Briefing paper of the Hungarian Helsinki Committee for the Working Group on Arbitrary Detention UN Commission of Human Rights

8 October2013 (updated after the meeting of the Working Group on Arbitrary Detention with Hungarian NGOs on 23 September 2013)

The Hungarian Helsinki Committee (HHC) is an NGO founded in 1989.
It monitors the enforcement in Hungary of human rights enshrined in international human rights instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The HHC strives to ensure that domestic legislation guarantee the consistent implementation of human rights norms. The HHC promotes legal education and training in fields relevant to its activities, both in Hungary and abroad.
The HHC's main areas of activities are centred on non-discrimination, protecting the rights of asylum seekers and foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on access to justice, the conditions of detention and the effective enforcement of the right to defence and equality before the law.

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The Hungarian Helsinki Committee (HHC) wishes to respectfully call the attention of the Working Group on Arbitrary Detention (WGAD) to the following problems which the HHC observed in the course of its activities regarding penitentiary institutions, police cells and alien policing jails.

For the purposes of the present report, in line with the Fact Sheet No. 26 of the WGAD the HHC defined arbitrary detention as the deprivation of liberty which is contrary to relevant international provisions laid down in the Universal Declaration of Human Rights or in the relevant international instruments ratified by States (Resolution 1991/42, as clarified by resolution 1997/50).

1. Pre-trial detention

In the case of an offence punishable with imprisonment the defendant may be subjected to pre-trial detention if (i) he/she has escaped or hidden from the court, the prosecutor or the investigative authority; he/she has attempted to escape, or during the procedure another criminal procedure is launched against him/her for an offence punishable with imprisonment; (ii) taking into account the risk of his/her escape or hiding, or for any other reason, there are well-founded grounds to presume that his/her presence at the procedures may not be secured otherwise; (iii) there are well-founded grounds to presume that if not taken into pre-trial detention, he/she would – through influencing or intimidating the witnesses, eliminating, forging or hiding material evidence or documents – frustrate, hinder or threaten the procedure; (iv) there are well-founded grounds to presume that if not taken into pre-trial detention, he/she would accomplish the attempted or prepared offence or would commit another offence punishable with imprisonment.[1] Pre-trial detention is ordered by a judge upon the motion of the prosecutor in the investigation phase (after the indictment, it is ordered or prolonged by the judge trying the case). Judicial decisions on pre-trial detention are subject to appeal to a higher judicial forum. Its longest possible term is four years, and needs to be prolonged and reviewed at intervals defined by the law.

The excessive use of pre-trial detention continues to be one of the most serious problems of the Hungarian criminal justice system. Reflecting the general trend of stricter criminal policy the number of pre-trial detainees is also rising, as demonstrated by the table below:[2]

Year	Number of pre-trial detainees	% of pre-trial detainees as compared to the total prison population	Total prison population
2009	4,502	29.31%	15,432
2010	4,803	29.42%	16,328
2011	4,875	28.33%	17,210
2012	4,888	28.45%	17,179

As the data indicate, the average number of detainees held in pre-trial detention increased by more than 7% in only two years after 2009 and currently almost 30% of the prison population consists of persons who were not convicted by any court for any crime.

Obviously, if **alternatives to pre-trial detention** were not as **underused** as are today (see e.g. numbers included in the table below[3]), the general problem of overcrowding could be at least partly solved.

Measures being applied at the time the accusation was made			
	Pre-trial detention	Geographical ban	House arrest
2012	2,500	167	61
2011	2,641	149	44
2010	2,667	181	42
2009	2,532	193	56

However, **courts continue to approve motions of the prosecution to order or upheld pre-trial almost as an automatic routine, failing to examine the individual circumstances** of the suspect in many cases. In 2012, for example, the number of prosecutorial motions for ordering pre-trial detention was 5,861 out of which 5,334 were approved by a competent judge, which means a success rate of 91%. In 2011 the number of prosecutorial motions for ordering pre-trial detention was

[1] Act XIX of 1998 on the Code of Criminal Procedure, Article 129
[2] Data available at: www.bvop.hu.
[3] Data available at: www.mklu.hu.

