



The worst interest of the child

The situation of children deprived of their liberty in Hungary

I. Overview

Hungary was a signatory to the Helsinki Final Accords and is a state party to both the UN Convention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR). As a Member State of the European Union, it shall respect and uphold the Charter of Fundamental Rights of the EU (Charter) which served an inspiration to its new constitution, the Fundamental Law as well.¹ Yet, according to the experience of the Hungarian Helsinki Committee (HHC) children can easily end up being deprived of their personal liberty – in fact, in a number of cases, this deprivation is automatic and unlawful.

The current document will examine the situation of asylum seeking children and children who committed a misdemeanour and will argue through their example that Hungary is falling short in ensuring that their best interest is taken into account.

II. Asylum seeking children

A. The erection of the transit zones and the 'state of emergency' regime

In March 2017, the Hungarian Parliament passed Law XX of 2017 which amended the Asylum Act², the Act on the Admission and Right of Residence of Third-Country Nationals³, the Act on the State Border⁴, the Act of Misdemeanours⁵ and the Act of Child Protection and Guardianship Management⁶. Key changes, applicable when a 'state of crisis due to mass migration' is in effect, put unaccompanied asylum seeking children at further risk.

The 'state of crisis due to mass migration' is a relatively new legal regime which may be ordered by the Government, however, the criteria based on which it may do so are highly subjective and leave considerable space for an arbitrary application of law.⁷ Since the Government was given this legal power, there has been a 'state of crisis due to mass migration' in Hungary, even though the number of applicants for international protection dropped significantly.⁸

The amendment to the Child Protection Act resulted in taking unaccompanied minors above the age of 14 out of the scope of the Act during a 'state of crisis due to mass migration'.⁹ This means that during a 'state of crisis', unaccompanied minors above the age of 14 are not entitled to the rights and protections guaranteed by the Child Protection Act, for example, they are not assigned a permanent guardian.¹⁰ This is in stark contrast with the definition of the child under Article 1 CRC and creates a system when the mass detention of

¹ See the reasoning of the Bill on the Fundamental Law of Hungary <http://www.parlament.hu/irom39/02627/02627.pdf>

² Act LXXX of 2007 on Asylum, available in English at : <http://www.refworld.org/docid/4979cc072.html>

³ Act II of 2007 on the Admission and Right of Residence of Third Country Nationals

⁴ Act LXXXIX on the State Border

⁵ Act II of 2012 on Misdemeanours

⁶ Act XXXI of 1997 on Child Protection and Guardianship Management

⁷ Section 80/A of the Asylum Act

⁸ See the detailed statistics at the HHC's website <http://www.helsinki.hu/en/press-room/press-releases/>

⁹ Section 4 (1) c) of the Act on Child Protection and Guardianship Management

¹⁰ Unaccompanied minors above the age of 14 are assigned a temporary guardian who may be present during the asylum procedure but does not actively work to guarantee that the child's welfare is respected.



Hungarian Helsinki Committee

children is part of mainstream law, which the HHC believes to be unconstitutional¹¹ and is clearly not in the best interest of children.

As of 28 March 2017, during a 'state of crisis due to mass migration', asylum can only be sought at the transit zones.¹² This effectively suspends the access to Hungarian territory and asylum procedure of those waiting in Serbia to lodge an asylum application as the admittance has been reduced to 5-5 in each transit zones on working days. All third-country nationals without the legal right to stay found anywhere in Hungary are escorted to the external side of the border fence without the right to seek asylum.¹³ This regulation is applicable to all third-country nationals, regardless of age, sex, mental or physical state, including children and unaccompanied children. It means that people fleeing, among them unaccompanied minors, are currently falling victim to indiscriminate collective expulsion without having access to a (fair) asylum procedure.

B. Detention in the transit zones

According to the Hungarian legislation applicable when the so-called 'state of crisis due to mass migration' is not in effect, families travelling with children and unaccompanied minors cannot be subject to the border procedure as they are regarded vulnerable by the Asylum Office.

As of 28 March 2017 all arriving families with children and unaccompanied minors between the ages of 14 and 18 are unlawfully detained in the transit zones.

