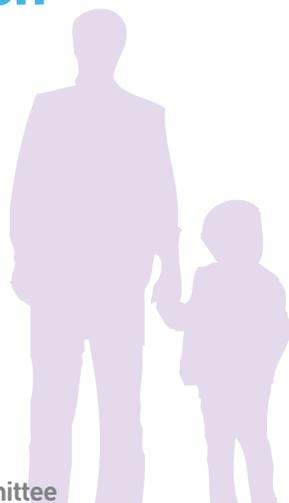


DUBLIN II Regulation National Report

**European network for technical
cooperation on the application
of the Dublin II Regulation**



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Acronyms

HHC – Hungarian Helsinki Committee

OIN - Office for Immigration and Nationality

TCN Act – Third country nationals Act

This report reflects the situation as of October 2012.

Chapter Recent development at the end of the report contains brief information on subsequent developments.

1.1. The Dublin II system: perspectives and challenges at the European level

The Dublin Regulation,¹ as its predecessor the Dublin Convention, was designed to ensure that one Member State is responsible for examining the asylum application of an asylum seeker and to avoid multiple asylum claims and secondary movement. It is confined to fixing uniform grounds for the allocation of Member State responsibility on the basis of a hierarchy of criteria binding on all EU Member States as well as Iceland, Norway, Switzerland and Liechtenstein. On the ten year anniversary of its entry into force this research provides a comparative overview of national practice in selected Member States on the application of this Regulation.

Our research shows that the operation of the Dublin system continues to act to the detriment of refugees, causing families to be separated and leading to an increasing use of detention. The Dublin procedure leads to serious delays in the examination of asylum claims and by doing so, effectively places peoples' lives on hold. The hierarchy of criteria is not always respected whilst there is a disproportionate use of Art. 10 linked to irregular entry. State practice demonstrates that asylum seekers subject to this system may be deprived of their fundamental rights *inter alia* the right to be heard, the right to an effective legal remedy and the very right to asylum itself as access to an asylum procedure is not always guaranteed. Reception conditions and services may also be limited for asylum seekers within the Dublin system in a number of Member States. As regards Member State co-operation there is an increasing use of bilateral administrative arrangements under Art 23 and most States resort to informal communication channels

¹ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, L 50/1 25.2.2003.

to resolve disputes in the allocation of responsibility. Evidentiary requirements are very stringent in some Member States making it difficult for asylum seekers to substantiate family links or show time spent outside the territory of the Dublin system. A number of Member States also apply an excessively broad interpretation of absconding thereby extending the time limits for Dublin transfers further increasing delays in the examination of asylum claims. Furthermore the problems inherent in the Dublin system are also exacerbated by varied levels of protection, respect for refugee rights, reception conditions and asylum procedures in Member States creating an 'asylum lottery'.

The national reports provide an insight into the application of this Regulation at the national level whilst the comparative report outlines the main trends and developments at the European level. This research comes at a time when the Grand Chambers of both the European Court of Human Rights and the Court of Justice of the European Union have pronounced on the compatibility of the Dublin system with asylum seekers fundamental rights. In addition the EU institutions have recently reached a compromise agreement upon a recast Dublin III Regulation that introduces significant reforms including the creation of a mechanism for early warning, preparedness and crisis management. Despite these significant advances, the findings of this research demonstrate the continuous need to carefully evaluate the foundational principles of the Dublin system and its impact both with respect to asylum seekers' fundamental rights and Member States. It is hoped that this research will aid the Commission's review of the Dublin system within the forthcoming launch of a 'fitness check' in 2014.²

² European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum, An EU agenda for better responsibility-sharing and more mutual trust, COM 2011 (835), 2.11.2011 p.7.

1.2. Overview of the Dublin II Regulation in Hungary

Hungarian asylum system was subject to criticism by several national, international inter- and non-governmental stakeholders³ during the project implementation period in which Dublin II related issues were raised as well. These concerns were – in several cases – dealt with which resulted the changes in policy,⁴ legislation and in practice to some extent. This report aims at providing a snapshot on the current state and functioning of the Dublin II system in the Hungarian context and intends to reflect on the dynamics which the lawyers and staff members of the Hungarian Helsinki Committee observed.

Hungary can be described as a mainly receiving country where the legal environment is fully EU compatible; however, shortcomings may be detected with regards to the consistent application of those rules.

1.3. Methodology

The information contained in this report was obtained through desk-based research, from the Hungarian Dublin Unit's answers to the questionnaire sent for the purpose of compiling this report and from the experience gathered by the Hungarian Helsinki Committee (hereinafter the HHC) through its daily work with asylum seekers.

³ I.e.: UNHCR Note on Dublin transfers to Hungary of people who have transited through Serbia, October 2012, <http://www.unhcr.org/refworld/pdfid/507298a22.pdf>

⁴ Hungarian government changed the practice regarding the assessment of the Dublin transferee's claims, revised its detention practice: "As of 15 July 2012 within the framework of existing national legislation Hungarian authorities examine each asylum application submitted by persons transferred under the Dublin procedure in merit. During the refugee status determination procedure as a general rule asylum seekers are accommodated in open reception facilities and provided with basic living conditions." in.: <http://www.kormany.hu/en/ministry-of-interior/news/the-ministry-of-interior-s-response-to-unhcr-s-note-on-asylum-seekers> [11 October 2012].

2

The National Legal Framework and Procedures

2.1. Legal background

The asylum procedure is regulated in the Act LXXX of 2007 on Asylum (hereafter the Asylum Act) and Government Decree 301/2007 (XI.9.) implementing the Asylum Act (hereafter the Asylum Act Gov. Decree). Relevant legal sources also include Act no. II of 2007 on the Admission and Right of Residence of Third-Country Nationals (hereafter the TCN Act) and Government Decree 114/2007. (V.24.) implementing the TCN Act (hereafter the TCN Gov. Decree). All these legal instruments refer to the Dublin II Regulation, but the Regulation has not been fully transposed into national legislation since it is directly applicable.

The authority in charge of asylum is the Office of Immigration and Nationality (hereinafter the OIN), which falls under the Ministry of Interior. No formal requirements exist to seek asylum. An asylum application is valid both in written and oral form and submitted in any language to any public administration body. If the asylum seeker submits the application at another authority, the authority is obliged to forward it without delay to the OIN. The OIN then has to start the procedure and duly inform the asylum seekers on their rights and obligations in the applicant's mother tongue or in another language which he/she understands.

The Hungarian asylum procedure has two instances: the first instance administrative procedure and the judicial review procedure at the second instance. The first instance procedure consists of two phases: of the admissibility (preliminary assessment) procedure and the in-merit (detailed assessment) procedure. Subsequent to the submission of the asylum application, OIN makes a photograph of the applicant and if s/he is older than 14 years, the authority takes his/her fingerprints on order to share with the EURODAC database. The applicant is obliged to undergo a health screening process as

well and if needed, s/he is subjected to medical treatment.. In the first interview the asylum seeker has to provide information on his/her personal identity, the route of the flight, connections with smugglers, family members and civil status and a rather brief explanation of the personal flight story, which is not examined in-depth at this stage of the procedure. In the case that the Dublin procedure is applicable, the admissibility procedure is suspended until the decision in the Dublin procedure is reached.

The OIN can decide that the asylum application is inadmissible in the following cases:

- the asylum seeker is a citizen of an EU Member State;
- the asylum seeker has already been recognized as a refugee by another Member State
- the asylum seeker has already been recognized as a refugee by a third country and the country in question is prepared to admit the applicant;
- a safe third country concept can be applied;
- the application is submitted on the same factual ground.

According to the section 51 (5)-(6) of the Asylum Act, the application is manifestly unfounded if the applicant:

- a) communicates only irrelevant or poorly relevant information in connection with his/her recognition both as a refugee and beneficiary of subsidiary protection;
- b) as a result of his/her conduct in bad faith, he/she is not able to verify or substantiate his/her country of origin; or
- c) he/she has failed to put forward an application for recognition within a reasonable time, though he/she had had the option to submit it earlier, and he/she is unable to justify the delay with reasonable grounds; however, the application may not be rejected solely on the basis of such delay;

The admissibility procedure can last up to 30 days. In Dublin cases it can take longer due to the suspensive effect of the Dublin procedure. If the asylum seeker applies at the airport, the OIN has to finish the admissibility procedure within 8 days. During that time the asylum seeker is kept at the airport in a transit zone.

If the OIN decides that the asylum application is inadmissible, the asylum seeker has a right to appeal to the court of his/her residence⁵ within 3 days and the court decides on the case in a non-litigious proceeding, in which personal/oral hearing is only held if applicant has explicitly requested it. The appeal has a suspensive effect.

If the application is admitted to the in-merit procedure, one or more substantive interviews take place. The OIN decides on the merits of the case and can either reject the application or grant one of the following protection statuses: refugee status (for indefinite period), subsidiary protection (for 5 years) or tolerated status⁶ (for 1 year).

The applicant has a right to request judicial review of the in-merit decision within 15 days. The court can review the facts and the application of law. The court will conduct the hearing and decide either to reject the appeal, to annul the OIN's decision and order re-examination of the case in a new in-merit procedure, or to grant one of the protection statuses.

For subsequent applications, Asylum seekers can start a new asylum procedure, but only if they can present important new facts or circumstances that were not considered in their previous asylum procedure. Subsequent asylum applications⁷ no longer have suspensive effect on the execution of the expulsion, if the Hungarian authority or court decided in its previous examination of the asylum applicant's claim and/or appeal or in the course of an expulsion procedure, that the prohibition of *refoulement* was not applicable. Rights to benefits and accommodation are also limited in subsequent asylum procedures (see more details in Section 3.6.1.2. Reception conditions for asylum seekers returned under the Dublin procedure).

5 The Budapest Metropolitan Court had by law exclusive jurisdiction over the appeals, but from April 2011, four regional courts (Budapest, Szeged, Debrecen, Győr) were assigned by the amended Asylum Act to review the first instance administrative decisions and in the new law the jurisdiction of the Regional Courts is determined by applicant's place of residence (either private place, detention centre or reception centre) which is designated by the asylum authority.

6 A protection status based on a general (not individualized) risk of harm in the country of origin.

7 The term "subsequent" refers to an application submitted once a previous asylum procedure has been closed with a final decision or has been discontinued (closed without a decision on the merits of the claim, e.g. because the person absconded in an early phase of the procedure).

