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ACCESS TO TERRITORY AND ASYLUM PROCEDURE IN HUNGARY

2012

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I. COOPERATION WITHIN THE FRAMEWORK OF THE BORDER MONITORING PROJECT

I.1. Introduction

This report summarizes the experiences gathered in 2012 in the course of the project “Asylum Seekers’ Access to Territory and Asylum Procedure in the Republic of Hungary” (Border Monitoring Project).

The Border Monitoring Project continued to be implemented in 2012 according to the tripartite agreement (Tripartite Agreement) concluded on 28 December 2006 by the Hungarian Helsinki Committee (HHC), the National Police Headquarters (Police) and the United Nations High Commissioner for Refugees (UNHCR).

The report is based on individual border monitoring visits and gives an account of the events and activities organized by the parties of the Tripartite Agreement in 2012. The report does not include an explanation of the rights of foreigners, or an account of the police facilities visited, as the detailed description of these are included in the report on the program’s first year in 2007.¹

In accordance with the Tripartite Agreement, the parties met twice during 2012, on 5 March 2012 and 4 January 2013 under the framework of the Working Group – created by Section 1 of Chapter V of the Tripartite Agreement (“Working Group”) – to evaluate the Project’s experiences. The parties continued to place great importance on tripartite cooperation efforts, as well as the joint assessment of practical issues and a professional working relationship, as it facilitates efficient cooperation among the parties implementing the Agreement. It also results in the effective exchange of information and positively influences the practice of the collaborating parties.

In line with previous years’ practice supplementary remarks of the Police to the findings are set in bold, italicized font.

I.2. Methodology of border monitoring

Attorneys contracted by the Hungarian Helsinki Committee monitored three sections of Hungary’s borders: the Ukrainian–Hungarian border, the Serbian–Hungarian border, and the Budapest Liszt Ferenc International Airport.

In general, police officers at all border checkpoints and field offices were consistently cooperative with the HHC monitors. Multilingual brochures produced by the UNHCR and the HHC for arriving asylum-seekers were regularly displayed in the UNHCR information booths in a conspicuous location along with the contact information of lawyers contracted by the Helsinki Committee.

Similarly to previous years, the contracted attorneys collected data during individual visits on the situation of foreigners who had been sent back or returned and thus had no access to the territory of Hungary. Within the framework of the program, there were two visits per month at each of the above-mentioned three border sections.

One of the two monthly visits at the given border section’s field offices examined whether the intercepted foreigners had access to the asylum procedure and whether they received adequate information to initiate a procedure. If an intercepted foreigner was present during the visit the monitor had the opportunity for a personal conversation with him or her. The second visit examined the anonymous documents on record on the foreigners who had been expelled or returned from Hungary during the preceding month. The monitors tried to reconstruct the events between the time of arrest and the time the foreigners were sent back based on the records of interviews and the opinion of the Office of Immigration and Nationality (OIN) as well as on the decision made considering whether the principle of non-refoulement was respected.

Pursuant to the Agreement, the Police ensure that monitors have access to – in previously specified categories and nationalities – copies of foreigners’ official files, even if the foreigners had already been removed from

¹ The 2007 report is available here: http://helsinki.hu/wp-content/uploads/Border_Monitoring_Report_2007_HUN_FINAL1.pdf

Hungary. In such cases, the copies of files had been made anonymous in accordance with data protection law. This provision significantly increased the scope of files the HHC could access even though anonymity still prevented the further monitoring of what happened to the foreigners after their expulsion.

Two days prior to each monitoring visit, the HHC informed the UNHCR and the Police about the planned visit, specifying the venues to be visited and the time of the visit. When deemed necessary, the monitors are allowed to have interpreters with them; in such cases obtaining a specific authorization from the Police is needed for the interpreter as well.

Under the Tripartite Agreement the monitors prepare a report of each visit to the HHC and these reports have to be forwarded to the Police and the UNHCR within 15 days of the visit. The Parties to the Tripartite Agreement are permitted to make comments, remarks and suggestions to each report.

For further details on the methodology of border monitoring see the 2007 report relating to the first year of the program.²

II. THE LEGAL FRAMEWORK OF ACCESS TO TERRITORY AND ASYLUM PROCEDURE

II.1. General legal framework

Hungary, as a state party to the United Nations Convention relating to the Status of Refugees, adopted on 28 July 1951 ("1951 Geneva Convention"), and the Protocol relating to the Status of Refugees, adopted on 31 January 1967 ("1967 Protocol"), must respect and implement the provisions of these international instruments.

Pursuant to Section XIV(3) of the Hungarian Fundamental Law, effective 1 January 2012, Hungary shall grant the right of asylum to those non-Hungarian citizens who are persecuted in their homelands or regular residence based on their race, religion, nationality, membership of a particular social group or political opinion or if there is well-founded fear of such persecution.

The prerequisite of protection of persons seeking international protection is their access to the country's territory where protection is available, meaning the entry to and stay on the territory is allowed while their asylum applications are pending. The police can return all foreigners not in need of international protection to a country that the law permits³ and/or execute expulsion ordered by the alien policing authority or the court. During the execution of these orders the police are obliged to respect the principle of non-refoulement.⁴ The police is also an alien policing authority, and it is entitled to order the expulsion when the illegal border crossing (or the attempt of such) is detected at the border during border management as defined in Article 2 (9) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the execution of the expulsion of the third country national is based on a readmission agreement.

