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What more can be done? ? lost hope in improving judicial review of asylum detention in Hungary

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Introduction

In Hungary judicial review of the administrative decision imposing detention on an asylum seeker is conducted by first instance local criminal courts. First the court performs the review within 72h after detention was ordered by the Immigration and Asylum Office (IAO). The court undertakes further reviews every 60 days. The court hearing is mandatory only at the first judicial review. Asylum seekers have a right to an ex officio appointed lawyer. Today, more asylum seekers are held in asylum detention than in open reception centres (a practice which was also apparent in 2016) and the Hungarian government has recently announced that plans to automatically detain all asylum seekers (including unaccompanied minors above 14 years old) until their case is decided [1]. Set against such a backdrop this piece details how the judicial review of detention in Hungary falls well below the standards prescribed by the ECHR and EU law. With a durable and long term perspective in mind, it examines why Court affirmed breaches have gone unheeded by the State and proposes other channels by which Hungary?s compliance with its international obligations can be assured.

Judicial review of asylum detention in Hungary

There exists a broad consensus amongst numerous national and international institutions, such as Council of Europe Human Rights Commissioner [2], UNHCR [3], UNWGAD [4], the Supreme Court [5] and Hungarian Parliamentary Commissioner for Fundamental Rights [6], that judicial review of asylum detention in Hungary is ineffective. All of the above mentioned sources have called for urgent improvement of the system. For example:

- *?Authorities should ensure that courts carry out a more effective judicial review of the detention of these groups.?* (UNWGAD);

- *?There is a need to improve the judicial review of asylum detention, which should be sped up and conducted on the basis of a real individual assessment.?* (CoE HR Commissionaire);

- *?Effective, automatic and periodical judicial review is required to ensure the regular in-merit examination of the legal basis for and the conditions of detention in an individualized manner. Such review should be carried out by a court specialized in reviewing administrative decision and not by a criminal court.?* (UNHCR).

- *?It is professionally unjustified to assign the task of judicial review to judges specializing in criminal or civil law; it would be desirable, in line with international practice, to assign these cases, after due preparation, to administrative judges.?*

(Supreme Court)

More precisely, the system of judicial review in Hungary is ineffective for the following reasons:

Lack of individualisation and examination of alternatives: The courts systematically fail to carry out an individualised assessment as to the necessity and the proportionality [7] of detention, in violation of Article 5(4) of ECHR, according to which a remedy must be effective and real and not just a formal review of the grounds of detention (A. and others v. United Kingdom [8], para. 202; Chahal v. United Kingdom [9], paras. 127-130) and also contrary to Article 28(2) of Dublin III Regulation and Article 8(2) of Recast Reception Conditions Directive. Judicial decisions are completely schematic and limit themselves to the mere repetition of the arguments submitted by the authority ordering detention. The courts are only able to make their decisions on the basis of the unilateral information in the motions submitted by the IAO, because the documents supporting those motions are not submitted, and therefore, it is not really possible to individualise the case. The result is a formulaic statement of reasons. Furthermore, the orders of detention only state that alternatives are not possible in a concrete case, but there is no explanation as to why. The courts reject the requests for application of alternatives, stating that this is in the exclusive competence of the IAO. This context should be set against the exceptionality of detaining asylum applicants, required by EU law and as recently confirmed in the Advocate General?s Opinion in Al Chodor [10] (para 56).

