



Hungarian Helsinki Committee

ACCESS TO PROTECTION JEOPARDISED

*Information note on the treatment of
Dublin returnees in Hungary, December 2011*

SUMMARY

In the Hungarian Helsinki Committee's opinion, Hungary currently does not provide appropriate reception conditions and access to protection to asylum-seekers returned under the Dublin procedure¹ as:

- Asylum-seekers returned under the Dublin procedure to Hungary ("Dublin returnees") are – as a general practice – immediately issued an expulsion order, irrespective of their wish to seek asylum;
- Dublin returnees who had previously submitted an asylum claim in Hungary cannot continue their previous (discontinued) asylum procedure, and if they wish to maintain their claim, it will be considered as a "subsequent" application for asylum;
- "Subsequent" asylum claims have no suspensive effect on expulsion measures (except in very limited cases); therefore those taken back by Hungary in a Dublin procedure are often not protected against expulsion, even if their asylum claim has never been assessed on its merits in any EU member state;
- Based on the automatically issued expulsion order, the majority of Dublin returnees are routinely placed in immigration detention, without consideration of their individual circumstances or alternatives to detention;
- Judicial review of immigration detention is ineffective, and the prolongation of immigration detention is quasi-automatic in nearly all cases;
- Dublin returnees (taken back by Hungary) who are not detained are deprived of proper reception conditions, as their "subsequent" asylum claim does not entitle them to accommodation and support services normally provided to asylum-seekers.

1. BACKGROUND INFORMATION

On 24 December 2010, a new Hungarian regulatory framework amending the asylum and immigration legislation entered into force. These amendments lowered key standards regarding the right to asylum and immigration detention in many ways, and particularly affected asylum-seekers returned to Hungary under the Dublin procedure.

The purpose of this information note by the Hungarian Helsinki Committee (HHC)² is to bring to the attention of the international public obstacles faced by asylum-seekers returned to Hungary under the Dublin II Regulation. Information included in this report is primarily **based on first-hand information gathered by the HHC in a high number of individual cases** (as the HHC provides legal advice and representation to more than 1 000 asylum-seekers, including Dublin returnees, each year).

¹ A procedure carried out under Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereinafter Dublin Regulation).

² The Hungarian Helsinki Committee (HHC) is a non-governmental organisation, which monitors the enforcement of human rights enshrined in international human rights instruments; provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The HHC strives to ensure that domestic legislation guarantees the consistent implementation of human rights norms. The HHC promotes legal education and training in fields relevant to its activities, both in Hungary and abroad. The HHC, as an implementing partner of the United Nations High Commissioner for Refugees (UNHCR), has been providing legal assistance to asylum-seekers and foreigners potentially in need of international protection since 1998. This activity includes regular visits by the HHC's contracted lawyers to jails where foreigners are held in immigration detention.

Website: www.helsinki.hu

2. "DUBLINED" BACK AND IMMEDIATELY EXPELLED

The Hungarian asylum authority (Office of Immigration and Nationality, OIN) does not automatically consider Dublin returnees **as asylum-seekers**. The OIN treats them primarily as unlawful migrants in the framework of an expulsion procedure, on the ground that – despite being returned in the Dublin procedure – the returned asylum seekers had no lawful basis to enter and/or stay in Hungary.

Prior to registering an asylum application, the Police issue an **expulsion order and a re-entry ban** against the asylum-seeker (for duration of 1-10 years). This is based on a short interview that only focuses on immigration and human trafficking-related questions with no focus on asylum or international protection needs.

Under Hungarian law, an expulsion order cannot be issued without assessing the principle of *non-refoulement*; however, in practice this assessment is not more than a pure formality and is clearly ineffective. The Police are required by law to turn to the OIN for a country of origin information assessment. The OIN officer on duty gives his/her opinion on the "returnability" of the person concerned (risk of *refoulement*) based on the minutes of the preliminary interview, which had been conducted by a police officer. The HHC's experience shows that the **country information assessment** carried out by the OIN and its conclusions in these cases are often too short and **fail to provide sufficient time and resources for a thorough assessment of the specific circumstances of the case**.³ Usually only asylum-seekers coming from a country that the OIN deems *prima facie* inadequate for return (regardless of the individual circumstances of the case) based on *non-refoulement* grounds are not expelled to their country of origin (e.g. Somalia). However, they can be expelled to another transit country (e.g. Serbia, Ukraine) based on the application of a "safe third country" principle and bilateral or EU-level readmission agreements.⁴

