



**HUNGARIAN
HELSINKI
COMMITTEE**

INFORMATION NOTE ON ASYLUM-SEEKERS IN DETENTION AND IN DUBLIN PROCEDURES IN HUNGARY



MAY 2014

This Information Note aims to provide a summary overview about recent developments regarding the Hungarian asylum system, with special emphasis on asylum detention and the situation of asylum-seekers under the Dublin III Regulation.

The main concerns of the Hungarian Helsinki Committee (HHC) are:

- First-time asylum applicants are frequently detained in asylum detention, which is a maximum 6-month long detention regime in place since July 2013. In practice, asylum detention is not an exceptional measure: in the beginning of April 2014, over 40% of adult male first-time asylum-seekers were detained.
- Decisions ordering and upholding asylum detention are schematic, lack individualised reasoning with regard to the lawfulness and proportionality of detention, and fail to consider the individual circumstances (including vulnerabilities) of the person concerned.
- Alternatives to asylum detention that exist in Hungarian law are only applied on an exceptional basis. Even when they are used, the application of alternative measures is neither transparent, nor efficient.
- The automatic, periodical judicial review of asylum detention (performed at lengthy, 60-day intervals) is clearly ineffective, with no individualised decision-making.
- Despite the ban in Hungarian law, due to the lack of proper state-funded age assessment mechanisms, and the difficulties of accessing it, apparently and allegedly minor unaccompanied asylum-seekers are being kept in lengthy detention together with adult detainees.
- Detention centres are ill-equipped to accommodate vulnerable detainees; vulnerabilities are not properly assessed.
- Despite recent improvements in the law, Dublin returnees whose asylum applications had been rejected at the first instance in Hungary are still not afforded an opportunity to seek effective remedies once they are returned to Hungary.
- The law still does not guarantee asylum seekers who are in a Dublin procedure the right to have access to a fully effective remedy against the decision to be transferred to another EU Member State.

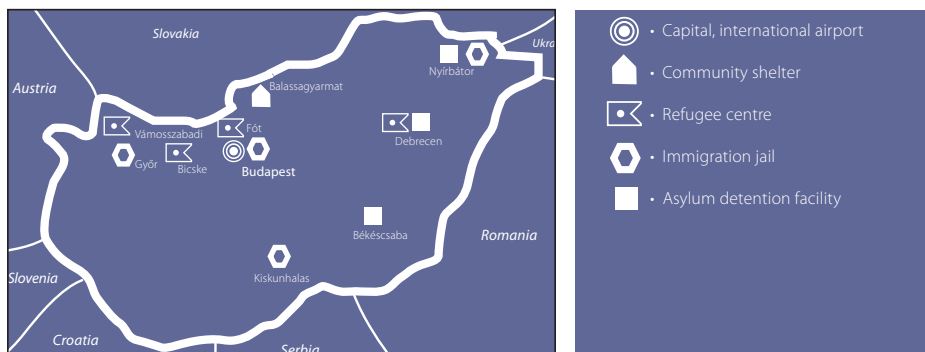
1. THE DETENTION OF ASYLUM-SEEKERS

1.1. Background and asylum detention centres

Until the end of 2012, many asylum-seekers were held in immigration detention (*idegenrendészeti őrizet*) in Hungary. The HHC, the UNHCR, the European Court of Human Rights and the European Commission strongly criticised this practice, questioning the legal ground of holding even first-time asylum-seekers in pre-deportation detention while the asylum proceedings were ongoing. In response, in 2013 the much-criticised detention practice was stopped and – following a six-month interim period – a new detention regime specific to asylum-seekers was introduced in the Act LXXX of 2007 on Asylum (hereinafter: Asylum Act). The legal grounds of asylum detention¹ (*menekültügyi őrizet*) are different from those of immigration detention; yet the systemic shortcomings of the two detention regimes are very similar.

The HHC already summarised the legal framework of the asylum detention in its Information Note of June 2013.² Detailed and up-to-date information regarding the Hungarian asylum system, including the legal framework, the asylum procedure and reception and detention conditions is available in the AIDA Country Report on Hungary, which is written by the HHC and published by the European Council on Refugees and Exiles (ECRE).³

In May 2014, three permanent asylum detention centres operate in Hungary in **Békéscsaba, Nyírbátor and Debrecen**. These detention centres are managed by the **Office of Immigration and Nationality (OIN)**. Békéscsaba has the capacity of 185 detainees and Debrecen 182 detainees, while in the Nyírbátor asylum detention centre a maximum of 105 asylum-seekers can be detained. (Immigration detention centres, which are run by the police, are located in Győr, Kiskunhalas, Nyírbátor and at the Liszt Ferenc International Airport in Budapest.)



1 Act LXXX of 2007 on Asylum (hereinafter: Asylum Act) Sections 31/A-31/H

2 For more details on the legal framework of asylum detention see Hungarian Helsinki Committee, *Information note on the main asylum-related legal changes in Hungary as of 1 July 2013*, 28 June 2013, <http://helsinki.hu/wp-content/uploads/HHC-update-hungary-asylum-1-July-2013.pdf>, Section 2

3 Asylum Information Database: <http://www.asylumineurope.org/reports/country/hungary>

1.2. Methodology

In order to collect up-to-date information regarding the application and impact of the new asylum detention regime, in early 2014 the HHC collected information from the following sources:

- Attorneys contracted by the HHC pay weekly visits to asylum detention centres to provide free legal assistance to detained asylum-seekers, and share their experience with the HHC.
- In February, HHC staff conducted day-long monitoring visits to the three asylum detention centres (Békéscsaba, Debrecen, Nyírbátor).⁴ In addition to discussions with the management, social workers and health care staff, the monitoring teams interviewed over 150 detainees during these visits.
- The HHC collected – with the consent of those interviewed – a total of 107 decisions ordering or maintaining the detention of 77 interviewees of 23 different nationalities. The main countries of origin of these detainees included Afghanistan (19), Pakistan (9), Mali (6), Iran (4) and Cote d'Ivoire (4). The 107 analysed decisions include those issued by the Office of Immigration and Nationality ordering the detention, as well as court decisions upholding asylum detention in the framework of a periodic review. The decisions were taken between 4 October 2013 and 21 February 2014 by courts in Debrecen, Nyírbátor and Békéscsaba.

