HUNGARIAN HELSINKI COMMITTEE

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Written by
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Legal framework and practice

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Legal framework and practice

This paper aims to provide an analysis of the legal background of the detention of asylum-seekers in Hungary by taking into consideration the general and specific requirements of international law (including both the relevant, legally binding universal and regional international instruments and soft law documents) and the newly established EU norms.

In this respect, the 'inevitable' connection between the detention of asylum-seekers and alien policing detention measures – as it is laid down in the current Hungarian law – deserves particular attention. In particular, three main points of analyses prevail: the alleged innate contradiction and the legal ambiguity surrounding the regulation and implementation of alien policing measures involving deprivation of liberty in Hungary; their excessive duration; and their insensitivity to the special needs of asylum-seekers, especially towards people in need of special assistance like children or victims of violence or trauma.

I. Statistical Data

No explicit statistical data is provided on the detention of asylum-seekers on the public internet web site of the Hungarian Office of Immigration and Nationality, whose Alien Policing Department is the central and regional Alien Policing Authority.[1]

The official data provided by the Border Guard reveals a sharp decline in the number of foreigners subject to alien policing detention. Similarly, the number of asylum applications submitted in Hungary has also dropped and in 2005 it was only cca. 25% of the number registered in 2002. Nevertheless, it seemed stagnant during 2004–2005. Although the proportion of asylum-seekers arriving illegally in the country has decreased, the decline is not so spectacular (25% from 2002 to 2005), with the majority of asylum-seekers arriving illegally in these years as well. This decreasing trend has had an impact on the number of persons subject to alien policing detention (the longest alien policing measure involving deprivation of liberty). According to United Nations High Commissioner for Refugees (UNHCR), the average number of persons in detention during the first six months of 2004 was 66% less than in 2003, and 70% less than in 2002. Similarly, the number of asylum-seekers in alien policing detention – according to the data provided by UNHCR – has also decreased.[2]

[1] It is the OIN which processes asylum applications.

[2] Consultations with Dr Agnes Ambrus, National Protection Officer, UNHCR Regional Representation for Hungary, Poland, Slovakia and Slovenia, September 2005.

Table 1.

The number of asylum applications, foreigners: applicants in alien policing detention

Year	Asylum applications	Asylum applicants arriving illegally	Asylum applicants arriving legally	Asylum applicants in alien policing detention	Foreigners in alien policing detention
2002	6,412	5,728 (cca. 89.3%)	684	312	1,084
2003	2,401	1,843 (cca. 76.7%)	558	271	579
2004	1,600	1,146 (cca. 71.6%)	454	94	571
2005	1,609	1,040 (cca. 64.6%)	569	145*	374
January–June 2005	765	450 (cca. 41.1%)	315	—	221
January–June 2006	999	722 (cca.27.7%)	277	221*	214

Note: * The number of asylum applications submitted in alien policing detention.

Nevertheless, on the basis of the new statistical data concerning the first six months of 2006 in comparison to the same period of 2005, the following remarks can be made. First of all, the decrease in the number of asylum applications seems to have ceased. However, it must be taken into consideration that the data includes the repeated asylum applications as well. A rejected asylum-seeker can submit a subsequent application without any limitations whatsoever, which also contributes to the increase in the number of subsequent applications. The fact that subsequent applications can be treated in an accelerated procedure does not have an impact, partly because the Refugee Authority is reluctant to apply the accelerated procedure. In any case, even if the Refugee Authority would apply the accelerated procedure, there is no restriction on appeal, and due to the workload of the Municipal Court, the judicial phase of the procedure would still remain at a minimum of six months. Secondly, the number of asylum applicants arriving in Hungary illegally seems to be increasing again while the number of foreigners in alien policing detention stagnates.

Meanwhile, the number of asylum applications submitted in alien policing detention in 2006 has doubled since 2004.

Reports by the Hungarian Helsinki Committee (HHC) reveal that large numbers of persons readmitted to the country under the Dublin II regulation are detained for a short period of time, e.g. in Győr, before being transferred to the reception centres. If their detention exceeds a reasonable and minimal period of time, during which their transport could have been arranged, that would certainly contradict the relevant legal requirements which state that persons readmitted under the Dublin II procedure should enjoy the rights, and fulfil the obligations, of asylum-seekers. These persons are to be transferred or directed to the Refugee Authority, which designates their place of residence. (Sections 1B(6) and 1 D(2), Government Decree 172/2001.).

Table 2.

Nationality of foreigners in alien policing detention

Nationality	2002	2003	2004	2005	January–June 2005	January–June 2006
Romanian	153	147	155	125	77	23
Moldovan	60	54	68	14	5	17
Turkish	26	36	45	22	14	5
Chinese	175	63	38	8	1	17
Serbian	133	58	26	30	13	80
Indian	93	12	15	3	—	—
Russian	10	13	4	3	—	—
Vietnamese					21	12
Other	434	196	220	169	90	60
Total	**1084**	**579**	**571**	**374**	**221**	**214**

The main countries of origin of detained asylum-seekers in 2004 were Bangladesh, China, India, Moldova, Russia and Ukraine.[3]

[3] Information and Cooperation Forum Country report (Hungary), 2004, Hungarian Helsinki Committee.

II. Legal Background on the Detention of Asylum-Seekers

Undoubtedly, the relevant general and specific international human rights law and EU norms provide for the detention of foreigners or asylum-seekers under certain circumstances.

As Tables 3, 4, and 5 show, Hungary has not only acceded to the most relevant human rights treaties, but these international instruments were also incorporated into the Hungarian legal framework. The only notable exception is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.[4]

[4] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res 45/158, Annex, 45 UN GAOR Suppl (No. 49A) at 262, UN Doc. A/45/49 (1990). Entered into force: 1 July 2003 Available at: http://www.ohchr.org/english/law/pdf/cmw.pdf. Accessed: 5 March, 2005.

Table 3.

General human rights instruments

International Treaty	Date of accession	Promulgation
International Covenant on Civil and Political Rights[5] (hereinafter "ICCPR")	23 March 1976	Law Decree No. 6 of 1976. amended by Law Decree No. 25 of 1988
International Covenant on Economic, Social and Cultural Rights[6]	03 January 1976	Law Decree No. 9 of 1976
(European) Convention for the Protection of Human Rights and Fundamental Freedoms[7] (hereinafter "ECHR")	06 November 1990	Act XXXI. of 1993
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")[8]	26 July 1987	Law Decree No. 3 of 1988, amended by Act LIX of 1990
International Convention on the Elimination of All Forms of Racial Discrimination[9] (hereinafter "CERD")	4 May 1967	Law Decree No. 8 of 1969, amended by Act LXXX of 1991

5 International Covenant on Civil and Political Rights (16 December. 1966), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. entered into force Mar. 23, 1976. Available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. Accessed: 5 March, 2002.

6 International Covenant on Economic, Social and Cultural Rights (16 December 1966), G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976. Entered into force 3 January 1976. Available at: http://www.unhchr.ch/html/menu3/b/a_cescr.htm. Accessed: 5 March, 2002.

7 European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols (4 November 1950), ETS No.: 005. entered into force Sept. 3, 1953, Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm. Accessed: 5 March, 2002.

8 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (10 December 1984), G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987. Available at: http://www.ohchr.org/english/law/cat.htm. Accessed: 5 March, 2002.

9 International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969. Available at: http://www.ohchr.org/english/law/cerd.htm. Accessed: 5 March, 2002.

Table 4.

The specific protection of refugees and migrants

International Treaty	Date of accession	Promulgation
Convention Relating to the Status of Refugees[10] (hereinafter "1951 Geneva Convention")	14 March 1989	Law Decree No. 15 of 1989
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	—	—

Table 5.

The protection of persons with special needs

International Treaty	Date of accession	Promulgation
Convention on the Rights of the Child[11] (hereinafter "CRC")	08 November 1991	Act LXIV of 1991
Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW")[12]	03 September 1981	Law Decree No. 10 of 1982

While the approach of the ICCPR and the ECHR concerning the detention of asylum-seekers can be regarded in many respects as identical, by establishing the general applicable human rights standards, the 1951 Geneva Convention regulates some distinctive aspects from the point of view of refugee protection. Finally, the CRC and the CEDAW contain specific provisions with respect to certain groups of people deserving particular attention.

[10] Convention Relating to the Status of Refugees (28 July 1951) 189 U.N.T.S. 150, entered into force April 22, 1954 and the Protocol of New York (31 January 1967) 606 U.N.T.S. 267, entered into force Oct. 4, 1967. Available at: http://www.unhchr.ch/html/menu3/b/o_c_ref.htm. Accessed: 5 March, 2002.

[11] Convention on the Rights of the Child, (20 November 1989) GA Res 44/25, Annex, 44 UN GAOR Suppl (No. 49) at 167, UN Doc A/44/49 (1989), entered into force September 2, 1990. Available at: http://www.unhchr.ch/html/menu3/b/k2crc.htm Accessed: 5 March 2002.

[12] Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979), GA Res 34/180, UN GAOR Suppl (No. 46) at 193, UN Doc A/34/180, entered into force September 3, 1981. Available at: http://www.unhchr.ch/html/menu3/b/e1cedaw.htm. Accessed: 5 March 2002.

A.1. General Requirements of International Human Rights Law

I. THE MAIN RULES GOVERNING THE DEPRIVATION OF LIBERTY

It is clear from the relevant provisions of the ICCPR and the ECHR that any form of the deprivation of liberty should be an exceptional measure, which is only applicable in accordance with international standards. This approach is echoed by those soft law instruments issued by the competent UN bodies as well, which deal with the issue.[13]

Although no specific case concerning the detention of asylum-seekers in Hungary was ever decided upon by either the European Court of Human Rights or by the Human Rights Committee, the guiding principles and general criteria can be clearly drawn from the relevant case-law of the ECtHR and from the views or general comments of the Human Rights Committee (HRC). These principles should be regarded as a formulative part of the authoritative interpretation of the respective international treaties, and as such they should be considered either binding or at least indicative for Hungary, regardless of the fact that Hungary itself was not a party in the invoked cases.

