15 days**

- *foreigners whose visas were cancelled;*
- *whose stay became illegal;*
- *former asylum seeker;*
- *formers applicants of stateless statute;*
- *foreigners whose stateless statute was cancelled.*

- **30 days**

- *foreigners whose right of stay was cancelled or revoked;*
- *foreigners who have been denied the right to stay;*
- *foreigners requesting a return decision before being found in an illegal residence situation;*

- **3 months**

- *foreigners who have to liquidate an investment;*

The indicated deadlines are calculated from the date on which the foreigner was notified of the return decision. At the request of the foreigner, in duly justified situations, taking into account the specific circumstances of each case, such as the length of legal stay, the existence of children attending school and the existence of other family ties, the time limit may be extended by up to 30 days.

The decision on the extension of the term for leaving the territory of the Republic of Moldova or on the refusal to extend this term shall be communicated in writing to the foreigner. The refusal decision can be appealed in court within 5 working days from the date of communication.

4.8. Assisted voluntary return

Foreigners on the territory of the Republic of Moldova can benefit, only once, from the support of the BMA in order to return to their country of origin or to another country if they do not have the financial means and meet the established criteria.

The BMA, together with national and international organizations with responsibilities in the field, is competent to carry out joint programs to identify concrete ways to support the above-mentioned foreigners, with a view to their return to their countries of origin, as well as the necessary financial resources.

4.9. Removal of a Foreigner under Escort

The removal of the foreigner under escort means that he is accompanied by specialized BMA personnel to the state border crossing point open to international traffic or to the country of origin, transit or destination. Removal under escort applies, by BMA decision, to the following categories of foreigners:

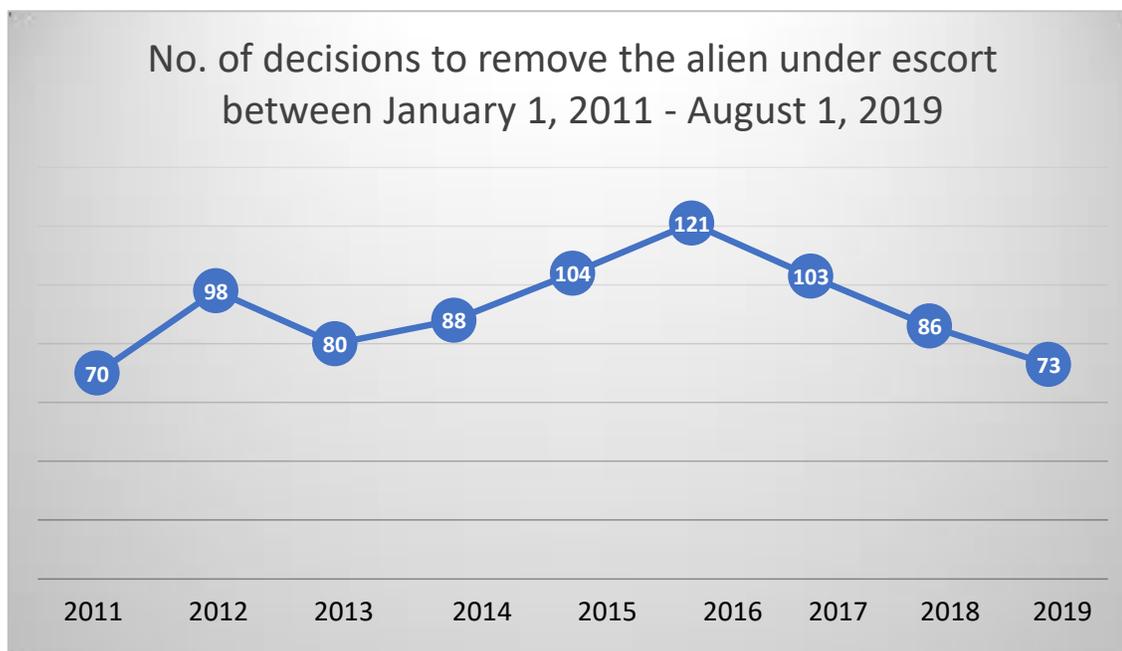
- that didn't leave the territory of the Republic of Moldova voluntarily at the expiry of the term given through the decision on return;
- crossed or attempted to illegally cross the state border or whose identity could not be established;
- entered the country within the period of a previous entry ban;
- declared undesirable;
- against whom expulsion has been ordered;
- who has not complied with the obligation to report periodically to the subdivision of the competent authority for foreigners which has imposed the measure or left its territorial jurisdiction;
- does not prove a living space on the territory of the Republic of Moldova;
- cannot prove his identity;
- there are other objective reasons determined by his behaviour.

During escort removal, specialized BMA personnel may use special procedures and means, in accordance with applicable law, only in cases where they are necessary to protect the life or physical integrity of escort staff, the foreigner or other persons, for preventing the occurrence of material damage or for fulfilling the purpose of removal under escort. The measures shall be applied with respect for the dignity of the foreigner, gradually and in proportion to the state of danger to be removed.

If the foreigner has a valid identity document for crossing the state border, financial means and if it is not necessary to carry out some other formalities, the measure provided for removal under escort shall be implemented within 24 hours.

For foreigners who do not possess valid documents for crossing the state border travel documents will be requested from diplomatic missions or consular offices accredited in the Republic of Moldova of foreigner's country of origin.

Law no. 200/2010 *Regarding the regime of foreigners* in the Republic of Moldova stipulates that if the valid travel document cannot be obtained under the conditions set out in the above paragraph, the BMA is competent to issue a travel document, the form and content of which were to be approved by Government. At the time of this study, no such document exists.



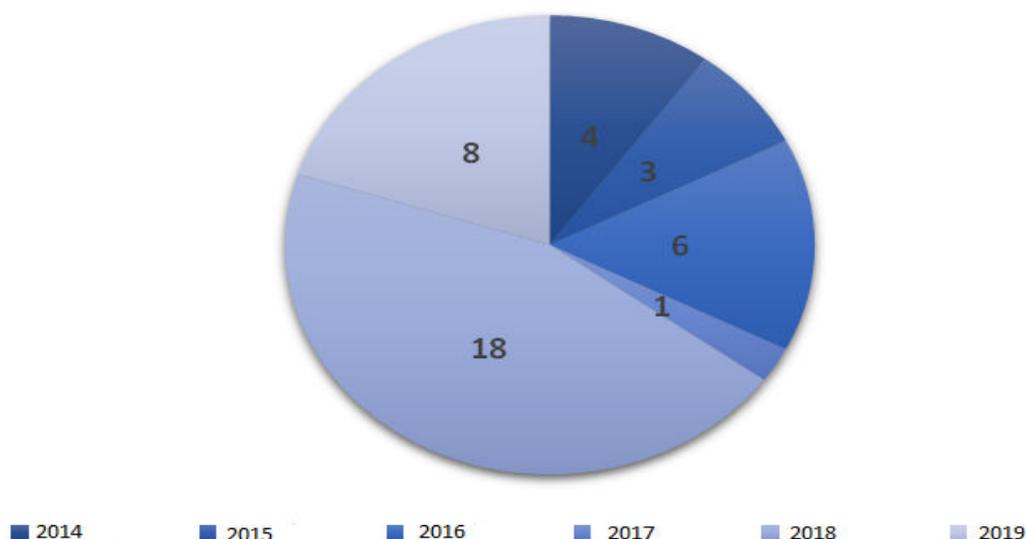
4.10. Deportation on the Basis of Readmission Agreements

The following categories of foreigners may be removed from the territory of the country and on the basis of readmission agreements concluded by the Republic of Moldova with other states, under the conditions stipulated in these agreements:

- foreigners who entered the territory of the Republic of Moldova illegally,
- whose stay in this territory has become illegal,
- whose visa or right of residence has been revoked,
- who have been refused an extension of the right of temporary residence,
- whose right of permanent residence has ceased,
- whose application for recognition of stateless status has been rejected, the procedure has been terminated or whose stateless status has been cancelled,
- former asylum seekers.

Readmission of stateless persons is provided for in the Agreement with the European Union, Norway, Bosnia and Herzegovina, Turkey, Georgia, Kazakhstan, and Ukraine. The agreements with Switzerland and Albania do not contain special provisions on stateless persons.

