

**Boldizsár Nagy:**

## **Is there a need for subsidiary protection in Europe? A view from a candidate country**

*(Comments offered at the Conference: "Subsidiary protection: Improving or degrading the right to Asylum in Europe" , Brussels, 16 November 2001)*

This text encompasses more than the short oral intervention, providing a more detailed map of the relevant Hungarian legislation and practice.<sup>1</sup>

### **Elements of the historical development of the Hungarian refugee law**

The development of the Hungarian legal system related to persons in need of international protection may be periodized in the following manner:

1. Up to October 1989: there were no formal rules on the protection offered by the state, except for an ideological phrase in the Constitution.
2. 1989-1998 Rules on the status determination procedure and on the rights accompanying Convention status were defined, but the geographical limitation excluding from the procedure the persecuted of non-European events was in force. UNHCR practised refugee status determination in their respect. There was no regulated subsidiary protection, but the practice of it in the form of temporary protection has gradually developed and after 1993 the Act on entry and stay of foreigners incorporated a detailed non-refoulement rule;
3. 1998 March 1 - 2002 January 1 The Asylum Act adopted in 1997 and its implementing Government decree has set up a system which is ready to deal with non-European cases, offers three major forms of protection and in principle incorporates the restrictive techniques developed by the EU member states
4. 2002 January 1 - the heavily amended Act of 1997 brings further harmonisation with the *acquis* of the mid-nineties (which in the meantime is totally overtaken by the Single Asylum System of the EU in the making), and transfers the subsidiary protection to aliens law

Here I will not provide a description of the refugee law as it existed before the entry into force of the Asylum Act in 1998,<sup>2</sup> but will concentrate on the specific critical elements of the present system and the new to come next year.

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<sup>1</sup> This text incorporates paragraphs from the manuscript: "Hungary and the forced migration An overview" to appear in : East-West Changes in Refugee Protection and Migration Control in Europe Ed. Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen. The Hague, Boston, London, Martinus Nijhoff in 2001

<sup>2</sup> For a description of the old regime see: Nagy, Boldizsár "Hungarian Refugee Law" in: Howard Adelman/Endre Sik/Géza Tessényi (eds.), The Genesis of a Domestic Regime: The Case of Hungary Toronto, York Lanes Press, 1994, 49-64 and Nagy, Boldizsár Before or After the Wave. Thoughts about the Adequacy of the Hungarian Refugee Law, in: International Journal of Refugee Law, Special Issue, 3 (1991) No. 3; Baehr Peter R/Tessenyi Géza (eds): The New Refugee Hosting Countries: Call for Experience - Space for Innovation (Utrecht SIM Special No. 11, 1991); Fullerton, Maryellen: Hungary, Refugees, and the Law of Return, in: International Journal of Refugee Law, 8. (1996) No. 4. 499 - 531; Adelman, Howard/Sik Endre/Tessényi Géza

Besides Article 65 of the Constitution<sup>3</sup> five legislative items are especially relevant. The Aliens Act and its implementing Government Decree<sup>4</sup> and the Asylum Act adopted on 9 December 1997 as amended in 1999<sup>5</sup> with the two implementing Government Decrees (No 24 and 25) of 18 February 1998.<sup>6</sup> The Act on Asylum (Act No CXXXIX) entered into force on 1 March 1998 together with the two Government Decrees regulating details of the procedure and the conditions of support to the protected categories.<sup>7</sup>

The new system which will enter into force on 1 January 2002 is composed of the following elements:

A new Act on the entry and stay of foreigners and its implementing Government Decree<sup>8</sup> and the substantially amended Asylum Act of 1997<sup>9</sup> with two new Government Decrees implementing it. One of them replaces the decree on the details of the procedure, the other amends the decree on the subsidy and support of those within the scope of the Asylum Act.<sup>10</sup>

## Conceptual issues

Temporary protection<sup>11</sup> and subsidiary protection<sup>12</sup> are two distinct concepts, the former applicable in case of large scale influx as an exceptional measure until the

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(eds.), *The Genesis of a Domestic Regime: The Case of Hungary* (Toronto, York Lanes Press, 1994); Szabó Máté: From "Catacomb" to "Civic" Activism: Transformation of Civil Right Movements in Hungary after 1989 in: Fullerton, Maryellen/Sik Andre(Tóth Judit: From Improvisation toward Awareness? Contemporary Migration politics in Hungary Yearbook of the Research Group on International Migration of the Institute for Political Science of the Hungarian Academy of Sciences, 1997, Budapest, 1997, pp 40 - 54;.

<sup>3</sup> Act XX of 1949 as amended by Act LIX of 1997. In force since 30 July 1997. "Article 65.