II.2. Respect for the principle of non-refoulement and Article 33 of the 1951 Geneva Convention

Article 33 (1) of the 1951 Geneva Convention sets forth the general principle of non-refoulement:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

² The 2007 report is available here: http://helsinki.hu/wp-content/uploads/Border_Monitoring_Report_2007_HUN_FINAL1.pdf

³ Section 40(1) of Act II of 2007 on the entry and residence of third country nationals (Third Country Nationals Act, hereinafter referred to as TCN Act)

⁴ Section 52(1) of the TCN Act. „The alien policing authorities are obligated to examine the principle of non-refoulement in all procedures regarding the order and execution of return and/or expulsion."

In accordance with the relevant international norms, Section 51 of the Third-Country Nationals Act accords with the principle of non-refoulement by declaring when return or the enforcement of expulsion is prohibited.⁵ The Police are required to contact the Office of Immigration and Nationality (OIN) in cases of doubt concerning the risk of torture or inhuman, degrading treatment the foreigner(s) may face upon return.

However, as previous reports on border monitoring activities⁶ have pointed out, return is generally a measure that is enforced within a relatively short period of time, and due to its special procedural characteristics, it is not preceded by a substantive interview. Both the UNHCR and the HHC support the idea of introducing such an interview requirement in the Hungarian alien policing legislation, as through such an interview it would be possible for the Police to gain more information about the reasons why the foreigner left his/her country of origin. In the absence of this substantive interview the assessment of non-refoulement carried out by the authorities in the course of the return procedure remains a mere formality.

The purpose of the return measure is that third country nationals who do not meet the conditions of entering and staying within the Schengen area should not be able to access this territory. The measure however has to be applied in consideration of the obligations of international protection and the principle of non-refoulement.

As previously expressed by the police in the 2011 border monitoring project, during the execution of the return the police staff decide on an individual basis in each case whether or not the principle of non-refoulement is applicable, based on the available general information, the personal circumstances and the behaviour of the person in consideration, and in case of doubt, with consideration to the opinion of the asylum authorities. The Hungarian practice is in accordance with the rules of return of the Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code). Based on the Schengen borders code, rapid measures are taken to prevent the entry in the Schengen area of those who do not meet the conditions to enter or those who pose a threat to the security of the Member States of the European Community.

The execution of the return measures takes place at the border crossing points, where the passengers usually possess some kind of travel document. In each case the police examine based on the available general information whether the returnee is at risk of violation of their human rights on the territory of the neighbouring country or in case of persons arriving at the airport, at the location of the departure. When there is no such risk, the return of the third country national is executed.

In the course of the procedure the person attempting illegal entry is taken into short-term arrest, against which he/she can file a complaint. During the short-term arrest the person is informed about their rights and obligations such as the possibility of requesting legal assistance. The phone number of the legal counsel can be found in each short-term detention facility, as well as the information leaflets of the UNHCR and the Hungarian Helsinki Committee. The police always allow the foreigner to contact the legal counsel.

Judicial review against the return order is always ensured.

The current regulation of readmission serves well the purpose of removal by a rapid measure to the state from where these persons crossed the external Schengen borders to Hungary without meeting the conditions for entry; adequate information and legal redress systems are functioning and enough time is available for lodging an asylum application during the execution of the readmission measure, therefore there was no need to hold hearings for 11 632 persons under return procedure in 2010, 11 819 persons returned in 2011 and 9316 persons returned in 2012.

⁵ Article 3 of the European Convention on Human Rights

⁶ Further findings with reference to the implementation of Article 33 of the Geneva Convention can be found in the border monitoring reports from previous years.

Experience shows that seeking asylum is only possible if communication between the Police and the foreigner permits the latter to express his/her wish to claim asylum in a way that is clear and comprehensible for the Police. The interpreter has a significant role at the first meeting between the foreigner and the authorities, and it is especially important to translate and record all the relevant information precisely.

The foreigner can express his/her intention to apply for asylum at any stage the police procedure, which will then be registered by the proceeding authority and forwarded to the competent asylum authority.

II.3. Changes in the Hungarian alien policing and asylum laws in 2012

The Hungarian alien policing and asylum laws were modified again in 2012 pursuant to the EU harmonization obligations (i.e. information exchange within the second generation of the Schengen Information System) and the pilot procedure of the European Committee that was launched in 2012 due to the anomalies of the Hungarian practice. Among the modifications relating to the border monitoring activities, it is important to point out Section 51(2) of Act II. of 2007 (hereinafter referred to as TCN Act) – effective 1 January 2013 – declaring that lodging an asylum application and the start of the asylum procedure mean an explicit ban on expulsion and return.⁷

With this seemingly straightforward modification the legislation guaranteed the asylum seekers' access to territory and asylum procedure. With this modification the Hungarian judicial practice is now in accordance with the judicial interpretation of the law regarding the expulsion of foreigners under pending asylum procedures. According to the Helsinki Committee's experiences, in recent years, the Metropolitan Court of Budapest decided in several cases in regards to the unlawfulness of expulsion of foreigners under pending asylum procedure.⁸ According to the court's explanation, the asylum seekers have the right to remain in the territory until a decision is made in their asylum claim therefore their expulsion was unlawful. Pursuant to the above mentioned modification the practice that the NGOs and UNHCR previously criticized may come to an end.

The modification of Section 51(2) of the TCN Act is definitely to be welcomed as it declares that the asylum seekers while their asylum procedure is pending have the right to remain in the country's territory thus their expulsion may not be ordered or executed. However, the methodology of application is especially important during the course of border patrolling and monitoring activities. The language of the legislation is ambiguous – "if the third country citizen is under asylum procedure" – as neither the law nor the Government Decree 114/2007 (V.24.) implementing it - provides interpretation guidelines for the authorities. It is ambiguous whether the claiming the intent of submitting an asylum application, the recording of such application or the appropriate authority's first action to launch the procedure constitutes a condition for the application of the TCN Act Section 51. In the Helsinki Committee's opinion, the lack of executing guidance is not in line with the requirement of legal certainty.