	Békéscsaba	Debrecen	Nyírbátor	Total
Decisions of OIN examined	19	16	8	43
Court decisions examined	1	24	39	64
Total decisions examined	20	40	47	107

Furthermore, the HHC received statistical information for the present report from the Office of Immigration and Nationality and the UNHCR.

Information in this report is valid on 30 April 2014.

1.3. The OIN's practice of ordering asylum detention

A high number of first-time asylum-seekers arriving in Hungary, including many of those sent back to Hungary in a Dublin procedure, are now held in asylum detention throughout most or all of the asylum procedure. In the period **between 1 July 2013 and 17 April 2014**, the Office of Immigration

4 For more information see: Hungarian Helsinki Committee: *Report on the practice of asylum detention (Jelentés a menekültügyi őrizet gyakorlatáról)*, 28 March 2014 (in Hungarian) <http://helsinki.hu/wp-content/uploads/anonim-MHB-jelentes-menekultugyi-orizet-gyakorlatarol.pdf>

and Nationality ordered the detention of asylum-seekers on **a total of 2372 occasions**.⁵ (The actual number of persons detained is slightly lower, as in some cases the OIN ordered detention twice – e.g. if a detainee had been previously released on bail and then absconded.) Recent stock data also demonstrates that the detention of asylum-seekers has become a frequent practice and **not an exceptional measure**.⁶

	Beginning of March 2014 ⁷	Beginning of April 2014 ⁸
All asylum-seekers with a pending asylum claim (stock data)	1625	1151
Adult male asylum-seekers with a pending asylum claim (stock data)	1073	766
Asylum-seekers in asylum detention	369	321
Proportion of detained asylum-seekers among all asylum-seekers	23%	28%
Proportion of detained asylum-seekers among adult male asylum-seekers	34%	42%

Although the law permits the detention of female asylum-seekers or that of asylum-seeking families with children younger than 18 years of age, they are hardly ever detained. Hence, in order to measure the actual prevalence of asylum detention within the population concerned, the number of detained asylum-seekers should be primarily compared to that of adult male asylum-seekers with a pending claim. The HHC finds it alarming that as a general trend, **more than one third (in early April 2014, over 40 percent) of adult male asylum-seekers are held in asylum detention in Hungary**.

5 Letter no. 106-M-12477/1/2014 of 17 April 2014 by the OIN Director General to the HHC

6 Statistical information provided by the OIN and the UNHCR Regional Representation for Central Europe

7 The number of pending asylum claims relates to 28 February 2014, the number of detained asylum-seekers to 5 March 2014, therefore a minor distortion cannot be excluded.

8 The number of pending asylum claims relates to 31 March 2014, the number of detained asylum-seekers to 2 April 2014, therefore a minor distortion cannot be excluded.

The analysis of 107 detention orders revealed that **the practice of ordering and prolonging asylum detention is characterised by the same grave and systemic problems as in the field of immigration detention**. The systemic deficiencies of immigration detention were strongly criticised by the HHC,⁹ the UNHCR¹⁰ and by the European Court of Human Rights in three individual cases relating to the immigration detention of asylum-seekers.¹¹

The **main shortcomings regarding asylum detention** include:

- The complete **lack of individualised decision-making** in assessing the necessity and proportionality of detention as well as the use of **speculative, generalised arguments** instead of an individualised reasoning;
- The **lack of duly considered alternatives** to detention;
- The **detention of presumably unaccompanied minors** (unlawful under domestic law);
- The **ineffectiveness of the judicial review** of asylum detention;
- Occasional **basic misunderstandings and formal mistakes** in both administrative and judicial decisions.

1.3.1. Complete lack of individualised decision-making

GIN asylum detention orders are **usually schematic and lack individualised reasoning** on the proportionality and necessity of asylum detention in the given case. The HHC found that the majority of administrative and judicial decisions contain identical or very similar reasoning, **without taking into account factors specific to the individual asylum-seeker** (15 out of 20 decisions observed in Békéscsaba, 40 out of 40 decisions from Debrecen and 23 out of 47 decisions from Nyírbátor).

⁹ For more information see: Hungarian Helsinki Committee, *Briefing paper for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the occasion of the CPT's periodic visit to Hungary*, 28 March 2013, Chapter 5.1, http://helsinki.hu/wp-content/uploads/HHC_briefing-paper_CPT_periodic_visit_28March2013_FINAL.pdf; Hungarian Helsinki Committee, *Access to Protection Jeopardized – Information note on the treatment of Dublin returnees in Hungary*, December 2011, Sections 4 and 5, <http://helsinki.hu/en/access-to-protection-jeopardised-2>; Hungarian Helsinki Committee, *Stuck in Jail – Immigration detention in Hungary in 2010*, April 2011, http://helsinki.hu/wp-content/uploads/HHC-immigration-detention_ENG_final.pdf

¹⁰ UNHCR, *Hungary as a country of asylum. Observations on the situation of asylum-seekers and refugees in Hungary*, 24 April 2012, Chapter X, <http://www.refworld.org/docid/4f9167db2.html>

¹¹ *Lokpo and Touré v. Hungary*, Application no. 10816/10, judgment of 20 September 2011; *Al-Tayyar Abdelhakim v. Hungary*, Application no. 13058/11, judgment of 23 October 2012; *Hendrin Ali Said and Aras Ali Said v. Hungary*, Application no. 13457/11, judgment of 23 October 2012

Even when the decision-maker is clearly aware of the relevant facts, they are still often overlooked.

