

## **ECtHR ? O.M. v. Hungary, Application no. 9912/15, 5 July 2016**

**Country of Applicant:**

Iran

**Date of Decision:**

05-07-2016

**Citation:**

European Court of Human Rights, O.M. v. Hungary, Application no. 9912/15, 5 July 2016

**Court Name:**

European Court of Human Rights (Fourth section)

**Keywords:**[Detention](#) [1][Individual assessment](#) [2][Relevant Documentation](#) [3][Reception conditions](#) [4][Nationality](#) [5][Vulnerable person](#) [6][Sexual orientation](#) [7]**Headnote:**

The ECtHR found the detention of a homosexual asylum seeker in Hungary was arbitrary, in violation of Article 5(1) ECHR. In particular, the Court found that the Hungarian authorities had failed to make an individualised assessment and to take into account the applicant's vulnerability in the detention facility based on his sexual orientation. The Court emphasised that the authorities should exercise special care when deciding on deprivation of liberty in order to avoid situations which may reproduce the plight that forced asylum seekers to flee in the first place.

**Facts:**

The applicant crossed the Hungarian border from Serbia in June 2014, was apprehended by a border guard patrol and taken into custody since he was unable to show documentary evidence of his identity or right to stay in the country. He applied for asylum and declared that he had fled Iran because of his homosexuality. He also stated that criminal proceedings had been instituted

against him in Iran for this reason.

After the hearing, the asylum authority ordered that the applicant be detained on the basis that the applicant's identity and nationality had not been clarified and that there were grounds for presuming that, if left at large, he would delay or frustrate the asylum proceedings and would present a risk of absconding. On 26 June 2014, the asylum authority applied to the Debrecen District Court for an extension of the asylum detention for a maximum period of 60 days. On 27 June 2014, the court appointed a legal representative for the applicant and, on the same day, held a hearing that lasted for 5 minutes, in which the extension of the detention for 60 days was granted.

The applicant applied to be released from detention or transferred to an open facility on various occasions, explaining that it was difficult for him to cope with the asylum detention for fear of harassment due to his sexual orientation. His multiple requests were denied. In August 2014, the asylum authority requested another 60-day extension of the applicant's detention, this time without success. The detention terminated on 22 August 2014 and he was recognised as a refugee on 31 October 2014.

The applicant complained under Article 5 § 1 ECHR that his detention pending the examination of his asylum application was unlawful and unjustified.

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### **Decision & Reasoning:**

First, the ECtHR recalled its jurisprudence with regard to Article 5 § 1(b) ECHR and analysed the Hungarian government's argumentation that the detention was justified as the applicant had failed to comply with 'an obligation prescribed by law', namely the duties flowing from [section 5\(2\) of the Asylum Act](#) [8] ('obligation to cooperate'). The ECtHR found that the obligation to cooperate does not require an asylum seeker to provide *documentary* evidence of identity and nationality. Rather, it entails an obligation to collaborate with the asylum authority (that is, to reveal the circumstances of his or her flight, communicate relevant personal information, facilitate the clarification of his or her identity, etc.). In the case in question, the applicant had made reasonable efforts to cooperate with the authorities.

Moreover, from section 5(3) of the Hungarian Asylum Act it can be deduced that the production of documents is not the only option for asylum seekers to substantiate their identities and nationalities. Therefore, the ECtHR concluded that O.M.'s case was not assessed in a sufficiently individualised manner as required by the national law.

Secondly, the ECtHR considered that national authorities should exercise particular care with regard to asylum seekers who claim to be a part of a vulnerable group in their country of origin in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place. In the case of O.M., the Hungarian authorities have failed to do so when they ordered his detention without considering the extent to which vulnerable individuals – for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. Therefore, the ECtHR found once again that the national authorities had failed to conduct an individualised assessment of the applicant's case and his membership of a vulnerable group by virtue of his sexuality.

In the light of all these considerations, the ECtHR ruled that the applicant's detention verged on arbitrariness, in violation of Article 5 § 1 ECHR.

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### **Outcome:**

The ECtHR found a violation of Article 5 § 1 ECHR, ordered Hungary to pay EUR 7,500 in respect of non-pecuniary damage, plus EUR 3,395 in respect of the costs and expenses incurred before the ECtHR.

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### **Observations/Comments:**

ECRE, the AIRE Centre, ILGA- Europe and ICJ have submitted a [third party intervention](#) [9] to the ECtHR.

This case has been generally considered a positive step in the ECtHR's jurisprudence on asylum and vulnerability.

### *Relevant publications on this ruling:*

- Denise Venturi, [The potential of a vulnerability-based approach: some additional reflections following O.M. v Hungary](#) [10], Strasbourg Observers, October 2016
- Corina Heri, [Blog seminar on positive obligations \(4\): The Responsiveness of a Positive State ? Vulnerability and Positive Obligations under the ECHR](#), [11] Strasbourg Observers, October 2016
- Paul Johnson, [Detention of gay asylum seeker violated ECHR - judgment in O.M. v Hungary](#) [12], July 2016

### **Case Law Cited:**

ECtHR - Blokhin v. Russia [GC], Application no. 47152/06, 23 March 2016

ECtHR - Alajos Kiss v. Hungary, Application no. 38832/06, 20 May 2010

ECtHR - Epple v. Germany, Application no. 77909/01, 15 December 2005

ECtHR - Khodorkovskiy and Lebedev v. Russia, Applications nos. 11082/06 and 13772/05, 25 July 2013

ECtHR - Gothlin v. Sweden, Application no. 8307/11, 16 October 2014

ECtHR - Lazariu v. Romania, Application no. 31973/03, 13 November 2014

[ECtHR ? Saadi v. Italy, Application No. 37201/06, 28 February 2008](#) [13]

[ECtHR - Suso Musa v. Malta, \(Application no. 42337/12\), 9 December 2013](#) [14]

ECtHR - Vasileva v. Denmark, Application No. 52792/99

ECtHR - Iliya Stefanov v. Bulgaria, Application No. 65755/01

### **Attachment(s):**



[CASE OF O.M. v. HUNGARY \(1\).pdf](#)[15]

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### **Other sources cited:**

Guidelines of UNHCR, Guideline 9.7

2011 Annual Report of UNHCR: ?Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity?

**Authentic Language:**

English

**State Party:**

Hungary

**National / Other Legislative Provisions:**

Hungary - Act LXXX of 2007 on Asylum

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**Links:**

[1] [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A27](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A27)

[2] [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A40](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A40)

[3] [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A67](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A67)

[4] [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A753](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A753)

[5] [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A199](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A199)

[6] [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A2495](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2495)

[7] [https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A2448](https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2448)

[8] <http://www.refworld.org/docid/4979cc072.html>

[9]

[http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/ECtHR\\_%20ECRE%20v-Hungary\\_0.pdf](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/ECtHR_%20ECRE%20v-Hungary_0.pdf)

[10] <https://strasbourgobservers.com/2016/10/25/the-potential-of-a-vulnerability-based-approach-some-additional-reflections-following-o-m-v-hungary/>

[11] <https://strasbourgobservers.com/2016/10/13/blog-seminar-on-positive-obligations-4-the-responsiveness-of-a-positive-state-vulnerability-and-positive-obligations-under-the-echr/>

[12] <http://echrso.blogspot.be/2016/07/detention-of-gay-asylum-seeker-violated.html>

[13] <https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-saadi-v-italy-application-no-3720106-28-february-2008>

[14] <https://www.asylumlawdatabase.eu/en/content/ecthr-suso-musa-v-malta-application-no-4233712-9-december-2013>

[15]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20O.M.%20v.%20HUNGARY>