

[Home](#) > The detention of asylum seekers in Hungary: exploring the impact of three judgments of the European Court of Human Rights

The detention of asylum seekers in Hungary: exploring the impact of three judgments of the European Court of Human Rights

Date:

Thursday, January 23, 2014

This article is to be read in conjunction with the EDAL [Case Summaries](#) [1] for [Lokpo and Touré v Hungary \(10816/10\)](#) [2], [Abdelhakim v Hungary \(13058/11\)](#) [3], and [Said v Hungary \(13457/11\)](#) [4].

Introduction

In three decisions of the European Court of Human Rights (?ECtHR?), [Lokpo and Touré v Hungary](#) [2] (Application No. 10816/10; final on 08/03/2012), [Abdelhakim v Hungary](#) [3] (Application No. 13058/11; final on 23/01/2013), and [Said v Hungary](#) [4] (Application No. 13457/11; final on 23/01/2013), the Court found Hungary?s detention of asylum seekers to be in violation of Article 5(1) of the European Convention of Human Rights (?ECHR?), which prevents the deprivation of individual liberty except in accordance with a procedure prescribed by law and for one of the prescribed reasons mentioned in the Article. A year after these decisions, the detention of asylum seekers in Hungary is still a cause of great concern. The UN Working Group on Arbitrary Detention visited Hungary from 23 September to 2 October 2013, and issued a damning [statement](#) [5], which concluded that ?the situation of asylum seekers and migrants in irregular situations need robust improvements and attention to ensure against arbitrary deprivation of liberty?.

This article seeks to explore the impact of the ECtHR judgments on the detention of asylum seekers in Hungary. It will first analyse the judgments themselves, then explore the amendments to the [Asylum Act](#) [6] in July 2013, which introduced the detention of asylum seekers, and finally identify continuing problems in the practice of detaining asylum seekers.

ECtHR judgments

The three judgments each concern asylum seekers in Hungary who were detained pending expulsion due to their irregular entry into the country. More information about the individual circumstances regarding each of the applicants is available in the EDAL case summaries for [Lokpo and Touré v Hungary \(10816/10\)](#), [Abdelhakim v Hungary \(13058/11\)](#), and [Said v Hungary \(13457/11\)](#).

The Applicants were detained as irregular immigrants pending expulsion by the alien policing authority on the basis of Article 54(1)(b) of [Act no. II of 2007 on the Admission and Right of Residence of Third Country Nationals \(?TCN Act?\)](#) [7], which grants powers to detain in order to secure expulsion where the person ?has refused to leave the country, or, based on other

substantiated reasons, is allegedly delaying or preventing the enforcement of expulsion?. All of the Applicants passed the initial admissibility stage (see Section 51(2) [Act no. LXXX of 2007 on Asylum \(?Asylum Act?\)](#) [6]) and were transferred by the asylum authority to the ?in-merit? procedure, also known as the ?substantive examination?. The principle issue in all three cases was that, although a pending ?in-merit? asylum claim temporarily halts expulsion (under section 51(2) of the TCN Act), it does not automatically lead to release from detention. Instead, Section 55(3) of the Asylum Act provides that:

?If the refugee authority proceeds to the substantive examination of the application and the applicant is detained by order of the immigration authority, the immigration authority shall release the applicant at the initiative of the refugee authority.?

In other words, if the refugee authority does not take the initiative, the applicant will not be released. For Lokpo and Touré, no such initiative was ever taken, and their detention only ended at the expiry of the six-month maximum period for detention. Abdelhakim?s release was initiated nearly three months after he was transferred to the ?in-merit? procedure, notwithstanding that he had also been granted ?tolerated status?, which permitted him to remain in Hungary for at least a year. The District Court extended the Said brothers? detention on five separate occasions, in spite of their asylum applications being ?in-merit?, until release after five months in detention, due to no initiation by the refugee authority.