6,245 out of which 5,712 were approved by a competent judge, which means a success rate of more than 91%. In 2010 this rate was 92.6%, while in 2009 it was 93.8%, so the trend is at least a decreasing one.[4]

The other serious problem with pre-trial detention is its **excessive length** in a considerable number of cases: suspects often remain in detention for several months, even for years. The number of cases where the pre-trial detention exceeded the length of one year was 172, 243 and 274 in 2009, 2010 and 2011 respectively.[5]

As also shown by decisions of the European Court of Human Rights presented below, a further problem regarding the Hungarian legal rules on pre-trial detention is that the **defence has a limited right to access the case file during the investigative phase**, thus, until the closing of the investigation, the defence is severely restricted in its ability to know what the basis for the accusation is. According to Act XIX of 1998 on the Code of Criminal Procedure, the suspect and the defence counsel have guaranteed access to only the expert opinions and the minutes of those investigative acts where they can be present. To other documents they may be granted access only if this does not infringe the interests of the investigation.[6] Since the Code of Criminal Procedure practically restricts the defence counsel's presence to the interrogation of the suspect and the hearing of those witnesses whose interrogation was initiated by either him/her or the suspect,[7] this provision severely limits the defence counsel's right to inspect documents, since practice shows that investigating authorities do not consider the actual threat the inspection of a certain evidence would pose to the success of the investigation, but they prefer to reject all requests for the inspection of files before the closing of the investigation. (After the conclusion of the investigation, the prosecutor or the investigating authority shall present to the suspect and the defence counsel the complete case file of the investigation.) This can mean that suspects' pre-trial detention is extended with no right for the defence to see the information that justified the extension, and with only very general reasons provided by the court. This not only violates Article 5 (4) of the European Convention on Human Rights, but is also in contradiction with Article 7 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

The following individual cases centred on issues related to pre-trial detention and the rights violation caused by its excessive use and the way it was ordered.

- *Darvas v. Hungary (Application no. 19547/07, Judgment of 11 January 2011)*

  Mr. Darvas was arrested on 5 December 2004 on charges of drug abuse. He was placed in pre-trial detention and released on 13 April 2005. On 20 May 2005, he was arrested in another case, on charges of aggravated drug trafficking, essentially because substantial amounts of various drugs and packaging material had been found in a garage of which he had been the tenant. On 22 May 2005, his pre-trial detention was ordered in the case on the ground of the risk of collusion with the presumed drug network's other members. Afterwards, his detention was subsequently prolonged at the statutory intervals in decisions which included rather stereotypical references to the risks of absconding and collusion with no detailed reasoning as to his individual circumstances or the evidence obtained against him. The investigation in the case was terminated on 12 June 2006, and on 10 August 2006 a bill of indictment was filed, that combined the facts of the two criminal proceedings outlined above. His pre-trial detention was prolonged, and he remained there until 30 November 2006, when he was released on bail and was placed under house arrest. In April 2008, the court found Mr. Darvas guilty of the charge relating to the offence for which he had been arrested on 5 December 2004, but was acquitted in respect of all the remaining charges. He spent altogether 18 months in pre-trial detention.

[4] Data provided by the National Penitentiary Headquarters.
[5] The data was kindly provided by the National Penitentiary Headquarters.
[6] Act XIX of 1998 on the Code of Criminal Procedure, Article 186 (1)
[7] Act XIX of 1998 on the Code of Criminal Procedure, Article 184 (2)

Mr. Darvas – represented by the HHC's attorney – turned to the European Court of Human Rights (ECtHR) regarding his pre-trial detention. As regards his detention subsequent to the termination of the investigation and in particular to the indictment, the ECtHR ruled that the manner in which the question of prolongation of the detention was dealt with by the courts – which had little or no regard to the particular elements of the case and the personal circumstances of the applicant, and did not consider less intrusive means of intervention or provide convincing reasons for the assumption that the applicant would abscond – effectively deprived this period of the applicant's detention of the justification required for the purposes of Article 5 (1) (c) of the European Convention on Human Rights. Thus, Hungary violated the Convention, and the applicant was awarded a just satisfaction.

- *X.Y. v. Hungary (Application no. 43888/08, Judgment of 19 March 2013)*

  The applicant, X.Y., was arrested in November 2007 on charges of a series of car thefts and placed in pre-trial detention. He was released in May 2008 under house arrest. All restrictions on his liberty were lifted in November 2009; the proceedings against him are currently still pending. Relying in particular on Article 5 (1) of the Convention, he alleged that his pre-trial detention from 18 February to 11 March 2008 had been unlawful under the national law on account of an error committed in an order to extend his detention. Furthermore, relying on Article 5 (3) of the Convention (entitlement to trial within a reasonable time or to release pending trial), he also alleged that the length of his pre-trial detention had been excessive, and in particular that the decisions to extend his detention had not taken into account a deterioration in his psychological health. Lastly, the applicant alleged under Article 5 (4) (right to have lawfulness of detention decided speedily by a court) that the proceedings in which he had challenged his continued detention had been unfair, as he had not had access to relevant documents in his case file. The ECtHR, in line with the arguments of the HHC's attorney, concluded that there has been a violation of Article 5 (1), (3) and (4) of the Convention.

