



The detention of asylum seeking children in Hungary: Dire tendencies in upholding the basic rights of children

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Since 2015, the term ‘refugee crisis’ has been widely used to describe the phenomenon of a relatively large number of people seeking protection in the EU. When observing the worrying human rights violations and the detention of asylum seekers, especially children in Hungary, one might ask, however: is it not the rule of law which is in crisis?

This blog will examine the legal framework of the detention of asylum seeking children and the procedural flaws the Hungarian asylum system is struggling with. It will discuss whether the current system is in line with the relevant international legal standards and will shed light on an extremely dire new development which may lead to a systematic detention of children seeking Europe’s protection.

International standards

The basic rights of children are protected by far-reaching guarantees set forth by international law, such as Articles 3 and 37 of the [Convention on the Rights of the Child](#) (‘CRC’). The CRC, however, does not ban the detention of children. It may be an option in a few cases, but only if necessary safeguards – the principles of necessity and proportionality – are respected and upheld.

Looking beyond the specific guarantees set forth by the CRC, the European regional regimes for human rights protection also enshrine the above-mentioned legal requirements. The ECtHR in its jurisdiction has consistently held the best interest of the child of paramount importance ([Krisztian Barnabas Toth v. Hungary](#) and [Qama v. Albania and Italy](#)). The ECtHR is of the opinion that the best interest principle seems to enjoy a broad consensus in international law, which is supported by Article 24 of the [Charter of Fundamental Rights of the European Union](#) (‘Charter’) ([Neulinger and Shuruk v. Switzerland](#)). Based on the jurisdiction of ECtHR, the detention of children may not last for a lengthy period and special care must be paid to their particular needs. In this respect, the ECtHR found the asylum or immigration detention of children to be in breach of Article 3 [ECHR](#), noting that detention may lead to such level of anxiety and stress that amounts to torture ([Ubilanzila Mayeka and Kaniku Mitunga v. Belgium](#); [Kanagaratnam and Others v. Belgium](#); [Muskhadzhiyeva and Others v. Belgium](#)).

It may be concluded therefore that international law currently does not pose a total ban on the detention of children in general, but all such decisions shall be made with the best interest of the child as a primary consideration – in line with Article 3 CRC. However, the question arises, whether being detained can ever be in the child's best interest? In their [joint statement](#), UN experts made their opinion very clear: 'detention is *never* in the best interest of the child.' This strong stance is in line with [General Comment No. 6 of the Committee on the Rights of the Child](#) (CRC Committee), which states that unaccompanied children 'should not, as a rule, be detained.' Since 2013, the [CRC Committee](#) has been calling on State Parties to cease the detention not only of unaccompanied minors but of children in a broader immigration status. Yet, day after day hundreds of asylum seeking children – accompanied or unaccompanied – are locked up in [immigration or asylum detention](#).

Hungarian context

When assessing the current Hungarian legal context, the country's record may be called dubious at best. According to the Asylum Act unaccompanied minors may not be placed in asylum detention (Asylum Act Section 31/A (8) c). This prohibition exempts children who arrive with their families: they may be detained up to 30 days (Asylum Act Section 31/A (7)). Asylum detention can last for no longer than 6 months (Asylum Act Section 31/A (7)). This is relevant in the case of those unaccompanied minors who are not recognised as such.

To effectively evaluate the provisions of the Asylum Act and examine their implementation, the cases of accompanied and unaccompanied minors will be evaluated separately. Before the two types of cases are examined, it is important to point out that contrary to the recommendation of [UNHCR and UNICEF](#), the Hungarian asylum procedure does not require a best interest determination (BID) procedure to be conducted. This means that there is no multidisciplinary evaluation with the participation of the Immigration and Asylum Office (IAO) of the child's individual needs and circumstances which aims to outline the most favourable legal options. The legal guardians of unaccompanied minors need to draw up a 'care plan' (Law XXXI of 1997 of the Protection of Children (Child Protection Act) Section 40/A (2) bf), but this is different in character and does not include children who have not yet been granted international protection. However, based on the initiative of the Hungarian Helsinki Committee (HHC) relevant stakeholders have been holding regular meetings, aiming to create a substitute for the lacking BID procedure. This, however, can only cover those unaccompanied minors who are already registered as such.