**No. of foreigners removed on readmission agreement
January 1, 2014 - August 1, 2019**



4.11. Extradition

Unlike the removal measures stated above, which are regulated by Law no. 200/2010 on the regime of foreigners in the Republic of Moldova and the execution of which falls within the competence of the Bureau Migration and Asylum (BMA), extradition is regulated by the rules of the Code of Criminal Procedure and is the competence of the General Prosecutor's Office or the Ministry of Justice. The request for extradition is made on the basis of the international treaty to which the Republic of Moldova and the requesting state are party or on the basis of written obligations under conditions of reciprocity.

Extradition may take place only if, as a result of the commission of the offense, the arrest warrant or a document with similar legal force or the decision of the competent authority of the requesting State, which is enforceable and ordering the detention of the requested person, is presented, and description of applicable laws.

If the person whose extradition is requested is being prosecuted, the competent authority to examine all the necessary materials and submit the extradition request is the General Prosecutor's Office. If

the person whose extradition is requested is convicted, the competent authority is the Ministry of Justice.

A foreign national or stateless person who is being prosecuted or who has been convicted in a foreign State for committing an act punishable in that State may be extradited to that foreign State, or to the State which took over the execution of the sentence, at the request of the competent authorities, following or executing the sentence pronounced for the committed deed or pronouncing a new sentence. Extradition for the purpose of criminal prosecution is granted only if the act is punishable under the law of the Republic of Moldova and the maximum sentence is at least one year in prison or if, after a similar reversal, the act would be, according to the law of the Republic of Moldova, punishable by such a punishment.

Extradition for the purpose of execution of the sentence shall be granted only if extradition is permitted under the conditions of the preceding paragraph and if a custodial sentence is to be served. Extradition shall be granted if the term of detention to be served or the cumulating of the terms of detention to be served is at least 6 months, unless the international treaty provides otherwise.

If the extradition of a person is requested in competition by several states, either for the same deed or for different facts, the Republic of Moldova will decide the extradition taking into account all circumstances, including the gravity and place of the crimes, the respective data in the applications, the citizenship of the requested person and the possibility of a subsequent extradition to another state.

After receiving the extradition request, the General Prosecutor's Office or, as the case may be, the Ministry of Justice undertakes measures, under the conditions of the Code of Criminal Procedure, for the preventive arrest of the person whose extradition is requested. The term of detention of the person may not exceed 180 days from the moment of detention until the surrender of the requesting party. The pre-trial detention of the extraditable person may be replaced by another preventive measure at the request of the prosecutor or by the court *ex officio*, in accordance with the procedural legislation in force, in the following cases:

- the person's state of health does not allow him to be in detention, a fact confirmed by a medical certificate;
- the person and his family have a permanent residence in the Republic of Moldova and there are no grounds to consider that he will avoid the extradition procedure.

In case of urgency, the person whose extradition is requested may be arrested before receiving the extradition request, based on an arrest warrant for a period of 18 days, which may be extended up to 40 days, following a request from the Prosecutor's Office. General or at the request of the foreign state or of the international court, if the request contains data about the arrest warrant or about the final decision adopted regarding this person and the assurance that the extradition request will be sent later. The requesting authority will be informed as soon as possible of the course given to its request.

If the Prosecutor General or, as the case may be, the Minister of Justice considers that the person requested by the foreign state or the international court cannot be extradited, he refuses extradition by reasonable decision, and if he considers that the person may be extradited, he shall apply to the court in the territorial area of which the Ministry of Justice is located, to which the application and the documents of the requesting state are attached.

The extradition request is solved by the investigating judge from the court located in the territorial area of the Ministry of Justice, with the participation of the prosecutor, the representative of the Ministry of Justice (in case of extradition of convicted persons), the person whose extradition is requested and its defender. The court decision on extradition can be appealed by the prosecutor, as well as by the extradited person or his lawyer.

At the request of the competent authority of the foreign State to extradite the person or to temporarily arrest him for the purpose of extradition, the extradition of the foreign national or stateless person in respect of whom an arrest warrant has been issued for extradition may be granted, without following the formal extradition procedure, if the person consents to such a simplified extradition and his or her consent is confirmed by the court. The investigating judge of the competent court will examine, in a court hearing with the participation of the prosecutor, the person whose extradition is requested and his lawyer, the identification data of the extraditable person, will inform him about his right to a simplified procedure of extradition and its legal effects, then record the statement made, which will be signed by all participants in the hearing.

4.12. Postponement of extradition and temporary extradition

Execution of extradition may be postponed if the person whose extradition is requested, while in the Republic of Moldova, is charged in a criminal prosecution trial or trial, or if he has been convicted of an offense other than the one in connection with which extradition is requested. The execution of extradition may be postponed until the end of the criminal trial or until the full execution of the sentence established by the national court or until the final release before the expiration of the term of the sentence.

The person may be temporarily extradited if the postponement of the extradition could lead to the expiry of the limitation period of the criminal case or could lead to serious damages for the establishment of the facts. The conditions for temporary extradition shall be determined by mutual agreement with the requesting Party.

4.13. Surrender of the extradited person

After the entry into force of the extradition judgment, the Prosecutor General or, as the case may be, the Minister of Justice shall inform the requesting State or the international court of the place and date of extradition, as well as of the length of detention.

If the requesting party does not receive the extradited person on the date set for surrender and if the extradition has not been requested, the person may be released at the end of the 15-day period from that date and, in any case, will be released at the expiration of the term of 30 days, calculated from

the date set for surrender, if the international treaties to which the Republic of Moldova is a party do not provide more favourable conditions for this person. The extradition of the person for the same deed after the expiration of the stated terms may be refused.

4.14. Refusal of extradition

Extradition will be refused if:

- the person, whose extradition is requested, holds the citizenship of the Republic of Moldova;
- the person, whose extradition is requested, has been granted the right of asylum on the territory of the Republic of Moldova;
- the crime was committed on the territory of the Republic of Moldova;
- in respect of that person, a national court or a court of a third State has already given a judgment condemning, acquitting or terminating the criminal proceedings for the offense for which the extradition is requested, or an order of the criminal prosecution body about termination of the trial or regarding this deed, the criminal investigation is carried out by the national bodies;
- the limitation period for criminal prosecution for the respective offense has been met, according to the national legislation, or the amnesty has intervened;
- according to the law, the criminal investigation can be initiated only upon the prior complaint of the victim, but such a complaint is missing;
- the crime for which the extradition of the person is requested is considered by the national law a political crime or an act related to such a crime;
- the Prosecutor General, the Minister of Justice or the court handling the extradition has good reason to believe that:
 - the request for extradition was made in order to prosecute or punish a person on grounds of race, religion, sex, nationality, ethnic origin or political opinion;
 - the situation of this person risks being aggravated for reasons of race, religion, sex, nationality, ethnic origin or political opinions;
 - if the person is extradited, he / she will be subjected to torture, inhuman or degrading treatment or will not have access to a fair trial in the requesting country;
 - the state requesting extradition does not ensure reciprocity in the sphere of extradition.

If the act for which extradition is requested is punishable by the law of the requesting country with the death penalty, the extradition of the person may be refused, if the requesting party does not give assurances, considered sufficient, that the death penalty will not be applied to the extraditable person under criminal prosecution or conviction.

If the Republic of Moldova refuses extradition, at the request of the requesting state, the possibility of taking over the criminal investigation activity against the person as a citizen of the Republic of Moldova or stateless person shall be examined.

5. PLACEMENT IN PUBLIC CUSTODY OF FOREIGNERS

The notion of *public custody* appeared in the Contravention Code of the Republic of Moldova, no. 218-XVI of 24.10.2008, in force since 31 May 2009. Article 40 “Expulsion” contained some provisions regarding public custody. In the wording of that rule, public custody could be applied as a consequence of the impossibility of immediate execution of the expulsion or in respect of foreign nationals and stateless persons in respect of whom the return measure was ordered or who were declared undesirable. Placement in public custody was ordered by the court. The placement period could not exceed 6 months.