Since a detailed analysis of the case law attached to the ICCPR and the ECHR exceeds the scope of this paper, it is only possible to summarize some key issues that are of particular importance with regards to Hungary as well.

a) The lawfulness of the detention of asylum-seekers

First of all, neither instrument excludes per se the detention of asylum-seekers. In fact, while the ECHR establishes that 'No one shall be deprived of his liberty save in

[13] See as well: Executive Committee in its Conclusion on Detention No. 44 (XXXVII) – 1986, 13 October 1986 (Hereinafter: Executive Committee Conclusion No. 44 (XXXVII) – 1986).

the cases listed exhaustively in the Convention' and 'in accordance with a procedure prescribed by law,' Article 5 (f) of the Convention explicitly authorizes the

> 'Lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.[14]

No such specific authorization can be found in Article 9 of the ICCPR, though the HRC in its view clearly applies such an interpretation.[15] Similarly, General Comment No. 8[16] of the Human Rights Committee has established that Article 9 (1) is applicable to 'all deprivations of liberty' including cases attached to immigration control.[17]

b) The concept of deprivation of liberty

While both the ICCPR and the ECHR prohibit unlawful arrest and detention, Article 9 and Article 5 respectively do not apply to mere restrictions on the liberty of movement.[18] This implies that a compulsory residence order accompanied by restrictions upon the author's movements within the state cannot substantiate a complaint under Article 9 of the ICCPR or under Article 5 of the ECHR[19], which cover only severe deprivations of liberty such as incarcerations within a certain building, for example an immigration detention centre.

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14 Article 5(1), ECHR.

15 See e.g. A. v. Australia Communication No. 560/1993 3 April 1997 CCPR/C/59/D/560/1993. Available at: http://www.unhchr.ch/tbs/doc.nsf/921031496436dab880256880003bb402/9dbcb136a858ebc5c12571cc00532f41?OpenDocument, Accession: 5 March 2005.

16 Right to liberty and security of persons (Art. 9): 30/06/82. CCPR General Comment No. 8. Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument. Accessed: 5 March 2002.

17 See also cases: Torres v. Finland Communication No. 291/1988 2 April 1990 CCPR/C/38/D/291/1988, Available at: : www.refugeelawreader.org/324/Torres_v._Finland.pdf. Accessed: 5 March 2005. A. v. Australia Communication No. 560/1993 3 April 1997 CCPR/C/59/D/560/1993.

18 See also ICCPR, Article 12.

19 See also Celepli v. Sweden Communication No. 456/1991, 2 August 1994. CCPR/C/51/D/456/1991. par. 9.2. Available at: http://www1.umn.edu/humanrts/undocs/html/vws456.htm. Accessed: 5 March 2005.

Nevertheless, the case law of the ECtHR established that excessive and long-term restrictions on freedom of movement could amount to deprivation of liberty. The case of Amuur v. France[20] concerned asylum applicants, arriving from Somalia to Paris-Orly Airport, who were held in the airport's transit zone for twenty days (from 9 to 29 March 1992) without the opportunity of prompt judicial review or legal aid. In fact, legal assistance only became accessible to them on 24 March 1992. While the applicants claimed before the ECtHR that they were arbitrarily deprived of their liberty under Article 5 of the ECHR, the French Government maintained that no such deprivation occurred as the applicants had the possibility to freely leave the transit zone at any time in order to return of their own accord to Syria (not bound by the GC). Thus, only their entrance to France was barred.

Nevertheless, the Court reaffirmed that the mere 'theoretical' possibility of leaving the country voluntarily where the asylum-seekers intended to seek international protection 'cannot exclude a restriction on liberty.'[21] This holds especially true if, in fact, there is no other country 'inclined or prepared to take (…) in' the asylum-seekers, which would offer comparable protection that they could find in the country where they submitted their asylum application.[22] The Court also concluded that 'holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty[23], and that 'the legal rules in force at the time, as applied' in the case, 'did not sufficiently guarantee the applicants' right to liberty.'[24]

c) Protection against arbitrariness

According to the concurrent, well-established case law of the European Court of Human Rights and the HRC, under no circumstances can any deprivation of liberty be arbitrary. As it was clearly stated in the Chahal v. UK case by the European Court

[20] *Amuur v. France,* 19776/92 [1996] ECHR 25 (25 June 1996) Available at: http://worldlii.org/eu/cases/ECHR/1996/25.html. Accessed: 5 March 2005.

[21] *Amuur v. France,* 19776/92 [1996] ECHR 25 (25 June 1996). par. 48.

[22] *Amuur v. France,* 19776/92 [1996] ECHR 25 (25 June 1996). par. 48.

[23] *Amuur v. France,* 19776/92 [1996] ECHR 25 (25 June 1996). par. 49.

[24] *Amuur v. France,* 19776/92 [1996] ECHR 25 (25 June 1996). par. 54.

of Human Rights, 'any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.'[25]

To avoid 'arbitrariness' implies more than being 'in accordance with a procedure prescribed by law', meaning that the decision on ordering detention should be in compliance with 'the substantive and procedural rules of national law' (lawfulness in the strict sense).[26] It implies necessarily that the law itself and the enforcement of that law must not be arbitrary. Thus, the prohibition of 'arbitrary' deprivations of liberty – in the context of the ICCPR – goes further than the prohibition of 'unlawful' deprivation (in the strict sense). In Van Alphen and the Netherlands (305/88) or A v. Australia (560/93), the HRC established that 'arbitrariness is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.'[27] It seems also evident that any detention which is arbitrary is also unlawful (in the broad sense). Lawfulness (in the broad sense) must include protection from arbitrariness.

In particular, the HRC, with regard to the detention of asylum-seekers, established that every decision to keep a person in detention should be reviewed periodically and the detention for which the state cannot provide appropriate justification should end. The HRC reaffirmed these principles in the case of a Cambodian national who, after landing illegally in Australia by boat on 25 November 1989, applied for refugee status. The person was detained during the refugee status determination procedure for a period of four years until he was granted an entry permit in January 1994 on humanitarian grounds. The Australian government maintained that the mandatory detention of border claimants is a necessary component of Australia's immigration policy, since many of the applicants who were held in the previously utilised unfenced migrant accommodation hostels, subject to a reporting requirement, absconded. Moreover, Australia claimed that the length of detention was the direct consequence of the fact that the person lodged appeals after the first negative decision on his application. However, the generalised justifications submitted by Australia were rejected by the HRC:

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25 Chahal v. The United Kingdom – 22414/93 [1996] ECHR 54 (15 November 1996) par. 118. Available at: http://www.worldlii.org/eu/cases/ECHR/1996/54.html. Accessed: 5 March 2005.

26 Chahal v. The United Kingdom – 22414/93 [1996] ECHR 54 (15 November 1996) par. 118.

27 Hugo van Alphen v. The Netherlands, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), par. 5.8. Available at: http://www1.umn.edu/humanrts/undocs/session39/305-1988.html. Accessed: 5 March 2005.

> "The State party seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive of the applicant to abscond if left in liberty…
>
> […] For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the indivi-duals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case which would justify his continued detention"[28]

Thus, the proper, individualised motivation and justification of the detention gains particular importance, especially in regards to the prolongation of detention. It is clearly insufficient to maintain that in the "State party's experience […] unless detention is strictly controlled, there is a strong likelihood that people will escape or abscond". A detention can be regarded as arbitrary in particular if the State party cannot demonstrate that less invasive means of achieving compliance with the State's party's immigration policies, such as reporting obligations or other conditions of a supervised release, were ineffective in achieving this objective.

These principles elaborated above by the HRC were reinforced in C v. Australia (900/99) concerning the two-year mandatory detention of an illegally arrived claimant whose visa application held a number of false statements, or in Baban v. Australia (1014/01).[29] The HRC also expressed concern in relation to the extended detention (from six months to two years respectively) of immigrants in a number of Concluding Observations in Japan, in the UK, in the USA, in Sweden or in Switzerland. However, in the case of Jalloh v. The Netherlands (794/98)[30], the three-and-a-half-month detention of the asylum applicant was validated by the HRC since the detention order was taken after the applicant absconded from an open facility, and he was released as soon as it turned out that there was 'no realistic prospect of expelling him.'

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28 A. v. Australia Communication No. 560/1993 3 April 1997 CCPR/C/59/D/560/1993, 9.2; 9.4.

29 C. v. Australia Communication No. 900/1999 28 October 2002 CCPR/C/76/D/900/1999 Available at: http://www.bayefsky.com/./html/australia_t5_iccpr_900_1999.php. Accessed: 5 March 2005, and Omar Sharif Baban v. Australia Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (2003). Available at: http://www1.umn.edu/humanrts/undocs/1014-2001.html. Accessed: 5 March 2005.

30 Jalloh v. The Netherlands Communication No. 794/1998, 26 March 2002 CCPR/C/74/D/794/1998, para. 2.3, 8.2. Available at: http://www.bayefsky.com/./pdf/netherlands_t5_iccpr_794_1998.pdf. Accessed: 5 March 2005.

Furthermore, the lack of access to legal assistance can also contribute to arbitrariness.[31] Finally, the European Court of Human Rights has repeatedly reinforced that the detention of foreigners under Article 5 (1)(f)

> "will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible. … It is thus necessary to determine whether the duration of the deportation proceedings was excessive."[32]

d) The habeas corpus

Both the ICCPR and the ECHR require the provision of a judicial review 'without delay' upon the request of the detainee. Although the right of access to court 'does not have to be ensured ex officio by the State', the HRC maintained that the right of the detainees to seek legal advice is corollary to the enjoyment of the right of access to court, since it is practically impossible for people to challenge their detention without such assistance.[33] It might also be not in compliance with the ICCPR if the immigration detainees are not strictly denied access to legal advice, and are not informed of this right.

The scope of the judicial review should encompass the examination of both the legality and the justification (of the prolongation) of the detention order. The court shall be entitled to order the release of the person deprived of his liberty if the detention is not 'lawful.' However, this is clearly not the case if the Court is restricted to carry out only a formal analysis of the fulfilment of the requirements of domestic law (legality in the strict sense) without assessing the case in substance to exclude the possibility of arbitrariness.[34] Moreover, regular judicial assessment of the prolongation of the detention is needed, which should include an assessment of whether the reasons for ordering the detention are still relevant.

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31 Berry v. Jamaica, Communication No. 330/1988, U.N. Doc. CCPR/C/50/D/330/1988 (1994). Available at: http://www1.umn.edu/humanrts/undocs/html/vws330.htm. Accession: 5 March 2005, CCPR Concluding Observations on the UK (2001) UN.doc. CCPR/CO/73/UK, par. 11.6.

32 Chahal v. The United kingdom – 22414/93 [1996] ECHR 54 (15 November 1996), par. 113. See also Quinn v. France – 18580/91 [1995] ECHR 9 (22 March 1995), p. 19, par. 48, Kolompar v. Belgium – 11613/85 [1992] ECHR 59 (24 September 1992) p. 55, par. 36.

33 Berry v. Jamaica, Communication No. 330/1988, U.N. Doc. CCPR/C/50/D/330/1988 (1994), CCPR Concluding Observations on the UK (2001) UN.doc. CCPR/CO/73/UK, par. 11.6.