The detention of accompanied children

The detention of accompanied children

According to the Asylum Act, asylum detention may be ordered if, inter alia, a person's identity needs to be established, if there is a risk of absconding, or in order to determine those elements on which the application for asylum is based and without detention, this would not be possible, or when detention is necessary for protection of national security. Accompanied children are detained in the same detention facilities as adults, though in a separate building which accommodates only families with children. Material reception conditions are not child friendly, since children are housed in an environment which offers little to no possibility of play and study. Detention may be ordered by the IAO for a maximum period of 72 hours, and may be extended by the Court up to 30 days. The Court shall hold a hearing – at least when first deciding on the extension of detention. Based on the HHC's extensive detention monitoring

experience, it can be said that hearings are highly formalistic. The systematic failures of the judicial review system have been discussed by [Gruša Matevžič in a previous EDAL blog contribution](#).

The detention of unaccompanied children

As mentioned above, unaccompanied children cannot be held in asylum detention. However, during 2016 attorneys working for the [HHC found](#) at least 35 cases when potentially underage persons were unlawfully held in detention. With all the best intentions, it sometimes may happen that an unaccompanied minor is detained – for instance when he or she gives a fake birthday, as advised by the smuggler, a person many, unfortunately, trust. However, the Asylum Act orders the detention to be terminated immediately once an asylum seeker is identified to be an unaccompanied minor (Asylum Act Section 31/A (8) c). Government decree 301/2007 on the implementation of the Asylum Act (Implementation Decree) provides that should doubts about the age of a person in the asylum procedure arise, the IAO is obliged to order an age assessment procedure to be conducted, in order to establish the age of the person (Implementation Decree Section 36/B). The language of the relevant section does not leave any power of discretion in the hands of the IAO, and its provisions are in line with Section 58 (1) a) of the Law on Administrative Procedure, according to which the relevant authority is obliged to request an expert's opinion if the authority itself does not possess the relevant knowledge which is needed in order to establish an essential fact (the applicant's age) in the given procedure.

Despite the seemingly adequate legal provisions, the HHC has found on many occasions that IAO rejects the asylum seekers' requests for an age assessment procedure, stating that at some point prior to their detention they stated a different age, without applying the above mentioned legal provisions.

The IAO, in some cases, informs the asylum seekers that an age assessment procedure may be conducted at their own expense, which is not a real option to many and is in violation of the Implementation Decree. The HHC is aware of one case when the IAO informed the minor asking his age to be assessed that should he be found to be an adult, he will be subject to fine for procedural misconduct.

Based on numerous complaints received by the HHC, many unaccompanied minors were detained as a result of erroneous age assessment done by a doctor who is present at the time of being apprehended by the police. Many complained that their age was recorded erroneously despite them objecting, and that proper interpretation was not provided. Age assessment remains a critical flaw in the system, which is based solely on medical examinations, ignoring the desired multidisciplinary approach supported by [UNHCR and UNICEF](#). The HHC is aware of age assessment procedures when the doctors merely looked at the asylum seekers and guessed their age based on their facial hair, or, in one case, on the size of his genitals. Some medical opinions do not state an age window, but rather just say whether the asylum seeker was found to be an adult or a minor, which means that the benefit of the doubt [cannot be applied](#). The Ombudsman noted in several reports that the current system of age assessment does not meet Hungary's international obligations, yet his repeated recommendations have been constantly ignored by the IAO (See report nos. AJB-7120/2009; AJB-733/2012 and AJB-3070/2012).

The situation of unaccompanied minors is particularly dire since they are alone in detention, surrounded mostly by adult men, and in their case, detention can last significantly longer (since in their case, as

mentioned above, the general maximum length of detention applies). The same serious flaws that characterise the judicial review of detention can be experienced in their case as well.

It can be stated therefore that the Hungarian authorities do not give due attention to the CRC, the ECHR, the Charter and the case law of the ECtHR. The cases of children – or those who claim to be children – is not examined from a viewpoint which takes their best interest to be of paramount importance and often violates not only international, but Hungarian law as well.