- *A.B. v. Hungary (Application no. 33292/09, Judgment of 16 April 2013)*

  The case concerned Mr A.B.'s complaint about his pre-trial detention from January 2007 to December 2008. The applicant's detention was repeatedly prolonged due to risk of collusion and intimidation of witnesses. Relying on Article 5 (3) and (4) of the Convention, the HHC's attorney complained about the excessive length of the applicant's pre-trial detention as well as about not being able to effectively challenge his detention because he was not given access to relevant material in the investigation on his case. The ECtHR found that the grounds for the applicant's detention – in particular when it continued after indictment – were not sufficient and concluded that there has been a violation of Article 5 (3) of the Convention. Furthermore, the ECtHR concluded that the Hungarian Government have failed to provide evidence that the requisite access was indeed made available to the applicant in terms of the case file, and it follows that the principle of "equality of arms" cannot be considered to have been respected in the case. Accordingly, the ECtHR concluded that there has also been a violation of Article 5 (4) of the Convention.

- *Baksza v. Hungary (Application no. 59196/08, Judgment of 23 April 2013)*

  The applicant, István Baksza, was arrested in January 2006 on charges of car theft, and was kept in pre-trial detention until June 2008 when he was released with a ban on him leaving his domicile. In the application it was claimed by the HHC's attorney that the pre-trial detention of Mr Baksza was of excessive length and that the decisions prolonging his detention had not been individualized or taken into account his personal circumstances, had not substantiated the risk of his absconding, collusion and re-offending or involved an assessment of the possibility of applying less stringent measures. The ECtHR found that the grounds for the applicant's detention, if relevant, were not sufficient in respect of the entire period of the pre-trial detention in question, and concluded that there has been a violation of Article 5 (3) of the Convention. Furthermore, it was claimed by the applicant that he was not able to effectively challenge his detention because he was not given access to evidence –

showing that he might abscond if released – in the investigation on his case. The ECtHR concluded in this regard that the principle of "equality of arms" cannot be considered to have been respected in the case, thus there has been a violation of Article 5 (4) of the Convention.

- On 29 July 2012 the HHC submitted an application to the European Court of Human Rights in a case of a 50-year old truck driver's pre-trial detention, who had a clear criminal record.

  In 2011 the driver was assigned to carry some goods from a place to another by truck. The goods were transported and the route of the truck was registered as required by the law. However, the goods disappeared from the depot and the police started an investigation into case. In the document proving that the goods for handed over in the depot the HHC's client wrote two characters of his name and one character of the number of his ID wrongly. After a one-year long investigation the HHC's client was identified as suspect as the police assumed that it was an intentional act to provide false personal data on the mentioned document. When the police went to the place where the client had been living for 40 years with his old parents and ill brother, the client was abroad, therefore, he could not be taken to the police station for interrogation. The police then issued an arrest warrant on account of the fact that the suspect was fleeing. Upon his arrival back to Hungary the client immediately went to the police station, made a statement and handed over all the documentation he had in relation with the investigated case. Nevertheless, the prosecution initiated ordering his pre-trial detention which was ordered by the court. The appeal against this decision was rejected. The only reason of the decision was that the suspect was caught upon an arrest warrant and he was abroad, there the danger of his fleeing is well-founded. The facts – that the suspect voluntarily went to police and was abroad before because he was working there – were not taken into account by the court.

  The driver was detained for months before he was released by the court. As from the very first moment the detention was unlawful, and the HHC decided to take the case to the ECtHR.[8]

2. Life-long and actual life-long imprisonment

2.1. Legal situation regarding life-long and actual life-long imprisonment

In its recent decision in Vinter and Others v. the United Kingdom, delivered by the Grand Chamber, the European Court of Human Rights held that „in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. [..] the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter. It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention."

The relevant Hungarian legal background does not meet these requirements as it both allows imposing life sentence where the possibility of the review of the sentence takes place after 40 years, and makes it possible – and in certain cases even compulsory – to impose actual life sentence, i.e. detention without the review of the sentence ever.

Article 34 of Act C of 2012 on the Criminal Code (hereafter referred to as "Criminal Code") provides that detention shall last either for a definite time or it shall be life-long. Article 42 sets forth that in case the court imposes life sentence, it shall determine the earliest possible time of the conditional

[8] For the press release of the HHC, see: http://helsinki.hu/elozetes.

release or **exclude that possibility**. Article 43 says that if the court did not exclude the possibility of conditional release, it shall determine its earliest time in 25 years and its latest time in **40 years**. This shows that the even in case of the life sentences with the possibility of parole the earliest time of the review of the sentence may exceed the twenty-five years period required by the ECtHR by fifteen years.

