European Database of Asylum Law
Published on *European Database of Asylum Law* (https://m.asylumlawdatabase.eu)

Mohammadi v. Austria - the issue of asylum detention in Hungary

Date:
Wednesday, October 1, 2014
This article is to be read in conjunction with the EDAL Case Summary[1]

Introduction

In July the European Court of Human Rights examined a case concerning the transfer of an asylum seeker from Austria to Hungary under the Dublin II procedure. The Austrian Asylum Office, the Asylum Court and the Constitutional Court all rejected his asylum request and ordered his transfer to Hungary. Relying in particular on Article 3, Mr Mohammadi alleged that, if forcibly transferred to Hungary, where asylum seekers are systematically detained, he would be at risk of imprisonment under deplorable conditions. He further complained that he would be at risk of refoulement to a third country, possibly Serbia (the country he travelled through before arriving in Hungary), without his asylum claim being examined on the merits in Hungary.

The Court considered that the relevant country reports on the situation in Hungary for asylum-seekers, and Dublin returnees in particular, do not indicate systematic deficiencies in the Hungarian asylum and asylum detention system. The Court therefore concluded that the applicant would currently not be at a real, individual risk of being subject to treatment in contravention of Article 3 of the Convention [2] (prohibition of inhuman or degrading treatment)if the applicant were to be returned to Hungary (par. 74-75 of the judgment [3]).

Between 2012 and 2014, the Hungarian asylum system has undergone several legislative and practical changes. The changes were rapidly made and certain practices relating to the detention of asylum seekers lasted not more than six months. In such a fast changing environment it is difficult to foresee what would actually happen to an asylum seeker if returned to Hungary.

This article aims to explore one of the issues raised in the case: detention of asylum seekers in Hungary and, more specifically, whether the Court based its conclusions on actual, objective and up-to-date information on Hungary.It will therefore not touch upon access to the asylum procedure and *refoulement* to Serbia.

Three detention systems in the last three years

During the past few years, three different detention systems existed in Hungary. In the first, much criticized system in place until January 2013, asylum seekers arriving irregularly were issued an expulsion order upon entry to the country and were detained based on the Third Country Nationals Act in order to secure their expulsion. The detention of asylum seekers under this system was found unlawful by the European Court of Human Rights in the cases of *Lokpo and Touré v. Hungary*

[4], *Al Tayar Abedlhakim v. Hungary and Hendrin Ali Said and Aras Ali Said v. Hungary* [5].

The second system, which was implemented between January and July 2013, was the least restrictive one, since first time asylum applicants, who immediately asked for asylum, were not detained, including Dublin returnees, whose case had not yet been decided on the merits.

The third system, currently in force, was introduced in July 2013. In the so called ?asylum detention system?, asylum seekers are detained based on extensive grounds provided for in the Asylum Act (Section 31/A), implementing Article 8 of the recast Reception Condition Directive 2013/33/EU [6]- if their identity or nationality is uncertain; if they have already absconded from the proceedings; if there is a risk of them obstructing, frustrating or delaying the asylum procedure; if they pose a threat to national security or public order or safety; if the application has been submitted at an airport; or if they have failed to appear on summons. The Hungarian Helsinki Committee (HHC) expressed its concerns [7] already before the system started to operate, namely that the above grounds are too vaguely formulated, leaving important room for interpretation, and thereby jeopardising legal certainty ? an overriding principle confirmed [8]by the jurisprudence [9] of the European Court of Human Rights [10]. In early 2014, the HHC analysed 107 detention orders collected through its monitoring visits, and published an information note [11] in May 2014, whose findings unfortunately confirmed the initial assumptions. Some of the findings read as follows:

- First-time asylum applicants are frequently detained in asylum detention. In practice, asylum detention is not an exceptional measure: in the beginning of April 2014, over 40% of adult male first-time asylum seekers were detained.
- Decisions ordering and upholding asylum detention are schematic, lack individualised reasoning with regard to the lawfulness and proportionality of detention, and fail to consider the individual circumstances (including vulnerabilities) of the person concerned.
- Alternatives to asylum detention that exist in Hungarian law are only applied on an exceptional basis. Even when they are used, the application of alternative measures is neither transparent, nor efficient.
- The automatic, periodical judicial review of asylum detention (performed at lengthy, 60-day intervals) is clearly ineffective, with no individualised decision-making.

