

OVERVIEW OF THE HUNGARIAN REFUGEE SITUATION

WITH SPECIAL EMPHASIS ON THE CONSEQUENCES OF THE DUBLIN SYSTEM

**Boldizsar Nagy's presentation in
Berlin, at the meeting „Gerechte
Verteilung von Schutzsuchenden in
Europa?“, 18 June 2012**

Scheme of this talk

I. Context

Hungary and the rule of law (Rechtstaatlichkeit)

History

The Dublin system: a recipe for unfairness

II. Major critical elements of the Hungarian law and practice

A) Legal and practical matters

Access to the territory and to the procedure

Dublin transfers and repeat (subsequent) applications

Detention

Reception conditions

Lack of perspective for protected persons

B) Institutional issues

Increased police influence (securitisation)

Decentralisation of courts

Deteriorating cooperation between OIN its critics

III. Conclusion

Context – rule of law

„...Hungary can not be regarded a Rechtstaat” statement by Zoltán Fleck, Professor of legal sociology, in „ÉS” – literary-political weekly, 1 June 2012

Venice Commission of the Council of Europe 8 opinions issued or pending in 2011-2012

- On the judicial reform: „, the Commission concludes that the essential elements of the reform – if they remained unchanged – not only contradict European standards for the organisation of the judiciary, especially its independence, but are also problematic as concerns the right to a fair trial under Article 6 ECHR” (point 120 of opinion 663/2012 on the Hungarian judiciary reform)
- European Union, Commission: two infringement procedures in CJEU, dealing with the discriminatory (or not) retirement of judges and with the independence of the data protection authority

Context - history. Four phases of the Hungarian post-cold-war refugee history

Main periods

- 1988-1991
- 1991-1995
- 1996-2004
- 2004-

Main characteristics

- Asylum seekers mainly from Romania (ethnic Hungarians) Most of them integrated outside of the refugee regime established in 1989 (with geographic limitation)
- Impact of the war in neighbouring (former) Yugoslavia. Still mainly generous reception and assistance, but sustained „temporarity” – no access to Geneva status
- 1998: Entry into force of the first Refugee Act, termination of the geographic reservation. Gradual adoption of restrictive and non-access rules and practices (safe third countries, manifestly unfounded application etc.) Legal harmonisation with the *acquis* of the EU. Becoming part of the global process.
- Full membership in the EU, transformation of the first phase CEAS rules, first in occasionally generous modes later ever more restrictively. New Refugee Act: 2007, with two major amendments in 2010 and 2012.

Context - the Dublin regime

Not responsibility sharing

No agreed mechanism to determine the relative share of the member states. Dublin transfers are not in proportion to any conceivable criterion reflecting the state's capacity to deal with applications (GDP, size, involvement in the generation of the refugee flow, existing refugee community or else.)

Not a tool of solidarity

Not based on request of the state exposed to extreme pressure, no criteria for a threshold when assistance may be demanded

Unfair

Lack of uniformity in

- substantive law (definition, rights)
- procedural law (e.g. appeal, legal assistance)
- physical reception conditions (detention, groups with special needs, geographic location)

→ lottery for the asylum seeker

THE CRITICAL ELEMENTS OF THE LAW AND PRACTICE IN 2012

Legal and practical issues – access to territory and procedure

- UNHCR claims that it received credible complaints in 2010 (ten complaints) and 2011 (seven) from Somali and Afghan asylum-seekers, including separated children, alleging forced return to Ukraine and Serbia by Hungarian authorities. UNHCR has advised against the return of asylum-seekers to Ukraine¹² and Serbia.
- Government denies and claims that no person is returned to these countries if they present an asylum claim – at least not without a preliminary procedure
 - When application submitted - preliminary procedure to establish if
 - safe third country applicable
 - repeat application
 - Dublin

Legal and practical issues – access to procedure - safe third country (stc) – abstract rules

STC definition (Section 2 i of the Refugee Act)

STC = in respect of which the Refugee Authority **has convincingly established** that the applicant is treated there in accordance with the following principles:

life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion, and the applicant is not exposed to any real risk of serious harm,

the principle of **non-refoulement** in accordance with the Geneva Convention **is respected**, **the prohibition of removal to a country** where there is substantial reason to believe that the person in question is likely to be subjected to the actions or conduct defined in Article XIV(2 of the Fundamental Law,) [**death penalty, torture or other inhuman treatment or punishment**] as laid down in international law, **is respected** and applied, and

the possibility exists **to request refugee status and, if found to be a refugee, to receive protection** in accordance with the Geneva Convention;

Applicable is

According to Section 51 of the Refugee Act an application may be considered inadmissible ... if the applicant:

resided in a stc **or travelled through** a stc and had opportunity to apply for effective protection;

has family in a stc and is allowed to enter the territory of the country; or a stc **requests the extradition** of the applicant.

Legal and practical issues – access to procedure - safe third country (stc) – Serbia, Ukraine and „Dublin country” Greece

Serbia

- UNHCR letter of 30 August 2011 to HHC lawyer: Serbia is not a safe third country
- Hungarian courts: divided – approximately 2/3 rd of the judgments consider it safe 1/3 not.
- Government: does not admit it is unsafe
- Fact:
 - a few persons returned to Hungary under the Dublin regime have in fact been returned to Serbia in 2011 and 2012.
 - Several hundreds of Kosovars and Serb nationals expelled and returned in 2010-2011. (Of course, in respect of the Serbs Serbia is not stc!)

Ukraine

- UNHCR position of 2007 October (still „in force”) „ UNHCR advises States, to refrain from returning third country asylum-seekers to Ukraine as at present no assurances can be given that the persons in question: a) would be readmitted, b) would have access to a fair and efficient refugee status determination procedure, c) would be treated in accordance with international refugee standards or d) that there would be effective protection against *refoulement*.”
- Hungarian Government claims not to return asylum seekers there

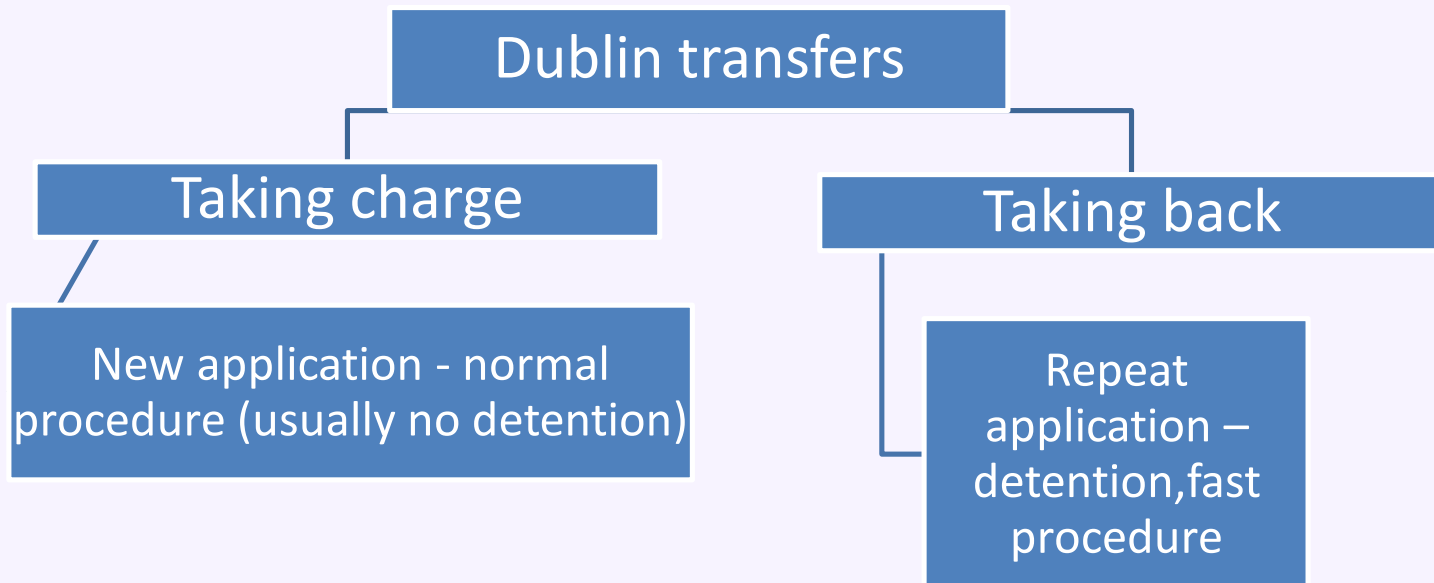
Greece

No returns since late early 2011. (After the *M. S.S. v. Belgium and Greece* judgment of the ECtHR adopted on 21 January 2011)

Legal and practical issues – access to procedure – Dublin transfers and repeat applications

„**Repeat (subsequent) application**” – which is inadmissible to be denied in the preliminary examination procedure

An application shall be considered inadmissible if: „after a final decision denying protection the same person submits an application based on the same facts”



Repeat (subsequent) applications and Dublin - HHC's summary

- 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 Hungary in a Dublin procedure are against expulsion, even if their never been assessed on its merits state;
- Based on the automatically 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

Dublin transfers to Hungary

2010: 742

2011: 448

Source: UNHCR Hungary as a country of asylum, p. 8, fn. 20

those taken back by often not protected asylum claim has in any EU member

issued expulsion

Dublin transfers – other views

- UNHCR:

„applicants subject to Dublin II may not have access to protection.” (Country report, 2012, point 20)

OIN ought to complete the refugee status determination and investigate the merits

Courts: there are judgments finding the expulsion of taken back applicants unlawful

Government: applicants are protected against *refoulement* by their appeal and complaint rights related to expulsion and the implementation of expulsion (deportation) as it must always be investigated if *refoulement* threatens

Legal and practical issues - detention

- Problems:
 - Numbers
 - Length
 - Conditions
 - Uncertainty as to who ends up in detention
 - Lack of effective, individualised judicial control
 - Dispersed responsibility for overseeing the institutions

Numbers: Two thirds of the asylum seekers are detained (1102 in 2011)

Length: maximum 12 months in prison-like circumstances (exception: unaccompanied minors – no detention; families with minors max 30 days; applicants who voluntarily apply before any aliens' law measure is taken)

Case of Lokpo and Touré v. Hungary (application no. 10816/10) ECtHR judgment 20 September 2011

Claim: detention between 9 April and 10 September 2009 had been unlawful, a situation not remedied by judicial supervision

Court: rule of law requirement: national law on deprivation must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (§ 18)

Legal and practical issues - detention

Detention is arbitrary (see: *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 67 to 73, ECHR 2008-...)

- if detention is not carried out in good faith;
 - if it is not closely connected to the purpose of preventing unauthorised entry;
 - if the place and conditions of detention are inappropriate, bearing in mind the measure is not applied to criminals, but to foreigners who, often fearing for their lives, have fled from their own country;
 - if the length of the detention exceeds that reasonably required for the purpose pursued”.
- The was not persuaded that” the applicants’ detention – which lasted five months purportedly with a view to their expulsion which never materialised – was a measure proportionate to the aim pursued by the alien administration policy.” (§ 23)

The absence of elaborate reasoning for an applicant’s deprivation of liberty renders that measure incompatible with the requirement of lawfulness (§ 24)

Violation of Art 5 (1) -10 000 Euros compensation awarded

The government appeal to the Grand Chamber was rejected,

Legal and practical issues - detention

- Two cases in front of the ECtHR with UNHCR intervening on the legality of detention
 - *Alaa AL-TAYYAR ABDELHAKIM v Hungary* (13058/11),
 - *Hendrin Ali SAID and Aras Ali SAID v Hungary* (13457/11)

UNHCR as intervener in those cases claims that as during the procedure no-one can be deported detention of asylum seekers is unlawful

- **Conditions of detention**

- UNHCR: Permanent detention facilities have been renovated and apply a strict prison regime
- Complaints concerned (collected by UNHCR and HHC)
 - the violent behaviour of some guards,
 - having been systematically given drugs/tranquillizers, resulting in some of them becoming addicted by the end of their detention term
 - when escorted from the facility to the court for hearings, or on other outings (such as to visit a bank or post office), detained asylum-seekers are handcuffed and escorted on leashes, which are normally used for the accused in criminal cases
 - little access to fresh air, closed cells for most of the day
 - space for each detained person below required standard (5 m²/head)
 - facilities also lack proper complaint mechanisms to address such concerns.