34 ECHR Article 5(4), ICCPR Article 9(4).

II. COROLLARY PROVISIONS TO BE APPLIED

a) The humane treatment of persons deprived of liberty

Article 10 of the ICCPR prescribes the humane treatment of detainees; similar obligations derive from Article 3 of the ECHR and from Article 7 of the ICCPR as well, prohibiting torture, inhumane or degrading treatment of detainees. Article 11 of the CAT contains similar prohibitions, providing that the State parties shall keep the rules governing interrogation practices and custody arrangements in order to prevent the torture of any detainee.

b) The protection of family life

Both the ICCPR (Article 17) and the ECHR (Article 8) provides for the protection of family life. However, those provisions which govern the ordering or maintenance of detention remain silent on it. Still, the right to family life – though seriously curtailed, – applies to those in detention as well, and implies – at least – the right to maintain contacts with one's family.

A.2. The Implementation of the General Requirements of International Human Rights Law in Hungary

I. THE MAIN RULES GOVERNING THE DEPRIVATION OF LIBERTY

a) The status of international human rights law in Hungary

In general, the Hungarian Constitution[35] prescribes that the harmony between the assumed international legal obligations and domestic law be ensured. Nevertheless, despite the incorporation into the Hungarian legislative framework of both international human rights instruments, the impact of the views of the HRC or of the case-law of the ECtHR (apart from certain developments) still remains limited. For example, Law Decree No. 6 of 1976 (amended by Law Decree No. 25 of 1988), incorporating the ICCPR and Act XXXI of 1993 promulgating the ECHR, does not enjoy any status superior to that of Act XXXIX of 2001 on the entry and stay of foreigners, which contains the principal norms on the detention of foreigners (hereinafter "Aliens Act of 2001").

Nevertheless, certain specific arrangements were adopted to make the implementation of the decisions of the international human rights bodies feasible in cases involving Hungary. Thus, the Code on Criminal Procedure[36] provides that the decisions of international human rights bodies (with respect to Hungary) are to be regarded as 'new evidence' for the purpose of reopening criminal cases, and a similar provision is expected to be included in a new Code on Civil Procedure.

However, reference to the decisions of the competent international human rights organs by the domestic courts is rare. This is all the more true in cases involving the detention of illegal migrants or asylum-seekers. Even in the case of eventual contradiction between the case law of the international bodies reflecting

35 Act No. XX of 1949, MK 174/49 of 20.8.1949. Article 7(1).

36 See also Hanna Bokor-Szegő, Mónika Weller: Hungary. In: R. Blackmann/J. Polakiewicz (eds.), Fundamental Rights in Europe, (2001).

the well-established interpretation of the relevant human rights instruments and the provisions of the Aliens Act of 2001 (or its guiding interpretation) involved, the latter seems to prevail. In fact, the Hungarian courts are by no means obliged to take into consideration even fundamental judgements or views which do not directly concern Hungary. Principally, it depends on whether the judge feels compelled to give any weight to the cases presented by the legal advisor.

Since the ratification of the ICCPR, the HRC issued Concluding Observations with respect to Hungary in 1993 and again in 2002.[37] In its Concluding Observation issued in 1993, the HRC expressed its 'concern about the use of excessive force by the police, especially against foreigners residing in Hungary and asylum-seekers held in detention,' and about 'the provisions allowing for the expulsion of aliens from Hungary and the extent of discretion in immigration law.'[38] Recommendations were made to thoroughly review the laws on entry, residence, detention, and the expulsion of aliens. Presumably, due to the substantial legal reforms of the Hungarian immigration law in 1999 and 2001, no such reference was made by the HRC in its Concluding Observations issued in 2002.

b) The Hungarian Legal Framework of the Detention of Asylum-seekers: General Rules[39]

In the Hungarian legal framework, no general rule provides for the automatic, mandatory detention of asylum-seekers. In principal, asylum-seekers are to be accommodated in open reception centres. If the person seeking international protection enters or stays in Hungary legally at the time of submitting his or her application, or by entering or staying illegally reaches a reception centre before being intercepted by the authorities, the general rule still applies. The Border Guards can also disregard the norms governing the entry of foreigners on account of humanitarian reasons or to implement an obligation under an international treaty (Section 4(2), Aliens Act of 2001).

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37 CCPR Concluding Observations on Hungary. 03/08/93. CCPR/C/79/Add.22; CCPR Concluding Observations on Hungary. 19/04/2002. CCPR/CO/74/HUN.

38 CCPR Concluding Observations on Hungary. 03/08/93. CCPR/C/79/Add.22, par. 8. par. 9.

39 See also e.g.: Boldizsár Nagy: Hungarian report contributing to the study: Return and Repatriation – EU Policies and National Practice, Budapest, July 2005.

However, it is not to be underestimated that any asylum-seeker is a foreigner at the same time, and cannot extract herself/himself from the scope of the regulation applicable to foreigners, included at present the following legal instruments:

- Act XXXIX of 2001 on the Entry and Stay of Foreigners (hereinafter "Aliens Act of 2001");[40]
- Government Decree No. 170/2001 (IX.26.) on the Implementation of Act XXXIX of 2001 on the Entry and Stay of Foreigners (hereinafter "GD 170/2001");[41]
- Government Decree 162/1999 (XI.19.) on the Establishment of the Office of Immigration and Nationality (Ministry of Interior);[42]
- 7/2001. (XI. 29.) BM-IM (MI-MJ) Joint Decree on the Implementation of Detention Ordered in Alien Policing Procedures.

Some specific rules regarding asylum-seekers can also be found in the:

- Act CXXXIX of 1997 on Asylum[43] (hereinafter "Act on Asylum");
- Government Decree 172/2001 (IX.26.) on the Detailed Rules of Procedures Covered by the Asylum Law[44] (hereinafter "GD 172/2001").

Besides taking into consideration the relevant norms in effect, a note shall be taken that Act II of 2007 on the entry and stay of third country nationals (hereinafter "Act II of 2007") substituting the Act XXXIX of 2001 on the entry and stay of foreigners also contains important amendments. The relevant provisions of Act II of 2007 are to enter into force on 1 July 2007. Due to the large-scale modifications of Act II 2007, the norms implementing the new act are expected to introduce further changes to the system.

40 Promulgation: 22.06.2001, entered into force: 01.01.2002 as amended by the Act XXIX of 2004 and the Act XLVI of 2005. Previously regulated by: Act LXXXVI of 1993.

41 Entered into force: 01.01.2002. As amended by: the GD 99/2002 (V.5) and GD 191/2004 (VI.2).

42 Promulgation: 19.11.1999, entered into force: 04.12.1999.

43 Promulgation: 15.12.1997; entered into force: 01.03.1998, amended by Act LXXV of 1999, Act XXXVIII of 2001, Act XXIX of 2004, Act LXIX of 2004.

44 Promulgation: 26.09.2001, entered into force 01.01.2002.

The rules governing the entry or stay of foreigners become all the more pertinent if the asylum applicant is in an irregular situation (i.e. being held up or arrested by the authorities on account of illegal crossing of the border or illegal stay) when he or she expresses his or her intention to apply for international protection. This renders the outcome of the asylum applicant's case more precarious since the relevant sanctioning provisions for violating the rules on entry or stay (including those on detention) of the Aliens Act of 2001 become applicable and along with (or preceding) the refugee status determination procedure an alien policing procedure is often also under way or initiated. In this respect, it is worth mentioning that the Border Guard has the right to conduct a search for illegal foreigners within the entire country. As the report of the International Helsinki Foundation for Human Rights (hereinafter "IHF") on the Places of Detention in Hungary noted with concern it was formerly the 'regular practice' of the Border Guards to:

> 'stop asylum-seekers in front of the gates of the reception centres and as the asylum-seekers usually cannot provide evidence that they are staying legally in Hungary, they will end up in alien policing detention, although they were only fifty meters away from the reception centre and from submitting their lawful applications.'[45]

Regardless of the fact that the number of detained asylum-seekers has dropped considerably during the past few years, the ambiguities concerning the application of alien policing rules to asylum-seekers have not ceased. Still, some provisions present in the Hungarian legal framework might prevent the detention of asylum-seekers intercepted in an irregular situation. Principally, if a foreigner 'expresses his/her intention to seek recognition as a refugee' during an alien policing procedure, the duty of the Alien Policing Authority (e.g. Border Guard acting in this capacity) is to register the application and forward it to the competent Refugee Authority holding jurisdiction (Section 2 (3), GD 172/2001). Also, the Alien Policing Authority is supposed to make the necessary arrangements for the transfer of the foreigner to the competent reception centre within 24 hours of registering the application.

[45] International Helsinki Foundation for Human Rights: Places of Detention in Hungary Report from the visit of the delegation of human rights NGOs to places of detention in Hungary on 11 and 12 May 2005. Budapest, Vienna, Sofia, Skopje, March 2006. p. 66. (hereinafter "IHF report on Places of Detention in Hungary, 2006").

However, there are two exceptions to the latter obligation: the Alien Policing Authority may not make any arrangements for such a transfer in airport procedure cases, or when the foreigner is under the effect of an alien policing measure restricting his/her personal freedom or such measures are applicable against him (Section 2 (4), GD 172/2001). These two provisions establishing exceptions prove to be crucial as their impact is to channel and subordinate the case of the intercepted asylum applicant, as well as the ordering and maintenance of his or her detention to the general rules related to foreigners. Moreover, in the case of asylum-seekers (or any foreigners) intercepted in illegal situations, there might almost always be applicable alien policing measures aiming at the restriction of personal freedom. On the other hand, the general rules on ordering and maintaining the detention of foreigners appear to be highly insensitive to the specific situation of asylum-seekers.

The aim of the following sections is to provide an analysis of the main rules governing at present the detention of foreigners with special emphasis on asylum-seekers and in light of the relevant international legal norms and soft law instruments. In addition, the relevant provisions of Act II of 2007 will also be assessed. Moreover, these sections will also highlight the problems stemming from the insensitivity of the pertinent rules to the specific situation of asylum-seekers, and the notable differences between the regulation of the detention of foreigners and asylum-seekers will also be assessed.

A) The legality of the detention of asylum-seekers

As it is mentioned above, at present the Aliens Act of 2001 and its implementing Government Decree 170/2001 cover the principal legal norms governing the detention of foreigners. In fact, the relevant provisions of the Aliens Act of 2001 established three different types of detention measures: detention for refusal, detention in preparation of expulsion and alien policing detention. All of them are aimed at foreigners apprehended or arrested by the Alien Policing Authority (or Border Guard, the police acting in such a capacity). Nevertheless, while the concept of alien policing detention has already been present in the Hungarian legal framework, Act XXXIX of 2001 introduced two further forms of the detention of foreigners. The system of alien policing measures involving deprivation of liberty will fundamentally be modified once more from July 2007 under the Act II of 2007, which abolishes detention for refusal.