According to the Administrative Proceedings Act,⁵ where a final decision in a proceeding requires the preliminary assessment of an issue where the decision lies with another authority, the authority shall suspend its proceedings. The application of this provision in the expulsion proceedings of an asylum-seeker would mean that the expulsion procedure shall be suspended until a final decision is issued about the asylum claim. Moreover, expulsion of an asylum-seeker may only be ordered after it has been considered whether he/she represents a serious threat to national security, public security or public policy.⁶

In practice, the Police do not suspend the expulsion procedure, just its execution. The staid expulsion order then serves as a **legal basis for ordering the foreigner's detention**. The HHC has challenged this practice in 5 appeals in cases of expulsion of asylum-seekers returned in the Dublin procedure. Until December 2011, the Metropolitan Court (*Fővárosi Bíróság*) has issued 3 judgments⁷ on this issue and ruled in all cases that the expulsion orders issued by OIN were unlawful. The court repeatedly concluded that the OIN should have waited for the asylum procedure to end and should have suspended the expulsion procedure (and not only its execution) until then. According to these judgments, irrespective of how many times an applicant had applied for asylum in Hungary previously, there will still be no lawful ground for expulsion after a Dublin transfer if the applicant requests the asylum procedure to be continued. **In contradiction with the consistent judicial guidance, the OIN continues to apply the above-described unlawful practice.**

Case example:⁸

An Afghan asylum-seeker was taken back by Hungary in a Dublin procedure, where he had previously applied for asylum. Following his return, an expulsion procedure started, during which he applied for asylum again. The OIN ordered his expulsion despite his application for asylum. In the decision's reasoning, the OIN referred to non-compliance with the requirement for a lawful stay under the Third Country Nationals Act and to the asylum authority's assessment of the principle of *non-refoulement*, stating that Afghanistan may be considered as a safe country of origin as regards the applicant. The OIN suspended the execution of expulsion until a final decision was delivered in the asylum procedure.

³ According to the UNHCR's Regional Representation for Central Europe, in 2009, the OIN only declared the prohibition of return based on the *non-refoulement* principle in 3 cases out of 1 580. Unfortunately more recent statistics are not available.

⁴ Access to territory and asylum procedure in Hungary, Hungarian Helsinki Committee, 2010, pp. 23-26, <http://helsinki.hu/dokumentum/Hatatmegfigyelo-program-2010-US-08-24-2011-final-WEB.pdf>

⁵ Section 32 (1) of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services.

⁶ Section 45 (3) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, as interpreted by the Metropolitan Court in the judgment *H. W. v. Office of Immigration and Nationality*, 21.K.32.365/2011, 21 September 2011.

⁷ *W. G. v. Office of Immigration and Nationality*, Metropolitan Court, 5.K.34.146/2010/4., 4 January 2011; *A. R. v. Office of Immigration and Nationality*, Metropolitan Court, 15.K.34.907/2010/5., 31 March 2011; *H. W. v. Office of Immigration and Nationality*, Metropolitan Court, 21.K.32.365/2011, 21 September 2011.

⁸ *W. G. v. Office of Immigration and Nationality*, Metropolitan Court of Budapest, 5.K.34.146/2010/4., 4 January 2011.

The applicant's legal representative appealed the expulsion order. In the meantime the applicant was granted subsidiary protection.

Basing its reasoning on Section 29 (1) (c) of the Third Country Nationals Act (any third country national who has applied for asylum shall be granted a residence permit on humanitarian grounds) and on Section 32 (1) of the Administrative Proceedings Act (where a final decision in a procedure requires the preliminary assessment of an issue where the decision lies with another authority, the authority shall suspend its proceedings), the court concluded that **the OIN should have waited for the asylum procedure to end and should have suspended the expulsion procedure (and not only its execution)** until then.

The court also noted that the execution of the expulsion was suspended until the travel documents and tickets would be procured and not until the asylum authority would reach a decision regarding the asylum claim, in contradiction with what the OIN claimed in its submission to the court. In addition, the court found questionable the seriousness and reliability of the OIN's investigation concerning the applicability of the principle of *non-refoulement* in light of its two contradictory opinions. In the expulsion procedure, the OIN asylum department established that Afghanistan is a safe country of origin, whereas in the asylum procedure it granted subsidiary protection to the same applicant.

The court ruled that by failing to suspend the expulsion procedure before actually issuing an expulsion order, the OIN had violated relevant procedural rules which in fact also affected the merits of the case. The court therefore annulled the expulsion order.