- In the case of two brothers detained in Debrecen, the OIN's respective decisions were completely identical.¹²
- Two decisions by the Nyírbátor District Court concretely referred to the applicants' statements about past persecution (torture in detention); however, the fact that the applicants were possibly traumatised torture survivors was not analysed with regard to the proportionality of detention.¹³

The specific legal grounds for detention referred to in the 107 decisions the HHC analysed were the following:

Grounds for asylum detention in the Asylum Act	Reference in Asylum Act	Decisions
"In order to establish identity/nationality; In order to establish the facts of the case, as there are serious reasons to presume that the applicant will frustrate/delay the asylum procedure and/or there is a risk of absconding"	Section 13/A (1) (a) and (c)	79
"In order to establish the facts of the case, as there are serious reasons to presume that the applicant will frustrate/delay the asylum procedure and/or there is a risk of absconding"	Section 13/A (1) (c)	22
"The applicant has already absconded or has hindered in another way the asylum procedure"	Section 13/A (1) (b)	1
No specific legal ground specified	-	5

In addition to the specific legal references to the grounds for detention as specified by the Asylum Act, most decisions cite **various circumstances and reasons for detention in the statement of facts and in the justification**, often going beyond the grounds permissible under the Asylum Act. The vast majority of decisions (94 out of 107 decision) referred in the justification to the same list of reasons for ordering/ upholding detention, namely that **"the applicant is not lawfully residing in Hungary, arrived in Hungary in an irregular manner; the applicant's personal identity is not established; the applicant has no financial means to support himself; and he has no links to Hungary"**. Another very frequently quoted pair of grounds (79 decisions) was the "lack of an established personal identity and the risk of absconding" (often in decisions that also contained the above "list"), while 22 decisions only referred to the risk of absconding.

¹² OIN cases no. 106-3-577-4/2014-M and 106-3-579-4/2014-M,

¹³ Nyírbátor District Court cases 9.Ir.1094/2013/4., 9.Ir.1095/2013/4

The lack of individualised decision-making is clearly demonstrated by how detention grounds were referred to in the justification of the 107 decisions. The most frequently quoted grounds and reasons for detention and the HHC's related concerns are explained below.

1) *"The applicant is not lawfully residing in Hungary; she/he arrived in Hungary in an irregular manner" (mentioned in 102 decisions)*

As a long-standing, general trend, the vast majority of asylum-seekers had arrived in Hungary in an irregular manner.¹⁴ Therefore this ground – in principle – could even serve as a "blank authorisation" to detain nearly all asylum-seekers arriving in the country. The fact that this argument has been found in almost all decisions becomes particularly worrisome in light of the fact that **none of these decisions specified for what specific reasons irregular entry and stay was considered a reason for detention in the given case, while it was not considered as such where detention was not ordered.**

2) *"The applicant's identity is not established" (mentioned in 54 decisions)*

Under Hungarian law¹⁵ the public administrative authority is obliged to establish the facts and circumstances of each individual case. Beyond this general obligation, EU law further specifies the authority's primary responsibility to assess the relevant elements of the case.¹⁶ Both EU law¹⁷ and Hungarian asylum law¹⁸ require the applicant to cooperate in this process. Undoubtedly, identity is clearly considered a relevant element of an asylum claim.¹⁹ Bearing in mind that almost all asylum-seekers arrive in Hungary without identity documents, the establishment of the asylum-seeker's identity is a joint endeavour of the authority in charge and the person concerned. In the HHC's view, the mere fact that the applicant's identity is not established does not suffice on its own as a ground for upholding detention after an initial short period, if she/he is otherwise cooperative, discloses the reasons of her/his flight, etc. It must be noted that the prohibition on contacting the authorities of the asylum-seeker's country of origin seriously limits the possibility to obtain documentary proof

14 In 2012, 96 percent of asylum applicants arrived in Hungary in an irregular manner. In 2013, this rate was 98 percent. Source: OIN statistical information

15 Act CXL of 2004 on the General Rules of Administrative Proceedings and Services, Section 50

16 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (hereinafter: Recast Qualification Directive), Article 4(1)

17 Recast Qualification Directive, Article 4(1) and 4(5), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereinafter: Recast Asylum Procedures Directive), Articles 13(1) and 13(2)(b)

18 Asylum Act, Section 5(2)

19 Recast Qualification Directive, Article 4(2)

about his/her identity and nationality. UNHCR also emphasises that “[m]inimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks. At the same time, the detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and within strict time limits established in law”.²⁰

The analysis of the 107 detention decisions showed that in most cases neither the asylum authority, nor the court take into account the above considerations. Judicial practice fully disregards the fact that as time passes, the likelihood that detention will effectively help to establish the identity of an asylum-seeker decreases; hence the duty of the detaining authority to justify that detention is necessary becomes increasingly onerous. Even in cases where the asylum-seeker’s identity could not be established in the first 60 (or in as many as 6 cases, even 120) days of detention, none of the examined court decisions questioned whether it was lawful to continue the detention of an asylum-seeker with the aim of establishing his identity. None of these judicial decisions examined whether the detaining authority had proceeded with due diligence in attempting to establish the detainee’s identity, nor did they examine to what extent did the asylum-seeker contribute to the fact that these attempts had remained unsuccessful.

3) *“The applicant has no financial means to support himself” (mentioned in 94 decisions)*

The vast majority of asylum-seekers arriving in Hungary lack the necessary financial means to support themselves. The HHC found that 94 out of 107 examined detention decisions cited that “the applicant has no financial means to support himself”. The EU Recast Reception Conditions Directive²¹ does not include such a detention ground; moreover, member states are obliged to ensure that material reception conditions are available to all asylum-seekers in need.²² While the applicant’s financial situation may be a relevant factor in the consideration of certain alternatives to detention, using this argument to justify detention, in the HHC’s view, **breaches both EU and domestic legal obligations.**

20 UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, <http://www.refworld.org/docid/503489533b8.html>, para. 24

21 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereinafter: Recast Reception Conditions Directive), Article 8(3);

22 Recast Reception Conditions Directive, Article 17: General rules on material reception conditions and health care: 17(1) “Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.”; Asylum Act, Section 26(2)

4) *“The risk of absconding prevails” (mentioned in 19 decisions) and “lack of links with Hungary” as an indirect indication of a risk of absconding (mentioned in 67 decisions)*

The Asylum Act stipulates that asylum detention may be ordered if ***“there are serious grounds to presume that the asylum-seeker would delay or hinder the procedure or would abscond”***.²³ The established case-law of the European Court of Human Rights clearly sets out that authorities ordering detention must justify why the particular person is at risk of absconding, and merely quoting this argument is not sufficient for maintaining detention.²⁴ In addition, “serious grounds” – as stipulated by Hungarian law – would require strong arguments, supported by factual, case-specific information. Most decisions referring to the risk of absconding fail to provide any individualised justification for this conclusion.