Article 44 of the Criminal Code enumerates the crimes for which an actual life sentence can be imposed; these are the most serious war crimes, crimes against humanity and other violent crimes. Paragraph 2 of the same Article provides that **it shall be compulsory to exclude the possibility of the review of the life sentence** if the perpetrator is a multiple violent recidivist (meaning he or she was sentenced for the third time for a violent crime) or the crimes listed in the Article 44 were committed in a criminal organisation. If certain conditions are met, imposing a life imprisonment is also mandatory under the Criminal Code.

Furthermore, **the possibility of imposing actual life sentence is now enshrined in the Fundamental Law**, in force since 1 January 2012, Article IV (2) of which goes as follows: „No person shall be deprived of his or her liberty except for statutory reasons or as a result of a statutory procedure. Life imprisonment without parole shall only be imposed in relation to the commission of wilful and violent offences."[9] Including the actual life sentence into the constitution results that related provisions of the Criminal Code and court decisions setting out and imposing actual life sentence may not be challenged before the Constitutional Court of Hungary anymore and the Constitutional Court cannot examine the constitutionality of the provisions allowing actual life sentence.

The possibility of the actual life-long imprisonment was also included in the previous Criminal Code of Hungary, which was in force until 1 July 2013. The HHC challenged the respective provisions of the previous Criminal Code in force before the Constitutional Court in March 2009.[10] However, the Constitutional Court failed to deliver a decision in the case until 31 December 2011, and the HHC's request was struck out of the list in January 2012 due to procedural reasons emerging under the Fundamental Law (the new constitution of Hungary, in force since 1 January 2012), similarly to other ongoing actio popularis review cases.

It has to be added that there is an ongoing case before the European Court of Human Rights, the case László Magyar v. Hungary (Application no. 73593/10), in which the applicant sentenced to actual life sentence claims that his rights under the European Convention on Human Rights have been violated.

2.2. Detention conditions of lifers and actual lifers

a) Placement

According to the a m
easure issued by the Head of the National Penitentiary Headquarters in December 2010,[11] women sentenced to life or actual life-long imprisonment shall be detained in the Kalocsa High and Medium Security Prison, while men sentenced to life or actual life-long imprisonment shall be detained in the Szeged High and Medium Security Prison. However, 10 years before the earliest possible date of their conditional release, male life term prisoners may be placed also to another penitentiary institution.

The table below shows the number of life and actual life term detainees, broken down by penitentiary institution, on the basis of the data provided by the National Penitentiary Headquarters on 9 November 2012.

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[9] Official translation, see: http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf.
[10] The actio popularis request of the HHC is available at: http://helsinki.hu/wp-content/uploads/MHB_ABinditvany_tesz.pdf.
[11] Measure 1-1/66/2010. (XII. 29.) OP of the Head of the National Penitentiary Headquarters on Executing Decree 21/1994. (XII. 30.) of the Minister of Justice on the Designation of Penitentiary Institutions, Sections 5 and 6. Available in Hungarian at: http://www.bvop.hu/hopi/2010/2010_66.html.

Place of detention	Number of life-term prisoners	Number of actual life-term prisoners
Szeged Strict and Medium Regime Prison	163	21
Sopronkőhida Strict and Medium Regime Prison	12	
Márianosztra Strict and Medium Regime Prison	5	
Kalocsa Strict and Medium Regime Prison	9	
Szombathely National Penitentiary Institution	5	
Vác Strict and Medium Regime Prison	4	1
Metropolitan Penitentiary Institution	9	2
Budapest Strict and Medium Regime Prison	11	1
Tiszalök National Penitentiary Institution	6	
Balassagyarmat Strict and Medium Regime Prison	3	
Juvenile Penitentiary Institution (Tököl)	1	
Tolna County Penitentiary Institution (Szekszárd)	2	
Central Hospital of the Penitentiary (Tököl)	1	
Békés County Penitentiary Institution (Gyula)	1	
Sátoraljaújhely Strict and Medium Regime Prison	2	
Total number	**234**	**25**
Total number of men	225	25
Total number of women	9	0
Number of non-final judgments	16	3

b) Special HSR unit in the Szeged High and Medium Security Prison

After the visit of the CPT to the HSR Unit in Szeged in the framework of its ad-hoc visit between 30 January and 1 February 2007, as a result of which it concluded that "particular care should be taken to ensure that the HSR Unit never becomes a »prison within the prison«",[12] and requesting further measures related to the HSR Unit e.g. to ensure that only the minimum restrictions necessary for safe and orderly confinement are imposed on prisoners, Decree 6/1996. (VII. 12.) of the Minister of Justice on the Rules of Executing Imprisonment and Pre-trial Detention (hereafter referred to as: "Penitentiary Rules") was amended, **establishing a legal basis for operating the so-called HSR Unit in the Szeged High and Medium Security Prison**.[13] The amendment entered into force on 28 December 2007.