Rights of asylum seekers:

- right to an interpreter during the procedure;
- right to request an interpreter and an asylum officer of the same sex;
- right to receive a written copy in Hungarian of all decisions taken during the asylum procedure;
- right to be informed about the content of the decision(s) in a language that asylum seeker understands;
- right to free legal assistance from a lawyer and/or from a non-governmental organisation;⁸
- right to contact the UNHCR;
- right to receive a humanitarian residence permit (a temporary permit stating that a person is under an asylum procedure) when the asylum application gets to the in-merit procedure, but only if the asylum seeker is not in detention;
- right to receive a monthly allowance once the asylum application gets to the in-merit procedure so long as it is the first asylum procedure and the asylum seeker is not detained and is not staying in a private apartment;
- right to basic medical care and emergency medical assistance;
- right to work, but only inside the reception centre.⁹ If the asylum procedure takes longer than a year, the asylum seeker has a right to work outside the camp, but he/she first needs to obtain a valid work permit;

⁸ In Hungary asylum seekers are automatically eligible for free legal aid, unless it is proven that they have enough financial resources themselves to obtain such aid. For more information on free legal assistance see Section 3.5.3. Effective remedy.

⁹ This right to work is enforceable from the moment the application is referred to the in-merit procedure but only pertains to employment within the reception centre where the applicant is staying.

- children have the right to go to school. If they are present in the country for less than a year, they can attend school only if the parents request it.

During the asylum procedure, asylum seekers are either detained in immigration jails or placed in the open reception centre in Debrecen or the community shelter in Balassagyarmat (for those with subsequent asylum claims who are not detained). Unaccompanied minors are placed in the children's home in Fót. The maximum duration of immigration detention is 30 days for families with children and 12 months for all others. Unaccompanied minors are exempted from immigration detention if their age is not disputed by the proceeding authorities (the Police and the OIN).

2.2. Procedural background

2.2.1. Triggering of the Dublin II Regulation

The examination of whether the Dublin II Regulation is applicable is usually part of the admissibility phase of the asylum procedure. If a Dublin procedure is initiated, the admissibility procedure is suspended until a Dublin decision determining the responsible country for examining the asylum claim is issued. Once the OIN issues a Dublin decision, the asylum seeker can no longer withdraw his/her asylum application.¹⁰ A Dublin procedure can also be triggered once the case is referred to the in-merit procedure¹¹, but the Dublin procedure shall only be conducted until the OIN takes a decision on the merit of the claim.¹² Finally, the apprehension of an irregular migrant can also trigger the Dublin II Regulation.

¹⁰ Asylum Act, Section 49 (4).

¹¹ It may occur that the result of the EURODAC test is received after the case was referred to the in-merit procedure. In such case the adjudicator shall send an "official request" to the Dublin Coordination Unit in which the refugee authority informs he DCO about - the personal data of the applicant, - the date of his/her application, - ref. number, date and place of the hit found by the Dactyloscopy Department of the Hungarian Institute for Forensic Sciences found in the EURODAC system. Caseworker shall also enclose the copy of the interview record(s) and the aliens policing preliminaries of the case. So, Dublin procedure can be conducted in the in-merit phase exceptionally, but always before the administrative decision is served.

¹² Section 96 (2) of Asylum Act Gov. Decree.

2.2.2. *Judicial review of Dublin decision*

The decision on the transfer is served in a written ruling served by the Dublin Coordination Unit which shall comply with Section 19 (1)-(2), the Section 20 (1) e) of the Dublin II Regulation¹³ as well as the measures prescribed by Article 72.§ (2) of the Act CLX of 2004 on the General Rules of Administrative Proceedings and Services¹⁴ the ruling shall be served in writing¹⁵. The Office of Immigration and Nationality does not provide the a/s with written translation of the Dublin ruling, but they do explain it orally in a language that asylum seeker understands. Asylum seekers have the right to start a judicial review of a Dublin decision within 3 days, before a regional court, depending on the place of their accommodation. The court can examine the facts and the law of the case. The court of jurisdiction is a regular county court and is not specialised in the asylum cases. The court examines the lawfulness of the Dublin decision and has to decide in 8 days. A personal hearing is specifically excluded by the law; therefore there is no oral procedure. The appeal has no suspensive effect. Asylum seekers have the right to ask the court to suspend their transfer; however, according to the TCN Act and Asylum Act, this request does not have a suspensive effect either.¹⁶

13 Also mentioned in Article 83.§ (4) of the Government Decree 301 of 2007.

14 According to the law, the ruling shall contain the following: the name of the competent authority, the case number and the name of the officer in charge; description of the subject matter of the case; the reasoning; the authority's decision, and information on the form of remedy available, the place and the deadline for filing, and information on the remedy procedure; the statutes upon which the authority has adopted the ruling, reference to the relevant legislation conferring the authority's powers and competencies; the venue and the time where and when the decision was adopted, the name and title of the competent officer, and the name and title of the issuer, if other than the competent officer; the signature of the issuer of the resolution and the stamp of the authority.

15 Article 36.§ (3) of the Act on Asylum

16 Section 48B (5) of TCN Act: "Pending judicial review, implementation of the ruling on the return order shall not be suspended upon receipt of a request therefor."

Section 49 (9) of the Asylum act: "In the course of the court review, an application for the suspension of the implementation of the decision providing for delivery shall have no suspensive effect on the implementation of the decision."

In its decision, the court is entitled to overrule the OIN's decision or to order the OIN to conduct a new procedure if the original decision or procedure was not in line with the Dublin II Regulation or if Hungary should apply the sovereignty clause based on human rights grounds.

2.2.3. *Dublin Unit*

The Dublin Unit is part of the OIN and consists of 6 full-time employees (5 caseworkers, 2 administrative staff and a head of unit). The caseworkers are not specialised; they all handle the incoming and outgoing requests, organize and coordinate the transfers and represent the OIN at the court in the case of an appeal against a Dublin decision. According to the Dublin Unit, the number of caseworkers has proved to be sufficient to manage all tasks fluently and efficiently under the current caseload.¹⁷

2.2.4. *Costs*

The Dublin Unit was not able to provide information on costs because many authorities – the OIN, the Police and the Hungarian Institute for Forensic Sciences – have duties related to the application of Dublin II Regulation, the conduct of the Dublin procedure and the EURODAC system. The fact that many different departments within the Hungarian administration are involved in the Dublin procedure means that it is difficult to calculate the overall costs of implementing the Dublin II Regulation.¹⁸

2.2.5. *Transfers*

Transfer to the responsible Member State is organized by the Dublin Unit in cooperation with the receiving Member State. The Dublin Unit coordinates the tasks of each collaborating party, but the Police perform the actual transfer.

¹⁷ Information obtained from the Dublin Unit for the purpose of this report, April 2012.

¹⁸ Idem.

In the case of air transfer, the competent Police authority assists with the boarding of the foreigner on the airplane, and – if the foreigner’s behaviour or his/her personal circumstances (e.g. age) do not require it – the foreigner travels without escorts. Otherwise he/she will travel with Hungarian police escorts. In the case of overland transfers, the staff of the competent Police authority hands over the foreigner directly to the authorities of the other State.

The Dublin Unit reported that transfers are executed according to the methods described in Article 7 (1) of the Commission Regulation No. 1560/2003 (hereafter Implementing Regulation) and that foreigners also have the possibility of arranging their own voluntary transfer. In these cases, the date of transfer is determined by the OIN in cooperation with the applicant. The OIN informs the receiving Member State.¹⁹

In cases of transfers to Hungary, the alien policing authority of the OIN meets the foreigner at the place and time appointed by the foreign authority. If the Police support is necessary, the OIN informs the Police about the transfer (e.g. due to an arrest warrant against the foreigner or his/her aggressive behaviour). The presence of a physician or the ambulance is ensured by the Hungarian authorities when the foreigner’s physical state makes it necessary. This depends on the information provided by the transferring Member State as to the foreigner’s health condition.

The transfer is followed by the opportunity for a hearing of the foreigner where the involvement of an interpreter is ensured. The necessity of further measures is decided based on the unique circumstances of the foreigner’s asylum application.

¹⁹ Idem.

2.2.6. *Bilateral co-operation agreements*

For the implementation of the Dublin II Regulation, Hungary has signed administrative agreements with the following Member States:

- Federal Republic of Austria (Government Decree 128/2005. (VII.1.));²⁰
- Republic of Bulgaria (Government Decree 291/2008. (XII.10.));²¹
- Romania (Government Decree 144/2008. (V.22.));²²
- Republic of Slovenia (Government Decree 302/2007. (XI.13.));²³
- Slovak Republic (Government Decree 247/2008. (X.14.)).²⁴

The OIN does not calculate the differences in procedural costs resulting from these administrative agreements. Nevertheless, as the agreements include the shortening of procedural time limits, applicants will have to be accommodated and supported for a shorter period of time; therefore a reduction in procedural costs can be presumed.²⁵

As a result of these administrative agreements the possibility of forming bilateral working groups has emerged. This creates the opportunity to address practical and theoretical questions, and the OIN can turn to these working groups for help if needed.²⁶ A working group shall be set up to clarify any practical questions related to the implementation of the bilateral agreement, including issues arising from the Dublin II Regulation, the Implementing Regulation and EURODAC Regulation. The working group shall consist of representatives designated by the Contracting Parties and the authorities involved in implementing the bilateral agreement.

²⁰ http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=94341.131214

²¹ http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=118487.168634

²² http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=117817.167347

²³ http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=111293.157553

²⁴ http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=118316.168317

²⁵ Information obtained from the Dublin Unit for the purpose of this report, April 2012.

²⁶ The working groups are bilateral, so if a practical issue arises between Hungary and Austria for example, the working group will be composed of Austrian and Hungarian representatives and the authorities involved in implementing this bilateral agreement.

The OIN uses the communication channels outlined in the Dublin II Regulation and Implementing Regulation in communicating with other Member States.