Pursuant to the modification, after 1 January 2013, there is no possibility to detain a foreigner under a pending asylum procedure as the legal basis for detention– i.e. ensuring the execution of expulsion- is missing.

Another important modification of the alien policing laws is clarifying the definition of the persons in need of special treatment which enables the authorities to recognize such foreigners at the initial stages of the alien policing procedure and thus to provide adequate accommodation and assistance for them.⁹ Identifying foreigners needing special treatment is a complex task and it may be necessary to include other experts in the process i.e. doctor or psychologist, which is recommended, though not required, in the government decree implementing the TCN Act.¹⁰

⁷ "If the third country national is under pending asylum procedure, return and/or expulsion may not be ordered and executed, if the third country national has the right to lawful presence in Hungary in accordance with specific provisions of the law."

⁸ Metropolitan Court of Budapest decisions: 5.K.34.146/2010/4. (2011. January 4.), 15.K.34.907/2010/5. (2011. March 31.), 21.K.32.365/2011. (2011. September 21.)

⁹ Section 2(t) of TCN Act: person in need of special treatment: the unaccompanied minor or vulnerable person – minor, elderly, disabled, expectant mother, single parent of a minor or victims of torture, rape or other severe forms of psychological, physical or sexual violence –, whose individual evaluation determined the presence of special needs.

¹⁰ Section 113(3) of the Gov.Decree.: „In case of a doubt, the proceeding alien policing authorities may seek assistance from physicians or psychologists in order to determine whether the expelled foreigner is in need of special treatment.”

In addition to the above-mentioned modifications, the UNHCR 2012-2013 regional project "Response to Vulnerability in Asylum"¹¹ bears significant importance, in which project all three organizations are actively participating. The aim of the project is to create tools for the authorities in order to identify foreigners' vulnerability at an early stage of the procedure with the aim to ensure adequate response to procedural and accommodation issues in practice. In the framework of the project, aiming at capacity building of the authorities, a procedural protocol is designed to enable a more efficient and confident procedure for the authorities, keeping the vulnerable asylum seekers' needs in mind.

II.4. Description of monitored facilities

The implementation of the border-monitoring project in 2012 concerned three border sections (the Serbian and Ukrainian borders, and the Budapest Ferenc Liszt International Airport) where three lawyers contracted by the HHC carried out border monitoring.

Serbian-Hungarian border section

The HHC's monitor at the Serbian-Hungarian border section visited the following locations as part of the border monitoring activity:

(1) Alien Policing Department of the Bács-Kiskun County Police Headquarters:

Alien Policing Department (Kiskunhalas), Bácsalmás, Bácsbokod, Hercegszántó and Kelebia Border Control Field Offices, and related border crossing points (Bácsalmás, Tompa, Kelebia).

(2) Alien Policing Department of the Csongrád County Police Headquarters:

Alien Policing Department (Szeged), Szeged Border Control Field Offices and related border crossing points (Röszke, Mórahalom, Tiszasziget).

Ukrainian–Hungarian border section

The HHC's monitors carried out border monitoring at the Ukrainian–Hungarian border section, visiting the following locations:

Alien Policing Department (Nyírbátor) of the Szabolcs-Szatmár-Bereg County Police Headquarters and Border Control Field Offices and related border crossing points (Záhony, Barabás, Beregsurány, Kölcse).

Budapest Liszt Ferenc International Airport

The HHC monitor paid border monitoring visits to the premises designated for the temporary detention of persons under return proceedings, located in Terminal 2B (the so-called "small community shelter"). The lawyer also had access to the files of foreigners under the return procedure at the offices of the Airport Police Directorate.

In general, it can be said that the HHC monitors found satisfactory material conditions in all police facilities they visited. In general, the equipment and cleanliness of these short-term holding facilities are satisfactory. The multilingual brochures prepared by the UNHCR and HHC were available at the facilities visited and in accordance with the Tripartite Agreement the HHC staff continuously refilled these brochures over the span of the project.

¹¹ Full name of the project: Ensuring Effective Responses to Vulnerable Asylum-seekers: Promotion of Adequate Standards for Identification and Claim Determination for People with Special Needs, funded partly by the European Refugee Fund

III. GENERAL FINDINGS

III.1. Migration trends and statistics in 2012

According to the 2012 statistics of the National Police Headquarters, the police ordered expulsion in 4476 cases and return in 7508 cases at the airport and the borders. At the border sections monitored by the program the police registered a total of 696 asylum applications during the year of 2012, however no data is available as to how many asylum applications were submitted by the detained foreigners in 2012 during the later stages (such as during detention) of the alien policing procedure.

2012	Expulsion	Asylum Applications	Return
January	429	54	703
February	235	17	481
March	438	44	647
April	242	37	509
May	328	41	495
June	316	39	491
July	286	32	753
August	448	54	786
September	676	54	728
October	511	124	647
November	334	79	630
December	233	121	638
Total	4476	696	7508

Source: National Police Headquarters

According to the experiences of the border-monitoring program, the number of foreigners that were returned to the Serbian authorities based on the Agreement between the European Community and Serbia on Readmission of Persons Residing without Authorization further increased in 2012.¹² This may be due to the fact that both the police and the Office of Immigration and Nationality considered Serbia as a safe third country resulting in the practice of automatically returning all arrested, foreigners who illegally entered Hungary. In 2012, 4315 such cases were registered compared to the total of 3752 cases in 2011.¹³ Due to the considerably good cooperation between the Hungarian and Serbian authorities and the common quasi-automatic practice of detention, 70% (3041) of intercepted and expelled foreigners were indeed returned to Serbia.