The amended Penitentiary Rules sets out that detainees serving long-term imprisonment, exceeding 15 years, and those sentenced to life term imprisonment may be placed to a special unit, designed specifically for those serving long-term sentences, provided that their special treatment and placement is justified by their behaviour, their skill for cooperation showed in the course of the execution of the imprisonment and on the basis of an individual security assessment. The Head of the National Penitentiary Headquarters shall appoint the penitentiary in which this special unit shall be established. The unit shall consist of so-called special security cells (*különleges biztonságú zárka*) and related areas, and shall be separated from the rest of the penitentiary institution. Detainees may be placed to this special unit for a maximum of six months upon the decision of the committee within the penitentiary dealing with admission, placement and working issues. This period may be extended with six months upon the request of the detainee. (There is no limit for the number of such requests.) If the preconditions of placing the detainee in the unit cease to prevail, the placement of the detainee in the unit shall be terminated. After the termination of the placement, one year shall pass before the detainee may be placed in the unit again.[14]

[12] Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 January to 1 February 2007, Strasbourg, 28 June 2007, CPT/Inf (2007) 24, § 32.
[13] The Penitentiary Rules were amended by Decree 61/2007. (XII. 23.) of the Minister of Justice and Law Enforcement.
[14] Penitentiary Rules, Article 47/A (1)-(2) and (5)-(6)

To some extent, rules on the rights of detainees placed in this special unit are the same as the rules for those detainees who are placed to special security cells or units. Namely:

- detainees are under constant supervision;
- cells shall be closed during the whole day and detainees may move within the penitentiary only with permission and under supervision; and
- detainees may carry out work only within the special unit or at a place determined by the head of the penitentiary institution.[15]

Furthermore, the Penitentiary Rules provides for the following restrictions and rights concerning the inmates placed in the special unit for long-term prisoners:

- the participation of detainees in the organisations of inmates may be restricted;
- inmates detained in the unit may participate in cultural, sporting and free time group activities only with a separate permission issued by the head of the penitentiary institution or only within the special unit;
- the objects which may be kept in the cell of the detainees may be subject to limitation;
- the frequency of having visitors and receiving and sending packages may be increased.[16]

According to the law, further detailed rules shall be included in the house rules of the penitentiary.[17]

The special unit of the Szeged strict and Medium Regime Prison for long-term prisoners (the HSR Unit) is designed to accommodate 13 detainees. According to data provided by the National Penitentiary Headquarters, on 9 November 2012, 12 prisoners were detained in the HSR Unit, all of them being actual life-term prisoners. According to the information provided by the National Penitentiary Headquarters, there are altogether four psychologists in the Szeged Strict and Medium Regime Prison: a separate, special psychologist deals with the 12 detainees (actual life-term prisoners) placed in the HSR Unit, and there are two special psychologists who deal with life-term prisoners in Building I. (This presumably means that there are only two psychologists available for the 163 life-term prisoners.)

3. Judicial and Observation Psychiatric Institute

The Judicial and Observational Psychiatric Institution (hereafter referred to as: "IMEI") was visited by the CPT in 2005[18] and 2009.[19] In both reports the CPT's delegation expressed its concerns regarding the location of the IMEI. The CPT declared that "it would be highly desirable for the IMEI to be re-located; this would help to ensure that a medical, rather than a penal, ethos prevails. The Committee urges the Hungarian authorities to find a solution as a matter of priority".[20]

According to a recent Government Resolution[21] the IMEI shall be **placed in another building,** in a former hospital, which is according to NGOs a clear indication of the growing prospects to remodel this institution as a treatment centre, not merely a prison. As prescribed by the Government Resolution the ownership of the buildings of the Szent László Hospital shall be transferred to the National Penitentiary Service until 31 December 2013.

[15] See: Penitentiary Rules, Article 47 (3) a)-c).
[16] According to Article 36 (1) c) and Article 36 (3) of Law Decree 11 of 1979 on the Execution of Punishments and Measures, detainees may have visitors at least once a month and may receive and send packages also at least once a month as a main rule.
[17] Penitentiary Rules, Article 47/A (3)-(4)
[18] Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 8 April 2005, Strasbourg, 29 June 2006, CPT/Inf (2006) 20
[19] Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 March to 2 April 2009, Strasbourg, 8 June 2010, CPT/Inf (2010) 16
[20] Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 March to 2 April 2009, Strasbourg, 8 June 2010, CPT/Inf (2010) 16, p. 75.
[21] Government Resolution 1060/2012. (III. 12.) on the integration of the Judicial and Observation Psychiatric Institute (Budapest), the Central Hospital of the National Prison Service (Tököl) and the Mental Institution and the Chronic Aftercare Unit of the Szeged Strict and Medium regime Prison (Algyő-Nagyfa)