The following time limits have been agreed upon in the above-mentioned bilateral agreements. Different time limits apply for each Member State with which the bilateral agreement is concluded:

- If a request is based on Article 9 of the Regulation, the time limit for the responsible authorities to respond to requests for taking charge shall be 45 (Sk) or 30 (Au, Bg, Ro, Si) calendar days²⁷ following the receipt of the request.
- If a request for taking back is based on data from the EURODAC system, the responsible authorities shall respond immediately but at the latest within 14 (Sk) or 10 (Au, Bg, Si) or 7 (Ro) calendar days²⁸.
- When a request is related to information referred to in Article 21 (1) - (3) of the Regulation, the responsible authorities shall respond within 30 (all 5 countries) calendar days²⁹ following its receipt.

The bilateral agreements also provide that *“If the responsible authorities wish to refuse their responsibility on the grounds that another Member State is responsible for examining an asylum application, they can do so only by submitting, without delay, direct and indicative evidence establishing verifiably the responsibility of another Member State.”*

Besides evidence listed in Annex II of the Implementing Regulation, other comparable types of indicative evidence may be defined during the clarification of practical questions by the working group and this indicative evidence shall be taken into consideration in the course of the examination of responsibility.

27 Article 18 of the Dublin Regulation, decision shall be made within 2 months of the date on which the request was received.

28 Otherwise the time limit set by 20.1.b) is two weeks.

29 Paragraph 5 Article 21 The requested Member State shall be obliged to reply within six weeks.

3

The application of the Dublin II Regulation in Hungary

Hungary is mainly a receiving Member State. In 2011, it received 1699 incoming requests, the main sending countries being Austria, Germany and Switzerland, and only 146 outgoing requests, Greece being the main receiving country (for more information see Annex 2 on Statistics).

3.1. The application of Dublin II Regulation criteria

3.1.1. Observance of the hierarchy of criteria

In 2010 and in 2011 the main grounds for incoming requests were mostly Hungarian EUODAC hits (previous asylum applications). The causes of rejection were mainly the reasons enlisted in Article 16 (3) of the Dublin II Regulation (spending at least 3 months outside EU).

In 2010 and in 2011 the main grounds for requests of outgoing transfers were also mainly EUODAC hits (previous asylum applications).

According to the Dublin Unit, the asylum application handed in earlier has priority over the “take charge” type request for transfer, unless the family unification, the humanitarian or the sovereignty clauses are applicable.³⁰

30 Information obtained from the Dublin Unit for the purpose of this report, April 2012.

3.1.2. *Application of the criterion related to irregular border-crossing*

Before the non-voluntary transfers to Greece were stopped, court practice in Hungary was inconsistent regarding the application of Article 10 (1) of Dublin II Regulation in cases where asylum seekers first entered Greece, but then arrived in Hungary through a third country (e.g. Serbia). According to the OIN, in such cases Greece was responsible and Article 10 (2) of Dublin II Regulation was applied. But the Municipal Court of Budapest sometimes ruled that responsibility for assessing such cases should be assumed by Hungary. The Court found that, although the applicants entered the EU through Greece, they had then travelled on and had entered Hungary via Serbia, a third country not participating in the Dublin system. The Court ruled that according to the Article 10 (1) of the Dublin II Regulation, Hungary and not Greece was responsible for assessing these claims.³¹ However, sometimes the court did not follow this reasoning and Greece was confirmed to be responsible by the Court; therefore the jurisprudence was inconsistent.³²

The HHC noticed that several Member States consider Hungary as a responsible Member State, despite the fact that a person originally entered the EU through Greece. Greece is not regarded as a responsible Member State because the asylum seeker left Member States' territory when departing to Macedonia and Serbia and travelling to Hungary. Hungary is regarded as a first country of illegal entry because the connection to Greece has been broken. Recently the Austrian Constitutional Court requested the Austrian

31 For example: Metropolitan Court of Budapest, judgments in Qurban Hasan, wife and child (Afghan), Ref. No. 6. Kpk. 45.500/2010, 28 May 2010; Shamsullah Ahmadi, wife and three children (Afghan), Ref. No. 17.Kpk.45.642/2010/3, 7 June 2010; and Mohmand Sinwari (Afghan), Ref. No. 6.Kpk.45.765/2010/2, 9 July 2010. Source: Updated UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece, 31 January 2011, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4d7610d92&page=search>

32 For example A. A. v. the Office of Immigration and Nationality, Metropolitan Court of Budapest, 5.Kpk.45.842/2010/1., 8.10.2010.

Asylum court to make a preliminary reference to the CJEU asking whether Hungary can be considered as a first EU country of entry in such cases.³³

3.1.3. *Application of the residence permit criterion within the Dublin II Regulation*

The HHC is aware of two quite complicated cases regarding the residence permit criterion.

An Ethiopian man arrived in Hungary, but did not ask for asylum. The Police granted him tolerated status because his return to Ethiopia would be in breach of the *non-refoulement* principle. The man then asked for asylum, but since he had had fingerprints taken in Greece, the authorities started the Dublin procedure. The HHC lawyer asked for judicial review, claiming that the Article 9 (1) of the Dublin II Regulation which states that “where the asylum seeker is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for asylum” should apply and that according to the Dublin II Regulation, this criterion should be applied before the criterion regarding fingerprints in the first EU country. The case was later closed because the man absconded.

In another case, Hungary accepted responsibility for an asylum seeker whose tolerated stay in Hungary expired 2 years previously. He had moved to Slovakia in the meantime where he also obtained a residence permit and a work permit. However, once his residence permit expired, it was not renewed because his passport had expired as well. Once he obtained a new passport, the Slovak authorities expelled him, despite the fact that he had a job there. He applied for asylum in Slovakia, and Hungary accepted responsibility because, though his tolerated stay had expired, it was never officially revoked. The usual procedure would be that once the permit expires, the OIN would examine whether the conditions for tolerated stay still apply. Since this re-examination never happened, Hungary accepted responsibility.

³³ For further information and academic commentary on this case see: <http://www.statewatch.org/analyses/no-195-dublinii-austria-hungary.pdf>

3.1.4. Family unity and the definition of family members

According to the OIN, the asylum seekers are asked whether they have family members in other Member States at the first interview in the pre-admissibility procedure. If the asylum seeker mentions the presence of family members in other Member States, the OIN contacts its counterpart in the country in consideration to initiate the tracing of these family members.³⁴ Contrary to the OIN's statement, the HHC's experience shows that the OIN often fails to retrieve information on family members residing in other Member States. In some cases where the HHC provided legal assistance, the asylum seeker's legal representative had to draw the authorities' attention to information on family links.

According to the HHC's experience, if a person does not apply for asylum, the Police do not start the tracing of his/her family members living in other Member States. For example, an Afghan minor, 14 years old, was apprehended at the border and he said that he wanted to get to his brothers in Switzerland because he had problems at home. Neither the Police and nor the case guardian asked any further questions regarding his situation, family members, or the reasons he fled his home country. He was expelled, as the *non-refoulement* principle was not considered applicable, and he was readmitted to Serbia under the readmission agreement.³⁵

As set out in Section 2 (j) of the Asylum Act, family members include the asylum seeker's spouse, if the family relation existed already before arriving in Hungary, minor children (including adopted children) and parent(s) in case of a minor. Unmarried partners in a stable relationship are not included in this category. However, the criterion of a prior relationship between spouses can be somewhat less restrictive, as the required marriage could have been contracted at any point before entry into Hungary, not just in the country of origin.

According to the OIN, family ties must be proved beyond reasonable doubt and in order to do this, they take into account all relevant evidence.³⁶

³⁴ Information obtained from the Dublin Unit for the purpose of this report, April 2012.

³⁵ Interview with dr. Júlia Iván, legal officer at the Hungarian Helsinki Committee, 25 April 2012.

³⁶ Information obtained from the Dublin Unit for the purpose of this report, April 2012.

An example from the HHC's experience concerns an old man from Somalia with serious psychological problems and eyes illness. The man's wife and 6 children had permanent permission to stay in Sweden. He was detained for many months in Hungary. Hungarian authorities asked Sweden to take charge of the man under the humanitarian clause, but they refused because the evidence proving his family ties was not considered to be of sufficiently good quality. Hungarian authorities therefore examined his asylum application and rejected it in the admissibility procedure on a safe third country ground. He was deported to Serbia.³⁷

In another case, an Afghan family requested asylum in Austria. They lost their 8-year-old son on their way. The son was found in Hungary in immigration jail with another Afghan man, who claimed to be his uncle. The Dublin Unit was notified that the boy had family in Austria, and they started the procedure with the Austrian Dublin Unit. The boy and his "uncle" were released after the maximum period of detention for children with family members (30 days) and placed in the reception centre in Debrecen. The transfer of the child to Austria had not yet been arranged. Once released, the boy and his "uncle" absconded.

3.1.5. Recognized refugees and Dublin transfers

The Dublin Unit has stated that the Dublin II Regulation creates a code regarding the determination of the Member State responsible for examining the asylum application lodged in one of the Member States only by third-country nationals. Therefore, according to the Dublin Unit's views – which they believe are consistent with the practice of the Member States – the personal scope of the Regulation does not extend to recognized refugees, even in a case when the recognized refugee is an asylum seeker in another Member State.³⁸

37 M.A.A. v. the Office of Immigration and Nationality, County Court of Szeged, 5.Kpk.20.313/2012/2., 03.02.2012.

38 Information obtained from the Dublin Unit for the purpose of this report, April 2012.

3.1.6. Readmission of asylum seekers to the country that transferred them under the Dublin II Regulation

The HHC is aware of several cases where asylum seekers were transferred to Hungary from Austria under the Dublin II Regulation, but were later granted the right to return to Austria due to an Austrian court decision.

According to the HHC's experience, there are two different types of cases. In cases where the court overruled the transfer decision, the Austrian Dublin Unit issued an official request to the Hungarian Dublin Unit and the asylum seeker was transferred back to Austria. The transfer was paid for by the Austrian authorities. In cases where the Austrian Asylum Court did not overrule the first instance decision yet but only granted suspensive effect, the Austrian Ministry of Interior issued a confirmation that the asylum seeker is allowed to re-enter Austria, but the Austrian Dublin Unit is not competent to initiate consultations in cases which are pending with the Austrian Asylum Court, as long as the Asylum Court has not overruled the decision. Therefore, the asylum seeker had to organize and fund his return by him/herself. This turned out to be quite complicated for the asylum seeker detained in immigration jail, since the OIN requested direct intervention from the Austrian Dublin Unit, in order to release the asylum seeker, which the Austrian Dublin Unit could not initiate. Finally, the asylum seeker was released as a result of the negotiations among the asylum seeker's Austrian lawyer, the Austrian Embassy and the Hungarian authorities.