In 2016, by Law no. 208 Article 40 of the Contravention Code was repealed. However, the placement in public custody became possible by virtue of the provisions of Law no. 200 on the regime of foreigners in the Republic of Moldova, in force since December 24, 2010. Article 64 "Taking into public custody" provides the legal basis for taking into public custody, categories of persons, situations, term of placement, competent authorities to request and order the placement in public custody⁹:

Article 64 "Taking into public custody"

(1) *Taking into public custody is a measure restricting the freedom of movement, ordered by the court against the foreigner who has not executed the return decision or who could not be returned within the time limit provided by law, who has passed or who has tried to pass illegally the state border, which entered the country during the period of prohibition previously ordered, whose identity could not be established, which was declared undesirable, against which the expulsion was ordered or if there is a risk of its abduction.*

(2) *In the case of a foreigner against whom the return measure has been ordered or who has been declared an undesirable person, the taking into public custody is ordered by the court for a period of up to 6 months, at the motivated request of the competent authority for foreigners.*

(3) *In the case of the foreigner against whom the expulsion measure has been ordered, the court may order, until the expulsion is carried out by the competent authority for foreigners, he to be taken into public custody.*

(3¹) *The court will examine the request of the competent authority for foreigners regarding the public custody of the foreigner on the same day as the request was submitted.*

(5) *The extension of the period of taking into public custody of the foreigners provided in paragraphs (2) and (3), who could not be removed from the territory of the Republic of Moldova within the established period, shall be ordered by the court at the motivated request of the competent authority for foreigners.*

(6) *The maximum period of taking into public custody of the foreigner against whom the return measure has been ordered may not exceed 6 months, and in the case of the foreigner who has been declared undesirable, the maximum period of taking into public custody may not exceed 12 months.*

(7) *The foreigner against whom the return measure has been ordered may file a complaint against the measures of taking into public custody in court, which is obliged to examine it within 5 working days from the date of receipt. The submission of the complaint does not suspend the execution of the measure of taking into public custody.*

(8) *Foreigners taken into public custody, as well as those returned, are subject to fingerprinting within 24 hours and are photographed.*

(9) *For the unauthorized leaving of the Temporary Placement Centre for Foreigners during public custody or during the escort in / from the Centre, the alien bears a contravention liability.*

⁹ Article 64 was amended by Law no. 232 of 11.10.2013 and Law no. 244 from 03.11.2016.

5.1. Placement place

The persons taken into public custody are placed in the Temporary Placement Centre for Foreigners. TPCF is a specialized structure, administered by the BMA, intended for the temporary accommodation of foreigners declared undesirable or against whom the measure of return or expulsion has been ordered and who have been taken into public custody. TPCF is located in Chisinau, on Petricani Street no. 88.

5.2. Placement period

Maximum period of taking into public custody:

- of the foreigner against whom the return measure was ordered - 6 months,
- of the foreigner who has been declared undesirable - 12 months,
- of the foreigner against whom the expulsion measure was ordered - until the expulsion is carried out.

The Supreme Court of Justice has ruled that, by its intensity and effects, custody deprives a person of the physical freedom guaranteed by Article 25 of the Constitution. The Court has established that, in the presence of sufficient conditions, the courts will order the application of the measure - taking into public custody, for an initial duration of no more than 30 days. Also, the extension of the custody period will be ordered for a period not exceeding 30 days, which cumulatively will not exceed 6 months and 12 months, respectively, to ensure the exercise of judicial control of the actions of the bodies empowered to execute return and removal decisions of foreigners from the territory of the Republic of Moldova¹⁰.

5.3. Procedure for taking / prolonging the period of taking into public custody

The taking / prolonging of the period of taking into public custody is ordered by the court at the motivated request of the competent authority for foreigners. The request of the competent authority for foreigners to take the foreigner into public custody is examined by the court on the same day it was filed.

The foreigner against whom the return measure has been ordered may file a complaint against the measures of taking into public custody in court, which is obliged to examine it within 5 working days from the date of receipt. The submission of the complaint does not suspend the execution of the measure of taking into public custody.

¹⁰ Advisory opinion of SCJ no. 102 from 11.12.2018

The Supreme Court of Justice made some recommendations on the procedure for taking into public custody / prolonging the period of taking into public custody of foreigners. In its opinion, the Supreme Court of Justice has ruled that taking into public custody constitutes in itself specific post-decision administrative operations subsequent to the issuance of the administrative act of return, therefore, taking into public custody will be ordered, in the administrative contentious procedure, by the court that examined or would be competent to examine the action in contestation of the administrative act, according to art.54 of Law no. 200 / 16.07.2010, by reasonable conclusion, with the thorough analysis of the respective request, in relation to the interests of the foreigner and of the state of the Republic of Moldova. The conclusion can be challenged on appeal, within 15 days from the date of its notification, which is to be examined within 5 days from the date of receipt (art. 64 paragraph (7) of Law no. 200 / 16.07.2010)¹¹.

In this sense, according to article 64, Law 200/2010, public custody is a measure of restriction of freedom of movement, ordered by the court against the foreigner who has not executed the return decision or who could not be returned provided by law, who crossed or attempted to cross the state border illegally, who entered the country during the period of interdiction previously imposed, whose identity could not be established, who was declared undesirable, against whom expulsion or if there is a risk of theft. According to the same principle, the arrest is applied, as a preventive measure, to the persons who would have committed contraventions and crimes that fall under the Criminal Code and the Contravention Code. Unlike the criminal procedure where there is a wide variety of preventive measures alternative to detention, in the migration field there is only detention in the form of public custody, and no alternatives to detention are provided. For this reason, the practice of placement in public custody predominates in the Republic of Moldova. We consider that judicial control would be an alternative applied to foreigners who fall under the incidence of art.64 of Law 200/2010. Direct control could be performed by the BMA.

Paragraph 1 of Article 64 of Law 200 provides that several categories of foreigners may be placed in public custody:

- ✓ foreigner who could not be returned within the time limit referred to in this law,
- ✓ foreigner who crossed or attempted to illegally cross the state border,
- ✓ foreigner who entered the country within the period of a previous entry ban,
- ✓ foreigner whose identity could not be established,
- ✓ foreigner who was declared undesirable,
- ✓ foreigner against whom expulsion has been ordered,
- ✓ if there is a risk of abducting the foreigner.

¹¹ Advisory opinion of SCJ no.107 from 05.07.2019

However, the same article, in paragraph 7, provides for only one category of foreigners, who may challenge the decision to challenge the placement in public custody: *"The foreigner against whom the return measure was ordered may file a complaint against the measures of taking into public custody in court ..."* The current wording of the enunciated norm reduces the subjects who can contest the judicial conclusion of taking into public custody, *only to the persons against whom the return measure has been ordered.*

Through the provisions of art.257(3) Administrative Code, the Government, within 6 months from the publication of the Code, was obliged to develop and present to the Parliament proposals regarding the bringing of the legislation in force in accordance with the Administrative Code. The same recommendation was set out in Advisory Opinion no. 107 of 05.07.2019 of the Supreme Court of Justice. Starting from the enunciated legal provision, the authors of the study find that, at the date of development of the study, Law no. 200 of 2010 on the regime of foreigners in the Republic of Moldova was not brought in accordance with the Administrative Code. The People's Advocate finds that the procedures regarding the removal of the foreigners, the placement / prolonging of the placement in public custody of the foreigners, as well as the procedures for contesting them, provided by Law no. 200 of 2010 on the regime of foreigners in the Republic of Moldova, do not comply with the Administrative Code.

5.4. Detention conditions

According to art.65, Law no.200 on the regime of foreigners, foreigners taken into public custody are placed at the Temporary Placement Centre for Foreigners (TPCF). The centre is a specialized structure, administered by the competent authority for aliens (Bureau Migration and Asylum), intended for the temporary accommodation of foreigners declared undesirable or against whom the measure of return or expulsion has been ordered and who have been taken into public custody. TPCF is financed from the allocations from the state budget, approved for the Ministry of Internal Affairs, as well as from other sources of financing that do not contravene the legislation in force. TPCF has 2 blocks of flats, one of which is intended for families with or without children, an administrative block, a walking yard, a sport yard, a sport hall, a documentation office, meeting rooms, a medical unit, an isolator. On average, 100-120 foreigners are placed in the TPCF annually.