The Commissioner for Fundamental Rights also paid a visit to the IMEI; his concerns were articulated in a report dated 11 October 2012.[22] Beyond observing the bad physical conditions the Commissioner requested the Minister of Public Administration and Justice to resolve the hiring freeze of employees in order to increase the number of healthcare staff at the institution. The Commissioner also criticized the **placement of patients**; found highly problematic that 10-19 patients with different psychiatric disorders are squeezed into one hospital room.

Compulsory psychiatric treatment is the involuntary psychiatric treatment of mentally ill offenders, ordered and supervised by the criminal system, which is executed in the IMEI. According to the new Criminal Code, as of 1 July 2013 the **length of the treatment has become indefinite**, possibly sustained life-long.[23] The time of the eventual release is not prescribed by law, it is a subject to periodical judicial review, as opposed to people sentenced to prison who have their release dates set by a sentencing court. After the new Criminal Code came into effect, detainees in psychiatric institutions may remain institutionalized for a longer period of time than the prison term they would serve were they to be so sentenced.[24]

Detainees in the IMEI are **forced to take psychiatric medication,** and the medication – as unofficial sources and NGO-monitoring experiences suggest — is claimed to be old-fashioned medication which has more severe side effects than more modern medications. The HHC brought a lawsuit on behalf of a detainee who was unlawfully medicated. In June 2013 the Metropolitan Court of Appeal established the violation of the detainee's inherent personal rights and obliged the IMEI to pay HUF 5 million as non-pecuniary damages because the IMEI staff subjected him to the so called "**chemical straitjacket**": the indiscriminate usage of multiple anti-psychotic drugs.[25]

The unofficial responses received from prison staff and psychologists only reinforce the HHC's experiences in interacting with detainees with psycho-social disabilities who were placed in other detention facilities after their medication was determined in the IMEI. The HHC has experienced numerous times that detainees arriving from the IMEI, where they supposed to receive the appropriate medication or their medication was supervised, cannot communicate, fall asleep during discussion and are addicted to medication.

Confinement for misdemeanours (see also Section 4.) shall be implemented in penitentiary institutions. Government Decree 173/2013 (V.30.) provides an exhaustive list of those institutions where confinement might take place. The list does not include the IMEI however in practice those who are confined and need special mental care are sent and treated there without any legal authorization. According to the data the HHC received from IMEI, in 2012 three persons were sent to the institution for 11, 4 and 3 days respectively.

4. Confinement for misdemeanours

The range of misdemeanours (petty offences) punishable with confinement has been widened in general already in 2010 by Act LXXXVI of 2010 on Amendments Necessary in Order to Improve Public Security, extending the possibility of confinement to misdemeanours against the property. (The same law allowed for the confinement of juveniles.) Act II of 2012 on Misdemeanours, the Misdemeanour Procedure, and the Misdemeanour Registry System (hereafter referred to as: "Law on Misdemeanours") upheld the extended list of offences punishable with confinement, and made it possible to apply confinement for the third misdemeanour within a 6-month period to any petty offence, thus even if none of the misdemeanours committed would be otherwise punishable by confinement.[26] Furthermore, the Law on Misdemeanours allows for automatically changing a fine or

[22] Available in Hungarian at: http://www.ajbh.hu/jelentesek-inditvanyok-allasfoglalasok.
[23] Act C of 2012 on the Criminal Code, Article 78 (2)
[24] A person detained in such a manner has the right to a court review of the lawfulness of detention within six months from the date of the initial detention.
[25] For the press release of the HHC, see: http://helsinki.hu/borton-pszichiatrian-sem-alkalmazhato-kemiai-kenyszerzubbony.
[26] Act II of 2012 on Misdemeanours, the Misdemeanour Procedure, and the Misdemeanour Registry System, Article 23

community service to confinement without hearing the offender in case he/she fails to pay the fine or carry out the work,[27] which violates the European Convention on Human Rights.