In general, regardless of their intent to seek international protection, any asylum-seeker 'found' in 'illegal situations' would most likely be subject to an alien policing procedure. In fact, if his or her entry or stay is illegal at the time of the interception, there is practically little chance of initiating a proper refugee status determination procedure before the commencement of the alien policing procedure, which frequently leads to the ordering of an alien policing measure involving deprivation of liberty. While the asylum-seeker's case is processed, he or she can be detained – at present – for up to 12 months. The 12-month limit, introduced by the Act XXXIX of 2001, was a considerable development compared to previous years. In 1993–1999, foreigners could be detained indefinitely, while in 1999–2002, the maximum duration of detention was 18 months. Nevertheless, as it will be discussed below, even the one-year detention of foreigners proved to be excessive, especially in the case of asylum-seekers. Act II of 2007 further reduces the maximum length of detention to six months, which is a significant and welcome step in the right direction.

One might assume that the ultimate logic of the system is that the alien policing measure precedes and, in practice, prevails over asylum law. Nevertheless, despite the initiation of an alien policing procedure, the ordering of any of the applicable detention measures is 'in principle' optional for the Alien Policing Authority. Thus, it seems to fall within the discretion of the Alien Policing Authority to opt for transferring the applicant to a reception centre or for terminating of the previously ordered detention measure. Taking into consideration the formulation of the relevant provision that exempt the Alien Policing Authority from the obligation of transferring the applicant to a reception centre ("is under the effect of an alien policing measure restricting his/her personal freedom or *such measures are applicable against him*"), the phrase 'applicable' should refer to situations where the alien policing procedure is under way but the detention measure has not been ordered yet (Section 2 (4), GD 172/2001). This is exactly the case during the first personal interview when a foreigner intercepted in an illegal situation expresses his or her intention to seek international protection. Then the Alien Policing Authority may choose transfer instead of confinement (as it clearly does in certain cases).

Although an asylum application submitted while in detention cannot be the sole reason for terminating detention (Aliens Act of 2001 Section 48/A (2)), together with other reasons that come to light in the course of the refugee status determination procedure, it could contribute to the release of the applicant. Gene-

rally, though, up to this point, this did not happen: asylum-seekers, once placed in detention, often remained in custody until the end of the possible 12-month period. The causes of this were manifold, including the probable lack of individual assessment and the mechanical prolongation of alien policing detention, which would not necessarily change with reduction of the maximum length of detention introduced by Act II of 2007.

As it is indicated above, in the Hungarian legal framework there are various alien policing measures constituting deprivation of liberty.

1. Under the present Section 36 (1) of the Aliens Act of 2001, the Border Guards are entitled to refuse entry to the foreigner having crossed, or who has attempted to cross, the state border illegally (measure of refusal) if he or she is intercepted within thirty days from crossing the border and there is an applicable readmission agreement (on account of his or her illegal entry). In order to ensure the implementation of the measure of refusal, the detention of the foreigner may be ordered (Section 47 (1), Aliens Act of 2001) if the implementation of the refusal is likely to take place within thirty days of the date of arrest (detention for refusal). In fact, detention for refusal was most likely to be attached to the measure of refusal, except in the case of unaccompanied minors who cannot be subject to detention under the Government Decree implementing the Aliens Act of 2001 (Section 52 (4), GD 170/2001). In practice, if an asylum-seeker submitted his or her application during the detention for refusal, it was more likely that he or she would be released and transferred to a reception centre.

   Act II of 2007 abolishes the measure of refusal and related detention measure; thus the cases covered formerly by Section 36 (1) of the Aliens Act of 2001 will fall under the rules on expulsion, which implicate the applicability of important additional safeguards.

2. The regional Alien Policing Authority is entitled to order the detention of the foreigner during an alien policing procedure in order to ensure the identification of the foreigner or the clarification of his or her legal residence (detention in preparation for expulsion, Section 48, Aliens Act of 2001). In practice, the submission of an asylum application during detention in preparation for expulsion so far has not lead to the release of the applicant.

3. Furthermore, if the foreigner violated or attempted to violate the rules of entry or exit, he may be subject to alien policing expulsion under Section 32 (2) of the Alien Policing Act. (The new Act II of 2007 introduces minor changes into the formulation of this provision.) The alien policing expulsion is ordered by the Alien Policing Department of the Office of Immigration and Nationality (OIN, central and regional Alien Policing Authority). Nevertheless, in order to apply the alien policing expulsion, a number of conditions are to be fulfilled:

   a) The Alien Policing Authority ordering the alien policing expulsion shall verify that the expulsion of the foreigner will not breach the principle of *non-refoulement*. This would presuppose an individual assessment of the specific circumstances of the case (Section 40 (1), Section 43, Aliens Act of 2001). Nevertheless, it is doubtful whether the Alien Policing Authority possesses the appropriate expertise and resources required for carrying out such a thorough analysis. In fact, the alien policing authority is only inclined to take into consideration whether there is a deportation ban with respect to certain countries of origin, which leads to discriminatory practices.

   b) Moreover, unaccompanied minors are also exempted from expulsion if the family reunification or appropriate state or other institutional care is not guaranteed in the country of origin or another admitting state (Section 39 (2), Aliens Act of 2001).

   c) Section 45 of the new Act II of 2007 lists a number of additional criteria (age, family background, possible consequences of the expulsion on family members) which shall be taken into consideration before the decision on expulsion is made. Thus, a more individualised assessment of the case of the third country national concerned will be required preceding the ordering of expulsion. Although these norms principally introduce the requirements established by the case law of the ECtHR to protect family life in expulsion cases, the provisions might also have a beneficial effect in promoting the due evaluation of the personal circumstances of foreigners, including those of asylum-seekers in the expulsion procedure.

In order to secure the preparation and implementation of the alien policing expulsion, the Alien Policing Authority of the OIN can (and under certain circumstances is obliged to) order the alien policing detention of the person concerned. The substance and legitimating aim of the 'alien policing detention' is to ensure the implementation of the expulsion order. The Aliens Act of 2001 contains an exhaustive list of all compulsory and optional cases of alien policing detention. The 'compulsory cases' of alien policing detention relate to alien policing expulsion ordered on the account of serious or/and organised forms of crimes committed intentionally by the foreigner, thus these cases are – in general – not applicable to asylum-seekers. It is important to note that the compulsory cases of alien policing detention have been abolished by the new Act II of 2007.

The optional, more relevant cases of alien policing detention – which will remain, for the most part, intact after the new Act enters into force – are applicable if the foreigner:

'a) has been hiding from the authority or has prevented the implementation of the expulsion order in any manner;

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; (…)

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; (…)' (Section 46 (1), Aliens Act of 2001).

Both under the Aliens Act of 2001 and under the Act II of 2007, any alien policing measure involving deprivation of liberty shall be terminated immediately whenever 'it becomes obvious that the expulsion cannot be implemented' (Section 46(8), Aliens Act of 2001; Section 54(4), Act II of 2007).

At present, the combined period of the different alien policing measures involving deprivation of liberty can not exceed twelve months (Sections 46 and 53(1), Aliens Act of 2001), which will be reduced to six months after the Act II of 2007 enters into force in July 2007 (Section 54(4)).

According to the Aliens Act of 2001, after the expiration of the 12-month mandatory deadline (e.g. the expulsion could not be implemented), if the grounds of

expulsion are still pertinent, the foreigner is not fully released but transferred to a so-called 'community shelter'. Nevertheless, violating the rules of the community shelter or committing another minor offence (e.g. attempt to cross the border illegally) gives rise to the imposition of alien policing detention for another twelve months. Under the Act II of 2007, after the expiration of maximum six months, a compulsory place of residence can be designated, which could be either a reception centre, a community shelter, or another appropriate place of accommodation (Section 62(2), Act II of 2007).

In practice, the application of various alien-policing measures involving deprivation of liberty has often merged. First, the detention of foreigners materialises within the form of the 30-day 'detention for refusal'. Once this has expired without the application of a readmission agreement, the Alien Policing Department of the OIN has almost automatically rendered a decision on expulsion, which created a new legal basis for further confinement of the foreigner under provisions of 'alien policing detention.' Ironically enough, in most cases when detention for refusal 'turned into' alien policing detention, only the legal basis of detention changed, while the alien policing detention was generally implemented in the same detention facility and in the very same cell. Nevertheless, this trend seems to be changing: increasing numbers of asylum-seekers who have submitted their asylum applications in detention for refusal have been released due to the fact that after the submission of the asylum application it became apparent that the measure of refusal cannot be implemented during the mandatory period prescribed by law, thus the legal justification of detention for refusal ended. This practice could in several cases lead to the relatively 'early release' of asylum applicants in detention for refusal.

All those asylum applicants, however, who have submitted their applications in alien policing detention often remained in custody. Thus, the present practice does not apply the rule of 'early release' to the one-year alien policing detention under the Aliens Act of 2001. The reason behind this has been the lack of individual assessment of asylum cases and the general presumption that the prospect of implementing the expulsion order is still not completely hypothetical – though in reality this outcome is certainly quite unlikely in several cases.

In principle, the formulation of the norms applied by Hungary circumscribing the conditions of *ordering* the detention of foreigners (including asylum-seekers) is not in contradiction *per se* with the requirements of the relevant, general human rights instruments. However, the excessive length of the alien policing detention and

the innate contradictions and ambiguities which surrounded the application of the rules of expulsion to asylum-seekers protected by the principle of *non-refoulement* not only cast doubts on adequate protection against arbitrariness but could also violate the criterion of legality (in the strict sense). (See also C) below).

The abolishment of detention for refusal by Act II of 2007 certainly simplifies the procedure and makes it more transparent, thereby contributing to the prevention of arbitrariness. However, the new law does not change fundamentally the rules of the remaining optional cases of alien policing detention. For example, it also remains to be seen whether the practice of 'early release' of asylum-seekers applied with respect to the one-month maximum detention for refusal can also be applied to the six-month maximum duration alien policing detention. Taking into consideration the average length of an asylum procedure, it becomes even more unlikely that the final asylum decision can be made within six months and consequently the provision 'becomes obvious that the expulsion cannot be implemented' seems to be applicable.