The HHC regards stay in the transit zone as detention. Members of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited Hungary in October 2015 and also regarded the transit zone as a place of detention in their report¹⁴. On 14 March 2017 the European Court of Human Rights ruled in *Ilias and Ahmed v. Hungary*¹⁵ concerning the case of two Bangladeshi asylum seekers, represented by an attorney of the HHC that *inter alia* placement in the transit zones is a form of unlawful detention. On his recent visit to Hungary, UN High Commissioner for Refugees Filippo Grandi also reminded Hungary that '*children, in particular, should not be confined in detention.*'¹⁶

Detention in the transit zones is also in breach of Hungary's legal obligations under Article 3 ECHR, since the conditions are dire to the extent which inevitably reaches the threshold of inhuman and degrading treatment. Asylum seekers are not served a ruling which they may challenge in the hope of being released, since the ruling on their place of stay may only be subject to judicial review in the context of their decision on the merits of their claim for asylum.¹⁷ Their confinement has no maximum limit guaranteed by the law, meaning that they may stay in the transit zone detention for an indefinite period of time.

The HHC is aware of cases when unaccompanied minors were held in detention for several months, and one family with four minor children have been waiting for their release for over half a year.

¹¹ A Magyar Helsinki Bizottság azt kéri a köztársasági elnöktől, ne írja alá a március 7-én elfogadott alkotmányértő törvénymódosításokat <http://www.helsinki.hu/a-magyar-helsinki-bizottsag-azt-keri-a-koztarsasagi-elnoktol-ne-irja-ala-a-marcius-7-en-elfogadott-alkotmanyerto-torvenymodositasokat/>

¹² Section 80/J of the Asylum Act

¹³ *Ilias and Ahmed v. Hungary*, Application No. 47287/15

¹⁴ UNHCR Chief visits Hungary, calls for greater access to asylum, end to detention and more solidarity with refugees <http://www.unhcr.org/news/press/2017/9/59b809d24/unhcr-chief-visits-hungary-calls-greater-access-asylum-end-detention-solidarity.html>

¹⁵ Section 80/J (5) of the Asylum Act



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Many complain about the lack of psychological support. Despite encouragement from the OSCE to cooperate with NGOs, the Government of Hungary has been preventing many highly qualified civil society professionals from entering the transit zone and working with asylum seekers. The Cordelia Foundation for the Rehabilitation of Torture Victims¹⁶ for instance is not allowed in the transit zone, neither is SOS Children's Villages Hungary. Many children complain that they have nothing to do.

The transit zones are a bleak and boring environment for children where their mental and physical well-being may deteriorate quickly. Mothers and fathers complained to representatives of the HHC that they feel powerless to help their children and suffer from having to watch their mental and psychological health decline.

Formal education is not accessible in the transit zones either.

The HHC is aware of one case when a child under the age of ten and her mother were not entitled to get food from the Immigration and Asylum Office, since she had already applied for asylum in Hungary prior to entering the transit zone again.¹⁷ Her mother informed the family's lawyer that they had been starving for a week before receiving food donations from the religious organisations who still have access to the transit zone.

Substandard age assessment practices also render several unaccompanied minors who are under the age of 14 to be held in detention unlawfully, among inhuman conditions. The HHC is aware of cases when unaccompanied minors complained several times to the case officers of the Immigration and Asylum Office, demanding a revised age assessment be carried out. The result of age assessment cannot be individually challenged, which in the current context may have extremely serious consequences.

The European Court of Human Rights, upon a request by detainees represented by the HHC granted interim measures, ordering the Government of Hungary to place the asylum seekers, many of them children, among conditions compatible with Article 3 ECHR.¹⁸ The Government has maintained its view that conditions within the transit zones are not in breach of the prohibition on torture or cruel, degrading and inhuman treatment. Many European countries have, following a call from UNHCR¹⁹, ceased transferring asylum seekers to Hungary under the Dublin III Regulation.