3.1.7. Heterogeneity of application within the country

A lack of heterogeneity was observed regarding the transfers to Greece before the *M.S.S.* case³⁹ (see Section 3.8. The impact of European jurisprudence at national level). There is also inconsistency in the application of Article 10 (1) of the Dublin II Regulation between different Member States (see Section

³⁹ *M.S.S. v. Belgium and Greece*, EctHR, Application No. 30696/09, 21 January 2011.

3.1.2. Application of the criterion related to the irregular border-crossing).

The courts' practice is also inconsistent with regard to whether Serbia is a safe third country for asylum seekers. In 2011, Hungarian courts took decisions regarding Serbia's status as a safe third country in 53 cases.⁴⁰ The safe third country concept as applied by the OIN was approved in 36 cases (68%) and overturned in 17 cases (32%). There were 47 decisions made in the first four months of 2012; the courts found Serbia to be a safe third country in 29 of the cases reviewed (61%), while the OIN was ordered to examine the asylum application on the merits in 18 cases (38%).⁴¹ See also Section 3.5.2. Access to the asylum procedure.

3.2. *The use of discretionary provisions*

3.2.1. *Humanitarian clause*

Hungary rarely receives requests for application of the humanitarian clause from other Member States and sends relatively few outgoing requests (see Annex II on Statistics). According to the OIN's experience, reunification of family members and relatives by the humanitarian clause is rarely requested, as other Articles of the Regulation ensure a number of alternate possibilities for reunification. The difficulties in proving family relations and other circumstances are also a factor for the infrequent application of the humanitarian clause.⁴²

The HHC is aware of some cases where the OIN requested another Member State to apply the humanitarian clause in order to bring together family members. The main reason for refusal by another Member State was the lack of convincing evidence of family ties.

⁴⁰ Information from the UNHCR Regional Representation in Central Europe, 25 May 2012.

⁴¹ Hungarian Helsinki Committee's report, "Serbia as a Safe Third Country: Revisited," July 2012, <http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf>

⁴² Information obtained from the Dublin Unit for the purpose of this report, April 2012.

The applicant's written consent is always sought before applying the humanitarian clause in line with Article 15.

3.2.2. *Sovereignty clause*

In the OIN's practice, no formal criteria have been outlined to define the application of the sovereignty clause. The sovereignty clause is not applied in a country-specific manner; cases are examined on a case-by-case basis. If the application of the sovereignty clause appears to be necessary, the OIN withdraws the Dublin request sent to another Member State and notifies it that Hungary is now responsible for examining the asylum application.

According to the HHC's knowledge, the sovereignty clause has only been applied in cases of asylum seekers who would otherwise be transferred to Greece (see Annex II on Statistics). However, the application of the sovereignty clause in Greek cases is not automatic. The consent of the asylum seeker is required, which means that if a person wishes to return to Greece, the sovereignty clause is not applied.

The applicant, his/her legal representative and the UNHCR have the right to request the application of the sovereignty clause by submitting a motion to the OIN. However, such a motion rarely results in the application of the sovereignty clause, as the OIN decides on a discretionary basis without taking other (previous) cases into account.

3.3. The practicalities of Dublin procedures

3.3.1. Circumstantial evidence and its application in the Dublin II Regulation

The Dublin Unit accepts and considers (in view of the individual circumstances of the case) the form of proof listed in Annex II of the Implementing Regulation⁴³ (see the following section).

According to the Dublin Unit, if it is necessary to verify the authenticity of information or data provided by the applicant, a number of available options exist (e.g. the authenticity of identity documents can be verified by an expert; via a request to another Member State for information within the framework of the Regulation, etc.). When an applicant provides identification data of his/her family member residing in another Member State (e.g. name, date of birth, residence, ...) and has a claim that makes the unification of the persons possible under the Dublin II Regulation, the Dublin Unit (depending on the quality and quantity of the data provided) sends a request for transfer or for information to the other Member State. The authenticity of the data can be primarily verified by the other Member State - whether the person in question is residing within its territory, and whether the statements from both parties are coherent.⁴⁴

The HHC is aware of several cases where asylum seekers were returned to Hungary from Austria, claiming that they were never stopped in Hungary and that their fingerprints were not taken. The grounds for returning these asylum seekers were either that they have been found close to the Hungarian border or that their driver or smuggler was caught and he/she admitted that they were coming through Hungary.

⁴³ Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

⁴⁴ Information obtained from the Dublin Unit for the purpose of this report, April 2012.

In the case *A.S. and S.F. v. the Office of Immigration and Nationality*,⁴⁵ the Municipality court explicitly referred to the Annex II, List B, point 7 of the Implementing Regulation and accepted the coherent statements on their journey to Hungary provided by family members as circumstantial evidence in the concrete case.

3.3.2. *Stay outside the EU within the timeframe of Dublin*

The HHC is aware of a case where the Hungarian Dublin Unit accepted responsibility for an Afghan asylum seeker, despite the fact that he had left the EU for 6 months and that he returned to Austria without being stopped in Hungary. Ultimately, the asylum seeker was not transferred to Hungary because his lawyer intervened at the Austria immigration office, pointing out that Austria should be the responsible State according to the Article 16 (3) of the Dublin II Regulation. However, the HHC is not aware of what kind of evidence the asylum seeker presented in order to prove his absence from the EU territory.

The Dublin Unit accepts and considers (in view of the individual circumstances of the case) the forms of proof listed in Annex II of the Implementing Regulation. The Dublin Unit considers as circumstantial evidence of leaving the territory of the requesting Member State those types of evidence listed in I/9 and II/3 and 4 of List B Annex II of the Implementing Regulation (a detailed and verifiable statement by the asylum applicant, exit stamp, reports/confirmation of the information by family members, travelling companions etc.). The Dublin Unit always examines any allegation that the applicant has spent more than 3 months outside the EU by evaluating the individual circumstances of each case as a whole.⁴⁶

⁴⁵ *A.S. and S.F. v. the Office of Immigration and Nationality*, Metropolitan Court of Budapest, 17.Kpk.54.642/2010/3., 07.06.2010.

⁴⁶ Information obtained from the Dublin Unit for the purpose of this report, April 2012.

3.3.3. *EURODAC*

EURODAC is used whenever a foreigner, entering or residing in Hungary illegally, is apprehended by the Police.

3.3.4. *Timeframes*

The timeframe in Dublin procedures ranges from a few weeks to several months. It depends on the type of case and the Member State requesting the procedure.

According to the HHC's experience, asylum seekers who challenge their Dublin decision can stay under Dublin procedures even up to 6 months. However, according to the law, the judicial review of a Dublin decision should last only 8 days.

3.4. *Vulnerable persons in the asylum procedure*

3.4.1. *Vulnerable persons/medical cases and transfers*

While the Asylum Act stipulates that vulnerable persons⁴⁷ should receive preferential treatment,⁴⁸ there is no formal mechanism to identify asylum seekers with special needs at an early stage. Each

⁴⁷ Section 2 k) of the Asylum Act defines the term "person with special needs" as an: "unaccompanied minor or a vulnerable person, in particular, a minor, elderly or disabled person, pregnant woman, single parent raising a minor child and a person who has suffered from torture, rape or any other grave form of psychological, physical or sexual violence, found, after proper individual evaluation, to have special needs because of his/her individual situation."

⁴⁸ According to the Section 34 of the Asylum Act Gov. Decree, a person with special needs seeking recognition shall be eligible for the health care services, rehabilitation, psychological and clinical psychological care or psychotherapeutic treatment required by the person's state of health provided free of charge with consideration for the person's individual situation and according to the opinion of a medical specialist.

asylum seeker undergoes an obligatory medical check upon arrival in Hungary, but this medical check does not include a psychological examination. According to the Section 3 of the Asylum Act Gov. Decree, it is the responsibility of OIN employees (case workers, social workers) to identify persons requiring special treatment in the asylum proceedings. In the event of doubt, the asylum authority may avail itself of a medical expert or psychologist in order to establish whether a person requires special treatment. The examination may be conducted solely upon the asylum seeker's consent, who should be informed about the examination in a language he/she understands. If a person refuses to consent to the examination, the provisions concerning persons requiring special treatment shall not be applicable to him/her. Despite this responsibility of the employees, absence of identification does not bare any legal consequences.

No additional medical examination is performed before the transfer in order to determine if a person is fit for transfer, unless a person objects to the transfer due to the medical reasons.

3.4.2. *Unaccompanied minors*

Every unaccompanied minor is appointed a legal guardian by the proceeding authority in the asylum procedure (including when they are in the Dublin procedure). Case guardians are appointed from a list of attorneys registered at the bar association. Practice shows that a legal guardian is typically appointed within some days following the start of the asylum procedure. Legal guardians are responsible for all relevant proceedings (asylum, social and medical). No training or guidance has been made available to legal guardians by the authorities concerned. Therefore, the legal guardians do not have the necessary expertise to deal with asylum cases. It is questionable whether a legal guardian can effectively assist in protecting the child's best interests. For example, the HHC represented a minor with hepatitis B in a Rule 39 procedure before the European Court of Human Rights where the guardian did not appeal against a Dublin decision ordering his transfer to Greece.

A legal guardian is also appointed for unaccompanied minors apprehended at the border, but according to the HHC's experience,

the guardians mostly pay attention to the formalities of the alien policing procedure, such as the participation of an interpreter at the hearing, and do not examine if the conditions to expel a minor as set out in Section 45 of the TCN Act are met.⁴⁹ The HHC never witnessed cases where guardians have appealed against a decision to return an unaccompanied minor at the border. In the case already mentioned under Section 3.1.4. Family unity and the definition of family members, the guardian did not ensure that the Police initiated family tracing of the child's brother nor did he try to clarify whether the child wished to apply for asylum; instead the guardian did not even object to the child's return to Serbia.

When transfers to Greece were still occurring, the OIN did not really take into consideration the vulnerability of unaccompanied minors. For example, in early 2009, the OIN was in the process of transferring an unaccompanied minor Afghan asylum seeker to Greece, despite the traumatising experiences he suffered there (e.g. beating by Greek policemen). The OIN finally refrained from realising the transfer, but only on an exceptional basis following the UNHCR's direct intervention.