Improper or missing justification for detention grounds invoked: The ground most commonly used is the ?**risk of absconding**? ground (Section 31/A(1)(c) of Asylum Act). However, justification why someone presents the risk of absconding is often done in an arbitrary way. For example, an asylum seeker who does not explicitly say that he/she wanted to come to Hungary, but only says that he/she wanted to come to the EU or to a safe country, would be considered as someone who might abscond. Even if the asylum seeker has good reasons why his/her initial destination was another EU country, these reasons would not be taken into consideration. The ? **threat to public safety**? ground (Section 31/A(1)(d) of Asylum Act) is also often interpreted arbitrarily. Asylum seekers convicted for irregular entry are automatically deemed to pose a threat to public safety and are detainable. This reveals a systematic use of detention, rather than an individualised assessment of whether an applicant constitutes a genuine and present threat to public order. Additionally, detention for the purpose of establishing the asylum seekers? **identity** can in some cases be considered arbitrary. Detention under this ground does not fall within the scope of Article 5(1)(b) of ECHR when asylum seekers make reasonable efforts to establish their identity, since there is no legal obligation for asylum seekers in Hungary to provide documentary evidence of their identity (Section 31/A(1)(a) of Asylum Act). Finally, asylum seekers receive a humanitarian permit also when they are in asylum detention, which means that they are **explicitly authorised to stay** in Hungary during the asylum procedure. Their detention therefore cannot fall under Article 5(1)(f) of ECHR either, because their detention does not pursue the two purposes mentioned in this provision, namely detention for the purpose of deportation and detention in order to prevent unauthorised entry [11].

Vulnerabilities are not taken into account: The courts tend to fail to consider the individual circumstances (including vulnerabilities) of the person concerned, in violation of Article 5 ECHR (O.M v Hungary [12], Muskhadzhiyeva and Others v. Belgium [13], Rahimi v Greece [14]).

Detention of minors: Unaccompanied children are explicitly excluded from asylum detention by law. However, unaccompanied children have been detained due to incorrect age assessment, as the age assessment methods employed by the police and IAO are considerably problematic. Even if their date of birth is recorded as minors in the detention order, courts? decisions don?t question the lawfulness of detention, nor do they refer to any age assessment process or evidence proving

the adult age of the asylum seeker concerned.

Detention of families: Detention orders for families lack assessment of best interest of the child and do not verify whether the placement in detention is a measure of last resort for which no alternative is available. Furthermore, similarly to the Popov [15] case, where the Court has found a violation of Article 5(4) in relation to children, the actual subject of the detention order is not the minor but the adult relative accompanying him/her and therefore there are neither legal grounds nor legal guarantees for the detention of the child [16].

Group hearings: Hearings usually last one hour and are conducted in groups of 10 to 15 asylum seekers, which means that each detainee has around 5 minutes (including translation), which significantly undermines their right to be heard, their right to an effective remedy and is contrary to the right to good administration (Articles 41 and 47 of the Charter, as per the CJEU cases of H.N [17] and M.M [18]).

Non performance of *ex officio* appointed lawyers: They are present, but usually do not know which client they actually represent, they do not meet their client before the hearing neither do they study their file. The lawyers usually do not object to the prolongation of detention and therefore the ?equality of arms? principle is not applied in practice.

Release rate: The release rate is very low. The Hungarian Supreme court conducted a survey which showed that out of some 5,000 decisions made in 2011 and 2012, only 3 discontinued detention, while the rest simply prolonged detention without any specific justification. The HHC?s attorneys report for 2016, that if the asylum seeker is represented by an *ex officio* attorney, the chances of success at the court are equal to zero. If the asylum seeker is represented by another attorney, then a chance of being released is bigger, but still very slim.

Lack of capacity: Judges are overburdened, and the irrationally high number of cases they are assigned makes it impossible to provide effective judicial review.

Recourse to other channels

When it is obvious that domestic remedies are ineffective and that advocacy efforts did not bring any results, the supranational courts remain the only hope. The HHC brought several cases to the ECtHR. The Court until today issued judgements in five cases: *Lokpo and Touré v. Hungary [19], Abdelhakim v. Hungary [20],* Said v. Hungary [21], Nabil and others v. Hungary [22] and O.M. v. Hungary [12]. In all cases the Court found that detention of asylum seekers was unlawful in violation of Article 5(1). In all 5 cases the Court found that the Hungarian authorities had failed to make an individualised assessment and to take into account the applicants? personal circumstances.

However, despite the fact that applicants in all five cases also claimed violation of Article 5(4) (their detention was prolonged several times by domestic courts), the ECtHR never communicated this Article to the Government and therefore never ruled upon it. The absence of any explicit attention paid to Article 5(4) limits the impact of these judgments on the domestic framework. Of course it can be concluded that since the detention was found unlawful, the fact that it was prolonged several times by the courts implies that the domestic judicial review was not done properly. This is especially visible in the Nabil case, where the Court actually found that the domestic court did not perform the requisite scrutiny. However, for the purpose of advocacy and in hope of actually achieving a change in the system, ruling on Article 5(4) would be of the utmost importance.