Women are placed separately from men. Receiving food and activities, according to the daily schedule for women, is also carried out separately from those of men. TPCF staff working with placed women is of the same sex. Families placed in the Centre benefit from separate accommodation.

Even if the material conditions at TPCF seem to be good, access to the Centre's facilities is limited. The bathroom is open once, twice a week, the rest of the days is locked. The cells in which people

are detained are closed during the night (starting at 22:00), so people do not have access to the toilet during the night, nor can they visit the prayer room to pray in the evening (problems have been identified especially during Ramadan). Food for detainees is delivered through the catering service. Foreigners from outside the CIS complain about its quality. Placed persons, who have the opportunity, buy their own dairy products, eggs, rice. Religious food preferences are not respected. Muslims complain that halal food is not served and they are forced to buy food on their own or remain hungry¹².

5.4.1. The right to information

Following the findings of the visiting team, the detainees are formally informed about the reasons for their placement at TPCF. The conclusion of the court by which they are placed in public custody are not translated and explained to them. Detainees are unaware of their rights, in particular the right to state-guaranteed legal aid and the right to challenge the actions of state authorities and the courts.

5.4.2. Access to healthcare

Detainees have access to medical assistance, which is provided by the medical service of the Border Police Department. There is a medical office and medical isolator in the Centre, but there is no doctor or nurse employed. There were cases when people were provided with the necessary medical assistance only following a written address to the TPCF administration, the verbal addresses being previously ignored. It is important to note that the TPCF administration and employees do not know how to work with HIV-positive people, in July an HIV-positive person was isolated from other inmates in a room, had separate cutlery, and all employees and guards knew about his HIV status.

5.4.3. Psychological assistance to foreigners

TPCF does not have a psychologist's office. An office was opened for the psychologist, on August 1, 2019, inside the GIBP at the medical service that serves the persons placed in the TPCF. The office is intended for GIBP employees and migrants in difficulty. In this regard, the TPCF administration was encouraged to refer distressed foreigners to the services of the GIBP psychologist. In reality, no person was referred to that service, and at the written request of one of the detainees, TPCF ignored the request.

¹² Access http://ombudsman.md/wp-content/uploads/2019/04/Raport-CPTS-06.12.18_DpT-1.pdf/
http://ombudsman.md/wp-content/uploads/2019/07/Raport-anual-de-activitate-CpPT-2018_Romana.pdf

5.4.4. Arbitrary detention

Arbitrary detention is prohibited. However, during the monitoring period, cases of detention beyond the term provided by the court ruling were identified. The TPCF administration considers that the beginning of the public custody is the time when the person was brought to the TPCF. Respectively, when the placement term expires, the person is released at the time he entered the TPCF.

The authors of the study consider this fact absolutely illegal. The term for taking into public custody starts from the moment the Judge pronounces the operative part of the conclusion / decision for taking the person in public custody. In practice, it takes several hours for the person to be transported from the court headquarters to the TPCF, especially when the person is transported from the Cahul or Balti Court. Likewise, it is for the judge to expressly indicate the date and time of public custody in order not to allow derogations from the fundamental rules.

5.4.5. TPCF employee training

According to the authors, TPCF employees are not prepared for work in a multicultural and diverse context. Detainees face language barriers in communicating with guards. Some employees do not speak English. In addition to language issues, the attitude and behaviour of TPCF staff and guards is racist and xenophobic. Detainees are cursed and verbally humiliated by some guards and staff members. For example, the citizens of Bangladesh and Turkey have learned insulting words from the lexicon used by employees in conversations with foreigners.

The Ombudsman concludes that the BMA / TPCF is to adopt a policy of tolerance towards foreigners, and that the employment of staff must comply with non-discriminatory principles. Such degrading and discriminatory behaviour in the custody institution is inadmissible.

5.4.6. Allegations of ill-treatment

According to the respondents, most of them alleged allegations of violence by the guards, degrading and inhuman behaviour towards the detainees. Due to insecurity, fear and dependence on the institution, including threats - detainees refused to file complaints. People who write complaints about the conditions or the attitude of TPCF employees are victimized by various sanctions: threatened with placement in solitary confinement; they have no access to food; they do not have access to the telephone; they are threatened with being sent to prison or returned to their country of origin where they will be tortured, etc. Along the way, LCA in the interest of some victims notified the Prosecutor's Office and the OO.

5.5. Detention time (without procedural documents) until placement in TPCF

During the monitoring period, the issue of illegal deprivation of liberty was identified at the pre-judicial stage (placing persons in public custody). The foreigners were detained in unarranged offices within the regional offices of the BMA or in the regional offices of the GIBP for more than 3 hours, without any record of detention, before they were accompanied to court at the meeting on the BMA Approach for placing the person in public custody.

There were 5 reported cases when people had to sit in chairs for 6 to 9 hours without any detention reports. Also, a case was reported, where a lady claimed to have been detained by BMA officers for 24 hours. She allegedly spent the day in chairs, and at night she was placed in a centre for the homeless (miserable conditions), without any detention minutes. Subsequently, she was placed in public custody.

Another case happened in Cahul district. The foreign citizen was detained on Friday at 01:00 pm, being deprived of liberty until 06:00 pm. Later, he was transported to an institution that looks like a penitentiary where he stayed until Monday morning. From there, he was transported to the Chisinau Court, which ordered his placement in public custody. During the detention period, the person was forced to sign documents, their contents not being translated. The foreigner was detained for 3 days, without understanding what was happening.

5.5. Minors at TPCF

The legislation provides for the taking into public custody of minors, both minors with families and unaccompanied minors. Art.64¹ of Law 200/2010 and art.45 of the Regulation of the Temporary Placement Centre for Foreigners No. 493 of 07.07.2011, provide that *unaccompanied minors shall be placed under public custody only as a measure of last resort and for the shortest possible period; the best interest of the child shall be a primary consideration in the context of placement of minors under public custody; minors placed under public custody have the right to education, educational programs*, this right is not ensured in the Temporary Placement Centre for Foreigners.

According to the Regulation of the Temporary Placement Centre for Foreigners, GD no. 493 of 07.07.2011, minors benefit from special conditions within the Centre. *They are placed in a separate Adult Centre with close relatives; are under permanent supervision and care; the order and conditions of placement for minors must correspond to the interests of the child, including the adequate arrangement of the accommodation rooms; the children can move freely in the place where they were placed and on the territory of the Centre, within the limits established by its staff.* **These norms provide for the placement of children in public custody only as a last resort and only with the assurance of the rights accessible to all children on the territory of the Republic of Moldova.**

In the case of unaccompanied minor asylum seekers, placed in public custody, the provisions of Law 270 of 2018, Regarding Asylum in the Republic of Moldova, art.14, according to which the *minor seeking asylum or accompanied or unaccompanied, is protected and receives appropriate assistance in order to enjoy all the rights recognized by the UN Convention on the Rights of the Child and other international human rights conventions to which the Republic of Moldova is part. Unaccompanied minors are subject to measures to protect children at risk and children separated from their parents, in accordance with the legislation in force in the Republic of Moldova.*

Unaccompanied minors on the territory of the Republic of Moldova are protected by **Law no. 140 on the special protection of children at risk and children separated from their parents.**

In the period 2018-2019, a citizen of Bangladesh was placed at TPCF, who declared himself a minor after his placement. Initially, in the placement lists, the person was registered with the year of birth 1995, and later declared that he was born in 2002. In November 2018, the minor applied for asylum, gaining the status of asylum seeker. On 22 November 2018, the LCA notified the BMA of the detention of an unaccompanied minor, an asylum seeker, and requested that measures be taken to protect children at risk and children separated from their parents. In turn, the BMA and the LCA notified the Chisinau Municipal Directorate for the Protection of the Rights of the Child in Chisinau in ensuring the fundamental rights of the child and the immediate placement of the minor in the alternative care service in accordance with Law 140.

LCA filed a lawsuit in court. The lawyers' request was admitted, and the minor released. Thus, **the minor was in detention until February 28, 2019. The rights guaranteed to minors in detention were not respected. It seems that the authorities need additional procedures for determining the age of minors. For now, this exercise would have failed.**

6. ASYLUM AND STATELESS STATUS APPLICATION IN PUBLIC CUSTODY

The foreigner placed in public custody can submit an asylum application under the conditions of Law 270/2008 on asylum in the Republic of Moldova. Article 52 of that law indicates, among other authorities competent to receive asylum applications, the structural subdivisions of the BMA. Recall that TPCF is one of the structural subdivisions of the BMA. The request received by TPCF is submitted to AID of the BMA for substantive examination.