The above-described legal remedy mechanism **does not provide a solution for the vast majority of asylum-seekers taken back by Hungary in the Dublin procedure**. The HHC's attorneys – due to capacity constraints and a variety of technical obstacles – could only be present and submit appeals in 5 such expulsion cases. Compared to the overall number of similar cases (a total of 391 persons were returned to Hungary under the Dublin regulation between 1 January and 31 October 2011), 5 cases can be considered insignificant.⁹ In addition, in Hungary, court judgments in expulsion cases only have an *inter partes* effect. The OIN therefore is under no legal obligation to consider these judgments when deciding similar cases. Furthermore, these decisions annulling the expulsion orders were issued by the same court (Metropolitan Court), and other courts in other regions of Hungary might rule differently. The 3 above-cited cases therefore should not be taken to mean that judicial review would be an effective tool to stop the unlawful practice in question that potentially affects hundreds of asylum-seekers each year.

3. DUBLIN RETURNEES' ASYLUM APPLICATIONS DO NOT SUSPEND THE EXPULSION PROCEEDINGS AND ARE NOT FREE OF CHARGE

The 2010 amendment of the asylum law removed the suspensive effect on expulsion measures of a second subsequent asylum application, if the OIN or a court in its latest (previous) decision decided that the prohibition of expulsion on *non-refoulement* grounds was not applicable.¹⁰ The term "subsequent" refers to an application submitted once a previous asylum procedure has been closed with a final decision or has been discontinued (closed without a decision on the merits of the claim, e.g. because the person absconded in an early phase of the procedure).

Taking into consideration the above-described quasi-automatic practice of immediately issuing an expulsion order in case of Dublin returnees, it is very likely that asylum-seekers returned to Hungary, originating from a country not considered as *prima facie* inadequate for return, will be issued an expulsion order first of all, and their "subsequent" asylum claim will not have a suspensive effect on it. This practice is of serious concern, as it might result in the **removal of asylum-seekers who have never had their asylum application examined on the merits in any EU member state**.

The HHC requested the OIN to clarify this issue in March 2011. The Director General of the OIN replied on 6 April 2011, stating: "The removal of the suspensive effect from subsequent asylum applications does not result in the violation of the principle of *non-refoulement* under the 1951 Geneva Convention and the European Convention on Human Rights, because the authority asks – prior to ordering the expulsion or during the execution of the expulsion order – the OIN's opinion about the applicability of the principle of *non-refoulement*. By breaching the obligation to cooperate with the authority by leaving for an unknown destination, and by applying for asylum in another country, the applicant suggests that he/she does not wish to avail him/herself of international protection in Hungary. He/she just intends to delay the alien policing procedure." The HHC is of the opinion that "punishing" in such manner an

⁹ According to the OIN, 934 persons were returned under the Dublin procedure to Hungary in 2009 and 742 persons in 2010. As regards statistics until 31 October 2011, the OIN accepted Hungary's responsibility in 990 cases and 391 persons were actually returned to Hungary in the Dublin procedure. This number includes 336 adults, 48 children (with families) and 7 unaccompanied minors. Source: OIN official statistics, *Kiadványfüzet 2009-2010*. worksheet no. 37 and an official information letter from the OIN dated 5 December 2011.

¹⁰ Section 54 (a) of Act LXXX of 2007 on Asylum ("Asylum Act").

asylum-seeker for wishing to seek refuge in another EU member state (where he/she may have family, cultural or linguistic ties, etc.), rather than in Hungary, **unjustifiably undermines the application of the Dublin system, a cornerstone of which is the principle that all asylum-seekers have the right to have their claim examined on the merits by one member state.**

In addition, the Asylum Act foresees that **subsequent asylum applications are no longer free of charge.**¹¹ According to the HHC's experience, so far no asylum-seeker has been requested to pay this fee. Nevertheless, the mere fact that this is foreseen by the law might limit the access to the asylum procedure for indigent Dublin returnees, should this practice change.

Thus, asylum-seekers taken back in a Dublin procedure face discriminatory treatment as compared to other asylum-seekers, solely because they had previously left Hungary. The European Commission has already criticised Greece for the similar practice as the incorrect application of the Dublin Regulation.¹² Until April 2006, Greece suspended and closed the claims of asylum-seekers who had left their place of residence without authorisation. These cases could be re-opened and examined on their merits only under very limited conditions. As a consequence, asylum-seekers risked being removed from Greece to their country of origin without any substantive examination of their claim, in a possible violation of the principle of *non-refoulement*. (The Greek authorities have in the meantime amended (eliminated) the problematic provision in question.)