Hungarian law prohibits the alien policing detention of unaccompanied minors.⁵⁰ Nevertheless, through its lawyers who pay weekly visits to immigration detention facilities, the HHC regularly becomes aware of detained persons who appear to be much younger than other detainees, looking more like teenage boys. The increased detention of underage migrants – regardless of their legal status as irregular migrant or asylum seeker – may derive from the fact that no proper age assessment mechanisms are in place to adequately identify children (adolescents) at a very early stage of the procedure, upon interception by the Police.

The age assessment ordered by the Police upon interception of a migrant is generally a very superficial and simplified process; in most cases a doctor merely looks at the person's physical appearance, without any further medical examination. In some cases cited by the HHC, the medical opinions simply stated, e.g.,

49 Article 45 (5) of TCN Act: An unaccompanied minor may be expelled only if adequate protection is ensured in his country of origin or in a third country by means of reuniting him with other members of his family or by state or other institutional care.

50 Third Country Nationals Act, Section 56.

that the person was “18 year and 3 months old”. This calls into serious question the reliability of age assessment examinations, as it is practically impossible to assess age with such exactitude. The result of the age assessment examination should be presented in a medical certificate. However, in cases where the Police order age assessment, this is not always the case; the HHC is aware of some cases where no formal, written opinion (or certificate) could be presented to attest to the results of the examination; still the minors were treated as adults and consequently detained.

If unaccompanied minors are returned by other Member States to Hungary with documents stating that they are children, based on those States’ own age assessment procedures, such documents are reportedly not taken into consideration in Hungary. Instead, a new age assessment is conducted and in most of the cases, the persons concerned are determined to be adults.⁵¹ The Dublin Unit stated that if the foreigner claims to be an adult at the Hungarian authority, or his adult age was proven by an age assessment test in Hungary before the foreigner left Hungary, the foreigner returned under Dublin procedure is treated as an adult. However, contrary to the practice observed by the HHC, the Dublin Unit asserts that if an age assessment test conducted in another Member State contradicts the Hungarian age determination, and this new evidence is provided to the OIN, then the OIN evaluates the evidence and accepts it, if it is proven to be reliable.⁵²

51 See also UNHCR report on Hungary as a country of asylum, April 2012, §61, <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html> and Hungarian Helsinki Committee, *Stuck in Jail: Immigration Detention in Hungary* (2010), April 2011, <http://www.unhcr.org/refworld/docid/4ed77ea72.html>, p. 11.

52 Information obtained from the Dublin Unit for the purpose of this report, April 2012.

3.5. The rights of asylum applicants in the Dublin procedure

3.5.1. Right to information

Foreigners apprehended by the Police receive a leaflet on their rights and obligations at the Police station, but the leaflet does not contain information on asylum procedure. Asylum seekers get the OIN information leaflet about the asylum procedure in their native language, or in a language that they understand, before their first interview with the OIN. This general information leaflet also explains the Dublin procedure by providing examples as to when the Dublin II Regulation may be applicable. It should be noted, however, that the OIN information leaflet does not clearly indicate that there is a hierarchy of criteria within the Dublin II Regulation and does not list all the criteria within the Dublin II Regulation.⁵³ The OIN states that all information is shared with asylum seekers in a comprehensive way, but the HHC's experience shows that the wording of these information leaflets is too complicated and too official for average asylum seekers to comprehend. The method of sharing information with asylum seekers is not adapted to individual circumstances or background. Once in a reception centre or immigration jail, the asylum seekers can have access to the HHC's leaflets on asylum procedure (recently updated and published in 9 languages),⁵⁴ where the Dublin procedure is explained in a more understandable way. The HHC lawyers regularly visiting accommodation and immigration jails also provide information orally on the Dublin procedure for those concerned.

Asylum seekers under a Dublin procedure are informed of this fact within a few days following their first interview in the form of a written decision ordering the suspension of the admissibility procedure due to the initiation of a Dublin procedure. The decision is in Hungarian language, but the OIN has an obligation to explain it orally to the asylum seeker in a language that he/she understands. Once a decision on the Dublin transfer is adopted, it is also handed to the asylum seeker and its content is explained to him/her orally, including the applicant's right to appeal (See Section 2.2.2 on

⁵³ http://www.bmbah.hu/ugyintez_es_eljarasrend.php?id=59

⁵⁴ <http://helsinki.hu/en/infoleaflets-for-asylum-seekers>

Judicial review of Dublin decisions). The time limit for carrying out the applicant's transfer is included in the decision on the Dublin transfer. Asylum seekers receive notification of the exact date and time of the transfer a few days preceding the transfer.

According to the HHC's experience, most problematic is the time between the suspension of the asylum procedure and the issuance of the Dublin decision on transfer because asylum seekers have to wait, sometimes for several months, and during that period no information regarding their procedure is provided to them.⁵⁵

Another problematic point of access to information is only indirectly connected to the Dublin procedure. The OIN treats most asylum seekers returned to Hungary under the Dublin II Regulation as irregular migrants. They are generally issued an expulsion order upon arrival in Hungary, automatically followed by placement in administrative detention (this is explained more in detail under Section 3.6.4. Detention). According to the HHC's experience, the asylum seekers lack information that they need to appeal against these expulsion orders. This is particularly striking since asylum seekers returned under Dublin II Regulation will usually have to submit a subsequent asylum application, and these subsequent asylum applications no longer have suspensive effect on expulsion (this is explained more in detail under the following section).

⁵⁵ See also UNHCR report on Hungary as a country of asylum, April 2012, §40, <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html>

3.5.2. Access to the asylum procedure

In Hungary, access to the asylum procedure upon return under Dublin II Regulation is problematic. Asylum seekers returned under a take back procedure are not automatically treated as asylum seekers by the Hungarian authorities, despite the fact that they already applied for asylum in Hungary. They must therefore re-apply for asylum once they have been returned. These applications are considered to be subsequent applications, which means they must show new elements in support of their claims which they could not have raised in their initial applications.⁵⁶ Subsequent applications do not have automatic suspensive effect on expulsion measures, if the OIN or court in its previous examination of the applicant's claim, appeal or expulsion procedure decided that the prohibition on *refoulement* was not applicable.⁵⁷ The term "subsequent" refers to an application submitted once a previous asylum procedure has been closed with a final decision or has been discontinued (closed without a decision on the merits of the claim, e.g. because the person absconded in an early phase of the procedure). In most cases, upon return to Hungary, the issuance of an expulsion order is automatically followed by placement in administrative detention.⁵⁸ As a result, asylum seekers transferred to Hungary under the Dublin II Regulation are generally not protected against expulsion to third countries, even if the merits of their asylum claims have not yet been examined.⁵⁹

According to the press statement from the OIN from October 2012, the Hungarian Government changed the practice regarding the assessment of the Dublin transferee's claims. The OIN stated that "As of 15 July 2012 within the framework of existing national legislation Hungarian authorities examine each asylum application

56 This does not apply to the applicants transferred under take charge procedures, since they never applied for asylum in Hungary before.

57 The quality of non-refoulement assessment by the OIN is questionable; see further information under the Section 3.6.4. Detention.

58 This is explained more in details under the Section 3.6.4. Detention.

59 See also UNHCR report on Hungary as a country of asylum, April 2012, §20, <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html> and Hungarian Helsinki Committee, "Access to Protection Jeopardized: Information note on the treatment of Dublin returnees in Hungary," December 2011, <http://helsinki.hu/wp-content/uploads/Access-to-protection-jeopardised-FINAL1.pdf>

submitted by persons transferred under the Dublin procedure in merit.”⁶⁰ The change of practice is welcomed although the legislation did not yet change and the press statement is not the most appropriate way to regulate such an important issue.

Access to asylum from detention has also been found to be problematic. In Kiskunhalas immigration jail, for example, an asylum seeker can only submit his/her intention to seek asylum to the security guards between 14:30 and 15:15 each day. This daily schedule is only available in Hungarian and is not properly explained to the asylum seekers. The HHC has documented cases where some asylum seekers have been unable to submit their applications or their applications were not forwarded to the competent asylum authority.⁶¹

Even if a Dublin returnee is accepted into asylum procedure, his application might not be examined on the merits, if he/she has originally arrived in Hungary through Serbia, which is considered as a safe third country, by the OIN. In such cases the asylum application would be rejected during the admissibility procedure and the expulsion to Serbia would be carried out. The result of this policy is that asylum seekers are returned to Serbia without an in-merit examination of their claim in any EU Member State. Court practice regarding the assessment of Serbia as a safe third country, in cases where the asylum seeker challenges the OIN decision to reject the in-merit examination, varies significantly. The Debrecen Tribunal (*Debreceni Törvényszék*) and the Metropolitan Court declared in a number of judgments⁶² that Serbia cannot be considered safe for asylum seekers. In contrast, the Szeged Tribunal (*Szegedi Törvényszék*) - which handles the majority of cases reviewing these OIN decisions - confirmed the OIN’s assessment of the situation in Serbia.⁶³ Serbia maintains a list of safe third countries⁶⁴ that encompasses all neighbouring states, as well as

⁶⁰ <http://www.kormany.hu/en/ministry-of-interior/news/the-ministry-of-interior-s-response-to-unhcr-s-note-on-asylum-seekers> (11 October 2012).

⁶¹ The HHC’s visit to the immigration jail in Kiskunhalas on 13 December 2011, <http://helsinki.hu/megfigyelo-latogatas-a-kiskunhalasi-orzott-szallason>

⁶² For example, Metropolitan Court (Fővárosi Bíróság), judgment 17.Kpk.45.517/2011, dated 11 October 2011; Hajdú-Bihar County Court (Hajdú-Bihar Megyei Bíróság), judgment 9.Kpk.30400/2011

⁶³ For example, Csongrád County Court (Csongrád Megyei Bíróság), judgment 14.Kpk.21.328/2011, 30 June 2011.