6.1. Asylum applications filed in public custody

Aliens placed in public custody can apply for asylum. The application is to be registered by the TPCF, which is then forwarded to the AID of the BMA. From the moment of application, the person obtains the status of asylum seeker.



Thus, from this moment, Law no. 270-XVI of 18.12.2008 on asylum in the Republic of Moldova, which provides at:

- para.2 art.9: "Asylum seekers will not be sanctioned for illegal entry and stay on the territory of the Republic of Moldova."
- para. (1) art.11: "No asylum seeker shall be expelled or returned from the border or from the territory of the Republic of Moldova."

- letter B, art. 28 provides: “*asylum seekers enjoy the following rights b) to reside in the Republic of Moldova until the expiration of a period of 15 days from the date of irrevocability of the decision on the rejection of the application.*”

Likewise, from the same moment, of the asylum application, Law 200/2010 on the regime of foreigners in the Republic of Moldova cannot be applied, regarding the asylum seeker, because at art.2 para.2 it is said: „*except for the situations in which, for reasons of national security or public order, it is necessary to return from the territory of the Republic of Moldova, under the incidence of this law do not fall foreigners whose regime is regulated by Law no.270-XVI of 18 December 2008 on asylum in the Republic of Moldova.*”

Analysing the mentioned legal norms, we deduce that from the moment of applying for asylum, the residence of the foreigner / asylum seeker becomes legal. The asylum seeker cannot be removed, in any form, from the territory of the Republic of Moldova, until the completion of the asylum procedure; he / she cannot be sanctioned for illegal entry and stay.

As the placement in public custody is provided by Law 200/2010 on the regime of foreigners in the Republic of Moldova, which can no longer produce effects on the asylum seeker, he **is to be released immediately from public custody**, except in cases where national security or public order reasons are required.

6.2. Applications for the determination of stateless status, filed in public custody

Foreigners placed in public custody may apply for the determination of stateless status, under the conditions of Law 200/2010 on the regime of foreigners in the Republic of Moldova.

From the moment of requesting the stateless status, the provisions of chapter X¹ of the enunciated law begin to have effects on the foreigner. The provisions of para.(1) art. 873 of the said Law allow the applicant stateless status:

- a. to be in the Republic of Moldova during the entire period of examination of the application;*
- b. not to be removed from the territory of the Republic of Moldova except in cases where there are reasons of national security or public order.*

According to the provisions of article 51 of Law no. 200 of 2010 on the regime of foreigners in the Republic of Moldova, regarding certain categories of foreigners, the BMA may order the measure of return from the territory of the Republic of Moldova. Among other things, among the categories of persons listed in Article 51 are foreigners: “*... whose application for recognition of stateless status has been rejected*”.

Analysing the set out legal norms, we deduce that from the moment of requesting the determination of the stateless status, the stay of the foreigner / applicant becomes legal. The applicant for statelessness status may not be removed from the territory of the Republic of Moldova until the completion of the status determination procedure, except in cases where national security or public order reasons are required.

In practice, the foreigner who requested the determination of the stateless status is released from public custody only in cases where the country, of which he was supposed to be a citizen, has denied membership in his citizenship. In such situations, the foreigner is redirected to the Statelessness Section of the BMA to document the person with a temporary stateless person applicant document and process his / her application for statelessness determination. The same practice is applied to foreigners whose alleged country of origin did not respond to BMA inquiries within 6 months (term of placing foreigners in public custody).

6.3. Placing foreigners in public custody, judicial practice

The judicial practice regarding placement in public custody is fairly uniform. At present, the process of placing in public custody and extending the term of public custody can be submitted only in 3 courts in whose constituency are the BMA Regional Offices, namely the Court of Cahul, Balti and Chisinau (Riscani headquarters). It was an exception when the person was placed in public custody by the Comrat Court (2019).

The BMA requests the placement of foreigners in public custody, even when their removal is impossible for reasons that do not depend on the will of the foreigner and for the reasons provided in art.12, paragraph (1), Law 200/2010:

- a) in a process of criminal investigation or trial of the criminal case on the territory of the Republic of Moldova, the foreigner is notified of the search by the competent body or one of the following preventive measures has been applied, according to the Code of Criminal Procedure: the obligation not to leave the city; the obligation not to leave the country; the transmission under supervision of the minor; house arrest; pre-trial detention; provisional release under judicial control or on bail, with the obligation not to leave the country;
- b) medical coercive measures were applied to the foreigner, under the conditions of the criminal law;
- c) the foreigner is prohibited from leaving the country on the basis of a court decision, according to the Enforcement Code.

The situations stated above make it impossible to remove the foreigner. Therefore, detention for the purpose of removal from "public custody" is not justified. We base this conclusion on the

provisions of the European Convention on Human Rights¹³ and the International Covenant on Civil and Political Rights¹⁴.

There were situations when the BMA invoked the argument that the foreigner is listed in certain criminal cases, which turns public custody into pre-trial detention for foreigners. Moreover, these arguments are copied from one approach to another without taking into account the real situation of foreigners.

In the cases of 26 Bangladeshi citizens in public custody during the monitored period, the use of the "criminal case" argument was ridiculous, as people were listed in criminal cases as victims of illegal migration. Likewise, we noticed the tendency to place victims of human trafficking in public custody.

The first judicial decisions of placement in public custody were issued in 2009. The first appeals of the placement decisions, based on the fact that the placed persons applied for asylum in the Republic of Moldova, were filed in the courts in 2010.

Between 31.05.2009 - 16.10.2010, the placement in public custody was decided based on the provisions of article 40 of the Contravention Code, and accompanied the expulsion of the contravention. The decisions were challenged through an appeal or a review of the placement decision. The appeal was selected depending on the procedural deadlines that allowed the appeal to be filed. As a rule, the appellants used the means of appeal, and when the term for filing the appeal was cancelled, the appellants used the means of review.

Subsequently, when the placement in public custody was applied in the order of administrative contentious, based on the provisions of Law no. 200 of 2010 on the regime of foreigners in the Republic of Moldova, applications for release from public custody began to be submitted by asylum seekers both at the stage of examining the BMA's application for public custody and at the stage of examining the steps of extension of placement. Challenging placement / extension decisions is also used when requesting the release of asylum seekers from public custody.

The authors of this Study do not have the complete official data of the cases in which the applications for refusal in placement / extension of placement or release from public custody were examined on the grounds that the placed persons applied for asylum. However, the data we have, regarding the cases in which LCA lawyers participated, allow us to state that the courts in most cases, admit such requests. Most cases, when asylum seekers are not released from public custody, are based on reasons related to national security or public order.

¹³ Article 5 (f), ECHR

¹⁴ Article 9 (b), ICCPR

If in the situation of public custody of asylum seekers there are several dozen judicial cases examined annually, which allow us to deduce about the existence of a more or less stable judicial practice, then in the case of persons who, being in public custody, have requested we do not have enough cases to determine the statelessness status, to talk about a judicial practice.

6.4. Release from public custody

Until 23.12.2016, the release from public custody was in practice possible only by court decision or at the expiration of the placement term. On 23.12.2016 entered in force Law no. 244 of 03.11.2016, which supplemented Law 200 on the regime of foreigners in the Republic of Moldova with article 64². In addition to situations of release of persons in public custody, on the basis of a court decision or the expiration of the placement period, Article 642 allows the BMA to decide administratively on release from public custody, when the reason for issuing the decision for taking in public custody cancelled.

Courts, in most cases, release asylum seekers and, in some cases, stateless persons from public custody. Although it is a positive practice, it requires additional efforts and expenses on the part of the authorities (court hearing, escorting the person placed, ensuring the participation of the lawyer ex officio, ensuring the participation of the interpreter, etc.). We are of the opinion that it is necessary to complete Law no. 200 of 2010 on the regime of foreigners in the Republic of Moldova, with provisions, which would expressly order the release from public custody of foreigners who have applied for asylum or the granting of statelessness.