Pursuant to current laws, the police may not decide about the application of non-refoulement thus may not evaluate Serbia to this effect either. In accordance with the obligations registered in Section 124(3) of the Government Decree 114/2007. (V.24.) implementing the Third Country Nationals Act (2007. II. (TCN Act.) the police obtains the official opinion of the asylum authorities in each case in regards to non-refoulement prior to executing the return of foreigners.

¹² Basis provided in the Government Decree 53/2010. (III. 11.) on the promulgation of the Report (19 December 2009, Rösztke) between the Hungarian Government and the Serbian Government on the implementation of the Agreement between the European Community and Serbia on Readmission of Persons Residing without Authorization, (18 September 2007, Brussels)

¹³ UNHCR Central-European Regional Office, Hungarian Helsinki Committee, National Police Headquarters: The asylum seekers' access to territory and asylum procedure in Hungary (2011), Page 18 http://helsinki.hu/wp-content/uploads/FINAL_border_monitoring_HUN_2011web.pdf

The police decide in accordance to relevant laws and international agreements - and not automatically - in each case of expulsion.

The increase in the number of expulsions to Serbia at the Serbian-Hungarian border section was linked to the increase in the number of illegal entries, 4243 cases in 2011 and 5228 cases in 2012.

The mass appearance of unaccompanied minors at the Serbian-Hungarian border section is a fairly new phenomenon. According to the National Police Headquarters' data in 2012, a total number of 875 minors, separated from their families, were intercepted, 615 Afghan, 76 Pakistani, 34 Algerian, 27 Kosovar, 21 Somali, 18 Moroccan, 13 unknown, 11 Syrian, 11 Bangladeshi, 8 Serbian and 7 Libyan citizens, in a total of 28 citizenship categories. These children are mostly boys between the ages of 14 and 18; however, there are examples of significantly younger, 5 year-olds being caught by the police. Further details about the unaccompanied minors will be presented in Section IV of this report.

The Ukrainian-Hungarian border section presented entirely different findings in 2012, where the number of intercepted and expelled foreigners further decreased. The police ordered expulsion in 159 cases against foreigners not complying with required conditions for entry and stay (in 2011, 203 such cases registered) and ordered return in 2982 cases (compared to 4179 cases in 2011). The police registered only 20 asylum applications in 2012 compared to 29 applications in 2011 resulting in a 30% decrease.

At the Budapest Liszt Ferenc International Airport the police reported 70 asylum applications and 160 cases of return during the implementation of the program. Pursuant to the relevant laws, the police usually order the return of non-admissible foreigners at this venue. The execution of return measures takes place at the border crossing points where the passengers usually possess some kind of travel document.

During the 2012 border monitoring program, the three monitors contracted by the Helsinki Committee reviewed a total of 350 files of expelled and/or returned foreigners and conducted personal interviews with 24 detained foreigners during the visits.

III.2. Training manual for the police

Within the framework of the "Return with human rights safeguards" project supported by the European Return Fund, the parties to the Tripartite Agreement drafted a manual for police training purposes. The manual's aim is to provide a brief and user-friendly summary of human rights protection related to the return and detention of foreigners, considering the needs of the target groups.

The manual was drafted by members of the Helsinki Committee, the National Police Headquarters, the UNHCR and the Cordelia Foundation. The editors of the manual held several meetings to discuss the structure of the manual and to call for comments and recommendations on the final texts from the authors of each chapter. The diversity of editors ensured the multi-disciplinary approach.¹⁴

The Helsinki Committee held two training sessions in March 2012 for 46 police officers working in the field of alien policing and border control.

The police made the manual available in print and electronic format for all of the involved staff members.

¹⁴ See the manual at: http://helsinki.hu/wp-content/uploads/helsinki_rendorjegyzet2012FINALweb.pdf

IV. FINDINGS OF BORDER MONITORING

IV.1. Serbia as safe third country

According to police statistics, in 2012, foreigners were expelled to Serbia in 4315 cases at the Serbian-Hungarian border section. Parallel to this tendency, the number of asylum seekers returned from Hungary to Serbia was also significant and though the Office of Immigration and Nationality data does not include the reason of the application's rejection (i.e. arrival through Serbia and application of safe third country concept), it may be concluded that there were hundreds of asylum seekers who had to return to Serbia (a total number of 384 applications were rejected without an in-merit examination, this includes foreigners returned to Serbia). A modification – effective 24 December 2010 – to the Hungarian refugee laws introduced the concept of a 'safe third country' among the criteria examined in the admissibility procedure. Pursuant to the modification, asylum seekers who arrived to Hungary through a safe third country may be returned to that country without an in-merit examination of their claim. The Office of Immigration and Nationality considers Serbia a safe third country. Due to the fact that the number of foreigners expelled to Serbia further increased in 2012 compared to 2011, the Hungarian Helsinki Committee found it important to examine in 2012 as well whether the opinion of the authorities is well-founded in view of the actual asylum system in Serbia.

During the execution of expulsion, the third country nationals returned to Serbia were not under asylum procedure thus may no longer be considered asylum seekers.