In addition, 21 decisions argued that detention was justified as the applicant’s destination country had not been Hungary, and as many as 67 decisions mentioned in this context that the applicant “has no connections with Hungary”. While most of these decisions did not explicitly refer to a risk of absconding, these arguments are likely to have been considered as indirectly indicating that without detention, the person would not choose to remain in Hungary during the asylum procedure. The vast majority of asylum-seekers have, understandably, no specific connections to Hungary when they arrive, and Hungary is not a likely destination for most irregular migrants heading towards Europe. However, the lack of links with the host country cannot constitute a ground for detention under EU or Hungarian law.²⁵ Therefore, while existing social links and support networks may be relevant for assessing the applicability of certain alternatives to detention, **it is unlawful and unreasonable to use the lack of such connections to justify detention.**

Only 13 out of all the 86 decisions that directly or indirectly referred to a risk of absconding contained references to specific and valid past events (examples of non-cooperation, absconding) as reasons for ordering/upholding detention. However, even these decisions failed to provide a truly individualised justification as to what the exact risk of absconding meant. None of the court decisions questioned the OIN’s conclusions regarding the risk of absconding, even if no individualised arguments or factual evidence had been brought before the court to support this conclusion.

23 Asylum Act, Section 31/A(1)(c)

24 See for example: *Fox, Campbell and Hartley v. The United Kingdom*, Application no. 12244/86; 12245/86; 12383/86, judgment of 30 August 1990, para. 41

25 Cf. Recast Reception Conditions Directive, Article 8(3), Asylum Act, Section 31/A(1)

1.3.2. Alternatives to detention: rarely assessed properly or applied

The EU Recast Reception Conditions Directive stipulates that member states may only detain asylum-seekers **if other less coercive alternative measures cannot be applied effectively**.²⁶ The Asylum Act provides for **three alternative measures** to asylum detention:²⁷

- bail (the amount of which may vary between EUR 500 and 5,000²⁸);
- regular reporting to the asylum authority; and
- a designated place of residence.

The HHC has found that alternatives to detention are not examined in details. **Only 13** out of the 107 detention decisions **referred to specific reasons** (e.g. absconding in the past or identifying a destination country other than Hungary) **for not applying alternatives to detention**. Decisions that address the issue of alternatives usually use the same arguments in their reasoning for not applying the alternative measures as in the ruling itself to justify detention, without properly linking these arguments to the full consideration of specific individual factors.

According to the OIN,²⁹ **as an alternative** to asylum detention **bail** was used only in case of **32 asylum-seekers** between 1 July 2013 and 31 March 2014. (For comparison, between 1 July 2013 and 17 April 2014, the OIN ordered the detention of asylum-seekers on 2372 occasions.) The amount of bail **ranged from EUR 962 to 2000**, the average being EUR 1000 Euros. Bail is usually **applied together with the other two alternative measures** (when an asylum-seeker is released on bail, he will have to stay at a designated place and regularly report to the OIN).

Information provided by the HHC's lawyers and the experience of the HHC's monitoring visits in February 2014 confirmed that **there is no uniform, transparent and predictable practice regarding the application of bail** in Hungary. Two HHC lawyers reported that the amount of bail used in their clients' cases was always EUR 2000 regardless of the client's financial situation. In addition, **most requests for bail submitted by HHC-contracted attorneys remained unanswered for longer periods** (sometimes even for weeks), without any justification for the delay. The OIN informed the HHC that the asylum authority may order asylum bail in any phase of the asylum procedure and this possibility as well as the amount of bail take the applicant's financial situation into account.³⁰

26 Recast Reception Conditions Directive, Article 8(2)

27 Asylum Act, Section 31/H

28 Decree No. 29/2013 (VI. 28.) of the Ministry of Interior on the execution of asylum detention and bail, Section 30(1)

29 Letter no. 106-M-12477/1/2014 of 17 April 2014 by the OIN Director General to the HHC

30 Letter no. 106-Ji-5026/9/2014 of 29 April 2014 by the OIN Director General to the HHC, <http://helsinki.hu/wp-content/uploads/BAH-valasz-menekultugyi-orizet-gyakorlatrol-20140429.pdf>

It is worth noting that the discussion on alternatives to detention usually **appears in detention orders after the grounds and justification of detention** itself. This further confirms that alternatives are not considered as a standard element of the assessment process and detention is not being used as an exceptional measure of last resort.

1.3.3. Unaccompanied minors in detention

Under Hungarian law, unaccompanied minors cannot be kept in asylum detention, while children with their families may only be detained for up to 30 days.³¹ Nevertheless, in the course of three monitoring visits to asylum detention facilities in February 2014, **the HHC met as many as 30 persons who claimed to be under 18 years of age**. The HHC monitoring teams were deeply concerned that at least one-third of these detainees appeared “at first glance” very young, potentially or presumably under 18 years of age.

According to the HHC’s long-standing experience based on individual cases, **age assessment practices in Hungary are not of a multidisciplinary character and ignore the difference between various populations of the world with regard to pubescence, the psychological and emotional development of the child, as well as her/his cultural background**.