The HHC strongly maintains the view that asylum seekers, among them many children, are held unlawfully in the transit zones among circumstances which amount to inhuman and degrading treatment. We therefore suggest the Government of Hungary the following:

- comply with the interim measures granted by the ECtHR
- ensure that all vulnerable asylum seekers, especially children, are accommodated in open reception centres where their needs can be duly attended to
- ensure that age assessment is carried out in a way which is in line with international recommendations in order to avoid the unlawful detention of children.

¹⁶ <http://www.cordelia.hu/index.php/en/>

¹⁷ Section 80/K (11) of the Asylum Act

¹⁸ *R.R. and Others v. Hungary*, appl. no. 36037/17; *A.S. and Others v. Hungary*, Appl. no. 34883/17, *N.A. and Others v. Hungary*, Appl. no. 37325/17, *A.A.A. and Others v. Hungary*, Appl. no. 37327/17, *I.A. v. Hungary*, Appl. no. 38297 /17 and *M.H. and Others v. Hungary*, Appl. no. 38967/17

¹⁹ UNHCR urges suspension of transfers of asylum-seekers to Hungary under Dublin
<http://www.unhcr.org/news/press/2017/4/58eb7e454/unhcr-urges-suspension-transfers-asylum-seekers-hungary-under-dublin.html>



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The HHC invited the international community to follow and monitor the situation of children and other vulnerable asylum seekers in the transit zone and call upon the Government of Hungary to comply with its obligations set forth by international and EU law.

III. The situation of juvenile offenders

For petty offence acts under the value of a misdemeanour, the punishment can be 30, in aggravated cases 45 days of detention for juveniles. The detention is executed in penitentiary institution.

The Law on Misdemeanours regarding juveniles results in an absurd and unacceptable situation. With regards to juvenile offenders, Article 105 (3) of the Criminal Code states that a measure or punishment involving the withdrawal of freedom may only be applied if the aim of the measure or punishment cannot otherwise be achieved. Thus, even in case of the perpetration of a criminal act, withdrawal of freedom can only be a last resort. The law, however, still doesn't change the rule that it is possible to use withdrawal of freedom for juvenile offenders in the case of less serious, less dangerous activities. According to the Law on Misdemeanours, there is still a possibility of confinement for juvenile offenders, as well as for the transfer of fine into confinement in case the fine is not paid. According to the Law on Misdemeanours only juvenile offenders over 16 years of age can be sanctioned with community service.

Imprisonment for juvenile offenders is unacceptable for the following reasons: The Law on Misdemeanours completely disregards the international legal obligations of Hungary by maintaining the possibility for confinement and also by not making any alternative sanctions available for juvenile offenders. Juvenile offenders should only be confined as a last resort, and in their case, the central focus of the criminal justice system should be education and reintegration. According to international legal rules, individuals under 18 are considered children, and this should be the primary perspective through which all legal solutions relating to them are evaluated. Article 37 CRC clearly requires that the arrest, detention or imprisonment of a child should only be applied as a measure of the last resort, and only for the shortest possible period of time. Moreover, amongst others, Recommendation Rec (2003) 20 of the Committee of Ministers of the Council of the European Union, adopted on 12 September 2003, concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, and the Beijing Rules (the UN 3 Standard Minimum Rules for the Administration of Juvenile Justice) also state: in the case of juvenile offenders, the criminal justice system needs to avoid a retributive approach.

The objective of the sanction according to these documents is the correction and education of the juveniles, and not punishment. The Law on Misdemeanours goes against these international rules.

According to the Law on Misdemeanours, confinement of juveniles is executed in a penitentiary institution; the possibility of carrying out the confinement in a juvenile correctional facility is excluded. Therefore the Law on Misdemeanours still goes contrary to Article 19 of the Beijing Rules, the commentary of which explicitly states that if a juvenile must be institutionalized, the loss of liberty should be restricted to the least possible degree, with special institutional arrangements for confinement and bearing in mind the differences in kinds of offenders, and giving priority to correctional or educational institutions. The former Parliamentary Commissioner for Civil Rights established that even for juveniles in pre-trial detention, thus for juveniles who have committed rather more serious activities than misdemeanours, it is an abuse of the juveniles' right to satisfactory physical, mental and moral development if their confinement does not take place in a juvenile correctional facility or a juvenile penitentiary institution.

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