The Office of Immigration and Nationality, in giving its opinion on the expulsion orders of the police, was consistent in its practice and claimed that the protection of refugees in Serbia in accordance with international standards is guaranteed and all foreigners can be returned without the risk of refoulement. The Court of Szeged held the same opinion – in most of the cases represented by the Helsinki Committee – in reviewing the asylum decisions of the OIN where the asylum applications were denied without an in-merit examination. In contrast, the HHC and the UNHCR are of the opinion that – in relation to asylum procedure – Serbia is not a safe third country. Both organizations examined the Serbian asylum system in detail and their findings were represented in their public reports.¹⁵

An examination of the files at the Serbian-Hungarian border reveals that the police contacted the OIN in each case to determine whether the foreigner could be returned to Serbia while respecting the principle of non-refoulement. According to the information available to the HHC the OIN gave a positive answer in each case and thus enabled the expulsion of the person in question. It is important to stress that the OIN is obliged to weigh all the circumstances of the case and to examine all cases individually to consider the risk of refoulement. The OIN treated Serbia as a safe third country with respect to refoulement in 2012, so even foreigners belonging to vulnerable groups – children, single women, etc. – were expelled and returned to the Serbian authorities under the readmission agreements.

The HHC went on a fact-finding mission to Serbia in April 2012 again to assess the state of the Serbian asylum system and update its 2011 report¹⁶. The HHC concluded that international protection for refugees is still not secured in Serbia and despite some improvements in regards to the accommodation of the asylum seekers, the conditions are far from satisfactory. There has not a single decision granting refugee status in the past 5 years. The partial improvements of the reception conditions will not relieve the situation of the several hundreds homeless and extremely disadvantaged migrants who are constantly exposed to harassment by locals and the police.

¹⁵ UN High Commissioner for Refugees, Serbia as a country of asylum. Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia, August 2012, available in English: <http://www.unhcr.org/refworld/docid/50471f7e2.html> and Hungarian Helsinki Committee: Serbia as a Safe Third Country: Revisited, June 2012, available in English: <http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf> and the summary in Hungarian: <http://helsinki.hu/wp-content/uploads/Szerbia-osszegzes.pdf>

¹⁶ <http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf>

The HHC is of the opinion that returned foreigners (asylum seekers) may face the risk of chain-refoulement to other non-safe third countries (i.e. Turkey) thus there is a risk that the Hungarian authorities indirectly return the foreigners to inhuman, degrading treatment. It is especially an important issue in cases where the foreigners were returned through Macedonia to Greece, as the European Court of Human Rights in Strasbourg declared in *MSS v. Belgium and Greece*¹⁷ that – due to the deficiencies of the Greek asylum system – the states returning asylum seekers to Greece expose these foreigners to the risk of inhuman and degrading treatment.

The HHC is of the opinion that the position of the OIN is misguided, as the Court of Debrecen and the Metropolitan Court of Budapest have also pointed out on several occasions in reviewing cases where refugee status was denied without an in-merit examination. However, judicial practice has been far from unified in this respect therefore the Supreme Court's Working Group on Asylum of issued an official opinion on 10 December 2012, regarding the application of the safe third country concept in asylum cases.¹⁸ The Supreme Court concluded that the proceeding authorities must take into consideration the previously overlooked country information documents such as the UNHCR reports. In the 2012 August report "...the UNHCR concludes that the Serbian refugee system is in need of improvements at multiple points and notes that the Serbian refugee authorities lack resources and capacity to ensure protection from refoulement, as participation in a fair and effective asylum procedure is unavailable. Furthermore, in light of the current situation of the Serbian asylum system, Serbia not to be considered a safe third country of asylum and recommends that countries refrain from sending asylum-seekers to Serbia on this basis."¹⁹

CASE 1

A Palestinian man was arrested and interviewed in English on 17 April 2012. He presented that he was expelled to Serbia along with 14 others where he was tried at court and taken to the prison in Szabadka. Nine days later he was transferred to Belgrade to a camp designated for foreigners. Six days later he was taken to the Serbian-Macedonian border by bus and was let go with a warning not to return to Serbia. He spent six days in Macedonia then decided to try to get to Serbia illegally and then to Hungary by himself. He travelled by train and then on foot until he was arrested. According to him, he left his country due to lack of employment opportunities and the war, in fear of being killed. He was interviewed again due to his injuries, and he presented that "I got injured when I was taken to the Serbian-Macedonian border by Serbian police officers." The principle of non-refoulement was not applied by the OIN and – in accordance with the Agreement between the European Community and Serbia on Readmission of persons residing without authorization – he was returned to the Serbian authorities on 23 April 2012.

IV.2. The case of unaccompanied minors

When inspecting the alien policing files within the framework of the border monitoring program in 2012, HHC monitors noticed a drastic increase in the number of unaccompanied and separated minors - 875 cases in 2012, compared to 359 cases in 2011²⁰- and among these cases unfolded the ones where these minors were returned to Serbian territory.