(1)The Republic of Hungary, in accordance with conditions determined by law, - if neither their country of origin, nor any other country provides protection - shall grant the right of asylum to those non-Hungarian nationals, who in their home country or at their usual place of residence, are persecuted on account of their race, nationality, membership in a particular social group, religion, or political opinion, or have a well founded fear from such persecution.

(2) The adoption of the act on the right of asylum requires the vote of two-thirds of the Members of Parliament present." (Translation by the author)

<sup>4</sup> Act LXXXVI of 1993 on "The Entry, Stay in Hungary and Immigration of Foreigners" (Aliens Act) as amended by act LXXV of 1999. regulates confinement in a detention-like situation of illegal aliens, including asylum-seekers, into Border Guard Community Shelters. Government decree 64/1994 (IV.30) as amended describes the details.

<sup>5</sup> See Act LXXV on the fight against organised crime

<sup>6</sup> Obviously there are many other (approximately 200) regulations from the Act on Nationality through customs rules to those governing education or health care which incorporate specific provisions for asylum seekers and refugees, but they are not subject of this study. A good description of the legal and social conditions is offered by: *Fabricie Liebaut (ed.): Legal and Social Conditions for Asylum Seekers and Refugees in Central and eastern European Countries* Copenhagen, Danish refugee Council, 1999, 79 - 101

<sup>7</sup> The Law was published in Magyar Közlöny (Official Gazette) 1997 No. 112, at p. 8359, the two implementing Decrees in Magyar Közlöny (Official Gazette) 1998 No. 10, at p 698 and 705 respectively.

<sup>8</sup> Act No. XXXIX adopted by Parliament at its session of 29 May 2001 .and Government Decree No. 170/2001 (IX. 26.) on the Implementation of Act XXXIX of 2001 On the Entry and Stay of Foreigners

<sup>9</sup> The Act amending it was Act No XXXVIII of 2001

<sup>10</sup> Government Decree No. 172/2001 (IX. 26) on the Detailed Rules of Asylum Procedures and Documents of Temporarily Protected Persons and Government Decree No. 171/2001 (IX. 26) on amending Government decree 25/1998 (II.18) concerning the supply and support of the foreigners within the scope of the 1997 Act on Asylum (CXXXIX)

<sup>11</sup> See: Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons

and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Official Journal of the European Communities 7.8.2001 L 212/12)

Article 2

For the purposes of this Directive: 1. Temporary protection shall not prejudice recognition of refugee status under the Geneva Convention.

(a) 'temporary protection' means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary

system can cope with the situation, the latter in case of individual applicants who for some reason do not qualify or do not apply for an individual Convention status.

However, the borderline between the two was much more blurred in the early nineties frequently leading to the approach which saw temporary protection as a subsidiary or complimentary form of protection. This was the prevailing approach in Hungary with respect to the victims of the Southern Slav conflict who were "temporarily protected", although there was no such legal category in the Hungarian law books. Therefore there was no set procedure for granting or revoking the status either. Government regulations fixed the material support forms and the conditions of staying within the reception centers<sup>13</sup>, but any practical problem accompanying a human's life (birth, death, job, marriage, acquiring real estate, education) led to almost insurmountable difficulties. Treating refugees from the Serbo-Croat war or the Bosnian conflict as "normal" foreigners was obviously not an option, but offering to the temporarily protected persons a more favourable treatment (outside the formal Convention protection) was not available due to the lack of legal foundation. However, 73 985 persons enjoyed temporary protection for shorter or longer periods between 1991 and 1996 when - following the Dayton accords - the possibility to recognise someone as temporarily protected person was abolished by an *oral* instruction<sup>14</sup>. All in all, the issue of the temporary protection/subsidiary form of protection had to be regulated by a statute.

## **Substantive law: protection categories in the law in force**

### ***The Asylum Act in force***

The presently governing law (Act CXXXIX of 1997) identifies the following forms of protection:

**Refugee status.** The definition for all practical purposes is identical with that of the Geneva Convention.<sup>15</sup>

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protection to such persons, *in particular* if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection;"

<sup>12</sup> See: Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection Brussels, 12.9.2001 COM(2001) 510 final 2001/0207 (CNS)

2 § "Subsidiary protection status" means the status granted by a Member State to a third country national or stateless person who is not a refugee but is otherwise in need of international protection and is admitted as such to the territory of that Member State. 5 (2) § "Subsidiary protection shall be granted to any third country national or stateless person who does not qualify as a refugee, ...or whose application for international protection was explicitly made on grounds that did not include the Geneva Convention., and who, owing to a well-founded fear of suffering serious and unjustified harm set out in article 15, has been forced to flee or to remain outside his or her country of origin and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

15 § The grounds for subsidiary protection:

(1) In accordance with article 5 (2), Member States shall grant subsidiary protection to an applicant for international protection who is outside his or her country of origin, and cannot return there owing to a well-founded fear of being subjected to the following serious and unjustified harm:

- (a) torture or inhuman or degrading treatment or punishment, or;
- (b) violation of a human right, sufficiently severe to engage Member State's international obligations or;

a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights.

<sup>13</sup> See especially Government Decree 129/1996. (VII. 31.) and the Decree of the Minister for Interior 19/1996 (VII.31)

<sup>14</sup> The final revocation of the protected status of those who had been granted it before 1996 came in 1999 with Government Resolution 2153/1999. (VII. 8.) terminating the protection and inviting the protected persons to regularise their position according to the general rules on foreigners by 1 July 1999.

<sup>15</sup> Although for the purposes of the implementation of the Act someone is only a refugee if recognised as such by the authority.

**A temporarily protected person is** "a foreigner who arrived from an area, from where flight en masse took place due to foreign occupation, war, civil war or ethnic clashes, or the massive and large scale violation of human rights and members of the group fleeing from that country were granted temporary protection in the Republic of Hungary on the basis of the decision of the Government, and were recognised as temporarily protected persons by the refugee authority"<sup>16</sup>

**A person authorised to stay** is "a foreigner who temporarily cannot be sent back to his country because there he would be exposed to capital punishment, torture, inhuman or degrading treatment, provided that the person concerned has been recognised as a person authorised to stay by the refugee authority"<sup>17</sup>

**Ex gratia of the minister status.** The act identifies a fourth, auxiliary form of recognition: the Minister of the Interior is entitled to exercise special consideration of equity for humanitarian reasons leading to convention status in individual cases.<sup>18</sup> The Minister never exercised this right even though requests to this effect were made.<sup>19</sup>

### ***The Law on Foreigners***

The presently valid Act on the entry and stay of foreigners incorporates an extensive non-refoulement rule, which has great practical importance as it will be explained.

#### **Non-refoulement rule<sup>20</sup>:**

"No foreigner shall be returned or expelled to a country or to the frontiers of territories, where he would be threatened with persecution for reasons of race, religion, nationality or belonging to a social group or political opinion nor to the territory of a state or to the frontiers of territories where there is serious reason to believe that the returned or expelled foreigner would be subject to torture, inhuman or degrading treatment. The existence of such reasons is to be established by the refugee authority. The aliens' authority must not adopt the decision on the return or expulsion of the foreigner before acquiring the opinion of the refugee authority acting as the specialised authority."<sup>21</sup>

### ***Brief comments on the categories***

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<sup>16</sup> This translation is provided by the author. Translations normally used are correct, but seem to make no sense. (The text used by UNHCR is the following: "a foreigner who arrived from an area, from where the members of the group fleeing en masse due to foreign occupation, war, civil war or ethnic clashes, or the massive and large scale violation of human rights going on in their country, were granted temporary protection in the Republic of Hungary on the basis of the decision of the Government and were recognised as temporarily protected persons/asylees by the refugee authority.) That is because the text of the Act in Hungarian is simply grammatically and logically wrong. The translation offered here reflects the intended content removing the original mistake.

<sup>17</sup> Both cited definitions appear in Art. 2 of the Act.

<sup>18</sup> Art 3 para 3

<sup>19</sup> Personal communication of Mr. Erdélyi, Deputy Director of the Refugee Directorate of OIN, 23 February 2001.

<sup>20</sup> Section 32. of the Act CXXXIX of 1993 as amended. (The Act on Aliens)

<sup>21</sup> Translation by the author. The text on the 2000 edition of the Refworld is probably a less accurate reflection of the Hungarian version and reproduces the text of the section before its 1999 amendment.

## Temporary protection

The introduction in 1997 of the temporarily protected status regulated by an Act (and not based on internal decisions) was certainly a great leap forward, which the EU has been agonising over, for almost a decade until the 2001 directive<sup>22</sup>. Temporarily protected persons enjoy significant rights: they have residence rights and the right to be employed without any restriction. Accommodation and maintenance/care must be provided to them from state sources if they can not sustain themselves. Further they are entitled to a travel document permitting the departure and return to Hungary,<sup>23</sup> which is important in "visit and see before return" situations. The temporarily protected person is not barred from starting a Convention refugee status determination procedure or entering the road leading to immigration. There is no time limit set to this type of protection: it terminates when the Government decides that the reasons triggering the flight ceased to exist.<sup>24</sup> Certainly all this represents a huge positive change compared with the previous practice according to which victims of the Southern Slav conflict - up until 1997 - had no right to work and were mainly in an *ex lex* situation.

There is one snag, though: this provision has never been applied, the Government has not yet designated a single group as subject to temporary protection. Obviously at least during the Kosovo conflict (1998-1999) this rule should have been made use of, as demanded by several Hungarian NGOs and hinted at by UNHCR.

## Authorised to stay

The status, "authorised to stay" is meant to be a *non-refoulement* status with more rights than generally accorded to those who are denied recognition as a refugee but can not be returned to their country for the threat of torture or inhuman or degrading treatment or punishment. It entails a right to accommodation and care. However, the person authorised to stay is only allowed to work according to the conditions generally applicable to foreigners. The only easment is that if the Refugee authority endorses the request the permit may not be denied. Persons authorised to stay must live in the reception center or any other place designated by the refugee authority. The entitlement to the status is subject to a compulsory annual review.

## *Policy problems related to the status*

### *First: "small asylum"*

The authorised to stay status became used as a subsidiary form of "protection", as a kind of "small asylum" for those whom the authorities did not want to recognise as (Convention) refugees. The following table tells the story:

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<sup>22</sup> Council Directive 2001/55/EC of 20 July 2001

<sup>23</sup> Article 20

<sup>24</sup> Article 10

**THE STATISTICS FOR THE RECENT YEARS RELATING TO SUBSIDIARY PROTECTION WHICH IN HUNGARIAN LAW IS CALLED "AUTHORISED TO STAY"**

	1998	1999	2000	2001 Jan-Oct 31	Total
<b>Total "authorised to stay"</b>	<b>232</b>	<b>1776</b>	<b>680</b>	<b>236</b>	<b>2924</b>
<b>of which</b>	<b>Refugee / auth. to stay</b>	<b>Refugee / auth. to stay</b>	<b>Refugee / auth. to stay</b>	<b>Refugee / auth. to stay</b>	<b>Refugee / auth. to stay</b>
<b>Afghanistan</b>	<b>177 / 30</b>	<b>127 / 223</b>	<b>82 / 176</b>	<b>43 / 77</b>	<b>429 / 506</b>
<b>Algeria</b>	<b>10 / 3</b>	<b>1 / 3</b>	<b>6 / 2</b>	<b>2 / 1</b>	<b>19 / 9</b>
<b>Armenia</b>	<b>0 / 0</b>	<b>0 / 3</b>	<b>7 / 27</b>	<b>7 / 2</b>	<b>14 / 32</b>
<b>Bangladesh</b>	<b>0 / 0</b>	<b>3 / 0</b>	<b>0 / 0</b>	<b>0 / 0</b>	<b>3 / 0</b>
<b>Bosnia-Herzegovina</b>	<b>1 / 0</b>	<b>0 / 8</b>	<b>0 / 5</b>	<b>0 / 0</b>	<b>1 / 13</b>
<b>China</b>	<b>2 / 0</b>	<b>0 / 0</b>	<b>0 / 0</b>	<b>0 / 0</b>	<b>2 / 0</b>
<b>Ghana</b>	<b>0 / 0</b>	<b>2 / 6</b>	<b>0 / 1</b>	<b>1 / 0</b>	<b>3 / 7</b>
<b>India</b>	<b>0 / 0</b>	<b>0 / 0</b>	<b>0 / 0</b>	<b>0 / 0</b>	<b>0 / 0</b>
<b>Iraq</b>	<b>0 / 0</b>	<b>60 / 52</b>	<b>37 / 47</b>	<b>47 / 45</b>	<b>144 / 144</b>
<b>Nigeria</b>	<b>15 / 3</b>	<b>6 / 5</b>	<b>3 / 0</b>	<b>1 / 3</b>	<b>25 / 11</b>
<b>Pakistan</b>	<b>1 / 0</b>	<b>0 / 3</b>	<b>1 / 0</b>	<b>0 / 0</b>	<b>2 / 3</b>
<b>Romania</b>	<b>1 / 0</b>	<b>0 / 0</b>	<b>2 / 0</b>	<b>10 / 0</b>	<b>13 / 0</b>
<b>Sierra Leone</b>	<b>3 / 2</b>	<b>1 / 18</b>	<b>1 / 11</b>	<b>1 / 7</b>	<b>6 / 38</b>
<b>Somalia</b>	<b>1 / 0</b>	<b>0 / 0</b>	<b>2 / 16</b>	<b>4 / 9</b>	<b>7 / 25</b>
<b>Sri Lanka</b>	<b>0 / 0</b>	<b>0 / 0</b>	<b>0 / 0</b>	<b>0 / 0</b>	<b>0 / 0</b>
<b>Turkey</b>	<b>0 / 1</b>	<b>0 / 2</b>	<b>2 / 2</b>	<b>1 / 0</b>	<b>3 / 5</b>
<b>Yugoslavia (Serbia and Montenegro)</b>	<b>35 / 166</b>	<b>37 / 1408</b>	<b>10 / 357</b>	<b>2 / 58</b>	<b>84 / 1989</b>

Source: Data of the Office of Refugee and Migration Affairs as compiled by Boldizsár Nagy

The table includes those groups by nationality which comprised more than 80 asylum seekers in at least one of the three full years

Even if one deduces the great number of authorised to stay status recognised to Kosovo Albanians and others (Serbs and ethnic Hungarian) escaping the Kosovo conflict, there remain 935 cases to be juxtaposed to the total of 1016 Convention status recognitions for the same - almost four years long - period . A more detailed table will also shed some light on the dynamics, namely that the majority of Convention status recognition stem from the early times - and include those, who had enjoyed UNHCR protection in Hungary and were "taken over" from the care of UNHCR as Convention refugees by the force of the new Act in 1998 - whereas there has been a strong tendency to deny refugee status but "grant" authorised to stay position in the recent past.

**THE STATISTICS FOR THE RECENT YEARS RELATING TO THE PERIOD AFTER THE ENTRY INTO FORCE OF THE NEW ASYLUM LAW**

		1998	1999	2000	2001 Jan-Oct 31	total
<b>Total</b>		<b>7118</b>	<b>11499</b>	<b>7801</b>	<b>7997</b>	<b>34415</b>
	<b>of which</b>					
	<b>Afghanistan</b>	<b>1077</b>	<b>2238</b>	<b>2185</b>	<b>3489</b>	<b>8989</b>
	<b>Algeria</b>	<b>314</b>	<b>179</b>	<b>95</b>	<b>65</b>	<b>653</b>
	<b>Armenia</b>	<b>51</b>	<b>189</b>	<b>123</b>	<b>30</b>	<b>393</b>
	<b>Bangladesh</b>	<b>337</b>	<b>1314</b>	<b>1656</b>	<b>1301</b>	<b>4608</b>
	<b>Bosnia-Herzegovina</b>	<b>3</b>	<b>322</b>	<b>5</b>	<b>3</b>	<b>333</b>
	<b>China</b>	<b>10</b>	<b>120</b>	<b>198</b>	<b>119</b>	<b>447</b>
	<b>Ghana</b>	<b>25</b>	<b>90</b>	<b>22</b>	<b>22</b>	<b>159</b>
	<b>India</b>	<b>61</b>	<b>121</b>	<b>235</b>	<b>206</b>	<b>623</b>
	<b>Iraq</b>	<b>542</b>	<b>543</b>	<b>889</b>	<b>874</b>	<b>2848</b>
	<b>Nigeria</b>	<b>102</b>	<b>130</b>	<b>94</b>	<b>77</b>	<b>403</b>
	<b>Pakistan</b>	<b>127</b>	<b>322</b>	<b>220</b>	<b>149</b>	<b>818</b>
	<b>Romania</b>	<b>124</b>	<b>16</b>	<b>36</b>	<b>39</b>	<b>215</b>
	<b>Sierra Leone</b>	<b>190</b>	<b>149</b>	<b>147</b>	<b>255</b>	<b>741</b>
	<b>Somalia</b>	<b>78</b>	<b>65</b>	<b>152</b>	<b>252</b>	<b>547</b>
	<b>Sri Lanka</b>	<b>81</b>	<b>174</b>	<b>249</b>	<b>54</b>	<b>558</b>
	<b>Turkey</b>	<b>153</b>	<b>91</b>	<b>116</b>	<b>61</b>	<b>421</b>
	<b>Yugoslavia (Serbia and Montenegro)</b>	<b>3306</b>	<b>4783</b>	<b>692</b>	<b>199</b>	<b>8980</b>
<b>From the total</b>						
	<b>Status recognition procedure started</b>	<b>7118</b>	<b>11499</b>	<b>7801</b>	<b>7997</b>	<b>34415</b>
	<b>Formally recognised as refugee</b>	<b>362</b>	<b>313</b>	<b>197</b>	<b>144</b>	<b>1016</b>
	<b>Formally recognised as person authorised to stay</b>	<b>232</b>	<b>1776</b>	<b>680</b>	<b>236</b>	<b>2924</b>
	<b>Procedure terminated</b>	<b>1174</b>	<b>5766</b>	<b>4916</b>	<b>3812</b>	<b>15668</b>
	<b>Formally denied status</b>	<b>2790</b>	<b>3537</b>	<b>2978</b>	<b>2458</b>	<b>11763</b>
	<b>Ratio of protection (status+ authorisation to stay) to denial</b>	<b>1 : 4,9</b>	<b>1 : 1,7</b>	<b>1 : 3,4</b>	<b>1 : 6,5</b>	<b>1 : 3,0</b>

Source: Data of the Office of Refugee and Migration Affairs as compiled by Boldizsár Nagy<sup>25</sup>

The table includes those groups by nationality, which comprised more than 80 asylum seekers in at least one of the three full years

<sup>25</sup> See also: Asylum Trends in Europe, 2000 – Part II United Nations High Commissioner for Refugees (UNHCR), 30 January 2001, Table 10 at p. 28



*Second: issues concerning exclusion from the status:*

The Act identifies three grounds for exclusion from the status,<sup>26</sup> to which the implementing decree added a hidden fourth one. It refers to the decision of the authority to recognise a person as authorised to stay in relation to the foreigner "whose identity has been clarified".<sup>27</sup> This was interpreted as excluding those whose documents have been withheld by the smugglers, because "clarified identity" was understood to be an identity to be proven by written evidence, preferably by official documents of identity. As a consequence of the repeated actions of the Hungarian NGO-s representing asylum seekers and others in need of protection<sup>28</sup> the rigour has been relaxed somewhat and now driver's licence, military identity papers and witness testimony of close relatives are also accepted.<sup>29</sup> This notwithstanding, still most of those who should enjoy the benefit of the 'authorised to stay' status have to put up with the mere 'protection from expulsion and deportation' as guaranteed by Article 32 of the Aliens' Act.

## **The Asylum Act of 2001 and the EU *acquis*.**

### ***The changes in general***

After a relatively short preparatory period the Ministry of Interior prepared a bill on amending the asylum law.<sup>30</sup> It formed part of a package consisting of altogether four proposals, the other three related to the aliens' law, the border guard's law and the law on nationality.

The brief justification accompanying the bill had one theme: the need to harmonise with the EU *acquis*. The bill itself listed eight documents with which it (according to the drafters) established harmony.<sup>31</sup> Critical voices were quickly raised: some claimed that harmonisation was premature in light of the hardly formed Single European Asylum system and reminded on the then last scoreboard<sup>32</sup> with its long list of tasks to be accomplished in the coming years and also proved that the rules suggested in fact were neither in harmony with the existing *acquis* nor with the one taking shape in the form of existing or planned Commission proposals made public by

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<sup>26</sup> Section 13 (2):

" a) the stay in Hungary of the person violates national security interest;  
b) there are serious grounds to believe that the person committed a crime against peace, a war crime or a crime against humanity, as defined in the international conventions relating to such crimes.  
c) has been sentenced for enforceable imprisonment for intentionally committing a crime."

<sup>27</sup> Article 29, paragraph (1) of Government Decree 24/1998 (II.18)

<sup>28</sup> In a recent decision the Metropolitan Court has challenged this approach of the authority. (Case No. 2 Kpk. 45963/1999 1-1 unreported, on file with the author).

<sup>29</sup> Letter of the Director of the Refugee directorate of OIN to the Hungarian Helsinki Committee, dated 4 December 2000, on file with the author.

<sup>30</sup> Bill No T/3708 submitted on 2 February 2001.

<sup>31</sup> These were: the Dublin Convention, (OJ No C 254 19 08 1997) the three London decisions of 1992, (WGI 1281, WGI 1282 Rev 1, WGI 1283) the 1995 Council resolution on the minimum guarantees of the procedure, ((OJ No C 274 19 09 1996) and on the "burden sharing" with regard to the admission and residence of displaced persons on a temporary basis (OJ No C 262 07 10 1995), the joint position on the harmonised application of the definition of the term refugee in Article 1 of the Geneva Convention (OJ No L 63 13 03 1996) and the 1997 joint position on unaccompanied minors

<sup>32</sup> COM (2000) 782 final, Brussels 30 November 2000.

early 2001.<sup>33</sup> Others noted that under the claim of harmonisation probably an aspiration to maximise the power in the domestic arena of the Office of Immigration and Nationality appears.<sup>34</sup>

The most important amendments incorporated in the new Asylum Act in relation to the above mentioned critical elements of the asylum system were the following:

- The **removal of the "authorised to stay" status** from the Asylum law and introducing it - with a more limited level of protection - as a humanitarian stay permit in the aliens law.
- The **reformulation of the temporary protected** category, to mean: "a foreigner who is a member of such a group of people arriving en masse in the territory of the Republic of Hungary, which group has been designated to be eligible for temporary protection by the Government or by the competent institution of the European Union, because the foreigner was forced to escape from his/her country due to armed conflict, civil war, ethnic clashes going on there or due to the general, systematic or brutal violation of human rights - in particular torture, inhuman or degrading treatment - causing en masse flight".
- The entitlement of the Government to maximise the number of those who can enjoy the benefit of temporary protection.
- The reformulation of the definition of the **safe third country** to mean a country where: "prior to arrival at the territory of the Republic of Hungary a foreigner had stayed, travelled through or wherefrom s/he continued to travel so that the applicability of the Geneva Convention had been recognised at his/her request, or he/she had the chance, but did not take advantage of submitting an application for recognition; provided that the legal rules and the actual practice of this country guarantee the examination of the merit of the asylum claims and the foreigner is not exposed to persecution, torture, inhuman or degrading treatment there and may not be returned to such a country"<sup>35</sup>
- The changes in the regime of detention of the asylum seekers appear in the new Act relating to the entry and residence of foreigners. They are beneficial, since community shelters will be open institutions once again and the maximum duration of detention of those asylum seekers who do not commit any violation against the rules (like an illegal crossing of the Western border) must not be longer than a month.
- The extension of the airport procedure to everyone who arrives at the airport and applies for the recognition of her status, even if the applicant does possess identity documents and does not arrive from a safe third country.

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<sup>33</sup> For details see: Nagy, Boldizsár: Utoléri-e a magyar Akhilleusz az Unió teknősbékáját? Megfigyelések a menekültügyi jogharmonizáció körében, (Will the Hungarian Achilles ever catch the Union turtle? Observations concerning the approximation of laws.) *Magyar Jog* 2001 April pp 213-220.

<sup>34</sup> Kőszeg, Ferenc: Az ember attól ember, (A human being is a human being because...) *Népszabadság* .... March 2001

<sup>35</sup> The Act has not changed the definition of the safe country of origin which is not in harmony either with the London conclusion or with the 2000 Commission proposal. The valid Hungarian definition is: "the presumption relating to the country of nationality, or in the case of a stateless person, to the habitual residence, of the person seeking recognition as refugee, according to which presumption that country observes/implements the International Covenant on Civil and Political Rights, the Geneva Convention, the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November, 1950, and where because of the characteristics of the legal order and the guarantees of legality there may not exist a threat of persecution for reasons of nationality, membership of a particular social group, political opinion, race, religion; or torture, inhuman or degrading treatment and which country allows independent national and international organisations to control and supervise the enforcement of human rights."

- The reformulation of the criteria of the manifestly unfounded applications and the deadlines in the accelerated procedure. There are four reasons envisaged as grounds for manifestly unfounded applications:

- "a) there is clearly no substance to the applicant's claim of persecution in the country of origin or to the well founded fear thereof;
- b) the application is based on deliberate deception or on the abuse of the asylum procedure;
- c) there is a safe third country, which is obliged to readmit the applicant;
- d) the applicant is the citizen of a member state of the European Union."

- The appeal rights and the whole system of the asylum system is subject to fundamental change. The one level administrative procedure will be replaced by a two level one, with genuine appeal concerning facts and law between the two levels, having suspensive effect. That presupposes that the Office of Immigration and Nationality will acquire local organs to decide at first level and the Office itself would be the appeal authority the decision of which would be subject to judicial review, starting at the Metropolitan Court of Budapest with one appeal to the Supreme Court.<sup>36</sup>

Without going into the details one may note that although the limitation of detention of innocent asylum seekers would certainly constitute a positive move as the new rules on family unification and unaccompanied minors, the general tendency is in the direction of tightening and expanding the regime and its institutions, getting a stronger grip on any irregularity of migration and conforming to whatever is thought to be the EU acquis.

### ***Subsidiary protection in the new regulation***

Whereas temporary protection as a group protection determined by the Government or by the Council of the EU remained in the Asylum Act the "authorised to stay" status moved into the aliens' law. (The translations in use refer to it as "admitted persons").

The definition appears in Art 2 (g)

**"admitted person [person authorised to stay]** shall mean any person who, for a transitory period, cannot be returned to his/her home country — in case of a stateless person, to the country of his/her habitual residence — because there he or she would be exposed to the death penalty, torture, inhuman or degrading treatment and there is no safe third country that would admit him or her."

The basis of the protection is the broad **non-refoulement rule** in Article 43:

"The return, the refusal of entry or the expulsion shall not be ordered or shall not be executed into a country which in respect of the affected person does not qualify as a safe country of origin or as a safe third country in particular where the foreigner would be threatened with persecution for reasons of race, religion, nationality or

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<sup>36</sup> The intention of the drafters was to eliminate recourse to the Supreme Court by inserting the administrative appeal. However - it so appears that due to the oversight of a regulation from the 1950-s - at present the procedure as four leveles, because the Supreme Court is entitled to legal review of the Metropolitan Court's decisions.

belonging to a social group or political opinion nor to the territory of a state or to the frontiers of territories where there is serious reason to believe that the returned, refused or expelled foreigner would be subject to torture, inhuman or degrading treatment or capital punishment.