From the point of view of lawyers, it is very frustrating to work on the application knowing that part of it might simply be ignored by the Court. And there is nothing you can do about it. Article 5(4)

was not found to be manifestly unfounded in the above cases; the Court simply decided that it is enough to assess the claimed violations under Article 5(1). However, in my opinion ?right to an effective judicial review of detention? is an independent right and therefore it cannot be just consumed under Article 5(1). Article 5(4) addresses the judiciary, while under Article 5(1) in the asylum context, scrutiny is placed upon the administrative authority who orders detention.

In terms of the remedies provided by the Court, one can?t help but wonder whether strategic litigation in front of the ECtHR is really useful to effectuate system change in national settings (beyond the specific case being heard before the ECtHR). In all the above mentioned cases, the Court only ordered just satisfaction. As a consequence, the Hungarian government in the Nabil case, for example, simply reported in the action plan on the implementation of the judgment that the just satisfaction has been paid and that the general measure undertaken was the distribution of the judgement to the judicial authorities and publication on the Governmental website [23]. There was no sign of a system improvement plan. Therefore when several cases addressing similar systemic problems are decided in front of the Court, especially seeing that nothing has changed between 2012 (Lokpo and Toure) and 2015 (O.M. v. Hungary), it would be very important for the ECtHR to pay more attention to the fact that violations addressed to it are of a systemic nature (ie embedded within the asylum system). The Court may, therefore, find it useful to indicate to the respondent State the type of measures that might be taken in order to put an end to the systemic situation that gave rise to the finding of a violation. This would be far more efficacious and ultimately streamline many of the repetitive cases before the Court. Lastly, the mere fact that the Court did not indicate specific general measures does not necessarily indicate that there is no systemic problem. The Committee of Ministers is entitled to require further action from the Government, even though the judgement did not indicate any general measures to be undertaken by the State. Bearing this in mind, it is very important that we do not stop with our advocacy efforts when the judgement is delivered by the Court, instead we should engage in the process of execution of judgements and present our views on the need for systemic change to the Committee of Ministers.

For more information on detention, reception and procedures in Hungary for asylum seekers, please see the AIDA Country Update report for Hungary [24].

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

Keywords:
Détention

Links:
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[2] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?coeReference=CommDH(
[3] http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html.
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[7] http://www.helsinki.hu/wp-content/uploads/HHC-Hungary-info-update-May-2014.pdf
[8] http://www.asylumlawdatabase.eu/en/content/ecthr-and-others-v-united-kingdom-application-no-345505-19-february-2009
[9] http://www.asylumlawdatabase.eu/en/content/ecthr-chahal-v-united-kingdom-application-no-2241493
[10] http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d58c8a15b766af4e04bdd89b0e
[11] http://www.asylumlawdatabase.eu/en/journal/detention-asylum-seekers-under-scope-article-51f-echr-some-thoughts-based-recent-echr-and
[12] http://www.asylumlawdatabase.eu/en/content/ecthr-om-v-hungary-no-991215-article-5-echr-5-july-2016
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[18] http://www.asylumlawdatabase.eu/en/content/cjeu-c-27711-mm-v-minister-justice-equality-and-law-reform-ireland-attorney-general-0
[19] http://www.asylumlawdatabase.eu/en/content/ecthr-lokpo-and-tour%C3%A9-v-hungary-application-no-1081610-0
[20] http://www.asylumlawdatabase.eu/en/content/ecthr-al-tayyar-abdelhakim-v-hungary-application-no-1305811
[21] http://www.asylumlawdatabase.eu/en/content/ecthr-hendrin-ali-said-and-aras-ali-said-v-hungary-application-no-1345711
[22] http://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-nabil-and-others-v-hungary-no-6211612-22-september-2015
[23] http://hudoc.exec.coe.int/eng#{"EXECIdentifier":["DH-DD(2016)1078E"]}
[24] http://www.asylumineurope.org/reports/country/hungary