⁶⁴ Government decree on defining the list of safe countries of origin and safe third

Greece and Turkey. Thus asylum seekers entering Serbia from any of these countries are to be automatically returned there without having their claim examined on the merits. In light of the grave deficiencies of some of the neighbouring countries' asylum systems, which have been highlighted by the European Court of Human Rights as well,⁶⁵ this practice gives rise to a serious risk of chain *refoulement*.⁶⁶

In an example case, an asylum seeker from Iran first entered the EU through Greece. He moved on to Austria where authorities wanted to send him back to Greece, so he continued his journey to Sweden. From there he was deported back to Greece. He then travelled to Hungary through Serbia. Hungary asked Sweden and Austria to accept the responsibility for his case, but both countries refused. Hungary therefore took responsibility for the case. His asylum application was rejected in the admissibility procedure on safe third country grounds, since he arrived through Serbia. His appeal was not successful. The applicant was transferred to Serbia. This is a worrisome practice; despite the fact that this applicant was present in four EU Member States, his asylum application was never examined on the merits by any of these EU Member States.⁶⁷

3.5.3. *Effective remedy*

The HHC lawyers mainly challenged Dublin decisions with regard to transfers to Greece (on human rights grounds), but in some cases they also challenged the incorrect assessment of the responsible Member State.

For more information on the characteristics of the remedies available against a Dublin decision see Section 2.2.2. Judicial review of Dublin decision. At this point it is worth repeating that neither an appeal, nor even a request for suspension of transfer, has any

countries, Službeni glasnik RS, No. 67/2009,
<http://www.apc-cza.org/en/liste-sigurnih-drava.html>

65 M.S.S. v. Belgium and Greece, Application No. 30696/09, 21 January 2011.

66 Hungarian Helsinki Committee's report Serbia as a safe third country: Revisited, July 2012, <http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf>

67 It is important to note that this took place over three years. Over that time period no Member State substantively examined the applicant's claim for international protection.

suspensive effect. The following example shows the seriousness of this problem. An Afghan family received a Dublin decision to be transferred to Greece within 4 days. In such a short period it is impossible to expect that the Court could reach a decision on the suspensive effect of the transfer; besides, the HHC lawyer could not even start the proceedings before the Court, since the OIN had not yet sent all the necessary documents. When the HHC lawyer asked the OIN to delay the transfer until the Court could reach a decision on suspensive effect, the OIN replied that the request for suspensive effect does not have a suspensive effect. The HHC lawyer tried to intervene at the Court to request expedition of the decision on suspensive effect in order to guarantee protection for the applicant during the appeal, but since the responsible judge was on leave, they could not hasten the procedure. In the end the UNHCR intervened, requesting that the OIN postpone the transfer, invoking arguments concerning the situation in Greece. The HHC lawyer was unofficially informed that the OIN would delay the transfer until the Court decides.

The Asylum Act stipulates asylum seekers' entitlement to free legal assistance - *the person seeking recognition shall be given the opportunity to use legal aid at his/her own expense or, if in need, free of charge as set forth in the Act on Legal Assistance, or to accept the free legal aid of a registered non-governmental organisation engaged in legal protection.*⁶⁸ In the judicial review phase, only lawyers can act as legal representative. No such requirement exists in the administrative phase.

In Hungary asylum seekers in need can benefit from free legal assistance paid for by the state under the legal aid scheme. This scheme, however, is not effective in asylum cases. The lawyer's fee offered under state-financed legal aid is extremely low, and yet representation in asylum cases requires highly specific knowledge and skills (including language skills) which are not yet common in Hungarian lawyers' practice. Interpretation and translation costs are not covered by the free legal aid scheme. Consequently, the state-financed legal aid mechanism does not ensure professional legal assistance in asylum cases, which makes external funding indispensable. Currently, the HHC ensures professional legal assistance and representation for asylum seekers (including

⁶⁸ Asylum Act, Section 37 [3].

Dublin cases). This activity is funded mainly by the European Refugee Fund, national allocation. However, the HHC has limited capacity and therefore cannot assist everyone in need. Particularly problematic is access to free legal aid in immigration jails where each jail is visited by only one HHC lawyer once a week, which is clearly not sufficient in the country's two biggest immigration jails in Kiskunhalas and Nyirbator, in order to reach all potential asylum seekers.

3.6. Reception conditions & detention

3.6.1. Reception conditions for asylum seekers in Hungary

3.6.1.1. Reception conditions for asylum seekers under the Dublin procedure

Asylum seekers in the Dublin procedure are entitled to the same reception conditions as other asylum seekers. In practice, they are usually detained in immigration jails.⁶⁹ Those who are not detained are accommodated in Debrecen reception centre,⁷⁰ where last year the practice was that contrary to the other asylum seekers, they were not allowed to leave the reception centre during the course of the Dublin procedure. This practice does no longer exist. Unaccompanied minors are placed to the children's home in Fót.

3.6.1.2. Reception conditions for asylum seekers returned under the Dublin procedure

If an asylum seeker returned under the Dublin procedure has never before applied for asylum in Hungary, he/she is entitled to the same reception conditions as other asylum seekers.

⁶⁹ Detention will be addressed in the Section 3.6.4. Detention.

⁷⁰ More information on Debrecen reception centre can be found in UNHCR report on Hungary as a country of asylum, April 2012, pp. 11-13, <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html>

Asylum seekers who must submit subsequent asylum claims are not entitled to the same services as those lodging initial applications, even if the merits of their cases have not yet been examined.⁷¹ In contrast to asylum seekers in Debrecen where the HHC lawyer is daily present, those returnees who submit subsequent asylum applications and are not held in detention are placed in the community shelter in Balassagyarmat where they do not have access to free legal assistance unless they travel at their own expense to Budapest, which is 90 km away. Access to information regarding their asylum proceedings is also limited, since no OIN asylum officers are present there. The residents of Balassagyarmat community shelter also complain of low quality of meals and insufficient and irregular medical service (mainly only superficial medical examinations, doctor does not come at fixed hours, no interpretation is provided to facilitate communication with medical staff, etc.).

The HHC is aware of cases where asylum seekers with subsequent asylum applications were requested to pay the costs incurred while they were detained in immigration jail or whilst living in a reception centre.⁷² In one example the OIN issued an invoice to two Afghan Dublin returnees who submitted subsequent asylum applications upon their return to Hungary, charging them for reception conditions.⁷³ The HHC lawyer appealed the decision, referring amongst other case law to the UK judgement *R (on the application of ZO (Somalia) and others) (Respondents) v. Secretary of State for the Home Department (Appellant) [2010] UKSC 36*. The Immigration office later withdrew its decision.

71 Asylum Act, Section 54 (b).

72 Hungarian Helsinki Committee, "Access to Protection Jeopardized: Information note on the treatment of Dublin returnees in Hungary," December 2011, p. 5, <http://helsinki.hu/wp-content/uploads/Access-to-protection-jeopardised-FINAL1.pdf>

73 The costs incurred in the cases the HHC is aware of (1 EUR = 280 HUF):

- 2 months in Balassagyarmat: 68.000 HUF
- 6 months, 20 days in Balassagyarmat: 235.000 HUF
- 3 months, 20 days in Nyírbátor: 46.000 HUF (specification of costs: 1212 HUF for cleaning stuff, 812 HUF for laundry, 44.000 HUF for food)
- 2 months, 20 days in Kiskunhalas: 185.000 HUF (specification of costs: 133.000 placement fee, 50.000 food, 1688 HUF transport)

3.6.2. Reception conditions in the responsible Member State

The HHC is only aware of the court decisions where the Metropolitan court assessed the Greek asylum procedure and the situation of asylum seekers in Greece as risking the violation of Article 3 of the ECHR.⁷⁴ The HHC has been informed that many persons who receive subsidiary protection or refugee status in Hungary continue their journey to other EU Member States and apply for asylum again, due to the bad integration conditions in Hungary.

3.6.3. Detention

Detention is widely used regardless of whether a risk of person absconding actually exists (see the following Section).

Since April 2010, detention of asylum seekers has become the rule rather than the exception. Most asylum seekers enter the country in an irregular manner and are accommodated in one of the four permanent administrative detention facilities run by the Police in Budapest, Győr, Kiskunhalas, and Nyirbator.⁷⁵ Families with children, married couples and single women are accommodated in the detention facility in Bekescsaba.

The maximum period of detention is 12 months, or 30 days in cases of families with children.

Immigration detention may only be ordered when the following conditions are met:

1. In order to secure the expulsion, or transfer in a Dublin procedure, of a third-country national the immigration authority shall have powers to detain the person in question if:

74 For example *J.M.A. v. the Office of Immigration and Nationality*, Metropolitan Court of Budapest, 3.Kpk.46.235/2010/2., 20 January 2011.

75 UNHCR report on Hungary as a country of asylum, April 2012, <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html>

- a) he/she is hiding from the authorities or is obstructing the enforcement of the expulsion in another way;
- b) he/she has refused to leave the country, or, based on other substantiated reasons, is allegedly delaying or preventing the enforcement of expulsion;
- c) he/she has seriously or repeatedly violated the code of conduct of the compulsory place of residence;
- d) he/she failed to report to the authorities as ordered, by means of which he/she obstructed the alien policing or Dublin proceedings;
- e) he/she is released from imprisonment to which he/she was sentenced for committing a deliberate crime.⁷⁶

2. The immigration authority may order the detention of the third-country national prior to expulsion in order to secure the conclusion of the immigration proceedings pending, if his/her identity or the legal grounds of his/her residence is not conclusively established.⁷⁷

In practice, asylum seekers entering or residing in Hungary unlawfully, or those returned under the Dublin II Regulation, usually receive an expulsion order and a re-entry ban upon arrival in Hungary, followed by placement in administrative detention. This is based on a short interview that only focuses on immigration and human trafficking-related questions with no focus on international protection needs.

According to the press statement from the OIN from October 2012, the Hungarian Government revised its detention practice regarding the Dublin returnees. The OIN stated that during the refugee status determination procedure as a general rule asylum seekers transferred under the Dublin procedure are accommodated in open reception facilities and provided with basic living conditions.⁷⁸ The HHC's lawyer working in open reception centre in Debrecen observed recently that an increasing number of asylum seekers returned under the Dublin procedure are being accommodated there. However, the HHC is not aware of any official guidance

⁷⁶ Section 54 (1) of the Third Country Nationals Act.

⁷⁷ Section 55 (1) of the Third Country Nationals Act.