In conclusion, starting from the fact that placement in public custody is a measure restricting the freedom of movement, ordered in order to remove the foreigner from the territory of the Republic of Moldova, if the authorities are not able to return the person to the country of origin, as this would constitute a breach of the principle of "*non-refoulement*", it can no longer be justified to restrict freedom of movement for the purpose of removal. The principle of "*non-refoulement*" is enshrined in Article 33 of the 1951 Convention relating to the Status of Refugees and in Article 11 of Law no. 270-XVI of 18 December 2008 on asylum in the Republic of Moldova. The same principle would be applied when other legal or practical obstacles prevent removal, such as the person is a stateless person, and no other country is willing to accept it.

7. EUROPEAN CASE LAW ON MIGRATION CASES¹⁵

7.1. Article 3 „Prohibition of torture”

- ***Soering v. the United Kingdom, 14038/88, 07.07.1989***

The plaintiff, Jens Soering, a German national, born on 1 August 1966, was in a prison in the United Kingdom, awaiting extradition to the United States, where he was to be tried in Virginia for two counts of murder. He argued that despite assurances from US authorities, there was a significant likelihood of being sentenced to death if he were extradited to the US. In addition, in view of the particular circumstances of his case, and in particular the "death aisle syndrome", he would be subjected to inhuman and degrading treatment and punishment which are contrary to the provisions of Article 3 of the Convention.

The ECtHR has ruled for the first time that a state's liability can be incurred if it decides to expel a person who may be ill-treated in the country of destination.

- ***Saadi v. Italy, 37201/06, 28.02.2008***

The plaintiff, a Tunisian national who had been sentenced in Italy on charges of, inter alia, criminal conspiracy, was deported from Italy to Tunisia, where he risked ill-treatment. The Court considered that the possibility that the applicant posed a serious threat to the community did not in any way diminish his risk of injury if he had been expelled. In addition, reliable sources on human rights have reported cases of ill-treatment of detainees in Tunisia, especially those convicted of terrorist offenses. Also, the diplomatic assurances offered in this case did not deny this risk either.

The Court therefore considered that there were serious and well-founded reasons to believe that the plaintiff was exposed to a real risk of being treated contrary to Article 3 of the Convention if he had been deported to Tunisia.

- ***Muminov v. Russia, 42502/06, 11.12.2008***

The plaintiff was an Uzbek national who, according to available information, appeared to be serving a five-year prison sentence in Uzbekistan after being extradited from Russia.

The ECtHR considered that, although there was no other reliable information on the plaintiff's situation following his extradition, apart from his conviction, there were sufficient credible reports of widespread ill-treatment of detainees in Uzbekistan.

The ECtHR has established:

¹⁵ The notion of "expulsion" is used by the ECtHR in a generic sense and includes any measure that forces the foreigner to leave the territory of the country, except for extradition..

- violation of Article 3 by extradition of the applicant to Uzbekistan,
- violation of Article 13, by Russia's failure to provide effective and accessible defence measures in connection with the plaintiff's invocation of the risks under Article 3,
- violation of Article 5 § 4 on the ground that there was no judicial procedure for examining the lawfulness of the plaintiff's detention with a view to his extradition,
- violation of Article 5 § 1 by his detention on the purpose of extradition to Uzbekistan.

7.2. Article 5 „The right to liberty and security”

- *Mikolenko v. Estonia, 10664/05, 08.10.2009*

The plaintiff was a former Soviet and Russian army officer who had served in Estonia since 1983. Following the restoration of Estonian independence, he was refused an extension of his residence permit in that country. Repeated orders from the Estonian authorities to leave the country and appeals from the plaintiff followed. Subsequently, the plaintiff was arrested on 29 October 2003 for failure to comply with the departure order. As immediate expulsion was not possible, as the applicant did not have a valid passport, the Administrative Court decided that the applicant should be detained in a deportation centre for the execution of the deportation order. It is not clear whether the applicant has lodged an appeal against this decision. During the applicant's detention, the Estonian Migration Committee requested the Russian Embassy to issue a return certificate to the plaintiff. However, on 10 December 2003, the Embassy replied that the applicant could only return to Russia on the basis of a Russian foreign passport, which he could apply for in person or through a representative. Attempts to obtain a valid document from the Russian Embassy to enforce the expulsion failed, and no further measures were taken between August 2004 and March 2006 to secure the plaintiff's expulsion. On 11 June 2007, the Migration Committee submitted a request to the Russian Embassy for readmission on the basis of the EU-Russia Readmission Agreement, which entered into force on 1 June 2007 and required Russian authorities to issue travel documents to people who will be readmitted regardless of their will. However, on 26 June 2007 the Embassy replied that the Russian side was of the opinion that the plaintiff did not fit into the readmission agreement. In the meantime, at the request of the Committee on Migration, the plaintiff's detention was extended every two months by the Administrative Court. The plaintiff appealed against the extension in some cases, but on each occasion the higher court eventually rejected the appeals. On 8 October 2007 the Administrative Court refused to further extend the plaintiff's detention on the grounds that it had become disproportionate and unconstitutional. On that day, the Management Board sent the complainant a written reminder that his expulsion order was still in force and he was ordered to reside in his permanent residence and to report to the committee any temporary or permanent change of place of residence.

The ECtHR reiterated that deprivation of liberty under Article 5 § 1 (f) is justified only as long as deportation proceedings take place. It follows that, if these proceedings are not followed diligently, the detention will cease to be justified in accordance with this paragraph¹⁶.

- ***Ozdil and others v. Republic of Moldova, 42305/18, 11.06.2019.***

The plaintiffs were teachers in a network of private schools in Moldova, called Orizont, which has been active since 1993. On the morning of 6 September 2018, the applicants were arrested at their home or on their way to work, and taken to an unknown direction by people wearing civilian clothes. Later, the Moldovan Intelligence and Security Service made several statements regarding a large-scale counterterrorism operation that took place that day, during which seven foreign nationals suspected of links to an Islamist organization were arrested and removed from the territory of the Republic of Moldova, in collaboration with the secret services of other countries.

The ECtHR reiterated that while the investigation of terrorist offenses is undoubtedly the responsibility of authorities with special missions, this does not mean that the authorities have full freedom of action under Article 5 to arrest suspects and detain them in police institutions without effective control by national courts and, for example, by the supervisory institutions of the Convention, whenever they consider that a terrorist offense has taken place.

7.3. Article 8 „Right to respect for private and family life”

- ***Kaya v. Romania, 33.970/05, 12.10.2006***

At the time, the plaintiff had lived in Romania for more than 5 years. In 2003, the plaintiff married a Romanian citizen. On 18 April 2005, he was arrested by border police and the foreigners' authority. On this occasion, a report was drawn up by 3 border police officers. On the same day, the plaintiff was taken by the police to the foreigners' authority in Bucharest. The next day, the plaintiff was deported to Turkey. In the present case, by an order of the Public Prosecutor's Office, the plaintiff was declared undesirable in Romania, was barred from residence for a period of 15 years and was expelled on the grounds that the Romanian Intelligence Service had "sufficient and serious information that he was conducting activities likely to endanger national security".

The Court found that no criminal proceedings had been instituted against the plaintiff on the ground that he had participated in the commission of an offense in Romania or in another country. Except for the general reason mentioned above, the authorities did not provide the plaintiff with any further details. The Court recalled that any person against whom a measure is taken on grounds of national security must enjoy safeguards against arbitrariness. In particular, the person must be able to initiate a review of the contested measure by an independent and impartial body, competent to rule on all relevant matters of fact and law, in order to establish the legality of the measure and to sanction any

¹⁶ See, mutatis mutandis, *Quinn v. France*, 22.03.1995, § 48, A no. 311

abuse by the authorities. Before such a control body the person concerned must benefit from an adversarial procedure in order to be able to present his point of view and to challenge the arguments of the authorities¹⁷. Given that the applicant did not enjoy a minimum degree of protection against the arbitrariness of the authorities before the administrative authorities or the Court of Appeal, the Court concluded that the breach of his private life was not provided for by “a law meeting the requirements of the Convention”.