¹⁷ *M.S.S. v. Belgium and Greece* (30696/09), available in English at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050>

¹⁸ <http://www.kuria-birosag.hu/hu/kollvel/22012-xii10-kmk-velemeney-biztonsagos-harmadik-oroszag-megitelesenek-egyesselkerdeseirol>

¹⁹ Excerpt from the report: UN High Commissioner for Refugees, *Serbia as a country of asylum. Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, Page 4, available in English at <http://www.unhcr.org/refworld/docid/50471f7e2.html>

²⁰ Source: National Police Headquarters and Report of the Hungarian Commissioner for Fundamental Rights: (AJB-2731/2012.) Page 1. see: <http://www.ajbh.hu/allam/jelentes/201202731.rtf>

The lawyer contracted by the Helsinki Committee to monitor the Serbian-Hungarian border section focused on the unaccompanied minors' access to territory and asylum procedure in 2012. After the inspection of the alien policing files the findings are as follows:

- As also presented in the police statistics, most of the arrested minors were Afghan nationals and between the ages of 14 and 18. Due to the fact that all of them arrived without identification documents, the medical staff of Csongrád County Police Headquarters conducted examinations to determine their age. According to their data,²¹ 881 such examinations were conducted until 31 October 2012 and in 55% of the cases, the foreign minors were assessed as between 14 and 18 years. According to findings of the Commissioner for Fundamental Rights (Ombudsman), the process of these examinations consists of the following: "the physician first records the foreigner's name, date and place of birth and address. In order to determine the examined foreigner's "previous data" the physician asked about the minors' parents, siblings, schools and about the duration of their travels. (...) As part of the physical examinations, the physician measured their height, weight, build, and looked for signs of sexual maturity and potential developmental problems. The final step of the age assessment is the dental examination where the physician examined the foreigner's dental health, condition of the teeth and the presence of wisdom teeth. Based on the above examination the doctor assessed the age of the foreigner."²²
- The majority of minors did not launch an asylum application during the interview and there is very little data as to the reason for this (for example: other family members are in another EU state and they wish to get to that state). The HHC monitor found a new practice that the authorities record a note at the end of the report stating: "NO ASYLUM APPLICATION INITIATED". After the examinations of alien files however, it was clear that based on information presented in the reports, certain conditions called for the need of international protection of these minors. Many of them arrived from war-ridden Syria who reported that they left their country due to the war. In the HHC's opinion, in order to ensure reasonable procedures in the case of unaccompanied minors in the future, the proceeding authorities are encouraged to thoroughly examine the reasons of this phenomenon. It is especially important that these minors are in an extreme vulnerable and disadvantaged situation and independent of their asylum status, due to their age alone, have the right to protection under the international obligations of Hungary.

CASE 2

On 14 August 2012 an unaccompanied Afghan national minor was arrested and taken to Hercegszántó Border Control Office. During his interview he presented that he left Afghanistan about a year ago due to the war. He wished to go to Germany and seek asylum there. The report shows that "NO ASYLUM APPLICATION INITIATED" by the Afghan minor. According to the OIN, the principle of non-refoulement was not applicable in returning him to Serbia therefore he was returned to Serbia the same day in accordance with the readmission agreement between the European Union and the Serbian Republic.

- The authorities expelled the unaccompanied minors in each case almost without exception if the lawful admissibility conditions were not met and failed to apply the Section 29(1)(d) of TCN Act.²³ to provide the minors with a humanitarian permission despite the fact that the legislation created a separate specific status for the unaccompanied minors independent of the asylum law and the non-refoulement requirement.²⁴ With respect to the serious concerns in the application of the non-refoulement principle it should be stressed that carrying out a non-refoulement assessment is the obligation of the OIN. In the HHC's experience the OIN almost automatically provides a positive answer – granting return – to all police requests sent to OIN prior to issuing an expulsion order.

²¹ Presented at the National Police Headquarters' professional consultation on 9 November 2012 in Budapest.

²² Report of the Hungarian Commissioner for Fundamental Rights (AJB-2731/2012.) page 6-7.

²³ Section 29 (1) of TCN Act. (1) In the absence of the requirements for a residence permit specified in this Act the following persons shall be granted a residence permit on humanitarian grounds: (...d) any third-country national who was born in the territory of Hungary who has been removed from the custody of his guardian having custody according to Hungarian law, and also unaccompanied minors;

²⁴ See also Gyulai Gábor: A nemzetközi védelem nem harmonizált formái Magyarországon (2009), available in Hungarian: http://helsinki.hu/wp-content/uploads/A_nemzetkozi_vedelem_nem_EU-harmonizalt_-formai_vegleges.pdf

- The unaccompanied minors were held for up to 24 hours and then were transferred to children's homes or appointed accommodations to different regions of the country, mostly to Bács-Kiskun and Csongrád Counties (Szeged, Szentes, Ópusztaszer, Kunfehértó, in few cases Tatabánya and Budapest). After examining the files the monitor concluded that the unaccompanied minors often left these facilities within a few hours or a day however there is no exact data on the number of such disappearances. The Csongrád County police staff reported that after their disappearance, a search was ordered, however there is generally no data on their subsequent whereabouts and circumstances. It is of great concern that these unaccompanied minors are exposed to the risk of becoming victims of human smuggling or trafficking after their disappearance from the children's homes. As concluded in the report of the Commissioner for Fundamental Rights (case no. AJB-2731/2012): currently there is no effective victim protection mechanism in place, "there is no data in any of the reports that the proceeding authorities initiated any victim assistance or reported these cases to the appropriate victim assistance authorities."²⁵
- The guardians appointed to assist the unaccompanied minor were found to be quite passive and in the HHC's experience, there was not a single case of review request of expulsion orders, which in itself is worrisome. The guardians are to represent the interest of the unaccompanied minors and are obliged not only to assess the minors' circumstances but to strive to obtain a durable solution to their problematic situation. The HHC strongly recommends that the authorities (OIN and police) – instead of expulsion – should examine each case separately and extensively to assess the protection needs and family situation of the child and foremost, to serve the best interest of the child. It should be emphasized that despite the fact that there is no definition of the best interest of the child, the administrative authorities - in compliance with current regulations of the law- have already been obliged to consider such notion in their decision-making process.²⁶