In most cases, age assessment is based on a simple physical observation by a doctor of the foreigner (sexual maturity, facial hair, teeth) or the X-ray examination of the wrist, collarbone or pelvis. The OIN confirmed³² that in case a police doctor at the border already issued an opinion confirming that the person is an adult, **a second – more detailed forensic expert’s opinion – can only be obtained by the OIN if the proceeding authority is in doubt about the results of the first medical examination; if this is not the case, the detained asylum-seeker has the right to request a repeated examination but he/she has to bear the costs thereof (at least cca. EUR 100)**. According to the HHC’s view, this OIN practice is not in line with the relevant Hungarian rule, which stipulates that “if the applicant seeking recognition declares, after the ordering of detention, that she/he is an unaccompanied minor, the asylum authority shall contact the medical service provider who has jurisdiction at the place of detention, in order to immediately establish the age of the applicant”.³³ In addition, Hungarian law exempts asylum-seekers from bearing the costs related to the asylum proceedings (in case of the first asylum claim).³⁴ The applicant’s age is a crucial factor to be considered in the asylum procedure, therefore the costs of proceedings related to age assessment should be borne by the state, at least in the case of the first asylum claim.

31 Asylum Act, Section 31/B (2) and 31/A (7), respectively

32 Letter no. 106-Ji-5026/9/2014 of 29 April 2014 by the OIN Director General to the HHC, <http://helsinki.hu/wp-content/uploads/BAH-valasz-menekultugyi-orizet-gyakorlatarol-20140429.pdf>

33 Section 36/B of the Government Decree No. 301/2007 (XI.9.) implementing the Asylum Act

34 Asylum Act, Section 34

This practice **excludes detained children who lack the financial means from seeking remedies against unlawful detention** through a repeated age assessment. This is in violation of Hungary's international and domestic obligations.³⁵

1.3.4. Ineffective judicial review of asylum detention

The legal framework on the judicial review of asylum detention raises serious concerns about compliance with international standards regarding the right to an effective remedy.

- OIN decisions ordering of asylum detention cannot be appealed, and there are no separate legal remedies against these detention orders.
- The lawfulness of detention can only be challenged through automatic judicial review. The first court decision on detention is taken 3 days after the OIN ordered detention. The automatic periodical judicial review of asylum detention is conducted at 60-day intervals. The length of this period per se excludes that detention is used only for as short a period as possible and only until the grounds for detention are applicable, as it would be required by EU law.³⁶ If for any reason, the relevant grounds for detention cease to be applicable, for example, one week after the last judicial review, this fact is extremely unlikely to be perceived by the detaining authority and the detainee will only have the first chance to bring this change to the attention of the district court and request to be released only 53 days later (i.e. after 53 days of unlawful detention). Therefore, the 60-day intervals cannot be considered as "reasonable intervals" in the sense of Article 9 (5) of the Recast Reception Conditions Directive.

In addition to these major concerns about the legal framework, the HHC's analysis of 64 court decisions confirmed that **the judicial review of asylum detention is ineffective**, also due to the same reasons for which the Curia (Hungarian Supreme Court) has already found ineffective the judicial review of immigration detention.³⁷

35 Articles 3, 22(1), 37(b) and (d) of the Convention on the Rights of the Child; Section 2(1) of Act XXXI of 1997 on the protection of the child and childcare services and Section 4(1) of the Asylum Act, all reaffirming among others the best interest of the child as a guiding principle throughout any procedures

36 Recast Reception Conditions Directive, Article 9(1)

37 *A Kúria Idegenrendészeti joggyakorlat-elemző csoportja által 2013. május 30-án elfogadott és a Kúria Közigazgatási és Munkaügyi Kollégiuma által 2013. szeptember 23-án jóváhagyott összefoglaló vélemény* [Advisory Opinion of the Hungarian Supreme Court adopted on 30 May 2013 and approved on 23 September 2013], http://www.kuria-birosag.hu/sites/default/files/joggyak/idegenrendeszeti_osszefoglalo_velemenyn_kuria.pdf, pp. 114-120 – Note that to date, the ineffective judicial review system of immigration detention has remained essentially unchanged, despite strong criticism by the Curia.

The HHC believes that the judicial review of asylum detention is ineffective because of several reasons:

- The proceeding courts **systematically failed to carry out an individualised assessment as to the necessity and the proportionality of detention and relied merely on the statements and facts presented in the OIN's detention order**, despite clear requirements under EU and domestic law to apply detention as a measure of last resort, for the shortest possible time and only as long as the grounds for ordering detention are applicable.³⁸ As an extreme example demonstrating the lack of individualisation, 4 decisions of the Nyírbátor District Court contained **incorrect personal data** (name, date of birth or citizenship of the applicant).³⁹
- Both detainees interviewed and the decisions observed by the HHC confirmed that the state-funded, *ex officio* appointed **case guardians (local attorneys) play a passive role in the judicial review process**. The HHC found that appointed attorneys do not communicate with their “clients”, do not become familiar with clients’ individual circumstances and do not present arguments for release from detention or submit motions for a personal hearing at the court, etc. This violates the equality of arms principle.⁴⁰
- 4 court decisions contain a date of birth which **indicates an age lower than 18 years**.⁴¹ Nevertheless, none of the decisions questioned the lawfulness of detention, nor did they refer to any age assessment process or evidence proving the adult age of the asylum-seeker concerned.

It should be noted that currently a working group set up at the Curia (Hungarian Supreme Court) is carrying out a study about judicial review practices concerning asylum detention, which will result in a public analysis and set of non-binding recommendations for judges, similarly to the previous study on immigration detention.

38 Recast Reception Conditions Directive, Article 8(2) and 9(1); Asylum Act, Section 31/A (2)

39 Nyírbátor District Court 1.Ir.214/2014/3., 9.Ir.350/2014/3., 1.Ir.728/2013/5., 9.Ir.335/2014/3.

40 Note that the Supreme Court also described and strongly criticised the same phenomenon with regard to immigration detention (where the *ex officio* legal aid mechanism is identical to that of asylum detention) – See *A Kúria Idegenrendészeti joggyakorlat-elemző csoportja által 2013. május 30-án elfogadott és a Kúria Közigazgatási és Munkaügyi Kollégiuma által 2013. szeptember 23-án jóváhagyott összefoglaló vélemény* [Advisory Opinion of the Hungarian Supreme Court adopted on 30 May 2013 and approved on 23 September 2013], http://www.kuria-birosag.hu/sites/default/files/joggyak/idegenrendeszeti_osszefoglalo_velemen_y_kuria.pdf, pp. 41-47