- ***Ozdil and others v. the Republic of Moldova, 42305/18, 11.06.2019.***

The plaintiffs were teachers in a network of private schools in Moldova, called Orizont, which has been active since 1993. On the morning of 6 September 2018, the applicants were arrested at their home or on their way to work, and taken to an unknown direction by people wearing civilian clothes. Later, the Moldovan Intelligence and Security Service made several statements regarding a large-scale counterterrorism operation that took place that day, during which seven foreign nationals suspected of links to an Islamist organization were arrested and removed from the territory of the Republic of Moldova, in collaboration with the secret services of other countries.

The ECtHR reiterates that the Convention does not, as such, guarantee the right of a foreigner to enter or reside in a particular country. However, the expulsion of a person from a country where close family members live may constitute a violation of the right to respect for family life, in accordance with Article 8 § 1 of the Convention¹⁸.

7.4. Article 13 “The right to an effective remedy”

- ***Allanazarova v. Russia - 46721/15, 14.02.2017***

The case was initiated at the request of Natalia Allanazarova against the Russian Federation on September 24, 2015. The plaintiff was a citizen of Turkmenistan. The plaintiff was submitted according to art.34 to the ECHR. The plaintiff stated that she was at risk of being subjected to inhuman treatment on her return to Turkmenistan, and that she did not have effective means of legal protection which she could have used to challenge the actions of the Russian authorities.

The ECtHR ruled that where the plaintiff claims that there is a risk of ill-treatment in the event of her return to her country of origin, the remedy for this is effective only if it meets the following two criteria: first, to have a suspensive effect removal; on the other hand, to lead to independent and rigorous risk control.

¹⁷Al-Nashif v. Bulgaria, no. 50.963/99, §§123 and 124, 20.06.2002;

¹⁸Boultif c. Swiss, no. 54273/00, § 39, ECHR 2001 IX.

- *Ozdil and others v. the Republic of Moldova, 42305/18, 11.06.2019.*

The plaintiffs were teachers in a network of private schools in Moldova, called Orizont, which has been active since 1993. On the morning of 6 September 2018, the applicants were arrested at their home or on their way to work, and taken to an unknown direction ,by people wearing civilian clothes. Later, the Moldovan Intelligence and Security Service made several statements regarding a large-scale counterterrorism operation that took place that day, during which seven foreign nationals suspected of links to an Islamist organization were arrested and removed from the territory of the Republic of Moldova, in collaboration with the secret services of other countries.

The Court reiterated that a person who is subject to a measure based on national security considerations must not be deprived of all guarantees against arbitrariness. He or she must, inter alia, be able to verify the measure in question examined by an independent and impartially competent body in order to examine all relevant factual and legal grounds, to determine the legality of the measure and to censure possible abuse by the authorities. Before that control body, the person concerned must benefit from contradictory procedures in order to present his point of view and reject the arguments of the authorities. ... the national courts could not, in any event, have examined the real reasons for the expulsion, since the national legislation did not provide that the note from the Secret Service which served as the ground for expelling the plaintiffs should be made available to the judges.

7.5. Protocol no. 7 ECHR, Article 1 „Procedural safeguards relating to expulsion of aliens”

Article 1, Protocol no.7 ECHR states that:

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
 - a. to submit reasons against his expulsion,
 - b. to have his case reviewed, and
 - c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

As regards its scope, this article refers only to a foreigner legally resident in the territory of the State concerned. The word resident is intended to exclude from the application of the article any foreigner who has arrived at a point of entry but has not yet passed immigration control or who has been admitted to the territory only for the purpose of transit or for a limited period for non-residential purposes. This period also covers the period pending a decision on the application for a residence

permit. It is up to the domestic law of the state to determine the conditions that must be met for the presence of a person in the territory that must be considered "legal".

The provision applies not only to foreigners who have entered legally, but also to foreigners who have entered illegally and whose stay has subsequently been regularized. However, a foreigner whose entry and stay have been subject to certain conditions, such as a specified period and who no longer complies with those conditions, cannot still be considered "legally" present. It should be noted that the notion of "expulsion" is used in a generic sense and includes any measure that forces the foreigner to leave the territory of the country, except for extradition.¹⁹.

- ***Ljatifi v. "the former Yugoslav Republic of Macedonia", 19017/16, 17.05.2018***

In 1999, the plaintiff moved from Kosovo to the Yugoslav Republic of Macedonia, where she was granted asylum status in 2005. Her residence permit was extended annually until 2014, when the Ministry of the Internal Affairs withdrew her status, stating only that it posed a "risk to [national] security", notifying her to leave the territory of the requested State within twenty days after receiving the final decision, the national courts upheld that decision, noting that it was based on a classified document obtained from the Intelligence Agency, and considered the plaintiff's argument that the document had never been presented to her to be irrelevant.

The Court notes that, apart from the general statement mentioned above (danger to national security), the authorities did not provide the plaintiff with any indication of the reasons on which it based its assessment. The classified note of the Intelligence Agency, filed in the form drafted in the proceedings before the Court, was not available for consultation in any case in the contested proceedings in the presence of the Ministry. In the absence of a description of the facts on which that assessment was based, the plaintiff was unable to present the case properly in the subsequent judicial review procedure. "

- ***C.G. and others v. Bulgaria, 1365/07, 24.04.2008.***

The first plaintiff had his residence permit revoked and ordered his removal from the territory of Bulgaria on the basis of a secret report from the Home Office, without giving any factual reasons for the report. The plaintiff was removed from the territory of Bulgaria the next day without being able to challenge his removal. The plaintiff complained that his expulsion had taken place in violation of Article 1 of Protocol No.7 of the Convention.

The ECtHR has ruled that in the case of expulsion, in addition to the protection afforded by Articles 3, 8 and 13 of the Convention, foreigners legally residing in the territory of a State which has

¹⁹ Raportul explicativ din 22.11.1984, la Protocolul 7 al CEDO, disponibil la <https://rm.coe.int/16800c96fd>

ratified Protocol No. 7 shall enjoy the specific guarantees provided for in Article 1²⁰. In short, the Court finds that the expulsion of the first applicant failed to meet the various requirements of Article 1 of Protocol No Convention. There was therefore a breach of that provision.

At European Union level, the return policy is governed by Directive 2008/115 / EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.

In accordance with art.15 para. (1) and (2) of the Directive, unless other sufficient but less coercive measures can be effectively applied in a specific case, Member States may hold a third-country national in public custody who is the subject of return procedures only in order to prepare the return process and / or to carry out the removal process if:

- (a) there is a risk of theft;
- (b) the third-country national concerned avoids or impedes the preparation for return or the removal process.

Measures to be taken into public custody shall be ordered by the administrative or judicial authorities. The taking into public custody is ordered in writing, mentioning the factual and legal reasons. Where the taking into public custody has been ordered by the administrative authorities, the Member States:

- (a) or ensure a speedy judicial review of the lawfulness of public custody, which shall be decided as soon as possible after the commencement of public custody,
- (b) or grant the concerned third-country national the right to bring an action under which the lawfulness of the measure of public custody is subject to judicial review as soon as possible from the initiation of the relevant proceedings. In this case, Member States shall immediately inform the concerned third-country nationals of the possibility of initiating such action.

In accordance with the European Convention on Human Rights, the procedural guarantees provided by art.1 of the protocol no. 7 of the ECHR establishes specific guarantees, one substantive and three procedural guarantees, for the situations in which a contracting state decides to expel, for reasons related to its assessment, a foreigner legally in its territory. The substantive guarantee is provided in art. 1para.1 of Protocol no. 7 and consists in the requirement imposed by the text that a foreigner who is, according to the relevant national legal provisions, on the territory of a state, can be expelled only by a decision adopted according to the applicable legal provisions in the state in question. To this are added the three procedural guarantees provided by the text, namely: a) the

²⁰ Lupsa v. Romania, §§ 51 and 52; Kaya v. Romania, no. 33970/05, §§ 51 and 52; and Bolat v, Russia, no. 14139/03, § 76;

foreigner must be given the opportunity to present the reasons that plead against his expulsion; b) to request the examination of his situation; c) to request to be represented before the authorities.