The ECtHR?s assessment

The ECtHR adopted the same reasoning and decision in each case. In all three judgments, the Court chose to assess the compatibility of Hungary?s laws exclusively with [Article 5\(1\)](#) [8], despite representatives for the Applicants making submissions also under [Article 5\(4\)](#) [8] (right to speedy court determination of detention lawfulness) and [Article 13](#) [8] (right to an effective remedy). The Court?s repetition of the reasoning in *Lokpo and Touré* to the two other cases was perhaps done to highlight the Hungarian authorities? lack of corrective action in the nine months between the judgments. The absence of any explicit attention paid to Articles 5(4) and 13 arguably limited the impact of these judgments on the domestic framework in the long run.

The starting point in each case was Article 5(1)(f), which provides that a deprivation of liberty can be justified if it is prescribed by law and constitutes:

?The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.?

The ECtHR noted that, unlike detention for other reasons, such as to prevent an offence, immigration detention need not be ?reasonably considered necessary? in order to be compatible with the Convention. It must only be ?in accordance with a procedure prescribed by law?. It is worth noting that this limited requirement of ?lawfulness? rather than ?necessity? is echoed in Article 9(1) of the [International Covenant on Civil and Political Rights \(ICCPR\)](#) [9]. By contrast, Article 31(2) the [1951 Geneva Convention](#) [10] does require that any restrictions imposed on refugees are deemed ?necessary? by the Contracting State. In addition, Article 8(2) of the [Reception Conditions Directive \(recast\)](#) [11] (?RCD recast?) provides that Member States may only detain an asylum seeker ?when it proves necessary?.

Despite the more limited standards obligated by the Convention, the Court insists that the ?lawfulness? requirement does not only demand the existence of and conformity with national law. It also ?implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness? [18].

The Court identified the key dispute as concerning the 'exact meaning and correct interpretation of section 55(3) of the Asylum Act [the initiative requirement], which was the legal basis of the applicants' continued detention' [19]. The Applicants in all cases submitted that section 55 conferred an actual obligation on the asylum authority to initiate an asylum seeker's release once transferred to the 'in-merit' procedure. The government disputed any such obligation.

In the end, the statutory interpretation dispute was immaterial, as the Court regarded the uncertainty of the government's interpretation 'i.e. that the initiative was discretionary' as incompatible with the lawfulness requirement of Article 5. In support of this conclusion, the Court cites, at para 20, [Saadi v. the United Kingdom \[GC\] \(Application No. 13229/03\)](#) [12] ([67]-[73]):

'to avoid being branded as arbitrary, ... detention [under Article 5(1)(f)] must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country' and the length of the detention should not exceed that reasonably required for the purpose pursued?.

The prolongation of the Applicants' detention due to the absence of initiative from the refugee authority was 'not incarnated by a decision, accompanied by reasoning or susceptible to a remedy' [23]. Instead, 'the Applicants were deprived of their liberty by virtue of the mere silence of an authority' a procedure which in the Court's view verges on arbitrariness. In this connection the Court would reiterate that the absence of elaborate reasoning for an applicant's deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5? [24].

It should be noted that Judges Jo'ien' and David Thór Björgvinsson disagreed with the majority on this point. They decided instead that 'the law does not provide for an unconditional legal obligation to liberate the asylum-seeker in all situations when his/her case reaches the merits stage. The fact that the refugee authority did not take the initiative is, in our view, not enough to render the continued detention arbitrary?.

Article 5 violations were found in each case, and 10,000 Euros per Applicant were awarded for non-pecuniary damage.

July 2013 amendments to the Asylum Act

The Hungarian government, both in response to the judgments of the ECtHR, and in an effort to transpose the RCD (recast), amended the laws on detention of asylum seekers. In particular, whereas formerly asylum seekers had been subject to immigration detention under the TCN Act by the alien policing authority, without regard to their status as asylum applicants, the amendments in July 2013 introduced a new and separate statutory framework for asylum detention, distinct from the immigration detention of third country nationals. The provisions are contained in [Act XCIII of 2013 on the amendment of certain law enforcement acts \(?July 2013 amendments?\)](#) [13] (Hungarian only ' translation below provided by the Hungarian Helsinki Committee (HHC) for the [Asylum Information Database \(AIDA\)](#) [14]). Section 31/A provides a number of circumstances in which the refugee authority may detain a person seeking asylum, loosely based on Article 8(3) of the RCD (recast).