In cases where the minor informed the authorities about family members on EU territories, the Hungarian authorities failed to conduct the authentication of such family ties and to initiate family reunification. The latter is available in accordance with the Dublin II Regulation stating that if the asylum seeker is an unaccompanied minor, the State where the asylum seeker's family is lawfully present is obliged to examine the minor's asylum application provided that this serves the best interest of the child.²⁷ The issue becomes more complex with the unaccompanied minors stating many times that they do not wish to submit an asylum application in Hungary, but in another EU state (for example in Austria, Germany or Italy). The question then arises whether it is the obligation of the guardian or the proceeding authorities to inform the minors about this regulation, thus trying to assert that there is a legal, official path to family reunification with family members residing in other EU states. This notion seems to be supported by the Advocate General's opinion – dated 21 February 2012 – on a case pending before the Court of Justice of the European Union (C-648/11 MA, BT, DA v Secretary of State for the Home Department) declaring that lawfulness of the family members' stay is not even a condition.²⁸

CASE 3

On 9 April 2012 an unaccompanied Afghan minor was taken into custody in downtown Szeged. The physical examination determined that he is probably a minor. During his interview with the presence of his guardian and an interpreter, he presented that his close relatives are Taliban and he was asked to join them. He refused; therefore he was forced to leave. He also presented that his sibling lived in London and he wished to get there and that he lost contact with his parents. His expulsion was ordered, the execution was suspended until its conditions for execution were met and he was transferred to the Rigó Alajos Children's Home in Szentes and on 12 April he was returned to the Serbian authorities.

²⁵ Hungarian Commissioner for Fundamental Rights report, case no. AJB-2731/2012. page 17.

²⁶ Act LXIV of 1991 promulgating the 1989 UN Convention on the Rights of the Child

²⁷ 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, Article 6.

²⁸ <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-02/cp130016en.pdf>

Several governmental institutions focused on finding solutions to this issue in 2012, including the Ministry of Interior, the National Police Headquarters and the Human Resources Ministry as well. The aim is to accommodate all unaccompanied minors who do not wish to seek asylum at a central facility and not at randomly selected children's homes depending on the available vacancies. In the period of time examined no such central facility was selected, however by the time of writing this report it has been announced that as of 1 February 2013 the facilities in Ópusztaszer and Hódmezővásárhely have 30 places available for accommodating unaccompanied minors based on the agreement between Szent Ágota Childprotection Service²⁹ and the Human Resources Ministry (EMMI).

As an example of further improvement in 2012, the National Police Headquarters and the Ministry of Interior are developing an age assessment protocol that will provide a standard framework for all police examinations with standard methodology and quality requirements. In developing the protocol, the parties had the opportunity to co-operate with civil and international organizations on 9 November 2012. The participating organizations shared their available international experiences and their recommendations on good practices.³⁰ The protocol is to be finalized in the first half of 2013.

The Commissioner for Fundamental Rights in its investigation under no. AJB-2731/2012. is deliberating on cases of unaccompanied minors who do not wish to seek asylum thus– considering that the Tripartite Agreement focuses on cooperation and coordination in support of the asylum seekers' access to territory and asylum procedure- does not fall under the Agreement. The referenced report did not find any unlawful actions on the part of the police.

IV.3. Implementation of Article 31(1) of the Geneva Convention

Article 31 (1) of the 1951 Geneva Convention stipulates:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

As highlighted in previous reports on asylum seekers' access to territory and procedure, the application of Article 31 of the 1951 Geneva Convention has been problematic in Hungary. HHC lawyers have provided legal assistance to asylum seekers facing criminal prosecution on the basis of forging or using forged travel documents. The UNHCR and the HHC are of the opinion that in several cases the Hungarian authorities failed to properly apply Article 31 of the Convention, as they established the criminal liability of asylum seekers without regard to this particular provision of the Convention.

According to the UNHCR, in the interest of implementing Article 31 (1) of the 1951 Geneva Convention — and similarly, rights protected by the European Convention on Human Rights — Contracting States must actively take concrete measures to ensure compliance with their international legal obligations. Therefore, the UNHCR position is that in order to comply with Article 31 (1) of the 1951 Geneva Convention, states must exempt asylum seekers or refugees from criminal prosecution. As refugee status is declaratory, Article 31 of the 1951 Geneva Convention also covers asylum seekers whose claim has not yet been examined.

The HHC and the UNHCR are of the opinion that if an asylum seeker is subject to criminal proceedings under the scope of the application of Article 31 of the Convention, Hungarian authorities must find a way to suspend criminal prosecution until the final decision granting or denying refugee status or subsidiary protection is made.

²⁹ <http://szentagota.hu/index.php>

³⁰ The publication of the Save the Children and the Separated Children in Europe Programme (SCEP) „Statement of good practices”, available at: http://www.separated-children-europe-programme.org/good_practice/SGP_2009_final_approved_for_print.pdf and the recommendations of the UNHCR and UNICEF on age assessment which - at the time of this report - have not been published yet.

The HHC's recent observations in 2011-2012 indicate a positive development regarding criminal proceedings based on forgery. In the HHC's experience the Police have maintained their practice at the airport by not initiating the pre-trial detention of asylum seekers intercepted with forged travel documents in every case. Several cases identified in the course of the 2012 border monitoring project confirm that asylum seekers, instead of being arrested, were transferred to a refugee reception center maintained by the OIN in Debrecen.