41 Nyírbátor District Court case 1.Ir.46/2014/3., Debrecen District Court cases 68.Beü.94/2014/4-I., 68.Beü.108/2014/4., 68.Beü.104/2014/4., 68.Beü.1087/2014/4.,

In May 2014 the president of Debrecen Public Administrative and Labour Law Court informed the HHC that from 1 May 2014, judges who otherwise also adjudicate asylum cases have also become involved in reviewing asylum detention decisions in Debrecen, which is expected to improve the quality of judicial review procedures.⁴²

1.3.5. Basic errors in detention orders

Beyond all the above systemic problems, the analysis also revealed some grave errors which raise **serious doubts about the overall professional quality** of decision-making:

- **5 decisions contained no reference at all to the legal ground for ordering or prolonging detention** (it was not specified under which provision of Section 31/A (1) of Act LXXX of 2007 on asylum the detention was ordered or prolonged, or in some cases there is a complete lack of any reference to the legal ground of detention).⁴³
- **15 decisions** observed while visiting the detention centre in Debrecen quoted as one of the grounds for detention the fact that the applicant based his asylum claim on public order and security-related concerns in the country of origin. This erroneous conclusion demonstrates a **basic misunderstanding of the framework of asylum detention**, where the merit of the asylum claim bears no relevance on the ground of detention.

1.4. Conditions of detention

Asylum detention centres are maintained by the OIN; however, the police is in charge of guarding the detainees and employs armed security guards who take part in this task under the supervision of uniformed police officers.

The HHC found that the **general mood** in all the asylum detention centres was **tense and dispirited**.

One of the biggest concerns about life in detention for the exclusively adult male detainee population is the **lack of daily activities and boredom**, which builds tensions and frustrations.

During the day, asylum-seekers can move around freely in the closed-in areas of the asylum detention centres and have access to outdoor courtyards.⁴⁴

⁴² Letter no. 2014.El.I.I.8.8. of 8 May 2014 by the president of the Debrecen Public Administrative and Labour Law Court to the HHC

⁴³ Nyírbátor District Court cases 4.Ir.651/2013/7., 1.Ir.728/2013/7., 1.Ir.814/2013/7., 1.Ir.812/2013/7., Debrecen District Court case 11.Beü.903/2013/4

⁴⁴ Detailed rules are set out in the Minister of Interior Decree no. 29/2013 (VI. 28) on rules implementing asylum detention and asylum bail

The HHC found that in the courtyard of the **Békéscsaba** asylum jail, which until a few years ago used to be an open reception centre, there is enough space for doing sports, the yard has a table-tennis table, badminton rockets and balls are available. In contrast, in **Nyírbátor** the otherwise spacious courtyard has no benches or shade-giving trees, limiting outdoor activities in sunny weather. In the **Debrecen** asylum jail, the small courtyard cannot be used for any meaningful free-time activity as it is only a fenced-in small area without benches or trees to give some shade on a warm summer day. In addition to this, the security guards' watchtowers frighteningly loom over the outdoor space. Since this detention centre is built in the middle of the large reception centre where asylum-seekers are housed, the detained asylum-seekers communicate with their friends living in the open facility by screaming out of the window or through the fence of the courtyard. This fact further increases their tension and the frustration experienced in the detention. The HHC strongly believes that having a closed detention centre in the middle of an otherwise open reception centre is inappropriate and recommends closing the facility as soon as possible.

Apart from staying outdoors, the three asylum detention facilities offer very few possibilities for activities and most detainees pass the time generally doing little more than nothing.

All asylum detention centres now are equipped with computer rooms where detainees are able to use the internet to communicate with the outside world, for 20-30 minute long periods. This is an important and laudable improvement, as the use of mobile phones is prohibited and regular payphones are expensive and few.

Detainees can watch television in the sparsely furnished communal rooms. Social workers employed by the OIN aim to organise some community activities but struggle with carrying out a wide variety of administrative duties.

During its human rights monitoring visits carried out in February 2014 to asylum detention facilities, the HHC did not find any major concerns regarding physical conditions of detention. Overcrowding was not a concern in any of the asylum detention centres as the minimum amount of space required by law⁴⁵, i.e. 15 cubic meters of cubic space and 5 sq. meters of moving space per person was respected in each facility.

Detained asylum-seekers did, however, complain to the HHC about hygienic conditions, particularly about the condition of bathrooms in Debrecen and Nyírbátor detention centres.

45 Section 36D(1) of Government Decree no. 301/2007 (XI.9.) implementing the Asylum Act

The HHC has met several vulnerable asylum-seekers in detention in whose case the deprivation of liberty is very likely to aggravate their mental or physical condition, and where the necessity and proportionality of detention is highly questionable. The HHC is concerned that such **medical or psychological vulnerabilities are not assessed properly** when ordering or prolonging detention. Furthermore, at the moment there is no psychological assistance available to detainees in any of the asylum detention centres -- in contrast, in police-run immigration detention facilities psychologists (employed by the NGO Menedék Hungarian Association for Migrants⁴⁶) have been helping detainees for over a year, with good experiences.

When detainees leave the premises of the asylum detention centre to attend court hearings in asylum or detention procedures, to withdraw money from the bank or for going on external medical examinations etc., they are escorted by police officers or armed security guards, and are handcuffed and led on leashes. Under the relevant rules,⁴⁷ the head of the police unit escorting the detainee may decide to order 'secured escorting' using handcuffs and even leashes, if, based on the known circumstances, there is a risk that the escorted person would abscond or attack the police escorts. The HHC is concerned that **handcuffs and leashes are used on all asylum detainees during transfers**, without any individualized assessment of the risk posed by the individual or their vulnerabilities. This practice is degrading and also stigmatizes asylum-seekers in the eyes of the public as criminals.

46 Menedék – Hungarian Association for Migrants, www.menedek.hu

47 Decree no. 29/2013 (VI. 28.) of the Minister of Interior on the rules implementing asylum detention and asylum bail, Sections 20(3), 21(2) and 24; Decree of the Minister of Interior no. 30/2011 (IX. 22.) on the police service regulations, Section 76 on the rules of police escorting

1.5. Ill-treatment in asylum detention

While the HHC found no general pattern of physical ill-treatment in asylum detention, **asylum-seekers detained in the Debrecen asylum detention centre complained to the HHC of verbal abuse and occasions of physical abuse by the armed security guards** working in the asylum detention centres.