⁷⁸ <http://www.kormany.hu/en/ministry-of-interior/news/the-ministry-of-interior-s-response-to-unhcr-s-note-on-asylum-seekers> [11 October 2012].

on which asylum seekers shall be detained and which shall be accommodated in an open reception centre.

Under Hungarian law, an expulsion order cannot be issued without assessing the principle of *non-refoulement*; however, in practice this assessment is not more than a pure formality and is clearly ineffective. The Police are required by law to turn to the OIN for a country of origin information assessment. The OIN officer on duty gives his/her opinion on the “returnability” of the person concerned (risk of *refoulement*) based on the minutes of the preliminary interview, which had been conducted by a police officer. The HHC’s experience shows that the country information assessment carried out by the OIN and its conclusions in these cases are often too short and fail to provide sufficient time and resources for a thorough assessment of the specific circumstances of the case. Usually only asylum seekers coming from a country that the OIN deems *prima facie* inadequate for return (regardless of the individual circumstances of the case) based on *non-refoulement* grounds are not expelled to their country of origin (e.g. Somalia). However, they can be expelled to another transit country (e.g. Serbia, Ukraine) based on the application of a “safe third country” principle and bilateral or EU-level readmission agreements.⁷⁹

The HHC has challenged this practice in five cases involving the expulsion of asylum seekers returned to Hungary under the Dublin II Regulation and The Metropolitan Court of Budapest has issued three judgments stating that the expulsion orders issued by the OIN were not lawful, that the OIN should have suspended the entire expulsion procedure until final determination of the asylum claims, and that no lawful ground exists for expulsion of an individual returned pursuant to the Dublin II Regulation where that individual requests asylum.⁸⁰ In contradiction with this consistent judicial guidance, the OIN continues to apply the above-described unlawful practice.

⁷⁹ Access to territory and asylum procedure in Hungary, Hungarian Helsinki Committee, 2010, pp. 23-26, <http://helsinki.hu/dokumentum/Hatatmegfigyeloprogram-2010-US-08-24-2011-final-WEB.pdf>

⁸⁰ See also Hungarian Helsinki Committee, “Access to Protection Jeopardized: Information note on the treatment of Dublin returnees in Hungary,” December 2011, p. 2, <http://helsinki.hu/wp-content/uploads/Access-to-protection-jeopardised-FINAL1.pdf>

According to the law, the OIN shall consider whether the execution of the deportation can be ensured by means of assigning a compulsory place of residence, before ordering immigration detention.⁸¹ According to the HHC's experience, the OIN only cites the relevant provision of law (the ground for detention) in detention orders, but does not provide any concrete justification as to why the detention of a particular person due to their individual circumstances meets the legal grounds for detention. Detention orders therefore lack proper individualisation and never consider any special circumstances or alternatives to detention. Furthermore, this practice is not in compliance with the ECHR. The ECtHR stated already in three cases that "the absence of elaborated reasoning for an applicant's deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the Convention."⁸²

There is an additional provision regarding the detention of those asylum seekers in a Dublin procedure, who may be detained prior to their transfer to the responsible Member State under Section 49 (5) of the Asylum Act. The OIN shall provide in the resolution on the transfer that the foreigner may not leave the place of residence designated for him/her until the completion of the transfer. This detention period, however, cannot be longer than 72 hours in order to ensure that the transfer actually takes place. However, since the majority of asylum seekers are already detained based on their expulsion orders, this provision is rarely applied in practice.

Judicial review of administrative detention of asylum seekers is ineffective, as Hungarian courts fail to address the lawfulness of detention in individual cases, or to provide individualized reasoning based upon the applicant's specific facts and circumstances.⁸³ Administrative decisions imposing detention on foreigners for unlawful entry or stay are subject to review conducted by first instance courts. Such reviews are conducted mostly by criminal law judges in a manner normally applied in criminal cases. It is common practice

⁸¹ Section 54 (2) of the Third Country Nationals Act.

⁸² Lokpo and Touré v. Hungary, App. no. 10816/10, 20 September 2011, § 24, Hendrin Ali Said and Aras Ali Saidi v. Hungary, App. no. 13457/11, 23 October 2012 and Al-Tayyar Abdelhakim v. Hungary, App. no.13058/11, 23 October 2012.

⁸³ Hungarian Helsinki Committee, "Access to Protection Jeopardized: Information note on the treatment of Dublin returnees in Hungary," December 2011, <http://helsinki.hu/wp-content/uploads/Access-to-protection-jeopardised-FINAL1.pdf>

for the court to issue decisions for a group of five, 10, or 15 detainees within 30 minutes, thus significantly decreasing the likelihood of a fair and individualized review.⁸⁴ A personal hearing is obligatory only after the first 72 hours of detention; in all further prolongations of detention the detainee has to specifically request a hearing. If the detainee manages to submit a request for a hearing at the time when the court is deciding on the prolongation of the detention order at the OIN's request, the court must hold a hearing and hear the detainee's arguments. This system is very complicated for foreigners who lack Hungarian language skills or legal skills and requires the assistance of a lawyer. However, according to the HHC's experience,⁸⁵ officially appointed lawyers (who are required to be present by the law at the first prolongation of the detention order⁸⁶) often fail to provide effective legal assistance in challenging immigration detention: most essentially never meet their clients before the hearing, study their case file, or present any objections to the prolongation of the detention order. The HHC currently has two cases pending in Strasbourg which raise the question of the lawfulness of the detention of asylum seekers and of the ineffectiveness of the legal remedy for detained asylum seekers.⁸⁷

Immigration detention facilities apply a strict prison regime, despite the fact that the residents have only committed the minor offence of irregular entry or stay. Complaints concerning abusive treatment of detainees and inadequate conditions in immigration detention facilities have been reported on extensively.⁸⁸ Detained asylum seekers also complain about having been systematically given drugs/tranquillizers, resulting in some of them becoming addicted by the end of their detention term.⁸⁹ When escorted from

84 The HHC's visit to the immigration jail in Kiskunhalas on 13 December 2011, <http://helsinki.hu/megfigyelo-latogatas-a-kiskunhalasi-orzott-szallason>

85 Interview with Dr. Júlia Iván, legal officer at the Hungarian Helsinki Committee, 14 March 2012.

86 Third Country National Act, Section 59 (4).

87 Alaa AL-TAYYAR ABDELHAKIM v Hungary (13058/11), Hendrin Ali SAID and Aras Ali SAID v Hungary (13457/11). The second case concerns an asylum seeker returned to Hungary under the Dublin II Regulation.

88 See, e.g., Pro Asyl : Ungarn : Flüchtlinge zwischen Haft und Obdachlosigkeit, 15 March 2012, http://www.proasyl.de/fileadmin/fm-dam/NEWS/2012/PRO_ASYL_-_bordermonitoring_Ungarnbericht_3_2012_Web.pdf and UNHCR report on Hungary as a country of asylum, April 2012, §50, <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html>

89 UNHCR report on Hungary as a country of asylum, April 2012, §50,

the facility to the court for hearings or on other outings (such as to visit a bank or post office), detained asylum seekers are handcuffed and escorted on leashes, which are normally used for the accused in criminal proceedings.⁹⁰ The regime in Bekescsaba immigration jails for families, couples and single women is better. Detainees can access the courtyard freely during the day, they have access to the common kitchens and the doors of the corridors are locked only at night, but never the door of their rooms.

As a major shortcoming, the Hungarian alien policing legislation does not set forth differentiated rules for vulnerable persons with specific needs in alien policing detention. Victims of torture or violence and asylum seekers with mental disabilities are not exempted from the implementation of alien policing detention. Section 126 (6) (b) of the TCN Gov. Decree only states that detention shall be terminated immediately if it becomes evident that the expulsion order cannot be executed, in particular, if the person subject to expulsion needs prolonged hospital treatment. This provision, however, does not allow favourable treatment for detainees with specific needs other than prolonged medical treatment in a hospital, for reasons of psychological distress, age, pregnancy or disabilities, for instance.⁹¹

Medical care provided in the immigration jails in Hungary is often criticized by the detainees. They rarely have access to specialist medical care when requested and are only taken to hospital in emergency cases. The only available treatment is medications, most frequently painkillers and sleeping pills.

<http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html>

90 See the Chapter on Hungary in UNHCR's regional AGDM report 2010: "Being a refugee", <http://www.unhcr-centraleurope.org/en/what-we-do/age-gender-and-diversity-mainstreaming.html>

91 Stuck in Jail, Immigration detention in Hungary (2010), Hungarian Helsinki Committee, April 2011, p. 10, http://helsinki.hu/dokumentum/HHC%20immigration%20detention_ENG_final.pdf.

3.7. Member State co-operation

3.7.1. Exchange of information and cooperation with other Member States

According to the Hungarian Dublin Unit it has sufficient capacity to respect the deadlines provided for under the Regulation. They always respond to the requests from other Member States⁹² (see also Section 2.2.6. Bilateral co-operation agreements).

The HHC has identified a new practice regarding the cooperation between national authorities in Dublin cases. Now the preliminary interview includes an explicit question as to whether the applicant is willing to allow the OIN to share his/her personal data, the minutes of his/her hearings and the decisions in his/her case with other Member States. The OIN gives the following information to the asylum seeker in a leaflet: *“For the purpose of conducting the Dublin II process the entitled authorities of the Member States may exchange information among themselves concerning your personal data. In any event, communication of your personal data within the framework of the before mentioned procedure is subject to your written approval. We also inform you, that you have the right to be informed of any data that is processed within the framework of Dublin II. This information must be requested. You can exercise this right only on data concerning you. If you find that these data are incomplete or inaccurate, you are entitled to have them corrected, erased or blocked.”*

3.7.2. Use of conciliation mechanisms between Member States

According to the OIN, Hungary has never used the conciliation mechanisms under the Dublin II Regulation.⁹³

⁹² Information obtained from the Dublin Unit for the purpose of this report, April 2012.

⁹³ Idem.

3.8. The impact of European jurisprudence at national level

Before the *M.S.S. case*, the Hungarian authorities continued to return asylum seekers to Greece (120 returns in 2010). Unaccompanied minors have been exempted from return to Greece only since April 2009. The practice was not consistent. Sometimes the OIN withdrew the Dublin decision before the court delivered a judgement in the appeal, and sometimes the transfers were stopped by the court. Since the *M.S.S. case* the transfers to Greece have occurred only if a person wishes to be transferred.