The HHC lawyers provided free legal counseling to asylum seekers and refugees who were charged with forgery or illegal entry and stay, for example to an Afghan unaccompanied minor and an Afghan family with small children. On 4 July 2012, 2 Somali refugees were released from charges in a repeated criminal procedure based on application of Article 31 of the Geneva Convention, in accordance with the continuous HHC and UNHCR assertion on the issue.

A noteworthy Criminal Code modification effective of 1 February 2013, is that the crime of "violation of prohibition of entry" is no longer listed and the new Criminal Code – declared on 25 June 2012 and effective of 1 July 2013- no longer considers it a punishable crime.³¹

V. INTERNATIONAL CO-OPERATION IN THE BORDER-MONITORING PROGRAM

The UNHCR places great importance on sharing the experience of the projects within the participating regions. The UNHCR organizes regional and bilateral meetings for this purpose, where participants have the opportunity to become acquainted with the results of each other's work and find solutions for legal and practical problems. The UNHCR promoted the border monitoring programs in the Central-European region in an international informative brochure and compiled the experiences of best practices of previous years.³²

The UNHCR Regional Representation for Central Europe and the UNHCR Belgrade Office held a regional meeting on 5-7 March 2012 in Belgrade, attended by Belgian, regional and local (Belgrade) members of the UNHCR, the representatives of Slovenian, Croatian, Hungarian, Romanian and Bulgarian NGOs that take part in border monitoring along with NGOs cooperating with the UNHCR. The participants discussed the current challenges of the Serbian asylum system and agreed that they will monitor the expulsion cases with international relevance in case of doubt of refoulement. The participants discussed current migration patterns in the West Balkan and the Central-European region and various practical questions relating to the identification and recognition of asylum seekers.

The UNHCR Regional Representation for Central Europe and the UNHCR Regional Representation responsible for Belarus, Ukraine and Moldova held the second international meeting on 22-25 October, 2012 in Odessa, Ukraine. Representatives of ministries, authorities, police forces and border guards of the countries in the region and NGOs taking part in border monitoring attended the meeting. The participants focused on harmonizing border control activities with the asylum seekers' international protection, also on the early identification of vulnerable asylum seekers, access to legal counseling and the training of the border control personnel.

Beyond further developing regional relationships, the HHC consulted Serbian NGOs several times regarding both strategic issues – based on the 2012 report on the Serbian asylum system – and individual cases where the asylum seekers were returned to Serbia. These NGOs are: the Belgrade Centre for Human Rights, the Asylum Protection Centre, Grupa 484 and the Humanitarian Centre for Integration and Tolerance.

The German Border Monitoring Project held a regional meeting on 13-14 December 2012 in Budapest focusing on the Ukrainian refugee situation. Several members of the HHC's refugee program also attended this meeting.

³¹ "Violation of prohibition of entry " previously in Section 214 of Criminal Code.

³² <http://www.unhcr-centraleurope.org/pdf/what-we-do/monitoring-the-border/border-management/refugees-at-the-border.html>

VI. CONCLUSIONS AND RECOMMENDATIONS

VI.1. Interview in the so-called simple cases

The UNHCR and the HHC continue to strongly recommend that, in order to prevent the unlawful return of any person in need of international protection, **the Police should be required to interview all foreigners who belong to a vulnerable group during the alien policing procedure (citizenship could be regarded as a vulnerability factor)**. A detailed personal interview is important to establish the facts of each case, particularly in the case of persons with special needs, such as single women, unaccompanied minors, elderly and sick people, traumatized persons, and families with small children. A longer and detailed interview could also help the Police to better identify persons in need of international protection, especially the ones with special needs in mixed migratory flows.

VI.2. Application of the principle of non-refoulement and Article 33 (1) of the Geneva Convention

The HHC and the UNHCR suggest that the Tripartite Working Group – in light of the UNHCR reports on Ukraine in 2007 and on Serbia in 2012 and in view of other readily available up-to-date country information - address the issue of the application of the principle of non-refoulement and the actual risks associated with not respecting it. The HHC further recommends that **the Hungarian authorities reconsider their view on Serbia as a safe third country in the alien policing procedures due to the deficiencies in the Serbian asylum system**. In applying the safe third country concept, the HHC recommends that the opinion of the Supreme Court's Working Group on Asylum be taken into consideration. Due to the large number of expulsions at the Serbian-Hungarian border section, the HHC stresses the importance of further monitoring of the Serbian asylum system.

VI.3. Focusing on the protection of children in expulsion procedures

The UNHCR and the HHC strongly recommend that the **authorities** – respecting the UN Convention on the Rights of the Child – **should carry out an individual and substantive examination in each case to determine the best interest of the child in expulsion procedures and consider the relevant aspects of child protection in their decisions**. The alien policing, asylum and child-care authorities should co-operate with special services and NGOs. The UNHCR and the HHC further recommend that the parties concerned should build a professional dialogue and carefully observe and implement good practices from abroad focusing on the examination of the best interest of the child, age assessment and intercultural communication with foreign children. The UNHCR and UNICEF in cooperation with the Hungarian authorities and NGOs, will develop a protocol on the definition of the best interest of the child during 2013, aiming to ensure the effective application of child protection principles in alien policing procedures.

VI.4. Consistent application of Article 31 of the Geneva Convention

The HHC and the UNHCR continue to strongly recommend that the Hungarian authorities **refrain from initiating criminal procedures against asylum seekers if Article 31 of the Geneva Convention is applicable**, and they will benefit from international protection in Hungary. Based on previous professional consensus, the judiciary is advised to suspend criminal procedures with an emphasis on avoiding ordering gratuitous, extended pre-trial detentions.