B) The concept of deprivation of liberty

Although under the ICCPR and the ECHR, severe deprivations of liberty such as incarcerations within a certain building (e.g. immigration detention centre), and in the case law of the ECtHR excessive and long-term restrictions on the freedom of movement could amount to deprivation of liberty[46], confinement in the transit zones (at the airport or international harbour) are not regarded as 'detention' in Hungary, despite the fact that it could last up to eight days.[47] Currently, no prompt judicial review is provided either as in the case of 'proper' detention measures. Act II of 2007 does not alter the rules on confinement in transit zones.

[46] UNHCR annotated comments on COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereinafter: UNHCR Annotated Comments on RD (2003) Available at: http://www.unhcr.org/home/RSDLEGAL/3f3770104.pdf. Accessed: 4 April 2005.

[47] Act XXXIX of 2001, Article 35 (2).

C) Protection against arbitrariness

The Aliens Act of 2001 has already taken considerable steps to provide better protection against arbitrariness by introducing a shorter absolute time limit of the detention of foreigners and certain safeguard clauses (e.g. with respect to the judicial review procedure). This tendency will be reinforced by the amendments of Act II of 2007, further reducing the maximum length of detention. Moreover, as it is indicated by the statistical data from 2002 to 2005, the number of detained asylum-seekers – the number of asylum applicants and the number of detained foreigners together – dropped dramatically. However, despite these obvious and non-negligible improvements, some serious concerns remain, specifically with regards to the arbitrary detention of asylum-seekers.

1. First of all, the requirement of 'lawfulness,' the legality (in the strict sense) of any deprivation of liberty, imposes – as it is shown above – compliance with domestic standards. Non-compliance with domestic standards implies arbitrariness as well. In practice, however, ordering and implementation of the alien policing detention in the case of asylum-seekers might not meet these requirements.

   As it is mentioned above, the purpose of the application of 'alien policing detention' is to ensure the implementation of the expulsion order. The legal implications of the aim of the expulsion measure in the case of asylum-seekers are crucial for the assessment of their appropriateness since it would presuppose that the authority makes the necessary arrangements in order to be able to expulse the applicant.

   Meanwhile, even if the submission of an asylum application cannot automatically lead to the release of the already detained person seeking international protection (Section 48/A (2), Aliens Act of 2001), the principle of *non-refoulement* does protect the asylum-seeker. In order to ensure the respect of the principle of non-refoulement, Section 43(2) of the Aliens Act of 2001 prescribes the suspension of the expulsion order while the 'foreigner is subject to an asylum procedure' up until the 'final and enforceable resolution of the refugee authority rejecting the application.' This implies the suspension of the execution of the deportation during the adjudication of the asylum application; thus the deportation proceedings are not (and cannot be) in progress while the expulsion is still pending.

However, it becomes apparent that the principle of *non-refoulement* and the aim of the expulsion measure are not easy to reconcile. While the legitimising aim of the detention for refusal or the alien policing detention is to prepare and ensure the implementation of the expulsion order, in reality the Alien Policing Authority cannot do anything because as long as the implementation of the expulsion order is suspended, no preparatory acts can be taken. The same dilemma is true for the application of detention for refusal in the case of asylum-seekers as well.

With respect to the lack of action by the Alien Policing Authority, it is worth noting that the case-law of the ECtHR reaffirmed that the detention of foreigners under Article 5 (1) (f) will only be permissible 'as long as deportation proceedings are in progress' and as long as the State party in question shows due diligence in processing the case. Otherwise, the duration of the detention could be regarded excessive.[48] This inconsistency is all the more true concerning the detention for refusal since no asylum procedure is completed within 30 days.

In consequence, it appears that the legal basis of detaining foreigners in view of expulsion is not fully applicable to asylum-seekers exempted from the implementation of expulsion measures.

2. Secondly, similar to the widespread state practice in the field, the facts of the cases and the motivation of detention orders indicate that asylum applicants are often detained in Hungary, mainly due to the presumption that they might abscond prior to the rendering of a final and enforceable decision by the Refugee Authority. Meanwhile, the Alien Policing Authority does not necessarily come up with any individualised and specific evidence to support this assumption in the particular case of the person concerned, which renders the argument of the Alien Policing Authority to no more than a mere speculation. The inconsistency may also cast doubts on the legality of ordering alien policing detention since the wording of the relevant provision, which enumerates the possible

[48] Chahal v. The United Kingdom – 22414/93 [1996] ECHR 54 (15 November 1996), par. 113. See also Quinn v. France – 18580/91 [1995] ECHR 9 (22 March 1995), p. 19, par. 48, Kolompar v. Belgium – 11613/85 [1992] ECHR 59 (24 September 1992) p. 55, par. 36.

grounds in an exhaustive manner, clearly indicates that alien policing detention is only applicable if the foreigner:

'a) has been hiding from the authority or has prevented the implementation of the expulsion order in any manner;

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;'

In fact, an asylum applicant intercepted by the Alien Policing Authority and subject to detention for refusal, for example, can hardly hide from the authorities or display any behaviour that could be regarded as an attempt to prevent the implementation of the expulsion order. A person seeking international protection would obviously refuse to return to any territory where his or her life or liberty is in danger.

One might say that the previous illegal entry or stay of the applicant or the use of forged documents can substantiate a presumption that he or she could later abscond. Nevertheless, this standpoint could not only miss the aim of Article 31 of the Geneva Convention (see Part I/B.1.) while being contrary to the established case law of the ECtHR and the guiding views of the HRC, but it could also give insufficient weight to reality. Refugees are often compelled to arrive illegally; valid reasons could hinder the submission of an asylum application and the use of forged documents can be a harsh necessity. It is not unprecedented that persons who have previously suffered ill treatment and were left unprotected by their country of origin would mistrust any authority. This also indicates that the identical regulation of the detention of foreigners and asylum-seekers without any specific arrangement simply proves to be inappropriate to handle with sufficient sensitivity the case of persons seeking international protection.

Though the above-mentioned factors (illegal entry/stay, forged documents) could be given adequate weight in the individual assessment of each particular case, it seems to be certain that purely 'hypothetic speculations' in assuming bad faith on behalf of the applicants is inappropriate in substantiating detention measures. International norms demand that 'there must be some substantive basis for such a conclusion

in the individual case.'[49] It is sufficient to recall that the generalised justifications submitted by Australia were rejected by the HRC in A v. Australia. The motives of rejection could be indicative of the evaluation of the Hungarian legal framework or practice.

Thus the 'perceived incentive of the applicant to abscond if left in liberty' or the 'State party's experience' that 'unless detention is strictly controlled, there is a strong likelihood that people will escape or abscond'[50] were not accepted by the HRC as justification of the detention order and especially of its prolongation. Although the HRC acknowledged that the fact of illegal entry might necessitate further investigation, other factors, particular of the individual (e.g. lack of cooperation, evidence on the likelihood of absconding), should justify the continued detention.[51] Such individual evidence supporting the likelihood of absconding might arise if the applicant has already attempted to abscond from an open facility as in the case of Jalloh v. The Netherlands (794/98). An example of the lack of cooperation might be that the applicant insists on his or her false identity after the disclosure of the forgery of the relevant documents and refuses to give information on his or her country of origin, thus hindering not only the alien policing procedure but the proper processing of the refugee status determination procedure as well.

3. The automatic ordering of the detention of asylum-seekers intercepted in an illegal situation without properly assessing their individual circumstances might constitute another violation of the requirements of international human rights law as the State parties to the ICCPR are to demonstrate that no less invasive means of achieving the same objectives (compliance with the State party's immigration policies e.g. the imposition of reporting obligations or other conditions of supervised release) were available.

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[49] Executive Committee: Detention of asylum-seekers and refugees: the framework, the problem and recommended practice, EC/49/SC/CRP.13 4 June 1999.

[50] C. v. Australia Communication No. 900/1999 28 October 2002 CCPR/C/76/D/900/1999.

[51] A. v. Australia Communication No. 560/1993 3 April 1997 CCPR/C/59/D/560/1993, para. 9.2; 9.4.

4. Finally, the distribution of detained asylum-seekers on the basis of nationality demonstrates a pattern that raises concern. While the main countries of origin of detained asylum-seekers are from Bangladesh, China, India, Moldova, Russia and the Ukraine, asylum-seekers from Iraq or Afghanistan, have practically been exempted from detention for years, most likely based on an internal instructions of the OIN.[52] Even if the deportation ban is taken into consideration, this amounts to discriminatory practice as well, and this, in itself, can constitute arbitrariness. It is not astounding that UNHCR has repeatedly noted the 'absence of clear criteria on the imposition of detention measures to asylum-seekers.'[53]

   In previous years, UNHCR repeatedly expressed its concerns with respect to the arbitrariness of the detention of asylum-seekers in Hungary. During the monitoring missions conducted by UNHCR in 2004[54], on account of the low number of persons including asylum-seekers kept in detention, it was difficult to assess whether these concerns were adequately addressed by the authorities or not. However, the UNHCR report noted with concern that, despite the modifications of the Aliens Act of 2001 or the Act on Asylum, no new elements were added to ensure a clear interpretation of the rules.[55] This, in turn, led to the 'problem of arbitrary interpretation and application of the detention rules to asylum-seekers.'[56]

   The IHF report on Places of Detention In Hungary emphasized that the 'detention of asylum-seekers was an issue of particular concern' and shall be avoided before the adjudication of their case 'irrespective of whether they submit the application before or after the authorities find a way to expel them as 'illegal migrants.'[57] The report also maintained that

52 Information and Cooperation Forum Country report (Hungary), 2004, Hungarian Helsinki Committee.

53 Consultations with Dr Agnes Ambrus, national protection officer, UNHCR Regional Representation for Hungary, Poland, Slovakia and Slovenia, September 2005.

54 UNHCR Monitoring Missions in HUNGARY – 2004.

55 UNHCR Monitoring Missions in HUNGARY – 2004.

56 UNHCR Monitoring Missions in HUNGARY – 2004.

57 IHF report on Places of Detention In Hungary, 2006, p. 5.

the decision regarding the imposition of asylum-seekers' alien policing detention or their placement in open reception centres 'depends on accidental circumstances and on arbitrary decisions of the authorities.'[58]

5. Cases were reported by lawyers working on behalf of the Hungarian Helsinki Committee concerning failed asylum-seekers who were summoned by the authorities to audiences without indicating that the principal aim of the interview was to place the failed asylum-seeker into alien policing detention. Although it is the legitimate aim of the state to ensure the enforceability of final RSDP decisions, the practice raises concerns of arbitrariness in light of the jurisprudence of Čonka v. Belgium.[59]

While Act II of 2007 abolishes detention for refusal, it does not resolve the similar contradictions surrounding alien policing detention described above in point 1. Unfortunately, Act II of 2007 similarly does not address the issues raised by points 2–4.