In a case example from 2009, an Afghan family including three children and a minor brother of the husband was apprehended at the airport in possession of false passports. One of the children was seriously ill. The parents and the minor brother were put in pre-trial detention and the three children sent to foster care. Once it was established that the minor brother actually was a minor he was released, but the parents remained in custody. The UNHCR and the HHC intervened, and finally they were released. The family had Dublin hits from Greece, but not the minor brother. The HHC lawyer appealed against their return to Greece, arguing among other things, that by sending the family to Greece, the minor brother would become an unaccompanied minor. The Court unfortunately dismissed the appeal and the family would have been transferred to Greece, if they had not escaped. This practice is no longer in existence. The Police do not initiate pre-trial detention anymore if persons are intercepted with forged documents at the airport.

In another case example, an Afghan minor arrived in Greece in 2007. Although he asked for asylum, he did not receive any social or legal assistance and he was forced to live on the street under inhuman conditions. He was arrested and detained in Athens and elsewhere in overcrowded and dirty jails on several occasions. The Police harassed him and beat him several times. He became infected with Hepatitis-B because of the lack of proper accommodation, adequate hygienic conditions and medical assistance, but was not given any medical treatment in Greece. In late 2009, the Afghan boy arrived in Hungary and applied for asylum. The OIN decided to apply the Dublin II Regulation and ordered his return to Greece. The HHC lawyer representing the Afghan minor requested an urgent

interim measure under the Rule 39 from the ECtHR to suspend the transfer to Greece. The ECtHR granted the interim measure and the OIN decided not to enforce the transfer to Greece and to examine his asylum application on the merits.

3.9. Good practices in Hungary

- According to the law, unaccompanied minors are not detained;
- Asylum seekers under the Dublin procedure are informed about the date of the transfer in advance;
- Several bilateral agreements were concluded with neighbouring states, which shortened the deadlines under the Dublin procedures;
- Hungary is respecting the ECtHR MSS judgment by not conducting involuntary transfers to Greece ;
- The Hungarian authorities interpret family as to include marriages established at any time prior to entry into Hungary and not just for families formed in the country of origin.

Conclusion and Recommendations

4

The European Network for Technical Co-operation on the Application of the Dublin II Regulation Project was designed to be more practical in nature, then theoretic. Although theoretical arguments are involved in the current report, we aimed at coming up with recommendations for the practice which can foster the situation of the asylum seekers transferred under Dublin II to and from Hungary, whilst providing guidelines to the Hungarian authorities on the proper application of the Dublin II measures.

4.1. Regarding the Dublin returnees

- Ensure access to asylum procedure and suspend expulsion proceedings until a final decision has been reached on the asylum claim;
- End the practice of automatically ordering immigration detention for Dublin returnees;
- Discontinue treatment of asylum claims of those taken back under the Dublin procedure as “subsequent” applications (in the sense that such applications are deprived of suspensive effect);
- Ensure access to proper reception conditions to all Dublin returnees taking into consideration the person’s individual circumstances including any special needs they may have;
- End practice of rejecting asylum applications on safe third country grounds if a person never had his/her claim examined on the merits in any of the Member States.

4.2. Regarding the asylum seekers under the Dublin procedure

- Appeals in Dublin cases should have a suspensive effect or at least the request to suspend the transfer should have a suspensive effect until the assessment of this request on the merits in order to be in line with Hungary's obligations under ECHR jurisprudence;
- A personal interview should be ensured during the appeal procedure;
- Provide regular information on the developments in each individual's case while a person is waiting for the Dublin decision;
- Create a more reader-friendly information leaflet on Dublin which highlights all the criteria and the fact that it is hierarchical list.

4.3. General recommendations

- The OIN should perform more detailed and individualized assessment of the principle of *non-refoulement* prior to making an expulsion order;
- The current restrictive detention policy should end and detention should instead be applied in accordance with the following principles: lawfulness, necessity and proportionality (detention should only be used as a measure of last resort if other less-coercive measures cannot be applied). Children and persons with special needs should not be detained. Alternatives to detention should be put into practice;⁹⁴

⁹⁴ These recommendations were taken from the UNHCR report on Hungary as a country of asylum, April 2012, p.18, <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html>

- Effective, automatic and periodic judicial review is required to ensure consistent examination on the merits of the legal basis for and the conditions of detention in an individualized manner. Such review should be carried out by a court specialized in reviewing administrative decisions and not by a criminal court;⁹⁵
- Conditions in detention should be humane, and appropriate mechanisms in order to stop violence and verbal abuses by the security guards should be put in place;
- Medical care services and access to it in immigration jails should be improved;
- Age assessment should be conducted properly, on a thorough scientific and methodological basis, and the benefit of the doubt should be applied in cases of alleged minors until the age assessment is conducted. The principle of child's best interest should be respected in practice;
- Hungarian authorities should establish an effective mechanism for early identification of persons with special needs amongst asylum seekers;
- The policy of considering Serbia as a safe third country should be terminated;
- Full access to the asylum procedure for those detained in immigration jails should be ensured;
- Police should start with family tracing when an unaccompanied minor apprehended at the border mentions that he/she has a family member in EU, instead of simply returning the minor under the readmission agreement with the neighbouring country;
- Guardians for unaccompanied minors should receive a proper training and mechanism of surveillance whether they are actually acting in the minor's best interest should be put in place.

⁹⁵ Idem.

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B. Statistics

In the general statistics, Dublin transfers are not distinguished from negative decisions on other grounds in the admissibility phase. Therefore, it is not clear how many negative decisions in admissibility procedure were Dublin transfers. The OIN provides special statistics on Dublin procedures.

2010

Incoming requests	1972 (+ additional 319 requests for information)
Rejections	445
Transfers	Germany (198) Austria (194) France (100) Switzerland (84) Sweden (41) Norway (34) Belgium (23) the Netherlands (23) Denmark (15) Total (742)
Main countries of origin	Kosovo (218) Afghanistan (217) Serbia (79) Georgia (52)
Outgoing requests	446 (+ 52 additional requests for information)
Rejections	45
Total transfers and main receiving countries	Greece (120) Romania (20) France (8) Bulgaria (4) Germany (4) Italy (4) Austria (2) Total 177

2011

Incoming requests	1699 (+ additional 421 requests for information)
Rejections	478
Transfers	Austria (135) Germany (97) Switzerland (53) Belgium (43) Denmark (18) France (17) the Netherlands (17) Sweden (17) Czech Republic (15) Total (448)
Main countries of origin	Afghanistan (180) Kosovo (39) Georgia (37) Serbia (6)
Outgoing requests	146 (+ 45 additional requests for information)
Rejections	36
Total transfers and main receiving countries	Romania (44) Austria (8) Bulgaria (4) Germany (3) Belgium (2) Greece (2) Total 70

The OIN applied the sovereignty clause in 6 cases in 2010 and in 52 cases (concerning 62 applicants altogether) in 2011. Due to the Greek migration situation, the OIN suspended the execution of transfers to Greece and in these 49 cases (concerning 55 applicants) the sovereignty clause was applied.

In 2010 the OIN received no requests based on the humanitarian clause. The Hungarian authority sent requests based on the humanitarian clause to other Member States in 8 cases, 4 of these

were accepted. In 2011 there was one incoming request based on the humanitarian clause, but the applicant's transfer to Hungary was not executed. The Dublin Unit sent outgoing requests based on the humanitarian clause twice in 2011.

In 2010, Hungary had 14,706 Category 1 hits (asylum seekers) and 1,736 Category 2 hits (irregular border crossing) in the EURODAC Central Unit database.⁹⁶

⁹⁶ <http://www.statewatch.org/news/2011/sep/eu-com-EURODAC-ann-rep-2010.pdf>

C. Recent developments

This report reflects the situation as of October 2012. The situation changed as a result of the subsequent amendments to law and policy in Hungary.

The changes brought some positive indications, such as:

- the number of immigration detainees in general has decreased since November 2012;
- some material improvements are already in place in the largest immigration jail in Nyirbator;
- the asylum authority has stopped considering Serbia as a safe third country and is no longer rejecting applications as inadmissible from asylum seekers who had transited Serbia (i.e. the claims are considered in the in-merit procedure);
- the new legislation and its interpretation by the police require that people who ask for asylum during the very first interview by the police at the border are not expelled and hence not put in detention. Those who, for any reason, apply later are still exposed to detention for the whole duration of the asylum procedure;
- the subsequent claims of Dublin returnees whose applications had not been considered in their substances before their departure from Hungary are now examined upon formal application to re-initiate the procedure. The applicants are not detained, and can stay in Hungary while their claim is being assessed. However, if Dublin returnees submit subsequent applications after their previous applications were finally rejected or the cases were closed due to the written withdrawal of the applications and the OIN or the court did not establish the existence of the protection against refoulement, their subsequent asylum applications do not have a suspensive effect on the execution of the expulsion orders and the applicants' rights to benefits and accommodation are limited.

Too little time has passed since these changes have taken effect hence it remains to be seen whether these improvements are consistently applied in practice.

European network for technical cooperation on the application of the Dublin II Regulation

By creating a European-wide network of NGOs assisting and counselling asylum seekers subject to a Dublin procedure, the aim of the network is to promote knowledge and the exchange of experience between stakeholders at national and European level. This strengthens the ability of these organisations to provide accurate and appropriate information to asylum seekers subject to a Dublin procedure.

This goal is achieved through research activities intended to improve knowledge of national legislation, practice and jurisprudence related to the technical application of the Dublin II Regulation. The project also aims to identify and promote best practice and the most effective case law on difficult issues related to the application of the Dublin II Regulation including family unity, vulnerable persons, detention.

During the course of the project, national reports were produced as well as a European comparative report. This European comparative report provides a comparative overview of the application of the Dublin II Regulation based on the findings of the national reports. In addition, in order to further enhance the knowledge, we created information brochures on different Member States, an asylum seekers' monitoring tool and a training module, aimed at legal practitioners and civil society organisations. They are available on the project website.

The Dublin II Regulation aims to promptly identify the Member State responsible for the examination of an asylum application. The core of the Regulation is the stipulation that *the Member State responsible for examining the asylum claim of an asylum seeker is the one where the asylum seeker first entered.*

www.dublin-project.eu

European Partner Organisations:

