HUNGARIAN HELSINKI COMMITTEE

Briefing paper for the periodic visit to Hungary by the Committee for the Prevention of Torture

29 March 2005

The Hungarian Helsinki Committee (HHC) wishes to respectfully call the CPT's attention to the following problems which the HHC has observed in the course of its activities regarding police jails, penitentiary institutions, and alien policing jails.

I. Police jails and penitentiary institutions

1. Problems of a general nature

1.1. Visiting facilities:

It is still often the case that detainees may only meet with their family members in visiting rooms where the parties are separated from each other by a transparent hard plastic wall, which prevents physical contact. This is contrary to the legal provisions in force[1] which only prescribe this limitation on an exceptional basis. Nevertheless in Unit III of the Budapest Penitentiary Institution [*Fővárosi Büntetés-végrehajtási Intézet*] and in the Dorozsmai út remand prison of the so-called "Star Prison" in Szeged [*Szegedi Fegyház és Börtön*], this has become the general norm, while visits making possible physical contact between the detainee and his/her visitor are only allowed on an exceptional basis.

1.2. Beds in police jails

In many police jails beds are still only 55-60 cm wide, in accordance with the standards prescribed by several decades' old legislation. In contrast, standards presently in force call for beds that are 75 cm wide. Moreover, if the mattress itself is 90 cm wide it becomes very difficult to sleep when the bed is just 60 cm – this leads to detainees not being able to rest at nighttime.

1.3. Maintenance of contacts with the outside world

The new Code of Criminal Procedure (Act XIX of 1998, hereafter "the CCP") made maintenance of contact with the outside world significantly more cumbersome for detainees, also creating a contradiction between different legislative instruments.

Law Decree 11/1979 on the Implementation of Sanctions and Measures (hereafter "the Penitentiary Code") provides that pre-trial detainees may exchange written correspondence with their family members or – based on the permission of the prosecutor, or the court after the bill of indictment has been submitted – with other persons, and may receive visitors and a package at least once a month; the right to correspondence and receiving visitors and packages may be limited – save contacts with the defense counsel – in the interest of ensuring the success of the criminal procedure.[2]

In contrast, the CCP provides that – until the submission of the bill of indictment, based on the permission of the prosecutor, later based on the permission of the judge – detained defendants may contact their family members orally or in person under supervision, or in writing under control.[3] Thus,

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[1] In terms of § 90 of Decree 6/1996 of the Minister of Justice on the Rules of the Implementation of Imprisonment and Pre-trial Detention (hereafter: Penitentiary Rules), the prison warden may order that the detainee may only speak to the visitor through a bar or from a closed booth if this measure is justified by security reasons. From this formulation it is clear that if no special security reasons exist, the separation cannot be justified and is therefore against the law.

[2] Penitentiary Code, § 118

[3] CCP § 43 Par (3)(b)

while under the Penitentiary Code the detained defendant can only be prohibited from contacting his/her family members if the prosecutor or the judge forbids this in the interest of ensuring the effectiveness of the criminal procedure, the CCP provides that pre-trial detainees may not write letters or meet with their relatives without the express permission of the prosecutor or the judge.

The CCP's provision leads to the situation that it is the detainee who should apply in writing to the competent prosecutor's office for permission to maintain contact, and until receipt of the permit, neither the police nor the penitentiary staff will allow the detainee to maintain contact with family members by written correspondence, by telephone or visits. Furthermore, until the prosecutor's permit is received detainees may not even receive hygienic packages (e.g. clean underwear, toothbrush, toothpaste, soap, towel etc.) from relatives.

Prosecutors do not consider the adjudication of applications for maintaining contact with family members as their primary task, thus frequently weeks or months pass until the application has been considered.

As the law does not prescribe any deadlines or formats for the prosecutor for issuing the permit, this practically means that prosecutors are not under the obligation to provide reasons for their decision to ban or restrict maintenance of contact. Hence legal remedies are not available against the decision, and in lack when making a formal complaint, detainees are not able to effectively call into question the prosecutor's decision as the reasons for the ban or restriction remain unknown to him/her.

The problem also applies to judicial decisions taken on this matter in cases which have already reached the judicial phase.

1.4. Grade 4 prisoners

Upon his/her reception into the penitentiary institution, the inmate is graded by the reception committee according to how dangerous he/she is to the order of the penitentiary system. The grading system enables the penitentiary to – from a security point of view – further categorize the inmates committed to different – low-security, medium-security or high-security – prisons by the court.

Under § 42 of the Penitentiary Rules the reception committee places the inmate into one of four security regimes (Grade 1, Grade 2, Grade 3 or Grade 4) according to the threat he/she poses to the security of detention. Grade 4 prisoners are those who are expected to escape or commit an act severely endangering or violating the order of the penitentiary or his/her or other people's life and/or physical integrity, or who have already committed such acts, and whose safe detention may only be guaranteed through guarding or – exceptionally – through surveillance.