A number of detainees in Debrecen complained to the HHC that they had been ill-treated by armed security guards in the doctor's surgery, as "there is no camera there". Several detainees alleged that one specific member of the medical staff (a male nurse) was present and did not intervene to stop the abuse. Detainees were skeptical about reporting these incidents to the authorities or feared retaliation by the guards.

- An Afghan citizen complained about ill-treatment by border police officers upon apprehension at the border (before being taken to the Debrecen asylum detention centre). Due to the elapsed time since the alleged incident, the HHC could not observe any external signs of previous ill-treatment. However, in the photo on the detainee's humanitarian residence permit that had been issued upon arrival at the detention centre, he had a clearly visible, approximately 5x5 centimeter large haematoma around his left eye and a bandage on his left eyebrow. According to the OIN, the detainee claimed during his medical check-up upon arrival at the centre that the injury had been caused by a fall.⁴⁸ While the HHC is not in a position to reconstruct what had exactly happened, especially months after the alleged ill-treatment had taken place, the situation and the character of the injury raises at least serious doubts about the explanation that it could have originated from a simple fall.
- Another Afghan citizen claimed that 7-8 days prior to the HHC's monitoring visit, 6 armed security guards had beaten him up in the doctor's surgery. He did not file a complaint, not trusting in any positive result.
- A third Afghan detainee stated that he had been ill-treated 4 times by the armed security guards, each time in the doctor's surgery. He filed a complaint on one occasion, after which he was interrogated by a "uniformed person", but he did not receive any written record of the interrogation and was not informed about any follow-up. The OIN confirmed the filing of the complaint, but stated that the detainee "did not cooperate in preparing a written record of the complaint". The OIN also claimed that the management of the detention centre informed the public prosecutor about the complaint and also informed the complainant about this fact with the help of an interpreter.⁴⁹

48 Letter No. 106-Ji-5026/9/2014 of 29 April 2014 by the OIN Director General to the HHC, <http://helsinki.hu/wp-content/uploads/BAH-valasz-menekultugyi-orizet-gyakorlatrol-20140429.pdf>

49 Letter No. 106-Ji-5026/9/2014 of 29 April 2014 by the OIN Director General to the HHC, <http://helsinki.hu/wp-content/uploads/BAH-valasz-menekultugyi-orizet-gyakorlatrol-20140429.pdf>

2. ASYLUM-SEEKERS IN DUBLIN PROCEDURES

2.1. Subsequent applications

Asylum-seekers returned to Hungary from another EU Member State under the Dublin III Regulation⁵⁰ (hereinafter: Dublin returnees) have to submit a subsequent asylum application upon return in the following cases:

- if the asylum-seeker withdrew his/her first application in writing;
- if the asylum-seeker received a negative decision either in the admissibility procedure or in the in-merit procedure and did not request judicial review;
- if the asylum-seeker received a negative decision from the court.⁵¹

New circumstances or facts have to be submitted in order for a subsequent application to be admissible, except when the asylum-seeker withdrew his/her previous asylum application in writing before any decision was issued.

In all other cases, Dublin returnees do not have to submit a subsequent asylum application, and their previous asylum procedure will continue in Hungary.

Until January 2014, asylum-seekers who had previously sought asylum in Hungary but whose claim was withdrawn in writing or it was finally refused and who were later transferred back from another Member State faced serious obstacles in regaining access to the asylum procedure and to having a full examination of their claim. Upon their return, they were issued a removal order by the OIN. If they insisted on maintaining their asylum claim, they had to submit a subsequent application. However, such subsequent applications did not trigger the automatic suspension of removal orders, which had put such asylum-seekers at the risk of being removed from the EU territory without having their claim examined on their merits in any EU Member State.⁵²

50 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L. 180/31-180/59

51 Letter no. 106-DU-4875/1/2014 of March 2014 by the OIN Director General to the HHC

52 For more information, see: Hungarian Helsinki Committee, Brief information note on the main asylum-related legal changes in Hungary as of 1 July 2013 <http://helsinki.hu/en/information-note-on-the-main-asylum-related-legal-changes-in-hungary-as-of-1-july-2013>;

Dublin II Regulation: National Report Hungary: European network for technical cooperation on the application of the Dublin II Regulation, <http://www.refworld.org/docid/514053412.html>;
National report: Hungary, Protection interrupted, The Dublin Regulation's Impact on Asylum-Seekers' Protection (The DIASP project), https://www.jrs.net/assets/Publications/File/protection-interrupted_JRS-Europe.pdf

After 1 January 2014, due to changes⁵³ in the Asylum Act, as a general rule, Dublin returnees are now guaranteed access to the asylum procedure and to a full examination of their asylum claim. However, there is one exception: if after return to Hungary an asylum-seeker submits the application after the (tacit or written) withdrawal of a previous application, which led to the discontinuation of the previous asylum procedure, the subsequent application is found inadmissible or manifestly unfounded, the request for judicial review against this decision will not have a suspensive effect on the removal decision.⁵⁴

Under the Asylum Act, the OIN may issue a decision in the absence of the applicant if it considers that it has enough information to be able to take a decision on the asylum application.⁵⁵ This is important because if a person absconds and the OIN issues a negative decision *in absentia*, the asylum-seeker who is later on returned under the Dublin procedure to Hungary will have to submit a subsequent application and present new facts and evidence in support of his/her claim.

According to the Dublin III Regulation,⁵⁶ the responsible Member State that takes back the applicant whose application has been rejected only at the first instance shall ensure that the applicant has or has had the opportunity to seek an **effective remedy** against the rejection. According to the OIN, the applicant only has a right to request a judicial review in case the decision has not yet become legally binding.⁵⁷ Since a rejection decision becomes binding once the 8-day long deadline for seeking judicial review has passed without such a request being submitted, the HHC believes that the **Hungarian practice is in breach of the Dublin III Regulation** because in such cases Dublin returnee applicants are not afforded an opportunity to seek judicial review after their return to Hungary. In case that the OIN issued a rejection decision *in absentia* (either in the preliminary procedure or in the in-merit procedure), the applicant does not have the right to request a judicial review at the court upon his/her return to Hungary, if the deadline for seeking the review has already expired in the meantime.