Article 3 (1) of the Dublin Regulation places an obligation to examine the asylum application in the Member State determined as responsible.¹³ This important element aims to guarantee that, upon transfer to the responsible Member State, applicants can benefit from effective access to the asylum procedure. The European Commission wrote in its Explanatory Memorandum for the Recast of the Dublin Regulation¹⁴ that the principle of effective access to the asylum procedure, which is part of the right to asylum, will be strengthened by clarifying **the obligation for the Member State responsible to proceed to a full assessment of the protection needs of asylum seekers transferred to it in the Dublin procedure.** According to the recast version of the Regulation, when the Member State responsible had discontinued the examination of an application following its withdrawal by the applicant, it shall revoke that decision and complete the examination of the application.¹⁵

The Council of the EU endorsed the Commission's proposal and proposed the following wording of the provision: "[...] when the Member State responsible had discontinued the examination of an application following its withdrawal by the applicant before a decision on substance in first instance has been taken, it shall ensure that the applicant is entitled to request that the examination of his/her application is completed or to lodge a new application for international protection, which **shall not be treated as a subsequent application** as defined in Directive [2005/85/EC] [Procedures Directive]."¹⁶

The Hungarian practice therefore not only fails to ensure the proper application of the *non-refoulement* principle, but it also disregards the current position of the European Commission and the Council on this matter.

4. DUBLIN RETURNEES ARE OFTEN KEPT IN LENGTHY IMMIGRATION DETENTION

Based on the expulsion order, the OIN usually orders detention of the asylum-seeker. The maximum period of detention had been increased in December 2010 from 6 months to **12 months**. The immigration detention of families with children also became possible, for up to 30 days. The amended legislation provides a legal basis for the

¹¹ According to the Section 29 of Act No. XCIII. of 1990 on fiscal charges, the fee is around 10 Euros.

¹² In February 2006, the European Commission initiated infringement procedures against Greece for non-compliance with Article 3 (1) of the Dublin II Regulation. The case against Greece was referred to the European Court of Justice (31 March 2008, Case-130/08, PbE (2008) C128/25). As a result of this referral, the Greek authorities amended the relevant provision of the Greek asylum regulation.

¹³ "Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum."

¹⁴ Proposal for a Regulation of the European Parliament and of the Council 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), 3 December 2008, COM(2008) 820.

¹⁵ Article 18 (2) of the Recast. Under the Dublin Regulation "withdrawal" of an application for international protection means the actions by which the applicant terminates the procedures initiated by the submission of his/her application for international protection, in accordance with Directive 2005/85/EC either explicitly or tacitly (Article 2 (e) of the Recast). Leaving the territory of a Member State might therefore be considered as a "tacit withdrawal" of asylum application.

¹⁶ Proposal for a Regulation of the European Parliament and of the Council 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), Council of the European Union, 18 July 2011, Interinstitutional File: 2008/0243 (COD).

detention of asylum-seekers for the entire asylum procedure (both administrative and judicial review phase), resulting in **routine detention for the majority of those seeking international protection**.

Immigration detention may only be ordered when the following well-established conditions are met:

1. In order to secure the expulsion, or transfer in a Dublin procedure, of a third-country national the immigration authority shall have powers to detain the person in question if:
 - a) he/she is hiding from the authorities or is obstructing the enforcement of the expulsion in another way;
 - b) he/she has refused to leave the country, or, based on other substantiated reasons, is allegedly delaying or preventing the enforcement of expulsion;
 - c) he/she has seriously or repeatedly violated the code of conduct of the compulsory place of residence;
 - d) he/she failed to report to the authorities as ordered, by means of which he/she obstructed the alien policing or Dublin proceedings;
 - e) he/she is released from imprisonment to which he/she was sentenced for committing a deliberate crime.¹⁷
2. The immigration authority may order the detention of the third-country national prior to expulsion in order to secure the conclusion of the immigration proceedings pending, if his/her identity or the legal grounds of his/her residence is not conclusively established.¹⁸

According to the law, the OIN shall consider whether the execution of the deportation can be ensured with the application of a compulsory place of residence, before ordering immigration detention.¹⁹ According to the HHC's experience, the OIN only cites the relevant provision from the law (the ground for detention) in detention orders, but **does not provide any concrete justification of why the detention of a particular person meets the legal grounds for detention**. Detention orders therefore **lack proper individualisation and never consider any special circumstances or alternative to detention**. This policy also affects Dublin returnees as well. Furthermore, this practice is **not in compliance with the European Convention on Human Rights**. The European Court of Human Rights clearly stated that "the absence of elaborated reasoning for an applicant's deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the Convention."²⁰