Grading – especially in the case of Grade 4 prisoners – has serious consequences. Inmates in the Grade 4 security regime are under increased security control and cannot participate in communal activities or work in the prison. Such inmates are only allowed to spend time in the walking yard alone and are restricted in their movement, e.g. may only move around within the prison building in handcuffs etc.

Therefore, under § 43 of the Penitentiary Rules the reception committee shall revise the grading at least once a year, and – in the case of Grade 4 prisoners – every three months. However, in the HHC's experience, such review either does not take place or is purely formal; therefore it is extremely difficult to be de-registered from the grade security regime. The HHC is aware of a case where an inmate was enrolled in Grade 4 in 1999, based on the report from the internal informer among the inmates. The enrollment was confirmed by the police in 2003, therefore the penitentiary institution does not dare to risk the inmate's re-registration in a lower security regime although it has no means to verify the credibility of the police information (while it cannot be excluded that the police informer was forced or compelled to provide information, or the risk of abuse).

A further safeguard is set forth by § 44 of the Penitentiary Rules, which provides that grading shall not influence the legally guaranteed rights of the inmate. This provision, however, is not always complied with – especially with regard to Grade 4 prisoners. The most common example is the gym. Although

using the existing sports facilities is a legally guaranteed right of the inmates,[4] Grade 4 prisoners are in most Hungarian penitentiaries banned from using the gym.

A problem of the system is that although the inmates' general right to remedy (the inmate may file a complaint within 15 days from the delivery of the decision) may be applied against the grading decision, under § 44 (2) of the Penitentiary Rules the reasons of grading may only be revealed to the inmate if this does not threaten the safety of detention, which greatly reduces the effectiveness of the remedial right, since if the inmate does not know the reasons of the decision he/she cannot substantiate his/her complaint.

This problem was also raised by the 1999 CPT Report. The CPT suggests that "a prisoner who is placed in a Grade 4 regime [...] be informed in writing of the reasons for that measure (it being understood that the reasons given could exclude information which security requirements reasonably justify withholding from the prisoner)."[5] With regard to this, in its reply to the CPT, the Hungarian government claimed: "We agree that a review of this practice is justified."[6] In spite of this, no significant improvement has taken place in this respect (with the exception of the fact that the frequency of revision was increased from six to three months).

Another anomaly concerning security regimes is that – although § 44 (1) of the Penitentiary Rules states that "the method and manner of exercising rights in different security regimes shall be determined by the institutions' internal rules" hardly any Hungarian penitentiaries' internal rules contain provisions in this regard. Therefore inmates are not able to judge whether the treatment accorded them had been lawful or in violation of the law.

Another problem is that although there is only one official maximum security ward ("MSW") in the country (in Sátoraljaújhely), in many penitentiaries quasi-MSW's are maintained by the leadership under the pretext of "single placement" (which should in theory be the general form of placement in all penitentiaries). In Vác, for example, inmates placed in this category are called "Grade 4 F" prisoners. The rules pertaining to them are even stricter than those applied to Grade 4 inmates (e.g. they are also handcuffed when escorted to the showers).

1.5. Overcrowding

Overcrowding is a general problem. The rate of overcrowding is 140-150 percent on average, which became higher in early 2005 due to the effect of new legislation that entered into force on 1 January 2005: § 135 of CCP maximizes the duration of pre-trial detention implemented in police premises to two months (in exceptional cases, and upon the decision of the court, pre-trial detainees may be held in police establishments for a maximum of 30 days, and they may be sent back twice to police establishments, each time for a maximum of 15 days, in exceptional circumstances justified by the investigation). Therefore, as a rule, pre-trial detainees shall now be placed in penitentiary institutions rather than police jails. The HHC welcomes this new provision, but it has to be pointed out that its coming into effect has further increased the overcrowding of penitentiaries.

In the HHC's experience, there is hardly a penitentiary institution where the 3 square meters of free space per detainee as prescribed by law is complied with. The worst situation is in the Baranya County Penitentiary Institution [*Baranya Megyei Bv. Intézet*], where at the time of the HHC's visit there were 194 detainees held in the 97 person capacity prison, thus in the majority of cells overcrowding was unbearable. Three-level bunk beds were installed in most cells, and the HHC saw cells of about 10 sq. meters which contained 2 three-level bunk beds (total of 6 beds) separated by about 40-50 cm of space.

The problems of overcrowding can lead to absurd situations. It happened in Vác for instance, that two inmates who were placed in a cell where lawfully only one person could be detained but where there

[4] Penitentiary Code, § 36 Par (1) (m)
[5] 1999 CPT Report, 98.
[6] Reply by the Hungarian Government to the report on the visit to Hungary carried out by the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT) from 5 to 16 December 1999.

are three beds (one bunk bed and one single bed) received a disciplinary warning because they folded the unused single bed and leaned it against the wall of the cell so that they would have more moving space. The warden claimed that inmates were sanctioned because they may not change the arrangement of the cell without permission, but also added that even if they had asked for permission, they would not have been likely to get it. Thus, the penitentiary institution (which violates the law by not providing 3 square meters of moving space) imposed a sanction on inmates who tried to mitigate the unlawful situation with their own restricted means.

2. Individual cases

In certain institutions ill-treatment of detainees occurs. However, proving these allegations is very difficult and cumbersome as it is difficult for the victim who is held in a police jail or prison to produce evidence that would corroborate the criminal act committed against him/her.

2.1. For example, F.M., a juvenile inmate held in the Tököl Penitentiary Institution [*Tököli Büntetés-végrehajtási Intézet*] reported to the HHC that when his cell-mate had been smoking in the corridor and the guard had sent him back to the cell, the inmate replied something to the guard. The next day the guard sent the penitentiary security service to the cell on the ground that the inmates had acted in a disrespectful manner towards him. In the course of the security control, the security personnel presumed that Mr M had been the disrespectful inmate, therefore he was ill-treated in the cell (the ensign ranking guard hit him in the chest, which caused him to fall against the sink, then he was pushed around again and pinned to the wall so that he his head was crushed against the wall several times) while his cell-mates were sent out of the cell into the corridor. Afterwards the detainee requested to see a doctor to have an official medical report prepared, and this request was granted. Additionally, an official report was submitted by the warden to the military prosecutor's office, but the prosecutor's office terminated the procedure for lack of evidence.

2.2. L.D., a juvenile inmate held in the the Tököl Penitentiary Institution [*Tököli Büntetés-végrehajtási Intézet*] reported to the HHC that he had told a guard that he had the right to file a certain application, which upset the sergeant-major to such an extent that he was made to stand facing the wall with legs spread for half a day. The Prison Governor responded to the complaint forwarded by the HHC that the detainee in a recorded statement had withdrawn the complaint he had earlier voiced to the HHC and explained that the reason why he had complained about the sergeant-major was that they were not on good terms.

2.3. Gy.M. a detainee in the penitentiary institution in Vác [*Váci Börtön és Fegyház*] has slight personality disorders hence the prison staff have difficulties in dealing with him. He complained to the HHC that when he had started knocking on the cell door in order to request medical treatment he had been dragged from the cell, handcuffed and kicked down a flight of stairs, then taken to the disciplinary isolation unit. He complained against the guards and nurse who had ill-treated him; however the investigation carried out by the prison governor did not verify his allegations. The nurse and the guards unanimously denied the charges and there was no other proof to support his statement. The case was transferred to the Budapest Military Prosecutor's Office (presumably also with regard to the HHC's involvement in the case). The HHC's doctor who was involved in the monitoring team also examined the detainee and was of the opinion that the marks of ill-treatment could still be detected on the detainee's body. The case is currently being investigated by the Budapest Military Prosecutor's Office.

2.4. The case of J.K.K., a detainee who alleged to have been ill-treated in the penitentiary institution in Vác [*Váci Börtön és Fegyház*] reached the judicial phase. The military court held a hearing in the prison, and the criminal proceedings are still pending. The detained victim complained to the HHC that the penitentiary institution personnel also participate in the public hearings held in the prison; therefore witnesses who are his fellow detainees are afraid of giving incriminating evidence in their court testimonies.

2.5. F.Ny., a 60-year old pensioner was subject to a police measure, when he was stopped for an identity check by the police patrol as he was pushing his bicycle home late at night in Hajdúhadház. The police officer asked him to produce a witness to verify that he was the true owner of the bicycle.

Mr Ny. was slightly drunk and upset by the police measure, so the police officer separated him from his bicycle so that the thumb of his hand with which he held the bicycle was bent backwards and broken. The injury resulted in permanent physical disability. Mr Ny. was then taken to the police station where the elderly man who had his hands cuffed behind his back was kicked in the groin by another policeman, then as he was bent over he received a blow to the back of his neck, and was kicked several times as he lay on the floor. With legal assistance from the HHC the case managed to reach the point where the prosecutor's office raised charges. (The county prosecutor's office investigation bureau terminated the investigation against the police officer on two occasions, and the forensic medical expert only stated in the judicial hearing that the victim had suffered permanent physical injuries whereas in the investigation phase he had determined that the injuries would heal within 8 days.) The local court however acquitted the two police officer and one civil guard defendants for lack of evidence.

II. Detention of migrants

1. Context

In 2004, Hungary experienced a sharp decrease in the number of asylum seekers arriving in the country[7] and the composition of asylum seekers' country of origin has changed significantly: the number of asylum seekers from Afghanistan or Iraq has decreased dramatically, while the number of persons arriving from Georgia, the former Yugoslavia, China, Moldova, Vietnam, Turkey, and also the number of Palestinians have increased.

The decline in the number of asylum applications in Hungary can be attributed to fact that migration (and human smuggling) routes have shifted towards Slovakia, for a number of reasons, including the detention policy of the Hungarian authorities, the use (or misuse) of readmission agreements with neighboring countries,[8] and the significant efforts of the Hungarian Border Guard to strengthen Hungary's future external EU borders.

Although the practice of the Ministry of Interior Office of Immigration and Nationality (hereinafter referred to as "the OIN") and of the courts concerning aliens' detention remained unchanged (see information given below) due to the decrease in the number of asylum seekers, the number of persons held in detention decreased throughout the last couple of years. In 2002 altogether 4127 persons were detained under alien policing legislation, most of them for 12 months. In 2003, the daily average number of foreigners detained in alien policing jails was approximately 250. Statistical data was not available, but it was estimated that in 2003 that approximately 60-70 percent of such detained foreigners were asylum seekers. In 2004, altogether 2221 persons were detained and detention was extended in case of 336 persons. Approximately 12 % of detained foreigners were asylum seekers in 2004. Most of the detainees were Chinese, Bangladeshi, Indian, Ukrainian and Moldovan citizens.

With regard to the physical condition of alien policing jails, major reconstruction work was carried out in recent years, including also considerable enlargement of certain premises. These concerned alien policing jails in Nyírbátor and Balassagyarmat. However, both the jail and the community shelter in Balassagyarmat had been closed down.

The transposition date of the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers for EU Member States was 6 February 2005. Until the end of March 2005 Hungary has not fulfilled its duty to transpose the provisions of the EC Directive, and therefore, in certain aspects the standards provided by the Hungarian legislation are below those

[7] In 2004 the number of asylum applications remained very low and followed the trend experienced in 2003. There were 1362 new applications (1600 persons) filed with the OIN. The number of persons recognized as refugees was 149 (in 103 cases). In accordance with the Aliens Act, the *non-refoulement* provision was applied and as a result "person authorized to stay" (PAS, subsidiary form of protection) status was granted to 177 persons (in 148 cases).

[8] See Hungarian Helsinki Committee: *Visit to three sections of the national border – Report of the Hungarian Helsinki Committee on the January 26-30, 2004 visits to the national border,* at www.helsinki.hu .

set forth by the EC Directive. Moreover, minimum standards prescribed by the EC Directive hardly or do not prevail in case of asylum seekers in detention.

2. Legislative developments since 1999

Since the CPT's last periodic visit in 1999, the legislative background concerning the entry and stay of foreigners in Hungary has changed significantly. A new Act on Aliens[9] entered into force on 1 January 2002, the Act on Asylum[10], the Act on Naturalization[11] and the Act on Guarding the Country's Borders[12] have been significantly amended.

A package of laws concerning migration was adopted by Parliament on 29 May 2001. In the interest of ensuring uniform application of the law, now it is the exclusive governmental agency that deals with all issues relating to the entry, stay and naturalization of foreigners, the refugee status determination procedure and social support to persons granted international protection status is the OIN (and its seven regional directorates).

In April 2004, in preparation for European Union accession, the Hungarian Parliament passed Act no. XXIX of 2004 "on the amendment, repeal of certain laws and determination of certain provisions relating to Hungary's accession to the European Union." The law entered into force on 1 May 2004. It *inter alia* contains substantial amendments to the Act on Aliens and the Asylum Act. Following these amendments the Joint Ministerial Decree of the Minister of Interior and Minister of Justice No. 27/2001 (29 of November) on the implementation of detention ordered in the alien policing procedure has also been amended.

The so-called Community Shelters that functioned as *de facto* detention facilities prior to 2002 and which the CPT visited in 1999 have ceased to operate as places of detention. Instead community shelters are now operated by the OIN and function as semi-open facilities to accommodate foreigners belonging to certain "legal categories"[13].

As a result of the new Act on Aliens in effect since 2002, three categories of detention now exist in alien policing legislation: (i) ordinary 'alien policing detention', (ii) 'detention for refusal' and (iii) 'pre-expulsion' detention (these latter two not exceeding 30 days). The compulsory place of stay for persons who are placed in detention is designated in alien policing jails which are operated by and are under the control of the Border Guards and are staffed by Border Guards officers.

Due to the 2001 amendments of the law (in effect since 2002) the Border Guards have lost many of their competences concerning illegal foreigners. The fact that the Border Guards' responsibility is restricted to guarding detainees and in certain cases transporting them (to court hearings and medical examinations), and their lack of competence concerning detention procedures has led to frustration on their side.

Apart from the procedures of the Border Guards concerning the refusal or readmission of foreigners, the OIN alien policing authorities are in charge of proceedings against unlawful foreigners; in case of asylum seekers the asylum authority of the same OIN conducts the procedure. OIN offices are mostly located in cities different from the place of detention. From documents related to the procedure against a given foreigners, only those are held by the Border Guards which are in connection with the foreigner's detention (decision ordering the detention, decisions ordering the extension of the detention issued by local or county courts, monthly court decisions on the necessity of maintaining the detention).

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[9] Act XXXIX of 2001 on the Entry and Stay of Foreigners
[10] Act CXXXIX of 1997 on Asylum
[11] Act XXXX
12 Act XXXX
13 According to Section 56 (1) of the Act on Aliens if „a.) the return, refusal or expulsion of the foreigner cannot be ordered or implemented owing to an obligation of the Republic of Hungary undertaken in an international agreement; b.) the period for detention has expired but the reason owing to which the detention had been ordered still exists; c.) the foreigner has a permission to stay for humanitarian reasons."

As a result of the lack of proper document available at the place of detention, Border Guards staff cannot provide information to the foreigners about the status of their case. For these reasons, the relationship between detainees and Border Guards staffed are strained, and detainees are completely desperate.

3. Major issues of concern

3.1. Asylum seekers in detention

Expulsion of asylum seekers and their detention with a view to securing the enforcement of the expulsion order while the refugee status determination procedure is pending is contrary to the law.

The alien policing procedure dominates over the asylum procedure: within the organizational system of the OIN, the alien policing departments are more powerful than the asylum authorities. No matter if the foreigner is intercepted or s/he voluntarily reports him/herself to the Border Guards, to the police or to the OIN's alien policing department, the alien policing procedure is implemented first, and it is not suspended despite the submission of an application for refugee status.[14] An asylum application made while in detention has to be forwarded to the asylum authority. The expulsion procedure will be suspended but detention pending deportation will nevertheless continue.

In practice the Border Guards automatically apply detention for refusal and order the refusal measure in case of foreigners who enter the country illegally and are intercepted by the Border Guards. Once the maximum time limit for this type of detention has expired, pre-expulsion detention or alien policing detention is prolonged routinely by the OIN alien policing authorities. Detention is in general automatically extended for 12 months by the courts (with the exception of asylum seekers from Iraq and Afghanistan who were – despite nearly identical factual and legal circumstances as those coming from e.g. Bangladesh, India or China – released after 30 days of detention for refusal and accommodated in open reception centres).

Legislation does not call for the compulsory detention of asylum seekers – nevertheless, if an asylum seeker is not able to reach the asylum authorities before being intercepted by the Border Guards, in practice he/she will be detained.

According to Section 46 (1) of the Act on Aliens, detention can be ordered in the interest of enforcing an expulsion order. An expulsion order or other grounds specified by the Act on Aliens[15] are therefore prerequisites for ordering detention. In case of asylum seekers, however, the expulsion may not be enforced until a final decision has been taken in the asylum procedure. The reasoning for the alien policing detention included in the decision of authorities and of the courts is that "the foreigner has refused to depart or there are other good reasons to presume that he would delay or hinder the implementation of the expulsion order" (Section 46 (1) (b)).

[14] This practice is contrary to Article 31 of the 1951 Geneva Convention relating to the status of refugees: „The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." (According to the OIN's interpretation the expression of the Article 31 „coming directly from a territory" makes the regulation impossible to apply in the cases of persons who arrive in Hungary via a third country.)

[15] According to Section 46 (1) of the Act on Aliens: "In order to ensure the implementation of the expulsion order, the regional alien policing authority may place the foreigner in alien policing detention who a.) has been hiding from the authority or has prevented the implementation of the expulsion order in any other way; b.) has refused to depart or there are other good reasons to presume that he would delay or thwart the implementation of the expulsion order; c.) is subject to expulsion and prior to departure has committed a petty offence or criminal act; d.) has severely or repeatedly violated the prescribed rules of behaviour in the place designated for his mandatory stay, has failed to meet the obligation to appear prescribed for him in spite of being called upon to do so and has thereby impeded the alien policing procedure; e.) has been released after a prison sentence levied owing to having committed a deliberate criminal act."

Judicial practice on detention is inconsistent. Alien policing authorities are obliged to petition the courts to extend alien policing detention in excess of 5 days, and courts can be requested to review the lawfulness of detention. Moreover, when the court decides on the extension of the alien policing detention, it has to review the justifiability of upholding detention (this judicial review is to be carried out automatically every 90 days). However, courts – following Hungary's legal interpretation, in terms of which courts could not examine the lawfulness, justified and enforceable nature of the expulsion order – acting upon request of the OIN's alien policing authority extend detention of asylum seekers to the maximum 12 months.

In the HHC's view judicial review is therefore not substantive; it only focuses on whether the law was correctly applied when the aliens policing authority (i.e. Border Guards aliens policing office, OIN alien policing authority) ordered the detention. Hence, in the majority of the cases the court's decision is merely rubber-stamping the alien policing authority's decision.

Furthermore, both authorities and courts ordering or extending detention ignore the legal provision and related factual circumstances that if expulsion evidently cannot be enforced, detention should be terminated[16]. Therefore, this practice is unlawful since it is highly unlikely that the refugee status determination procedure would come to end within one year, meaning that expulsion of asylum seekers cannot lawfully be executed in a reasonable time.

The above method of terminating detention by law rarely happens. Those in detention speak of their release as "how much from the one-year period is left".

In principle the alien policing detention has a decisive effect on the asylum procedure. Although the asylum procedure is formally carried out even in case of migrants in detention (i.e. detained foreigners have access to the asylum procedure as well) those who are detained are in a much worse situation. Alien policing authorities are obliged to assess in each individual case whether the *non-refoulement* provision (Section 43 of the Act on Aliens) is applicable[17]. Decisions on the issue of non-refoulement are not taken on the basis of case by case assessments, but on the basis of internal directives applying to particular countries: non-refoulement applies to Iraqis and Afghans, but does not to Bangladeshis, whatsoever persecution they might report on.

Responding to a report of the HHC in her letter of 24 June 2003 the Director General of the OIN made it clear: "Should the case occur that the court or the alien policing authority has already decided on the question of expulsion, the asylum authority refrains from deciding on it." This statement clearly supports HHC's assumption that in most cases it is not the asylum authority that decides on the question of non-refoulement, but the alien policing authority, which primarily enforces policing points of view.

The fact that the detention of foreigners is ordered to an expulsion order should mean that the prohibition of *refoulement* was established not to apply in the case concerned. Based on the above, and presuming that alien policing authorities perform their tasks in accordance with the law, there would be no chance for receiving protection in the refugee status determination procedure. The above presumption, however, does not correspond with the facts. Firstly, alien policing authorities do not have expertise in assessing the non-*refoulement* principle, and in practice they do not perform their duty. In addition, they have an obligation under the asylum legislation to forward the application for refugee status to the OIN's asylum authority[18], which in many cases they only do with a significant delay, as they wait for the alien policing procedure (i.e. procedure with a view to return, readmit or deport the illegal foreigners) to commence.

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[16] As per Section 46 (8) of the Act on Aliens 'detention shall be terminated when the conditions of expulsion are assured or when it becomes obvious that the expulsion cannot be implemented, and the regional alien policing authority ordering detention shall designate a mandatory place of stay for the foreigner'.

[17] Contrary to former provisions in effect before 2002, the alien policing authorities are not obliged to request the OIN's asylum authority's expert opinion on the applicability of the non-refoulement provision in case of asylum-seekers who report themselves to or are intercepted by Border Guards officials.

[18] In most of the cases the asylum application is lodged during the first interview held by the Border Guards.

The HHC has experienced that the expulsion and alien policing detention of illegal foreigners seeking asylum depend on the country of origin of the applicant. This may be deemed as a discriminatory practice in light of Article 3 of the 1951 Geneva Convention. Moreover, asylum seekers from countries considered as "safe countries of origin" (e.g. Bangladesh, China) had no chance of receiving international protection status (i.e. recognition as a refugee or subsidiary protection). This indicated that asylum authorities presume that detained asylum seekers do not deserve international protection.

Contrary to law, asylum seekers in detention are not provided with a document certifying their legal status while asylum seekers not held in detention are furnished with a document verifying their legal status.

The HHC witnessed some positive developments in this regard in 2004 and 2005 that support the notion that detention is unlawful in case of asylum seekers. Firstly, several asylum seekers detained in the alien policing jails in Szombathely and Győr were recognized as refugees or were granted subsidiary protection. Secondly, in 2004 the courts terminated (or refused to extend) alien policing detention in about 10 cases where the HHC's lawyer petitioned the court to terminate detention. In both scenarios, after the expulsion order had been taken the OIN' asylum authority established that the non-refoulement provision applied to the case, which evidently means a ban on expulsion for those concerned.

3.2. Unlawful and lengthy detention of foreigners awaiting deportation

Many detainees are foreigners who did not apply for asylum and explicitly indicated to the authorities that they are willing to return to their country of origin voluntarily. Nevertheless their detention is routinely extended by the courts. The courts do not carry out a substantive review of the legal basis of detention, and do not carry out an in-merit assessment of whether the aliens police authority had done its best to obtain travel documents for migrants who are not in possession of such documents, particularly in case of those persons who cannot be returned to their country of origin due to circumstance beyond their own control and whose embassy does not co-operate in obtaining new travel documents. It is not clear how many months of unsuccessful attempts to obtain travel documents is required in order to establish if it is impossible to enforce expulsion.

3.3. The right to have access to a lawyer

Until 2004, access to lawyers in detention facilities was exclusively ensured through lawyers working with the Hungarian Helsinki Committee who provide free legal assistance and representation to migrants in detention. The HHC has concluded a Cooperation Agreement with the National Headquarters of the Border Guards in September 2002. Prior to this date, only those lawyers had access to migrants detained in alien policing jails who had in their possession a previously signed letter of authorization from the foreigner, which obviously implied that the lawyer and the migrant had met in person at least once. Moreover, according to former Section 7 of the Joint Ministerial Decree 27/2001 the detainee was only allowed to contact his/her defence counsel (appointed in case of a criminal proceeding) or a legal representative who is authorized to represent him/her in proceeding concerning detention. The above provision was repealed in May 2004.

As a result of legislative amendments that took effect in May 2004, foreigners in detention who do not understand Hungarian and are not in a position to authorize a legal representative shall be entitled to have an *ad hoc* case guardian (a form of ex officio appointed lawyer) appointed to their case by the court[19]. Prior to the May 2004 amendments of the Act on Aliens no such form of mandatory representation for detained foreigners existed. As of writing the implementation of this new provision cannot be assessed in full.

[19] Section 52 (4) of the Act on Aliens

4. Other issues of concern

HHC monitors paid visits to almost all alien policing jails around Hungary in 2003, and two jails were visited in 2004. The information below is based on these visits. However, it has to be highlighted, that thanks to the regular weekly visits of HHC's lawyers to alien policing jails, much improvement has taken place, concerning in particular the nexus between Border Guards officials and HHC's lawyers. In the Szombathely alien policing jail for instance, the HHC's lawyer has developed an exceptionally good working relationship with the Border Guards, which resulted in much better conditions for detainees and a smoother way of resolving problems.

4.1. Information on rights and obligations

Information on detainees' rights and obligations and their legal situation is in general insufficient. Reliable information is guaranteed exclusively through the services provided by the HHC's lawyers.

Foreigners are frustrated by being deprived of their liberty for 12 months solely on the ground of having entered or stayed in the country illegally, particularly when foreigners from certain countries (Iraqis, Afghans) are being released after one month.

The Border Guards is only obliged to provide information (upon admission to the jail) on the rights and obligations related to detention. Services of interpreters are many times not used; instead, written information translated into a limited number of languages (usually not the native language spoken by detainees) is placed out on the wall of the corridor. Interpreters are only available for foreigners for official occasions (interview etc.)

There is still a lack of guards who speak foreign languages and of permanently available interpretation, which greatly hinders communication between guards, doctors/paramedics and detained foreigners.

4.2. Minors, persons belonging to vulnerable groups

According to the current legislation, unaccompanied minors (under the age of 18) shall not be placed in detention. According to § 52 of Government Decree No. 170/2001 on the implementation of the Alien Policing Act, in alien policing procedures, the alien policing authority shall examine a) whether the foreigner is a minor, b) whether there is any person obliged by virtue of legal rule or custom to perform supervision of the foreign minor. If detention has been ordered and it is found in the course of the procedure that the rules pertaining to unaccompanied minors are applicable in the foreigner's case, detention has to be terminated and a designated place of stay has to be ordered for the unaccompanied minor.

Minors are to be placed together with adult relatives accompanying them, separately from other detainees.[20]

Since foreigners are placed in rooms or floors according to gender, it happens that adult members of the same family are accommodated in separate cells in the alien policing jails.

The HHC was informed of cases when the father was detained in a separate part of the same detention facility. In another case the father was placed in detention while other members of the family were accommodated in an open facility.

Male and female detainees are to be accommodated separately.[21]

Detention is in general not applied in the case of separated children, although the HHC and the UNHCR Office in Hungary encountered a number of cases during their missions when unaccompanied minors were detained for several months, and in some cases married couples were detained in different quarters of the same detention facility.

[20] § 4 of Joint Ministerial Decree 27/2001
[21] § 54 (2) of the Act on Aliens

In 2003, in the case of an unaccompanied minor female asylum seeker from Nigeria who was placed in detention in Nyírbátor for several months an application has been submitted to the European Court of Human Rights stating the obvious violation of § 5 and § 13 and § 1 of Protocol 7 of the European Convention of Human Rights.

In practice many detainees suffer from psychological problems, and some of them of PTS. For them, there is no special assistance (neither psychological or psychiatric care nor medication) available.

4.3. Physical conditions

The Joint Ministerial Decree 27/2001 sets out the general rules of implementing detention ordered in an alien policing procedure. However, detainees' rights in many aspects depend on the orders of the head of the respective Border Guard Directorate in charge of the alien policing jail. Therefore, conditions of detention in alien policing jails vary from place to place.

Detainees in the alien policing jail in Nagykanizsa were locked in their bedrooms all day, and cell doors were allegedly opened for only 15 minutes each hour during the day. In other detention facilities bedrooms were kept open, but the bars separating the detention facility from the rest of the building were kept locked.

The living conditions in the Győr detention facility are slightly better. The asylum seekers may move freely around the corridors and access the small yard at any time. The rooms are poorly furnished but clean. There is a common TV room.

In some alien policing jails, public payphones were placed outside the detention area and out of detainees' reach, whereby foreign detainees' right to contact their family members was excessively limited. MATÁV - the exclusive owner of the lines in Hungary - has terminated access to pay phones in these places. According to HHC's information, the Border Guards in Szombathely has already purchased a new telephone line from their own budget in order to ensure that detainees have access to telephone.

4.4. Ill-treatment

In the detention facility in Kiskunhalas, during the HHC's visit in 2003 detainees complained of ill-treatment by the guards, and were aggrieved by the foul, humiliating and degrading language generally used by the guards. Foreigners felt that the guards looked down on them, black asylum seekers from Africa were said to be especially mistreated. They were on several occasions refused by the guards to hand in letters or to use the public phone, and some guards were reported to have regularly made xenophobic and racist comments.

The staff-detainees relations also vary from place to place, and also depend on the Border Guards official concerned, but it can be concluded to be generally strained.

4.5. Inadequate medical/psychiatric care

Although general medical care is provided in the alien policing jails, complaints often relate to the following problems: detained foreigners rarely have access to specialist medical care and are only taken to hospital in emergency cases. Usually only sleeping pills and tranquillizers are provided. Several detainees reported that in cases of dental problems they had to have a tooth pulled out.

Health care services available to detained migrants are unsatisfactory. In Győr, for example, although there is a 24-hour on-duty health care service, there is no qualified doctor. As a result, medication and treatment prescribed were not always appropriate. In addition, a number of foreigners suffered from psychiatric disorders which remained untreated.

Adequate psychological or psychiatric care is not available for those in need. In Szombathely, access to specialist care is available upon request submitted to the Border Guards. The services of Cordelia Foundation - an NGO providing psychological counseling and treatment to asylum seekers in open reception centers - are totally unavailable for the detained asylum seekers.

In the course of a 2004 visit, the Szombathely detention facility directorate claimed that there was no problem as far as psychological care was concerned. At that time, one of the detained asylum seekers was on a hunger strike which had already lasted for several days, yet was not receiving any special attention. Another asylum seeker who had mentioned emotional problems had been moved to a single cell.

Under the Asylum Act all asylum seekers need to pass a medical check-up and are placed in quarantine for the time of the medical screening in order to identify infectious diseases. Contrary to this provision in practice, asylum seekers in detention are not given an adequate medical examination nor put in quarantine. Apart from questions asked by the general doctor, foreigners do not undergo specific medical examinations or laboratory tests. Reportedly, in two detention facilities certain foreigners infected by serious infectious diseases had to be removed from the jail, but only after having spent several months in the facility.

On 16 April 2003 members of the HHC visited the alien policing jail in Szombathely and noted that medical documents of all detainees had been signed by the physician with the note "no infectious disease". The doctor at the alien policing jail stated that he arrived at this conclusion by looking at the detainees and by what the foreigners told.

4.6. Food

Hot food is usually unavailable at weekends when detainees receive bread and canned meat that usually contained pork, contrary to many detainees' religious diet. Although, both detainees and the HHC have suggested that detainees receive rice instead of bread, it has never been solved.

4.7. Other

Detainees in some jails did not have access to electricity; cutting their hairs, nails and shaving was only possible once a month or even more seldom.

Basic sanitary and washing supplies were provided for detainees, although in general all these products were out of date. However, in most of the detention facilities laundry facilities were not accessible at all.

Apart from the possibility of watching television from 9 a.m.-10 p.m. and one hour of outdoor exercise (as prescribed by government decree), there were basically no activities offered to foreigners in the jails.

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