In addition, the maximum period of asylum detention is 6 months. Families with children under 18 years of age may not be detained for more than 30 days. Asylum seekers submitting subsequent applications will instead be subject to the provisions of immigration detention contained in the TCN Act. Alternatives to detention, called 'measures ensuring availability' will be available in the form

of: bail (Section 2(lc) and Section 31/H of the Asylum Act); a designated place of stay (Section 2(lb) of the Asylum Act); periodic reporting obligations (Section 2(la) of the Asylum Act). In a more or less direct transposition of Article 8(2) of the [RCD recast](#) [11], asylum detention may only be ordered on the basis of assessment of the individual's circumstances and only if its purpose cannot be achieved by applying less coercive alternatives to detention. Under section 31B(2) of the Asylum Act, unaccompanied children are excluded from asylum detention by law. However, no other categories of vulnerable asylum seekers are excluded from detention, nor do vulnerable applicants have access to procedural safeguards and guarantees, such as access to accommodation and services in accordance with their needs.

The root of the problem identified by the ECtHR is that asylum seekers were detained by the *immigration authority* but their release was initiated by the *refugee authority*. The uncertain nature of the latter's power to initiate release – whether discretionary or obligatory – was the key ambiguity that flouted the lawfulness requirement of Article 5 [ECHR](#) [8]. The July 2013 amendments resolve this ambiguity by simply giving the refugee authority *direct* power to detain asylum seekers according to a separate statutory scheme. Asylum seekers will no longer be detained by the immigration authority, which obviates the need for any power vested in the refugee authority to initiate their release.

Continuing problems in the detention of asylum seekers

But does this statutory innovation by the Hungarian authorities bring their detention practice in line with European and international human rights standards? The UN Working Group on Arbitrary Detention is not satisfied. Their [statement](#) [5] notes the positive changes brought about by the July 2013 amendments concerning individual assessment obligations, consideration of detention alternatives, provision of social workers, and the exemption for unaccompanied children. However, the lack of proper judicial review of detention and the prolongation of detention is raised. Furthermore, detainees are often not informed of their right to challenge their detention. Detention can also be extended without regard a detainee's circumstances or their lawyer's submissions. The Group is also concerned that from September 2012 to September 2013, 'around 8000 such submissions for release were made, out of which only three were successful'. The positive measures that were introduced by the July 2013 amendments are, according to the Group, not being properly implemented.

The Hungarian Helsinki Committee (HHC), which submitted a [Briefing Paper](#) [15] to the Group on 8 October 2013, is also critical. The HHC visited the asylum detention facilities in summer 2013 and observed that, based on evidence of some detention orders, the refugee authority is failing to 'carry out a proper individualised assessment' of each detainee, and 'thus detention becomes a quasi-automatic measure for 'at least' asylum-seekers of certain nationalities' (p.18). Despite the new statutory obligations, 'the detention orders do not contain any justification why a certain alternative is not used instead of detention', nor are detainees properly informed of such alternatives. The HHC also criticises the detention conditions for families, noting that 'there are no social or educational activities for children, the food is also not adequate for children and they have no toys'.

Detention can only be challenged through an automatic court review procedure, performed at 60-day intervals by the district courts, mostly by criminal law judges, who almost always approve the detention orders. The ineffectiveness of the supervisory role played by the courts is compounded by the fact that, according to the HHC, 'the hearings are usually conducted in groups of 5, 10, or 15 detainees within 30 minutes' (p.20). Furthermore, mandatory court-appointed legal representatives of detainees 'usually do not object to the prolongation of detention'. Finally, despite the clear legal ban on detention of unaccompanied children, [HHC](#) [16] and [UNHCR](#) [17]

(p.10) have both documented instances where separated children were subject to *immigration detention* due to incorrect age assessment. It is inferred that similar incorrect assessments may also lead to the *asylum detention* of children under the new July 2013 provisions.