According to data published by the National Judicial Office the number of those whose fine or community service decision was automatically changed to confinement has drastically increased in the second half of 2012:

Month (2012)	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.
Recorded cases	3,504	4,021	4,268	9,720	15,454	18,822	23,896	23,291	20,341
Closed cases	3,775	4,072	4,034	3,933	5,781	11,728	17,952	18,992	15,108
Ongoing cases	5,210	5,159	5,393	11,180	20,853	27,947	33,891	38,190	43,423

Confinement shall be carried out in a penitentiary institution.[28]

It may be added that the above Law on Misdemeanours also **criminalized homelessness**: it set out that living on public premises and storing related personal property on public premises constituted a petty offence, and those living in public premises may have been punished with a fine or with confinement. "Anti-homeless" rules were also criticized by UN experts on extreme poverty and on housing who called on Hungary to reconsider the legislation on criminalizing homelessness.[29] In its Decision 38/2012. (XI. 14.) the Constitutional Court abolished, among others, the respective provisions of the Law on Misdemeanours, stating that criminalizing the status of homelessness is unconstitutional, since it violates human dignity. However, the **Fourth Amendment** to the Fundamental Law of Hungary (adopted on 11 March 2013) does not take into consideration the arguments of the Constitutional Court cited above and **enables the Parliament or local governments to criminalize homelessness** by including the following provision into the Fundamental Law under Article XXII (3): "An Act of Parliament or local government decree may outlaw the use of certain public space for habitation in order to preserve the public order, public safety, public health and cultural values." The amendment not only goes against the decision of the Constitutional Court, but on the other hand it only sets out that the State and local governments shall "strive" to guarantee housing for every homeless person, which does not mean an obligation on the authorities.

The new Law on Misdemeanours regarding juveniles results in an absurd and unacceptable situation. With regards to juvenile offenders, Article 105 (3) of the Criminal Code states that a measure or punishment involving the withdrawal of freedom may only be applied if the aim of the measure or punishment cannot otherwise be achieved.[30] Thus, even in case of the perpetration of a criminal act, withdrawal of freedom can only be a last resort. The law, however, still doesn't change the rule that it is possible to use withdrawal of freedom for juvenile offenders in the case of less serious, less dangerous activities. According to the Law on Misdemeanours, there is still a possibility of **confinement for juvenile offenders**, as well as for the transfer of fine into confinement in case the fine is not paid. According to the Law on Misdemeanours juvenile offenders over 16 years of age can be sanctioned with community service.

Imprisonment for juvenile offenders is unacceptable for the following reasons: (i) The Law on Misdemeanours completely disregards the international legal obligations of Hungary by maintaining the possibility for confinement and also by not making any alternative sanctions available for juvenile offenders. Juvenile offenders should only be confined as a last resort, and in their case, the central focus of the criminal justice system should be education and reintegration. According to international legal rules, individuals under 18 are considered children, and this should be the primary perspective through which all legal solutions relating to them are evaluated. Article 37 of the Convention on the Rights of the Child, adopted in New York on 20 November 20 1989, clearly requires that the arrest, detention or imprisonment of a child should only be applied as a measure of the last resort, and only

[27] Act II of 2012 on Misdemeanours, the Misdemeanour Procedure, and the Misdemeanour Registry System, Articles 12 and 15
[28] Act II of 2012 on Misdemeanours, the Misdemeanour Procedure, and the Misdemeanour Registry System, Article 139
[29] See: Hungary's homeless need roofs, not handcuffs – UN experts on poverty and housing, 15 February 2012, http://www.europe.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9994&LangID=E.
[30] Similarly to the current Criminal Code of Hungary which is in effect until 30 June 2013.

for the shortest possible period of time. Moreover, amongst others, Recommendation Rec (2003) 20 of the Committee of Ministers of the Council of the European Union, adopted on 12 September 2003, concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, and the Beijing Rules (the UN 3 Standard Minimum Rules for the Administration of Juvenile Justice) also state: in the case of juvenile offenders, the criminal justice system needs to avoid a retributive approach.
The objective of the sanction according to these documents is the correction and education of the juveniles, and not punishment. The Law on Misdemeanours goes against these international rules.

According to the Law on Misdemeanours, confinement of juveniles is executed in a penitentiary institution; the possibility of carrying out the confinement in a juvenile correctional facility is excluded. Therefore the Law on Misdemeanours still goes contrary to Article 19 of the Beijing Rules, the commentary of which explicitly states that if a juvenile must be institutionalized, the loss of liberty should be restricted to the least possible degree, with special institutional arrangements for confinement and bearing in mind the differences in kinds of offenders, and giving priority to correctional or educational institutions. The former Parliamentary Commissioner for Civil Rights established that even for juveniles in pre-trial detention, thus for juveniles who have committed rather more serious activities than misdemeanours, it is an abuse of the juveniles' right to satisfactory physical, mental and moral development if their confinement does not take place in a juvenile correctional facility or a juvenile penitentiary institution.[31]

5. Special children homes

The Commissioner for Fundamental Rights paid a visit to Károlyi Isván Special Home for Children at Risk [*speciális gyermekotthon*, hereafter referred to as "special home"], opened in January 2011.