Court?s assessment

With regards to the applicant?s complaints relating to the detention regime, the Court stated that country reports showed that there is still a practice of detaining asylum seekers, and that asylum detention is also applicable to Dublin returnees. The grounds for detention are vaguely formulated, and there is no legal remedy against asylum detention. However, the reports also showed that there is no systematic detention of asylum seekers anymore, and that alternatives to detention are now provided for by law (para. 68 of the judgment).

The last sentence *?[t]he reports showed that there is no systematic detention of asylum seekers anymore?* is worth examining in closer detail. The Court based its conclusion on the reports from three main sources: the UNHCR, the UN Working Group on Arbitrary Detention (UNWGAD) and the Hungarian Helsinki Committee. The UNHCR reports are from 2012 and therefore not relevant for the detention issue, since they only reflect the first system in place until 2013, while some of the HHC?s reports date from the beginning of 2013, when the second system was in place and although they mention the up-coming changes, they could not reflect the actual practice yet. Therefore, the most relevant reports examined were the report on Hungary prepared in the framework of the project entitled ?AIDA? (Asylum Information Database [12]) and the statement of the UNWGAD [13], since they were published when the ?asylum detention system? was already in operation.

It is interesting to note that based on these two reports the Court reached the conclusion that no systematic detention takes place anymore. In the AIDA report [12]the HHC observed that since the introduction of that regime, the asylum detention facilities were used at their full capacity. Based on the official statistics from the Office of Immigration and Nationality (OIN), the HHC calculated that the number of male asylum seekers in detention increased to around 42%. It further criticised the rare use of alternatives to detention, its lack of transparency and coherence. The HHC observed that the OIN failed to carry out proper individual assessments of the cases before subjecting asylum seekers to detention. Another concern was that detention orders did not contain any justification on why alternatives to detention were not used, despite the consideration of such alternatives being mandatory under the law.

The UNWGAD statement [13] expressed its concern that there had been a significant focus on detaining asylum seekers. The issue of prolonging the detention of an asylum seeker and the lack of proper judicial review were consistently raised during the interviews it conducted. The Working Group therefore brought the Hungarian Government?s attention to the fact that the situation of asylum seekers and migrants in irregular situations needed robust improvements to prevent arbitrary deprivation of liberty. It recommended that the measures introduced by the recent law, which were considered to be positive, should be implemented in a clear and defined manner. Detention should not be the common and first resort and should be for the shortest possible duration, especially when genuine asylum seekers may be overlooked or detained unnecessarily without proper justification.

When turning to the statistics it is true that the overall number of detained asylum seekers was not high (23%), but since women and children were not detained in asylum detention during the given period, however, the percentage of detained adult men is more revealing: 42% of all male asylum seekers were detained in the beginning of April 2014, which represents a significant proportion of adult male asylum seekers.

As far as the use of alternatives to detention are concerned, the Court was satisfied with the fact that the alternatives are prescribed in law and ignored the reports on how they are rarely used in practice, how their use is not transparent and coherent, how detention orders lack proper individualisation, and, moreover, why certain alternatives could not be used instead. The judgment in this respect unfortunately did not reflect the Court?s established principle that the ECHR is a living instrument and that protection under the ECHR must be effective and practical and not theoretical and illusory (see *Airey v. Ireland,* no. 6289/73, 9 October 1979).

Further on, despite the Court citing in para. 63 of the judgment that *?the relevant time of the risk assessment will be that of the proceedings before the Court? (see Saadi v. Italy [GC], no. 37201/06* [14]*, § 133, ECHR 2008, and A.L. v. Austria, no. 7788/11* [15]*, § 58, 10 May 2012). A full assessment is called for, as the situation in a country of destination may change over the course of time (see Salah Sheekh, cited above, § 136),*and in par. 66that*?[t]he Court therefore will only take into consideration the most recent reports and respective arguments by the parties?*, the Court did not take into consideration the above mentioned report of the Hungarian Helsinki Committee [11] published on 29 May 2014, which analyses the ?asylum detention system? in detail,despite the fact that it was published before the date of the deliberation - 10 June 2014. Notwithstanding the fact that it may be difficult for the Court to take into consideration a new report published only two weeks before the assessment of the Court and which may not have been referred to by the parties to the case, it certainly leads the Court to base its arguments on old sources, leading its judgement to be grounded on outdated realities having adverse consequences on both the applicant in this case, and on potential future asylum seekers? cases. Arguably, there is now a very real danger thatdecision makers in asylum matters will revert to the findings of this judgment and conclude that there are no systemic deficiencies in Hungary regarding the asylum detention, regardless of the

HHC?s contrary findings in the report, since the date of the deliberation of the judgment and the final date of the judgment postdate the publication of the HHC?s report.