D) The habeas corpus

Besides ensuring the right of access to court, Hungary established a system of a built-in review guaranteeing the legality of ordering, and the lawfulness of maintaining, the alien policing measure involving deprivation of liberty.

i. Access to court

Although the foreigner is not entitled to demand the suspension of the alien policing measures involving deprivation of liberty or to submit an administrative appeal against the decision imposing detention, it is possible to file an application to the court within five days demanding the review of the legality of the alien policing measure entailing deprivation of liberty (Section 49 (1), Aliens Act of 2001). The Act II of 2007 prescribes that the third-country national could present an objection within 72 hours of ordering the alien policing detention (Section 57, Act II of 2007). The relevant, applicable international norms require the respect of the right of access to

[58] IHF report on Places of Detention In Hungary, 2006, p. 66.

[59] Čonka v. Belgium – 51564/99 [2002] ECHR 14 (5 February 2002) Available at: http://worldlii.org/eu/cases/ECHR/2002/14.html. Accessed: 5 March 2003.

court, thus these provisions are in compliance with the international requirements.

ii. In-built review and prolongation

The in-built review differs depending on the alien policing measure restricting the personal liberty of the applicant:

1. Detention for refusal and detention in preparation of expulsion:

   The competent Alien Policing Authority may order these types of detention for five days. Then, it is within the competence of the local court to decide on the prolongation until the departure of the foreigner, mostly for 30 days (Section 47(4), Section 48(3), Aliens Act of 2001). Concerning the detention in preparation of expulsion, the intervention of the local court is prescribed by the new Act II of 2007 after 72 hours as of the ordering of the detention measure (Section 55, Act II of 2007).

2. Alien policing detention:

   a) The review of the lawfulness of the alien policing detention

   After five days, the local court may prolong the detention upon the official motion of the Alien Policing Authority. If six months pass, the judicial review becomes the competence of the county courts. The county courts then decide upon the motivated, official motion of the Alien Policing Authority. The intervention of the local court is prescribed by the new Act II of 2007 after 72 hours as of the ordering of the alien policing detention upon the motivated motion of the Alien Policing Authority which shall be submitted to the court within 24 hours of ordering the alien policing detention (Section 54 (3), Section 58 (1), Act II of 2007).

   b) The review of the justification of the prolongation of the alien policing detention

   The court that prolongs the detention measure will examine its justification. At present, this examination is carried out by the local courts on the 90th day as of ordering the alien policing detention, and by the county court on the 90th day as of the prolongation of the detention measure after 6 months.

> The Act II of 2007 applies a stricter system of revision: the prolongation of the alien policing detention measure shall be reviewed every 30 days upon the motivated initiative of the Alien Policing Authority submitted eight days prior to the expiration of the detention measure.

iii. The scope of judicial review

In principle, the court shall assess the legality of the detention. The Aliens Act of 2001 does not specify whether the term 'legality' means lawfulness in the strict sense or the review of the justification of the imposition or continuation of the detention measure as well. The fact that with respect to the alien policing detention, Aliens Act of 2001 distinctively regulated the review of the justification of the prolongation of the detention measure, this might imply the former approach which is not in compliance with the relevant international norms. In practice, however, it seems that the courts often render their decisions automatically, based on the initiative of the alien policing authority and without duly assessing the relevant circumstances of the case or the possible applicability of the principle of *non-refoulement*.

Moreover, penal judges of local or county courts, who often have neither the necessary expertise to make a meaningful assessment of asylum cases nor the inclination to do so, and treat alien policing cases as a 'branch' of penal cases, are in most cases assigned to review the prolongation of alien policing detention measures. This is highly inappropriate, considering the non-penal character of alien policing cases and especially those of asylum-seekers.

II. COROLLARY PROVISIONS TO BE APPLIED

a) The humane treatment of persons deprived of liberty

Although Hungarian law prescribes the humane treatment of persons deprived of liberty, and there is a constitutionally protected right to freedom from torture, and inhumane or degrading treatment, serious concerns were raised by the IHF report on

the Places of Detention in Hungary regarding the adequate and effective protection of foreigners, and asylum-seekers in alien policing jails.[60]

b) The protection of family life

According to the general rules on the detention of foreigners, family members of different sexes are to be separated. Thus, they are not supposed to be accommodated in the same room or even on the same floor in the detention facilities. This would clearly apply to detained asylum-seekers as well. Nevertheless, the monitoring missions conducted by UNHCR revealed that asylum-seeker families tend to be exempted from alien policing measures involving deprivation of liberty, and are now more frequently accommodated in open reception centres.[61]

It is a significant improvement that Act II of 2007 explicitly states that a compulsory place of accommodation (e.g. reception centre or community shelter) can be designated for a third country national against whom a detention measure would be applicable but whose minor children would be left without supervision in case the detention measure would be implemented (Section 62 (1)).

[60] IHF report on Places of Detention In Hungary, 2006.

[61] UNHCR Monitoring Missions in HUNGARY – 2004.

B.1. Specific Requirements of International Refugee Law

I. IMPUNITY FOR ILLEGAL ENTRY OR STAY

Article 5 of the ECHR and Article 9 of the ICCPR render possible the ordering of the detention of foreigners including asylum-seekers under certain conditions elaborated above. However, Article 31 of the Geneva Convention provides explicitly that the State parties to the Convention refrain from imposing:

> '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'.

Moreover, the Article 31 (2) provides that only 'necessary' restrictions to the movements of refugees can be applied

> 'until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country'.

According to these norms, refugees illegally entering should not be penalised by applying excessive detention measures. In fact, the detention of asylum-seekers should be subject to specific norms in comparison to the norms governing the detention of foreigners.

II. THE SPECIFIC NORMS GOVERNING THE DETENTION OF ASYLUM-SEEKERS

With respect to the 'soft law' instruments related to the detention of asylum-seekers, it is necessary to turn to the relevant UNHCR guidelines and comments.[62]

[62] See also: UNHCR annotated comments on RD (2003); UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers February 1999; UNHCR, Executive Committee: Detention of asylum-seekers and refugees: the framework, the problem and recommended practice, EC/49/SC/CRP. 13 4 June 1999.

The core content of these soft law documents – which reflects the requirement of international human rights norms and the decisions of the relevant human rights bodies – repeatedly emphasizes that the detention of asylum-seekers shall be an exceptional measure applicable only if it is 'provided for by law', 'necessary to achieve a legitimate purpose' and 'proportionate to the objectives to be achieved.' Moreover, any such detention measure is to be ordered and maintained in a non-discriminatory manner and for a minimal period of time.

Nevertheless, widespread state practice ignoring these requirements is of great concern. It is not surprising that in 1998 the UNHCR Executive Committee Conclusions on International Protection[63] condemned that many countries routinely and arbitrarily detain asylum-seekers (including minors), 'for unduly prolonged periods', without ensuring the necessary safeguards such 'as adequate access to UNHCR and to fair procedures for timely review of their detention status.' Moreover, the necessity of the detention of refugees should be assessed on an individual basis while giving due consideration to 'alternative options, such as reporting requirements.'

Furthermore, the Executive Committee Conclusion[64] established which specific criteria relating to refugees should govern the individual assessment of the necessity of detention of asylum-seekers. Thus, detention may be necessary, for example 'to verify identity', 'to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities', or 'to protect national security or public order.'[65]

63 Executive Committee Conclusion No. 85 (XLIX) – 1998.

64 Executive Committee Conclusion No. 44 (XXXVII) – 1986, See also: UNHCR annotated comments on RD (2003).

65 Executive Committee Conclusion No. 44 (XXXVII) – 1986, See also: UNHCR annotated comments on RD (2003).

B.2. The Requirements of International Refugee Law in the Hungarian Legal Framework

I. IMPUNITY FOR ILLEGAL ENTRY OR STAY

Although Law Decree No. 15 of 1989 promulgated the 1951 Geneva Convention, there is no explicit reference to the provision contained by Article 31 of the 1951 Geneva Convention in the Aliens Act of 2001 containing the principal legal norms governing the detention of foreigners. This considerably hinders the effective implementation of this provision, and as a result, remains practically unnoticed and, in practice, unapplied.

II. THE SPECIFIC NORMS GOVERNING THE DETENTION OF ASYLUM-SEEKERS

As it has already been illustrated above, no fundamentally different criteria relate to ordering and maintaining the detention of asylum-seekers arriving illegally to Hungary than those applicable to other foreigners. Therefore, the general rules of the alien policing norms apply to asylum-seekers as well. Moreover, concerns were raised regarding the requirements of legality, proportionality (excessive length) and non-discriminatory imposition of detention measures demanded by not only the applicable, general human rights norms, but also by the relevant UNHCR guidelines, comments and Executive Committee Conclusions. Similarly, before the ordering of the detention of asylum-seekers, there is no specific duty to assess, in particular, the personal circumstances of the person seeking international protection (including his or her mental state), and the possible alternatives of detention or to take into consideration the special circumstances of the submission of the application. This latter analysis should include an assessment of all valid reasons (including e.g. illness, trauma, lack of access to information, the need to consult a legal counsellor or cultural sensitivities)[66] that could legitimately hinder the addressing of the competent

[66] UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005. Available at: http://www.unhcr.org/home/RSDLEGAL/42492b302.pdf. Accessed: 10 August 2005UNHCR Provisional Comments on the Draft Procedure Directive, February 2005.

authorities, especially in light of the protection provided by Article 31 of the Geneva Convention before imposing any alien policing measure involving deprivation of liberty. Note shall be taken, that – in theory – under the general, applicable rules, both the Alien Policing Authority and the courts reviewing the prolongation of the detention measure could conduct such an assessment since the imposition of the detention measure is never compulsory in the case of foreigners (asylum-seekers) breaking rules of entry or stay.

C.1. The Specific Protection of Persons with Special Needs Under International Human Rights Law

I. THE PROTECTION OF CHILDREN

a) The protection provided by the Convention on the Rights of the Child (CRC)

Detention of children can be highly detrimental to their development, as well as their emotional and physical well-being; therefore, the Convention on the Rights of the Child prescribes specific protection against the arbitrary, excessive detention of children. The detrimental effects of detention especially endanger asylum-seeker children who might have suffered from malnutrition, poverty and experienced traumatic events or loss before arriving in the country of asylum. The detention of these children can lead to depression, confusion, and changes in behaviour, in addition to refusal to eat, weight loss, lack of sleep, and skin problems. Detention can result in re-traumatization as well. Moreover, children are also 'directly affected by the distress and depression of their adult family members.'[67] Furthermore, the detention of children might also preclude their exercise of important rights protected by the CRC including, for example, the right to education.