53 Amendment of the Asylum Act by Act CXCVIII of 2013

54 Asylum Act, Section 54(2)

55 Asylum Act, Sections 52(2a)(c) and 66(3)

56 Article 18(2) of Dublin III Regulation

57 Letter no. 106-DU-4875/1/2014 of March 2014 by the OIN Director General to the HHC

2.2. Reception conditions for Dublin returnees

Despite the improvement since January 2014 that now guarantees the right to stay in Hungary until a final decision has been taken on the asylum claim, asylum-seekers with a subsequent application do not have a right to the same reception conditions and the right to work as other asylum-seekers if:⁵⁸

- the subsequent asylum application that was submitted after the adoption of a final decision of discontinuation with respect to the previous application and the subsequent application is found inadmissible or manifestly unfounded;⁵⁹
- the subsequent application was submitted after a final rejection of the previous application;⁶⁰
- the subsequent application that was submitted after the adoption of a final decision of discontinuation with respect to the previous application and the Hungarian authority or court in its latest decision decided that the prohibition of refoulement did not apply.⁶¹

In practice, asylum-seekers in above mentioned cases are usually placed in the OIN-run “community shelter” in Balassagyarmat where they can stay up to 2 months.⁶² Since November 2013, more and more residents have exhausted the maximum period of stay in the community shelter and the risk of homelessness and destitution has become a reality for many subsequent applicants. The HHC finds it especially disturbing that such asylum-seekers face having to await the result of their asylum procedure in the street, in destitution and poverty, although they could be eventually recognized as refugees with all the benefits that this status affords.

Dublin returnees can be placed in asylum detention if one of the grounds for asylum detention under Section 31/A of Asylum Act prevail.

2.3. Asylum-seekers in the Dublin procedure

In the course of human rights monitoring missions to asylum detention centres in February 2014, the HHC met several asylum-seekers who had previously been in Bulgaria and who were in a Dublin procedure. They all feared to be returned to Bulgaria and to face the miserable reception conditions again. At the beginning of the 2014, UNHCR called for temporary halt to Dublin transfers of asylum-seekers to Bulgaria⁶³ and several EU Member States decided to suspend these

58 Asylum Act, Section 54(2) and (3)

59 Asylum Act, Section 54(2)

60 Asylum Act, Section 54(3)

61 Idem.

62 Section 63 of Act II of 2007 on the Entry and Stay of Third-Country Nationals

63 UN High Commissioner for Refugees (UNHCR), *UNHCR observations on the current asylum system in Bulgaria*, 2 January 2014, available at: <http://www.refworld.org/docid/52c598354.html>

transfers. The Hungarian immigration office (OIN) refused to suspend the transfers to Bulgaria in general. Not even the transfers of vulnerable asylum-seekers were suspended, despite the recently updated version of UNHCR's observations on the current situation of asylum in Bulgaria,⁶⁴ which concludes "that while deficiencies are no longer such as to justify a general suspension of Dublin transfers to Bulgaria there may nevertheless be reasons precluding transfers under Dublin for certain groups or individuals". To date, the HHC is aware of only one court decision⁶⁵ where the court decided to halt a transfer to Bulgaria.

The deadline to request judicial review of a Dublin decision (i.e. a transfer to another EU Member State) is very short: only 3 days.⁶⁶ Courts and judges deciding such requests are not specialised in asylum law but deal with general public administrative and labour law matters. A personal hearing of the applicant is specifically excluded by law. A request for judicial review against a transfer does not have automatic suspensive effect; although the asylum-seeker has the right to ask the court to suspend the transfer, this request does not have a suspensive effect either.⁶⁷ Given that the Dublin III Regulation provides the right to an effective remedy in a Dublin procedure,⁶⁸ the HHC is of the view that the foregoing provision of the **Asylum Act is in breach of the Dublin III Regulation**. In practice, this collusion of the Asylum Act and the Dublin III Regulation is remedied by the internal instruction of the Director General of the OIN guaranteeing that if an applicant requests the judicial review of the transfer decision, the transfer should not be carried out until the court brings a decision on the request.⁶⁹ The HHC welcomes the fact that the OIN ensures respect for the Dublin III Regulation and does not apply the non-compliant provision of the Asylum Act; however, the Asylum Act is still non-compliant in this respect.

In practice, asylum-seekers awaiting a transfer in the Dublin procedure are usually detained. They are not detained based on the Dublin III Regulation, but under the regular grounds on asylum detention (Section 31/A of Asylum Act), for example risk of absconding and/or establishment of their identity. Asylum-seekers who are not detained can be prohibited from leaving their place of stay until the actual transfer to another EU Member State is carried out.⁷⁰ This restriction of movement, however, cannot exceed 72 hours as it is meant to ensure that the transfer actually takes place.

64 UN High Commissioner for Refugees (UNHCR), *UNHCR observations on the current asylum system in Bulgaria*, April 2014, available at: <http://www.refworld.org/docid/534cd85b4.html>

65 Debrecen Public Administrative and Labour Law Court, 10.Kpk. 30.289/2014/8.sz.

66 Asylum Act, Section 49

67 Asylum Act, Section 49(9)

68 Article 27(3)(c) of the Dublin III Regulation

69 Letter no. 106-DU-4875/1/2014 of March 2014 by the OIN Director General to the HHC

70 Asylum Act, Section 49(5)

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The Hungarian Helsinki Committee (HHC) is a leading non-governmental non-profit human rights organisation in Hungary.

The HHC monitors respect for human rights enshrined in international instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The HHC's main areas of activities are centred on non-discrimination, protecting refugees and foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on access to justice, the conditions of detention and the effective enforcement of the right to defence and equality before the law.

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