- **Government:** there was improvement in conditions and more freedom is given now, than at the time of the reports

Legal and practical issues - detention

- **Uncertainty as to who ends up in detention**

Legally arriving and applying: not

Illegally staying, caught by police: yes

Illegally arriving and immediately applying, Dublin taking charge: probably not,

Dublin taking back: probably yes

- UNHCR, 2012: „it is generally unclear when and why some asylum-seekers are transferred from detention facilities to the open centre in Debrecen, if at all, before the expiration of the twelve-month time limit. Different OIN Directorates appear to follow different policies in the absence of a publicly available standard operating procedure”

Legal and practical issues - detention

- **Lack of effective, individualised judicial control**
 - The rule: after three days and then monthly: judicial review of detention. No individual appeal is allowed.
 - Practice: Courts extend detention in purely formal resolutions not looking into the efforts of the aliens' police activity to remove the foreigner.
 - No explanation of why detention and no alternative methods are applied
 - Personal hearing: frequently in groups lasting for half an hour or less.
- **Dispersed responsibility for overseeing the institutions**

Most of the detention institutions are run by the police (but Békéscsaba is owned and administered by the Office of Immigration and Nationality /OIN/) whereas many of the detained are in effect asylum seekers having a procedure with the refugee authority (branch of OIN) - responsibility for the conditions during the refugee status determination (and the meeting of the reception conditions directive criteria) are obfuscated.

Institutional issues

Increased (aliens') police influence (securitisation)

The underlying reason for the increased detention presumably is twofold:

- The increased pressure of other EU member states calling for a stop of (irregular) migration through Hungary
- The long standing securitisation mentality of some branches of OIN which have been reinforced by the „law and order” mentality of the conservative government

Decentralisation of courts

On 24 December 2010 the Metropolitan Court lost its monopoly over reviews - instead of a few highly specialised and trained judges now – in principle – five courts may proceed.

Deadlines are still not kept but uniformity of decisions is in enhanced danger

Deteriorating cooperation between OIN its critics

Mixed bag: still expert groups with involvement of all stakeholders, NGO presence in sensitive areas allowed, but nervous reactions to critiques, withholding of information, less consultation on draft laws

Recent reports

- Hungarian Helsinki Committee : *Stuck in Jail Immigration Detention in Hungary* (2010)
- Hungarian Helsinki Committee: Serbia as a safe third country: a wrong presumption, September 2011
- Hungarian Helsinki Committee: *Access to Protection Jeopardised Information note on the treatment of Dublin returnees in Hungary*, December 2011
- Pro Asyl report = Ungarn: Flüchtlinge zwischen Haft und Obdachlosigkeit Bericht einer einjährigen Recherche bis Februar 2012
- UNHCR 2012 = Ungarn als Asylland. Bericht zur Situation für Asylsuchende und Flüchtlinge in Ungarn April 2012
www.unhcr.at

Conclusion

- Is Hungary Greece? For the first applications certainly not
- Is detention excessive? Certainly yes
- Is there a danger of refoulement in taking-back cases (i.e. in cases of „abandoned” applications?) Legally not, practically hardly. The danger is that an asylum applicant will never have access to an in-merit procedure (and will end-up in an „authorised to stay” status with minimum rights)
- Is there a need for continued scrutiny of the Hungarian system and early warning in case of deterioration? Certainly yes.
- The Dublin system will compel (already compels) forced migrants to
 - Abstain from applying for asylum at the periphery EU member states choosing instead complete clandestine presence
 - Go underground in the destination country (without applying for international protection, even in well founded cases) in order to avoid transfer to the responsible state

Thanks!

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