The ECtHR has also established that Article 8 (right to respect for private and family life) contains procedural guarantees to prevent arbitrary interference with the right to privacy and family life. This can be important for people who have been in a state for a long time and who may have developed a private and family life there or who may be involved in court proceedings in that state. Deficiencies in the procedural aspects of decision-making within the meaning of Article 8 may lead to an infringement of Article 8 (2) on the grounds that the decision did not comply with the law.

Article 13 of the International Covenant on Civil and Political Rights provides that “an alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority”.

The UN Human Rights Committee reiterated in one of its general comments (General Comment 15/27 of 22 July 1986, paragraph 10) that "Article 13 directly governs only the procedure and not the substantive grounds for expulsion". The Committee also recalls that the person who is the subject of an expulsion order should have access to legal representation in order to be able to present reasons for his expulsion (Concluding Observations on Denmark, 31 October 2001, paragraph 17).

The ECtHR has emphasized that when the human right in question is an absolute right (prohibition of torture or the right to life), non-return becomes an absolute right and cannot be the subject of any exception, either in law or in practice. This practice applies regardless of national security considerations, other public interests, economic pressures or large flows of migrants.

RECOMMENDATIONS OF THE OMBUDSMAN:

Parliament of the Republic of Moldova:

- 1) To exclude paragraph 4 of Article 63 of Law no. 200 of 2010 on the regime of foreigners in the Republic of Moldova, in order to completely exclude the possibility of return or removal of foreigners in territories where they risk being subjected to torture, inhuman or degraded treatment, regardless of the risk to national security and public order. For such situations, the possibility of expelling the return / removal to other territories than those stated should be foreseen;
- 2) To adjust the Law no. 200 of 2010 on the regime of foreigners in the Republic of Moldova to the Administrative Code;
- 3) To complete the Law no. 200 of 2010 on the regime of foreigners in the Republic of Moldova, with provisions, that would expressly order the release from public custody of foreigners who have applied for asylum or the granting of statelessness.

Government of the Republic of Moldova:

- 2) By the provisions of art. 257 (3) Administrative Code, the Government, within 6 months from the publication of the Code, was to elaborate and present to the Parliament proposals regarding the bringing of the legislation in force in accordance with the Administrative Code. To bring its normative acts in accordance with the Administrative Code as well as to develop the normative acts necessary for its implementation.

Bureau Migration and Asylum:

- 1) To transcribe asylum procedures on the information website and any other sources in the languages of international circulation as an element of ensuring human rights;
- 2) In the decisions to declare undesirable persons to describe the facts that are the basis for the declaration of undesirable person, so that the declared person can present his case adequately in the subsequent judicial control procedure;
- 3) To thoroughly examine any case of entry (especially illegal) of foreigners into the territory of the country on the issue of the obligation to provide humanitarian protection, subsequently - as a ground for illegal border crossing;
- 4) To delegate to the BCP "Chisinau International Airport" its representatives - in order to receive immediately the asylum applications received from applicants arriving in the Republic of Moldova through the airspace;
- 5) To apply to foreigners - alternatives to detention, other than detention in TPCF;
- 6) To adopt clear procedures regarding the assurance of the right to an interpreter / translator to foreigners, including in the context of a higher flow of foreigners in the country;

- 7) The BMA / TPCF are to adopt a policy of tolerance towards foreigners, and the employment of staff must comply with non-discriminatory principles. Such degrading and discriminatory behaviour in the custody institution is inadmissible.;
- 8) Organize a psychologist's office within TPCF;
- 9) To establish an anti-torture register within the CPTS, as well as a protection mechanism in case of retaliation, abuse or any other form of ill-treatment in the institution.

General Inspectorate of Border Police:

- 1) To thoroughly examine any case of entry (especially illegal) of foreigners into the territory of the country on the issue of the obligation to provide humanitarian protection, subsequently - as a basis for illegal border crossing;
- 2) In order to prevent any form of abuse, the GIBP is to apply standard operating procedures regarding detention, escort and transportation, information, ensuring fundamental guarantees of uniform detention for all police officers;
- 3) Likewise, the GIBP is to adopt conditions of detention in the local and regional police sectors in accordance with the minimum standards of detention, including a clear mechanism for redirecting detainees to the General Inspectorate of Police and the National Administration of Penitentiaries or other institutions;
- 4) GIBP is to inform the People's Advocate and / or the prosecutor's office about cases of excess / abuse / application of physical force and / or other special means / suicide attempts / deaths while detaining foreigners within 24 hours as fundamental guarantees against ill-treatment;
- 5) To train all categories of police officers participating in different stages of the detention process on how to carry out the detention, their role at the appropriate stage of detention, as well as how to inform / explain to detainees the rights they have. It is necessary for police officers to understand the need for each step and how its legality is determined in order to take responsibility for every procedural action they take;
- 6) The GIBP is to adopt clear procedures regarding the assurance of the right to interpreter / translator to foreigners, including in the context of a higher flow of foreigners in the country.

Supreme Court of Justice / Judiciary:

- 1) To effectively verify the term of placement in public custody of foreigners, as well as the administrative control of detention. Apply alternatives to detention.;
- 2) Verify that the person, before examining the BMA / SIS, received a copy of the indictment, the relevant evidence, and whether the accused person was able to consult the reasons for the administrative decision so that he could benefit from an effective appeal to the court.

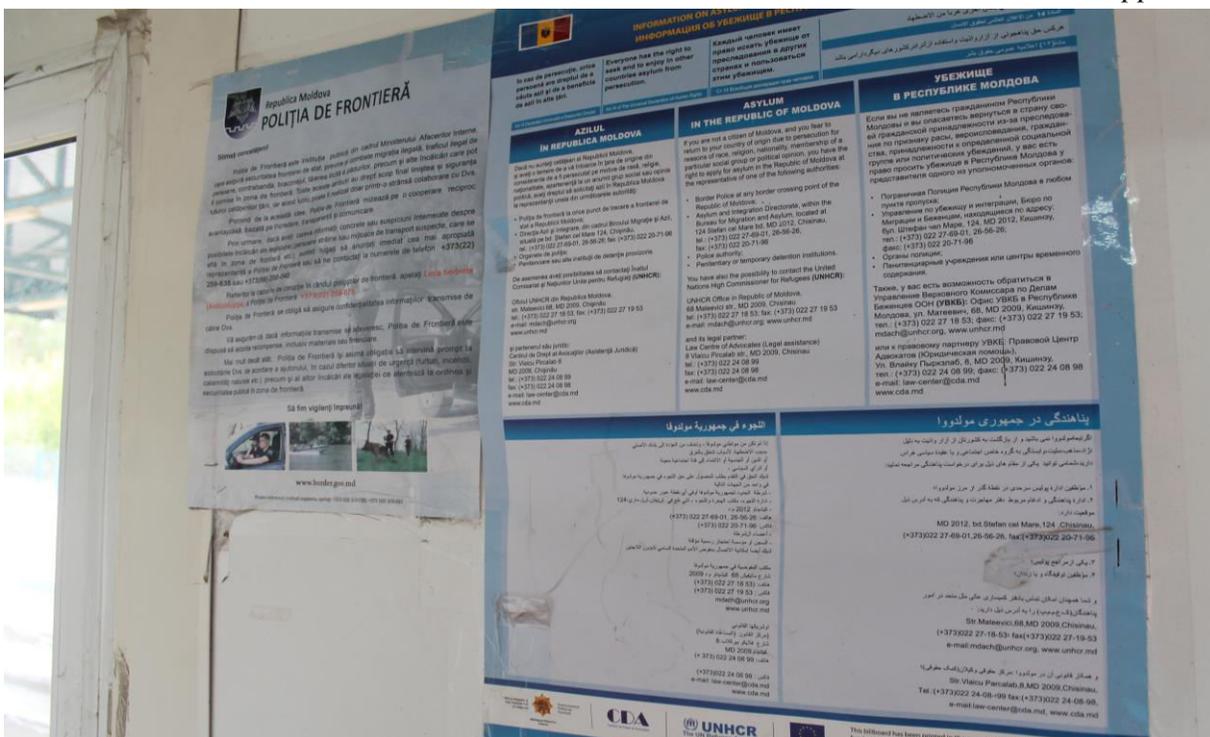


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Foto_PAO_room_asylum seeker (women)_BC_Palanca_29.07.2019



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