For further analysis of the July 2013 amendments, see UNHCR's [comments](#) [18] on the legislation while it was still in draft form. For criticism of the RCD recast, on which the July 2013 amendments were partly based, see the AIDA Annual Report 2012/2013 entitled [?Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System?](#) [19].

Conclusion

In response to the ECtHR finding Article 5 violations in Hungary's detention of asylum seekers in three separate decisions, the Hungarian government side-stepped the identified problems by devising new specific asylum detention provisions. Section 55(3) of the Asylum Act, the impugned provision in the three judgments, is now rendered redundant by the July 2013 amendments. As a result, deficiencies persist in the Hungarian detention of asylum seekers, in part due to a failure to properly implement the new legislation. It is hoped that continued pressure from NGOs and civil society, the concerted application of the EU asylum *acquis* (including the Charter of Fundamental Rights of the EU, which has acquired Treaty status), and future judgments of the ECtHR will compel the Hungarian authorities to improve their practice of detaining asylum seekers.

Matthew Fraser

Legal Assistant, European Council on Refugees and Exiles (ECRE)

January 2014

(This journal entry is an expression of the author's own views, and not those of EDAL or ECRE. If you would like to share any comments, you can contact us [here](#) [20].)

Keywords:

Child Specific Considerations
Individual assessment
Personal circumstances of applicant
Inhuman or degrading treatment or punishment
Delay
Effective access to procedures
Effective remedy (right to)
Legal assistance / Legal representation / Legal aid
Procedural guarantees
Best interest of the child
Detention
Material reception conditions
Reception conditions
Unaccompanied minor
Vulnerable person

Tags:

Hungary
ECtHR

Links:

- [1] <https://www.asylumlawdatabase.eu/en/node/4347>
- [2] <https://www.asylumlawdatabase.eu/en/content/ecthr-lokpo-and-tour%C3%A9-v-hungary-application-no-1081610-0>
- [3] <https://www.asylumlawdatabase.eu/en/content/ecthr-al-tayyar-abdelhakim-v-hungary-application-no-1305811>
- [4] <https://www.asylumlawdatabase.eu/en/content/ecthr-hendrin-ali-said-and-aras-ali-said-v-hungary-application-no-1345711>
- [5] <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13816&LangID=E>
- [6] <http://www.refworld.org/type,LEGISLATION,NATLEGBOD,HUN,4979cc072,0.html>
- [7] <http://www.refworld.org/type,LEGISLATION,,HUN,4979cae12,0.html>
- [8] <https://www.asylumlawdatabase.eu/en/node/195>
- [9] <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- [10] <https://www.asylumlawdatabase.eu/en/content/en-refugee-convention-28-july-1951>
- [11] <https://www.asylumlawdatabase.eu/en/content/en-recast-reception-conditions-directive-directive-201333eu-26-june-2013>
- [12] <https://www.asylumlawdatabase.eu/en/content/ecthr-saadi-v-united-kingdom-no-1322903-29-january-2008>
- [13] <http://www.kozlony.magyarorszag.hu/dokumentumok/cd7615df825472f45640e783541d020ef3e9ba39/me>
- [14] <http://www.asylumineurope.org/reports/country/hungary/grounds-detention>
- [15] http://helsinki.hu/wp-content/uploads/HHC_briefing-paper_UNWGAD_8_Oct_2013.pdf
- [16] <http://helsinki.hu/megfigyelo-latogatas-a-kiskunhalasi-orzott-szallason>
- [17] <http://www.refworld.org/docid/4f9167db2.html>
- [18] <http://www.unhcr-centraleurope.org/pdf/where-we-work/hungary/unhcr-comments-and-recommendations-on-the-draft-modification-of-migration-related-acts-april-2013.html>
- [19] http://www.asylumineurope.org/files/shadow-reports/not_there_yet_02102013.pdf
- [20] <http://www.asylumlawdatabase.eu/en/content/contact-us>