Finally, the conclusion of the Court in par. 69 of the judgment referring to the lack of a UNHCR position paper requesting EU member States to refrain from transferring asylum seekers to Hungary under the Dublin II or Dublin III Regulation is also questionable. Such a conclusion is dangerous since it implies that if UNHCR does not publish a position paper on transfers to a certain country, the conditions there are presumed to be safe. However, there might be many other legitimate reasons why UNHCR does not publish position papers on certain countries, such as, for example, lack of capacity and resources, bureaucracy barriers, diplomatic issues, etc., but also the nature and the scope of the deficiencies in the system. The UNHCR has so far only published statements calling on the suspension of Dublin transfers with regard to Greece [16] and Bulgaria [17] (subsequently lifted [18] in April 2014), where the situation was highly critical, described as a ?humanitarian crisis?. But no such statements were issued for other countries whose asylum systems have also been largely criticized, evidence by some national courts continuing to suspend Dublin transfers in individual cases to those Member States, including Italy, Hungary, Poland and Malta.

With the aforementioned in mind it is important to highlight that the ECHR was not asked to rule whether all transfers to Hungary should be stopped, but whether there would be a risk of a violation of Article 3 in the case of the applicant. In order to find out whether the detention conditions amount to inhuman and degrading treatment the Court should first assess whether there is a risk that the applicant will be detained. It is at this point that the Court, not taking into account the up to date information, erred when concluding that there is no systematic detention of male asylum seekers in Hungary. The fact that the Court already condemned Hungary for unlawful detention of asylum seekers that was in place until January 2013, should have at least reminded the Court that stricter scrutiny is needed in analysing the current detention system.

Conclusion

As far as detention of asylum seekers in Hungary is concerned, the judgment of the Court reaches the opposite conclusion as the HHC?s recent report. Considering that the report was published before the judgment and that the Court was not aware of it, it might be reasonable to request a revision of the judgment according to the Article 80 if the Rules of the Court [19], which is possible in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party.

30 September 2014

Gru?a Matev?i?, Legal Officer, Hungarian Helsinki Committee

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

Keywords:
Dublin Transfer
Détention

Tags:
ECtHR
Hungary

Links:
[1] http://www.asylumlawdatabase.eu/en/content/ecthr-mohammadi-v-austria-application-no-7193212#content
[2] http://www.echr.coe.int/documents/convention_eng.pdf
[3] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145233#{"itemid":["001-145233"]}
[4] http://www.asylumlawdatabase.eu/en/content/ecthr-lokpo-and-tour%C3%A9-v-hungary-application-no-1081610-0
[5] http://www.asylumlawdatabase.eu/en/content/ecthr-decisions-al-tayyar-abdelhakim-v-hungary-no-1305811-and-hendrin-ali-said-and-aras-ali
[6] http://www.asylumlawdatabase.eu/en/content/en-recast-reception-conditions-directive-directive-201333eu-26-june-2013
[7] http://helsinki.hu/wp-content/uploads/HHC-update-hungary-asylum-1-July-2013.pdf
[8] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57584#{"itemid":["001-57584"]}
[9] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58240#{"itemid":["001-58240"]}
[10] http://www.refworld.org/docid/496365562.html,
[11] http://helsinki.hu/wp-content/uploads/HHC-Hungary-info-update-May-2014.pdf
[12] http://www.asylumineurope.org/reports/country/hungary
[13] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13817&LangID=E
[14] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":["37201/06"]}
[15] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":["7788/11"]}
[16] http://www.asylumlawdatabase.eu/en/content/en-unhcr-position-return-asylum-seekers-greece-under-dublin-regulation-15-april-2008
[17] http://www.asylumlawdatabase.eu/en/content/unhcr-calls-suspension-dublin-transfers-bulgaria
[18] http://www.refworld.org/docid/534cd85b4.html
[19] http://www.echr.coe.int/documents/rules_court_eng.pdf