5. DUBLIN RETURNEES PUT IN IMMIGRATION DETENTION HAVE NO ACCESS TO EFFECTIVE REMEDY

According to the HHC's long-standing experience, the **judicial review of immigration detention is practically ineffective** in Hungary. Immigration detention is to be reviewed every 30 days and can only be prolonged by the regionally competent local court. However, this in most cases remains a mere formality. Local courts issue basically identical decisions in all cases, and their reasoning is laconic, **lacking proper fact assessment and individualisation**. Therefore – unlike in most European states – the prolongation of immigration detention in Hungary can be considered as automatic or at least quasi-automatic. The HHC is not aware of a single case in the last several years where a court has terminated the detention referring to, for example, the impossibility of carrying out an expulsion measure, even if the person was later granted protection by the OIN.

Furthermore, **the OIN's decision ordering detention cannot be appealed**. The lawfulness of detention can only be challenged through the above-mentioned automatic court review system. Asylum-seekers returned in the Dublin procedure are **systematically detained** and – due to these general shortcomings – do not have the possibility to have the lawfulness of their detention examined in an effective manner.

6. DUBLIN RETURNEES ARE DEPRIVED OF RECEPTION CONDITIONS AND MAY HAVE TO PAY THE COSTS OF THEIR DETENTION

Those placed in immigration detention may be **obliged to pay for the costs of their detention**.

Recent case example:²¹

A female asylum-seeker was taken back by Hungary in a Dublin procedure and submitted a "subsequent" asylum

¹⁷ Section 54 (1) of the Third Country Nationals Act.

¹⁸ Section 55 (1) of the Third Country Nationals Act.

¹⁹ Section 54 (2) of the Third Country Nationals Act.

²⁰ See for example: *Lokpo and Touré v. Hungary*, App. no. 10816/10, 20 September 2011, § 24 and *Darvas v. Hungary*, App. no. 19547/07, 11 January 2011, § 28.

²¹ Decision 106-1-9330/39/2011-Ké, Office of Immigration and Nationality, 22 September 2011. The decision has been appealed and there is no final decision regarding the appeal at the time of publishing this document.

application. She was issued an expulsion order and detained for 3 months. In September 2011, she was granted subsidiary protection and a week later she received a decision ordering her to pay the costs of her 3-month long detention (approximately 620 Euros). The decision referred to Section 50 (1) of the Third Country Nationals Act, whereby the costs associated with expulsion shall be borne by the person expelled, and that she has refused to leave the country voluntarily and was delaying or preventing the enforcement of expulsion (Section 54 (1) (b) of the Third Country Nationals Act).

In addition, according to the Asylum Act, those who submit a subsequent asylum application **are not entitled to assistance or accommodation services normally provided to asylum-seekers.**²² As Dublin returnees' asylum claims are considered as "subsequent" applications (if they had previously applied for asylum in Hungary, see Section 3), those who are finally not detained do not have access to proper reception conditions after being returned to Hungary. In practice, those not detained are placed in a community shelter in Balassagyarmat, where they do not have access to free legal assistance (unless they travel at their own costs to Budapest, which is 90 km away). Access to information regarding their asylum proceedings is also limited, since there are no OIN asylum officers present.

7. RECOMMENDATIONS

1. The HHC urges EU Member States and national courts to carry out a thorough and individualised assessment of the conditions the asylum-seeker would face upon return to Hungary when deciding about Dublin transfers to Hungary by taking the above facts into consideration and. In particular, guarantees should be sought to ensure that

- **the asylum procedure will precede any procedure aiming at the removal of the person from Hungary;**
- **immigration detention will not be automatically ordered and**
- **proper reception conditions will be ensured (considering the person's individual circumstances).**

2. The HHC urges Hungarian authorities to ensure full and effective access to the asylum procedure in Hungary for those returned to Hungary under the Dublin procedure. Hungarian authorities should

- **suspend expulsion proceedings until a final decision has been reached on the asylum claim;**
- **discontinue the quasi-automatic practice of ordering immigration detention in case of Dublin returnees;**
- **discontinue treating asylum claims of those taken back under the Dublin procedure as "subsequent" applications;**
- **ensure access to proper reception conditions to all Dublin returnees.**

For more information, contact the Hungarian Helsinki Committee (helsinki@helsinki.hu, www.helsinki.hu).

²² Section 54 (b) of the Asylum Act.