A child rights catastrophe

A Bill (Bill T/13976) proposed by the Government on 14 February 2017 and was [passed](#) by Parliament on 6 March, aims to significantly alter the asylum procedure. The Bill is currently awaiting the signature of the President of the Republic. If signed into law, it may enter into force by 24 March the latest (According to Section 11 of the Bill, if signed into law, it will enter into force 8 days after signature. According to Article 6 (3) of the Fundamental Law (Constitution), if Parliament passes a Bill, it needs to be sent to the President of the Republic within 5 days who signs it within 5 days). Should the President veto the Bill or refer it to the Constitutional Court for a review procedure (Fundamental Law (Constitution) Article 6 (4) – (5), the entry into force may be deterred, although whether the President will use these powers is highly uncertain.

The Bill exempts unaccompanied minors over 14 from the scope of the Child Protection Act (Bill Section 1) in case of an ‘immigration crisis’ which would be generated by the Bill itself (Bill Section 6). This means that in case of an ‘immigration crisis’, unaccompanied minors could be held in transit zones (Bill Section 7) for the entire length of the asylum procedure. Once outside the scope of the Child Protection Act, unaccompanied minors will not be assigned a legal guardian either.

According to the Bill, the changes regarding unaccompanied minors are needed because ‘many’ migrants abused the favourable legal provisions enjoyed by vulnerable asylum seekers (Bill, General Reasoning Paragraph 3). This is a false statement with no supporting evidence. As it was explained above, the current situation is rather that children, and especially unaccompanied minors, who are clearly vulnerable, cannot enjoy their rights due to serious procedural flaws and, in a few cases, misconduct. This Bill aims to integrate the systematic violation of children’s rights into mainstream law. Even if there were cases when adult asylum seekers managed to pass as minors – which cannot be proven – abuse of law committed by a few cannot justify leaving a great number of vulnerable people in a situation where their rights are systematically violated.

In the original Bill, the Government acknowledged this to be ‘technically detention’. A new version of the Bill was uploaded on the [Parliament’s website on 20 February](#), without the above-mentioned phrase. Although the Government insists that this would not be detention – given that asylum seekers would be free to leave towards Serbia (Bill Section 5) – in the view of the HHC – which is supported by ECtHR case law ([Amuur v France](#)) – it is clearly detention.

Accompanied minors are also be affected adversely by the Bill, since it removes the maximum length of detention, making it possible for children with families to be held in detention for an [indefinite period of time](#). Although the Government acknowledges that the proposed changes would be against European law, it is ready to [fight it out with ‘Brussels’](#).

The Bill further states that asylum applications may only be lodged in the transit zones (Bill Section 7) and that undocumented migrants, intercepted anywhere in Hungary may be escorted out of the country through the border fence (Bill Section 11). This, together with the announced [closure of the Károlyi István Children's Home](#), which is currently hosting unaccompanied minors, may mean that soon almost all minors seeking asylum might find themselves in detention. Unaccompanied minors below 14 would not be subject to the new regime (Bill Section 7), however, their future accommodation remains to be uncertain, given the closure of the Children's Home.

The distinction between unaccompanied minors younger or older than 14 is arbitrary and is in clear violation of the Article 1 CRC, according to which a child is a human being below the age of 18. The Government states that since unaccompanied minors over 14 have all procedural rights guaranteed in the asylum procedure, it is logical that they shall not be exempt from the new regime (Bill, Detailed Reasoning to Section 1).

If enacted into law, the effects of this Bill will be nothing short of a child rights catastrophe, created intentionally by the state itself.

Conclusion

Although a State Party to the CRC, bound by the ECHR and the Charter, Hungary does not maintain an asylum procedure which takes the best interest of the child to be of paramount importance. Children can be legally detained for a long period of time under the current Hungarian legal context, and are often detained out of neglect and lack of care. The proposed Bill would further deteriorate the situation by amending the current laws in a way which would lead to the systematic detention of children.

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(This journal entry is an expression of the author's own views, and not those of EDAL or ECRE)

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