The CRC, besides confirming the principle of the best interest of the child, also provides for specific protection of the child against arbitrary detention (Article 37 (b)–(d) of the CRC). On the one hand, the provisions of Article 37 (b)–(d) reflect the requirements of the general human rights instruments (lawfulness, protection against arbitrary detention, prompt judicial review). Furthermore, Article 37 (b) also prescribes that the detention of a child should be applied as 'a measure of last resort and for the shortest period of time' and every child deprived from his or her liberty – besides being treated with humanity – shall receive legal and other

[67] Alternatives to immigration detention of families and children: A discussion paper by John Bercow MP, Lord Dubs and Evan Harris MP for the All Party Parliamentary Groups on Children and Refugees Supported by the No Place for a Child Coalition July 2006. Available at: http://www.noplaceforachild.org/report.pdf. Accessed: 10 October 2006.

appropriate assistance (37 (c)). Specific requirements govern the conditions of detention (e.g. separation from adults unless the best interest of the child requires otherwise).

b) General comment no. 6 (2005) treatment of unaccompanied and separated children outside their country of origin[68]

In General Comment No. 6, the aim of Committee on the Rights of the Child was to identify a number of protection gaps in the treatment of unaccompanied and separated children. Special emphasis was given to the situation of asylum-seeking unaccompanied and separated children. In fact, these children in many countries face a particularly great risk of detention, as they are routinely denied entry or detained by border or immigration officials.[69]

The Committee, nevertheless, established that according to Article 37 of the CRC and the principle of the best interest of the child, that the detention of unaccompanied or separated children should be an exceptional measure.

The detention of the child cannot be justified solely on the basis of his or her being unaccompanied or separated, or on his or her migratory status. Where detention proves to be exceptionally justified for other reasons, it shall be applied in conformity with the domestic law and it can only to be used as a measure of last resort and for a minimal period of time while appropriate steps are to be taken 'to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.'[70] The Committee also reinforced that besides domestic law, international obligations constitute part of the law governing detention. Furthermore, in the exceptional case of detention, its conditions should be adapted to the best interest of the child (including e.g. medical care and psychological treatment, prompt and effective access to legal assistance.)

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68 Committee on the rights of the child thirty-ninth session 17 May–3 June 2005 general comment no. 6 (2005) treatment of unaccompanied and separated children outside their country of origin (hereinafter: CRC/GC/2005/6).

69 CRC/GC/2005/6, p. 5.

70 CRC/GC/2005/6, p. 18.

With respect to asylum-seeking unaccompanied and separated children, special emphasis should be given to Article 31 of the Geneva Convention. General principles of law may also justify the illegal entry into or stay of an unaccompanied or separated child if it remains the 'only way of preventing a violation of the fundamental human rights of the child' (trafficking, exploitation).[71] The criminalisation of these children solely for reasons of illegal entry must be avoided.

II. WOMEN

The UN Convention against the Elimination of All Forms of Discrimination against Women does not explicitly exclude the detention of female asylum-seekers. Nevertheless, Article 10 of the International Covenant on Economic, Social and Cultural Rights provides for the specific protection of mothers. However, the detention of asylum-seeking women should be avoided since these women, like children, are also 'vulnerable to physical and mental health problems' in addition to the 'high incidence of rape as a form of persecution perpetuated on women asylum-seekers'.[72]

III. TRAUMATISED PERSONS, VICTIMS OF VIOLENCE

No specific international norms exclude explicitly the detention of traumatised persons and victims of abuse or violence. Nevertheless, no one shall be subjected to inhumane, degrading treatment. The detention of mentally or seriously disturbed traumatised persons, considering the detrimental effects of detention, in alien policing jails could amount to such treatment.

71 CRC/GC/2005/6, p. 18.

72 Alternatives to immigration detention of families and children A discussion paper by John Bercow MP, Lord Dubs and Evan Harris MP for the All Party Parliamentary Groups on Children and Refugees Supported by the No Place for a Child Coalition July 2006.

IV. FAMILY

With respect to the detention of families, it must be considered that there is no evidence that families abscond when there is a threat of detention or removal.[73] Meanwhile, the detention of families, including children, is not consistent with the best interest of the child. On the other hand, the separation of the family would also be contrary to the right to family life. Therefore, in the case of families, it is highly important to envision alternatives to detention, including reporting duties, bail or electronic surveillance.

[73] Alternatives to immigration detention of families and children A discussion paper by John Bercow MP, Lord Dubs and Evan Harris MP for the All Party Parliamentary Groups on Children and Refugees Supported by the No Place for a Child Coalition July 2006.

C.2. The Implementaion of the Norms Relating to Persons with Specific Needs in Hungary

I. THE PROTECTION OF CHILDREN

Considering the second periodic report by Hungary, (Hungary CRC/C/70/Add.25) the Committee on the Rights of the Child adopted a number of concluding remarks on 18 January 2006.[74]

With respect to the application of the general principle of the best interest of the child, the Committee expressed its concern that although this is consistently required by law, it is not always respected in practice, especially in the case of children belonging to vulnerable groups such as refugee and asylum-seeking children.[75]

Regarding the special protection measures concerning asylum-seeking children, the Committee acknowledged the developments and improvements achieved by the government, including the establishment of a special residential facility. The Committee also recommended that Hungary should take into account General Comment No. 6 (2005) concerning the treatment of unaccompanied and separated children.[76]

Under Section 52 (4) of GD 170/2001, unaccompanied minors cannot be detained. Nevertheless, the Committee noted with concern that children continue to be victims of arbitrary detention.[77]

Act II of 2007 makes possible the designation of a compulsory place of residence to minors against whom an alien policing measure involving deprivation of liberty would be applicable (Section 62 (1)).

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74 Committee on the Rights of the Child forty-first session consideration of reports submitted by states parties. Under article 44 of the convention Concluding Observations: Hungary; CRC/C/HUN/CO/2, 17 March 2006.

75 CRC/C/HUN/CO/2, 17 March 2006, p. 5.

76 CRC/C/HUN/CO/2, 17 March 2006, p. 12.

77 CRC/C/HUN/CO/2, 17 March 2006, p. 6.

II. WOMEN

The Committee on the Elimination of Discrimination against Women in its Concluding Observations issued in 1996[78] noted with concern the discrimination of asylum-seeker women in Hungary. The detention of asylum-seeking women is not precluded as such. With respect to the conditions of the detention of women, it was revealed by UNHCR during its monitoring missions in 2004 that more detention facilities were used to accommodate female detainees than in previous years. Nevertheless, the living conditions of the female asylum-seekers detained in the 'newly' utilised detention facilities proved to be of great concern as no female border guards worked there, and the facilities designed for female detainees lacked adequate services. In fact, 'female detainees do not have, for example, access to the courtyard for open air activities.'[79] This, however, besides being insensitive to gender-related specificities, may lead to a discriminatory, less favourable treatment of female asylum-seekers in detention.

In September 2006 a Roma family (two adults with three underage children) was detained for up to 30 days. They were intercepted by the Border Guard on the green border between Hungary and Serbia. Due to the inapplicability of the relevant readmission treaty, there was no chance of their deportation in the near future. Their detention for refusal was, nevertheless, ordered by the Kiskunhalas Border Guard Directorate, and their detention was confirmed during the mandatory judicial review as well. Each member of the family had submitted asylum claims. The Border Guard and the Prosecutors' Office were of the opinion that the detention of the asylum-seeker family, including the underage children, was neither contrary to the relevant Hungarian norms nor contrary to the applicable international law norms. While this might be true since under the Hungarian norms only the detention of unaccompanied minors is precluded, the detention of asylum-seeker children should be a measure of last resort. Other alternative solutions including the placement of the family in community shelters should have been envisaged.

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78 Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Hungary. 09/05/96. A/51/38, paras. 229–264.

79 Consultations with Dr Agnes Ambrus, national protection officer, UNHCR Regional Representation for Hungary, Poland, Slovakia and Slovenia, September 2005.

The amendment introduced by Section 62(1) of the Act II of 2007 allowing for (but not requiring) the designation of a compulsory place of residence in similar cases is a significant step forward to eliminate the possibility of detention of families with children, though families will still not be exempted *per se* from the application of alien policing measures involving deprivation of liberty.

III. TRAUMATISED PERSONS, VICTIMS OF VIOLENCE

No specific norms govern the health care of seriously ill or mentally disturbed asylum-seekers (and foreigners) detained in alien policing jails. Remand prisoners or convicts are transported to the Central Prison Hospital in Tököl, or to the Forensic Observation and Psychiatric Institution (IMEI) in Budapest, but this option is excluded in the case of foreigners (including asylum-seekers). In their case, the local hospital is available, which might not offer sufficient psychiatric treatment and increase the burden of the Border Guards as they need 4 or 5 officers to guard one detainee.[80]

Many asylum-seekers suffered trauma or torture, which renders their mental health precarious. Still, victims of torture or violence are not exempted from the implementation of the lengthy alien policing detention. The IHF delegation, in its report on Places of Detention in Hungary, expressed concern over the 'health care for seriously ill or mentally disturbed foreigners in alien policing jail is not solved in the Hungarian system at all'.[81]

[80] IHF report on Places of Detention In Hungary, 2006, p. 68.

[81] IHF report on Places of Detention In Hungary, 2006, p. 5.

D.1. The Applicable EU Norms

I. GENERAL NORMS TO BE APPLIED

The regulation of the detention of asylum-seekers did not form a focal point of either pertinent EU directives. In fact, in-depth analysis shows that the relevant articles of the Procedure Directive[82] and the Reception Conditions Directive[83] do not seem to provide adequate safeguards with respect to the general requirements established by applicable human rights norms.

Article 18 of the Procedure Directive reaffirm that no one shall be detained for the sole reason of submitting an application, although it seems to be obvious that this principle would need further elaboration[84] in view of the requirements of international law. Article 7 of the Reception Conditions Directive makes possible the confinement of the applicants – in accordance with the national law of Member States – if it 'proves necessary' due to 'legal reasons' or 'public order'. This being in reality an extremely broad formulation leaves a large margin of appreciation to Member States, which appears to be incompatible with the wording and objective of either the ECHR or the ICCPR. Nevertheless, Article 18 of the Procedure Directive prescribes that if the applicant is in detention, the possibility of a speedy judicial review shall be provided.

Moreover, Article 7 of the Reception Conditions Directive provides for the designation of the residence of the applicants 'for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring' of the claim. Under Article 6(1) of the Reception Conditions Directive, it is not mandatory either to provide documentation to asylum-seekers in detention.

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82 Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status Official Journal L 326/13 of 13. 12. 2005.

83 Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers Official Journal L 31 of 06.02.2003.

84 These include in particular Article 9 of the International Covenant on Civil and Political Rights, 1966; Article 37 of the Convention on the Rights of the Child, 1989; Article 5, Convention for the Protection of Human Rights and Fundamental Freedoms (04. 11. 1950, Rome) ETS No.: 005, Executive Committee Conclusion No. 44 (XXXVII) – 1986.

II. THE PROTECTION OF PERSONS WITH SPECIAL NEEDS

The Reception Conditions Directive and the Procedure Directive contain detailed rules on the protection of vulnerable groups such as children, unaccompanied minors, and victims of torture and violence who shall receive the necessary treatment of damages caused by the aforementioned acts. Children who were subject to any forms of abuse should in particular have access to rehabilitation services, while unaccompanied minors are entitled to legal representation and special rules governing their accommodation (Section 17–20, Reception Conditions Directive, Article 17, Procedure Directive). Nevertheless, the detention of people with special needs is not excluded under the EU norms.

D.2. The Implementation of the EU Norms in Hungary

The transposition of the general provisions of the Reception Conditions Directive has not resulted in substantial changes to the Hungarian legal framework of the detention of asylum-seekers, while the protection of persons with special needs in the Hungarian system is still not in compliance with the requirements of the Directive. Asylum-seekers in detention are not provided with documentation certifying their applicant status under Article 6(1) of the Reception Conditions Directive. If they are transferred to another detention facility, they cannot prove their asylum-seeker status, and thus the risk of refoulement increases.[85]

Additionally, it is predictable that the transposition of the Procedure Directive will not lead to considerable alterations with respect to the conditions of the detention of asylum-seeker.

[85] UNHCR Monitoring Missions in HUNGARY – 2004.

III. Access to Refugee Status Determination Procedure, Procedural Safeguards

a) The submission of an application

Although any application submitted during detention shall be forwarded to the Refugee Authority on the single basis of the submission of an asylum application in detention – as was mentioned above – detention shall not cease (Section 48A, Aliens Act of 2001).

b) Late applications

There are no rules – in line with Article 8 of the EU Procedure Directive or the views of UNHCR – which would exclude the examination of the application or prescribe its rejection on the sole ground that it has not been presented earlier (Act on Asylum, Section 31).[86] Nevertheless, if the applicant entered illegally and 'had the opportunity to apply for asylum before an expulsion decision was made according to the alien policing procedure, but failed to do so' (Section 43, Act on Asylum), his or her case can be processed in an accelerated procedure. However, the imposition of a detention measure can reduce considerably the chances of the application to succeed and thus creates an indirect obstacle to the access to a fair and full asylum procedure. For example, while in detention only one personal interview is held, otherwise more interviews are conducted.

[86] UNHCR Provisional Comments on the Draft Procedure Directive, February 2005.

c) Legal assistance and representation

The legal assistance and representation is provided to asylum-seekers under the Act on Asylum, and free legal aid is available, as well in conformity with Act LXXX of 2003 on Free Legal Aid.[87] (In theory both in the administrative and the judicial phase, in reality – due to the lack of state funds – only in the administrative phase since the relevant provisions will not enter into force till 1 January 2008.

Asylum-seekers, as other foreigners detained in alien policing jails, are entitled to maintain contact with their legal representative (Section 54(3) b, Aliens Act of 2001). Nevertheless, no specific rules apply to the modalities of the access of legal representatives to the detainees. Although it was formerly restricted, in 2002 the Hungarian Helsinki Committee and the National Border Guard Headquarters concluded a cooperation agreement, which can be considered as good practice. Under this cooperation agreement, lawyers and refugee law clinic students may make regular visits to the detention facilities maintained by the border guards.

The access to documents and the presence of the legal representative at the interviews is regulated by the general rules applicable to public proceedings.[88] Nevertheless, the occasional transfer of asylum-seekers from one detention facility to another may hinder the access to documents by the legal representative.

d) Effective judicial review

As it is indicated above, it is questionable whether the courts conduct a meaningful judicial review. Some courts tend to restrict themselves to the assessment of the legality (in the strict sense) of the imposition and prolongation of the alien policing measure involving the deprivation of liberty. Thus the assessment of the justification of the detention order or of its prolongation is not often conducted by the courts. Although the alien policing detention shall be terminated if it is obvious that the expulsion order cannot be implemented,

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87 Section 4(1) b; 5(d); 12 (2)(a); 16(a) Act LXXX of 2003, promulgation in the Official Journal: 06.11.2003, in force since: 01.04.2004.

88 Section 5(4), 40(1), 51(1), 68 -69, Act CXL. of 2004 on the general rules of Public Proceedings and Services (Act on Public Proceedings adopted by the Parliament on 20. 12. 2004. Entered into force: 01.11.2005.).

'this provision is practically never applied by the courts, as according to the judicial practice that has developed in the past years, judges are not in the position to establish whether an expulsion order can or cannot be executed, unless the alien policing authorities declare that the expulsion is not executable.'[89]

[89] IHF report on Places of Detention In Hungary, 2006, p. 66.

IV. Recommendations

The amendments introduced by Act II of 2007 contain several improvements, including the restriction of the maximum duration of the alien policing detention to six months. Moreover, the Alien Policing Authority will only be entitled to order the detention of foreigners for 72 hours, which could be extended only by the court. In addition, the different types of alien policing detention measures will be simplified and compulsory cases of alien policing detention, as well as the detention for refusal, will be abolished. Furthermore, provisions aiming at the protection of family life, and the exemption of minors from the implementation of alien policing measures involving deprivation of liberty, will be introduced.

Nevertheless, the regulation of alien policing detention remains largely insensitive to the specific cases of persons seeking international protection. This might be compensated by the prospective amendments of the Act CXXXIX of 1997 on Asylum or by the amendments of the implementing Government Decrees, although it would be more appropriate to lay down the most important specific regulations in the Aliens Act.

1. The detention of asylum-seekers in Hungary is the consequence of the application of alien policing rules to asylum applicants.
    a) Article 31 of the Geneva Convention should be explicitly incorporated into the Aliens Act.
    b) The regulation of the detention of asylum-seekers should be separated from the detention of foreigners. No expulsion order should be imposed before the adjudication of the asylum application or at least without a due assessment of the applicability of the principle of non-refoulement. Although in principle the Alien Policing Authority is

obliged to assess the principle of non-refoulement before ordering the expulsion of a foreigner, this evaluation is to remain mechanic and non-specific. In this respect, the involvement of the OIN could be envisioned by providing the necessary expertise and country information.

c) In principal, the detention of asylum-seekers should be an exceptional measure; this criterion should be inserted into the rules on alien policing detention measures. In this respect, previous absconding or the submission of a subsequent application might also be duly taken into consideration.

2. An amendment of the existing, applicable rules would be necessary to avoid the possibility of arbitrariness.

   a) Any order imposing any of the forms of detention measures must be preceded by careful assessment of the personal situation of the asylum-seeker and of the specific circumstances of his or her case. In this respect, the involvement of the Refugee Authority of the OIN could be envisaged in order to evaluate the necessity or appropriateness of the detention measure, for example, in the form of a proper admissibility procedure to assess whether the application is manifestly abusive or unfounded. The admissibility assessment should be carried out by the OIN within a maximum of 10–14 days.

   b) The Border Guard or the Alien Policing Authority of OIN should refrain from imposing any alien policing measure involving deprivation of liberty without duly assessing the validity of the reasons which hindered the earlier submission of the application. No detention measure should be ordered or implemented if the applicant can substantiate, or it seems to be obvious, from the circumstances of the claim[90] that such valid reasons exist and no other circumstances necessitate his or her detention.

[90] E.g. asylum-seekers intercepted while heading for a reception centre.

c) Clear, unambiguous, and specific criteria should be established, following the guidelines of UNHCR, in order to regulate the possible, necessary cases of the detention of asylum-seekers, and protect national security or public order. This includes the verification of identity in cases where refugees or asylum-seekers have destroyed their travel and/or identity documents, or have used fraudulent documents in order to mislead the authorities.[91]

d) Before imposing an alien policing measure implying deprivation of liberty, other alternative forms of control must be assessed. These alternative measures might imply placement in community shelters, reporting duties, bail or electronic surveillance. The detention of asylum-seekers should be regarded as proportionate only if the authority can justify that these alternative controlling measures are not applicable or appropriate.

e) The maximum length of the detention of asylum-seekers should be proportionate to the achievable objective. In any case, it should not exceed one month. In principle, the alien policing detention should end when it is obvious that its aim cannot be achieved. In the case of a person submitting an asylum application it is likely – in particular if we consider the adopted amendment – that it cannot be executed during the maximum period of six months of an alien policing detention. Therefore it might only be justified for a limited period of time when the specific cases mentioned by UNHCR guidelines are concerned.

f) The stay of asylum-seekers at the airport should be minimised. In any case, the right of access to court must be provided.[92] Moreover, persons with special needs (separated children, elderly, and the sick and traumatized) should be explicitly exempted and admitted to the territory.

[91] Executive Committee Conclusion No. 44 (XXXVII) – 1986, See also: UNHCR annotated comments on Reception Conditions Directive (2003).

[92] UNHCR Provisional Comments on the Draft Procedure Directive, February 2005.

3. In order to ensure the protection of persons with special needs besides unaccompanied minors, children, victims of torture, sexual violence or traumatized persons and families, persons with serious mental or physical disability should be explicitly exempted from detention.[93] If such an exemption is not applied, the assessment of alternative measures must be of particular importance. Such an assessment is also of primary importance in the case of vulnerable persons such as unaccompanied elderly persons, nursing mothers, and pregnant women.

4. Moreover, judicial review should meaningfully consist of both the thorough assessment of the legality and the justification of the detention order or its prolongation. The aim of the judicial review should be to exclude arbitrariness. Inactivity of authorities should lead to the termination of the detention if no other pertinent reasons necessitate the detention of asylum-seekers (public order, etc).

   It is also questionable whether local (county) courts have the necessary expertise to deal with asylum cases. Judicial review should also be based on relevant country information. In this respect, the involvement of the Refugee Authority in the procedure might also be envisioned. It must be clear to the judges that in asylum cases, the genuine risk of persecution leads to a deportation ban, and absolute certainty is not required. It is also unfortunate to assign alien policing cases of asylum seekers to penal judges, whose specific awareness-raising training is recommended.

[93] See also: UNHCR annotated comments on Reception Conditions Directive (2003).


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