The admitted person has a right to stay (Article 15: (1)):

"For **humanitarian reasons**, the Office and the regional alien policing authority may issue a permission to stay even when the conditions of stay according to the law do not obtain: ...to the admitted person;"

Further rights of the admitted person are reflected in the chapter on the care and support for persons authorised to stay of the Government Decree of 170 / 2001 (IX.26).

The Office of Immigration and Nationality shall provide care and support. (Article 81)

Types of personal care are: a) accommodation and care in a community shelter or other equivalent accommodation; b) health care; c) meals in education institutions. Cash benefits are: a) one-time financial aid for establishing the person's own accommodation, b) aid for schooling. Financial support takes the form of: a) housing allowance; b) aid for permanent departure from the country; c) aid for the medical examination concerning employment fitness (Article 82). These cares and supports are only provided for if the person authorised to stay has neither assets nor an income above a certain minimum level (Article 83).

In case the person authorised to stay is accommodated in a community shelter, the foreigner shall not be charged the fees of stay for a period of eighteen months and from the third month, persons elder than 14 years of age shall benefit from a monthly allowance, the amount of which shall be determined by the Minister of Interior, that can be spent without restrictions. If the person benefiting from allowance repeatedly or seriously violates the house rules of the community shelter, the allowance shall be partly or entirely withdrawn. The person authorised to stay may leave the community shelter with the intention of moving out to private accommodation with permission from the regional alien policing authority. In exceptional cases, the Office may permit persons authorised to stay to live longer than eighteen months in the community shelter.

If the person authorised to stay is not covered by social security insurance, he/she is entitled to benefit free of charge of basic and emergency health care services. A person authorised to stay when moving to private accommodation within one year from the first issue of a permission to stay may request a one-time financial aid from the Office for moving out.

In case of a final return home or a final departure to a third country, the Office, at the request of the person authorised to stay, may partly or entirely reimburse the costs of a valid travel ticket to the destination and other expenses related to the exit.

### ***Conceptual similarities and differences between the formulating Hungarian system and the evolving EU acquis on subsidiary protection***

### Similarities:

There are at least three clear similar features of the two sets of norms:

- \* They aim at formalising a broad non-refoulement command, based on human rights and humanitarian considerations.
- \* In case of over-use (abuse) by the authorities the subsidiary form of protection may replace the Convention protection thereby fuelling the downward spiral of protection.
- \* Temporary protection is reserved for large scale influx

### Differences:

A simple table summarises the most important differences:

<b>The Commission's approach</b>	<b>The Hungarian legislator's approach</b>
Subsidiary protection is a full protection status intended to extend protection to further categories of persons in need of it. It is part of refugee/asylum law.	Humanitarian residence permit is the exception to be granted to those who otherwise should leave the territory. It is an aliens' law measure.
Unless otherwise requested by the applicant the claim to subsidiary protection is investigated in a single asylum procedure.	The authorised to stay status may not be requested, but is established as a side product of another aliens law procedure (aimed at expulsion e.g.).
The guiding principle is the approximation the rights of refugees and the rights of those enjoying subsidiary protection.	There are substantive differences in the substantive rights, for example in the field of employment or family unification.
The freedom of movement is unlimited	The protected person must live in a designated place and not permitted departure leads to alien policing detention.
The exclusion grounds are practically identical with those of the Geneva Convention.	Persons expelled by the Court or being in aliens policing detention are not entitled to residence permit - even if they can neither be removed.

### Conclusion

The present Commission proposal - if adopted - would certainly constitute a welcome pull-factor on the Hungarian regulation. Adoption of the *acquis* concerning the area of freedom, security and justice is a non-negotiable requirement of the EU and it is beyond doubt that the proposal is conceptually clearer and in its impact more consistent than the half-hearted Hungarian regulation which does not intend to establish a status but only mitigates the pressure on someone who is perceived as an illegal "alien".<sup>37</sup>

<sup>37</sup> The explanatory memorandum of the 2001 Aliens Act submitted with the Bill introduces the transfer of the "authorised to stay status" from the Asylum Act to the Aliens Act by referring to the need to fight illegal migration and emphasises that it "does not establish a particular status" only guarantees that no-one will be returned to her country in violation of the human rights obligations. It is not "more protection", but "less refoulement".