Children in temporary placement, short term or long term foster care, who are older than 10 years and display severe psychic or dissocial symptoms or suffer in psychoactive drug addiction, are placed in the so called special homes.[32] The special homes are part of the child protection system, aiming at the socialization and re-socialization of children, their habilitation and rehabilitation, if the special care cannot be provided in other institution, or the separation of these children from those not in need of such special care.

In his Report no. AJB 3012/2012. the Commissioner for Fundamental Rights summarized his findings of the visit paid to the special home:

- The institution completely resembles a penitentiary. Each unit of the building is kept closed separately, the windows are equipped with bars, children may enter their own room only after 6 p.m., they may be deprived of their right to receive visitors as a result of a disciplinary sanction (which in itself is contrary to the law), they may eat in the canteen only on special occasions, they may walk alone within the institution only in exceptional cases, the sports court and one side of the building is equipped with barbed wires. Some of the employees are former police officers, other law enforcement agents and security guards.
- The staffing is insufficient; some of the staff members do not have the qualification required by the law.
- The hall appointed for receiving visitors is not suitable for this purpose – no intimate and personal conversation can take place there.
- The house rules are not available in the institution at an easily visible place.
- The institution was not monitored since it was established although according to the law at least once a year such supervision should take place by the organ issuing the permission for operation or the one maintaining it.
- The guardians of the children either do no visit them regularly or are not even available via phone.

After the report of the ombudsperson mentioned above was published, the Ministry supervising the institution, accepting the findings of the report initiated the amendment of relevant legislation.

[31] See Case no. OBH 4841/2007.
[32] Article 126 (1) of Decree 15/1998. (IV. 30.) NM

6. Access to a lawyer

6.1. Appointment of ex officio defence counsels

Surveys of various actors show that the system of the ex officio appointment of defence counsels (who provide criminal legal aid to indigent defendants) suffers from severe deficiencies. Such counsels often fail to participate in proceedings in the investigative stage, and the **quality of their performance is believed by all actors of the procedure to be worse than that of retained counsels**. The problem of ex officio counsels being absent from the interrogation of a detained person was also noted by the CPT in its report on its visit to Hungary in 2009, and it recommended that steps are taken „to further improve the system of legal aid for persons who are not in a position to pay for a lawyer, and to ensure that it is applicable from the very outset of police custody".[33]

In the HHC's view one of the central problems related to the ex officio defence counsel system is the way defence counsels are appointed, which has not been modified since the CPT's last visit in 2009. In the HHC's view the low quality of ex officio defence work is to a great extent also due to the fact that the **authorities** (including the investigative authorities, i.e. in most cases the police) **are completely free to choose the lawyer to be appointed** under Article 48 (1) of Act XIX of 1998 on the Code of Criminal Procedure, thus the authorities are not obliged in any way to consider the wishes of the defendant. (Under Article 35 of Act XI of 1998 on Attorneys at Law, the competent bar association keeps a register of those attorneys who can be appointed as defence counsels, and the authority conducting the actual phase of the procedure chooses from this list.) The HHC's research results also show that some attorneys base their law practice principally on ex officio appointments, so **they may become financially dependent on the member of the police** who takes decisions on appointments. This situation as a whole poses a severe **threat to effective defence**, as the investigating authority is disinterested in efficient defence work.

In the framework of its latest research regarding the issue, the HHC requested data concerning the names of appointed counsels and the number of cases in which they were appointed in 2008 from police headquarters, as a result of which a database containing the related data of 36 local police headquarters, 7 Budapest district police headquarters and 6 county police headquarters was established. Data analysis clearly demonstrated that **the practice of having "in-house" ex officio defence counsels at police headquarters is widespread**, and that in-house lawyers deal with a **significant, sometimes irrational amount of cases**. At 19 police organs the same attorney at law was appointed in more than one third of all cases. One of the highest percentages in this regard was 82% at the Kiskőrös Police Headquarters, where 295 criminal cases were dealt with by the same defence counsel out of the total of 358 cases in 2008. At the Siófok Police Headquarters the most frequently appointed attorney at law defended clients in 276 cases, amounting to 70% of all ex officio criminal cases handled by the police unit in that year (393). When analyzing the data, the HHC has examined what percentage of the cases the three most frequently appointed attorneys take per unit, and revealed significantly disproportionate practices in this regard as well. At 34 police headquarters the three most frequently appointed defence counsels were chosen by the police in more than 50% of the cases, the percentage exceeding 70% at 19 police headquarters. The table below shows examples of the highest results in terms of appointments per year received by the same single attorney and the percentage of appointments the same attorney takes a year.[34]

[33] Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 March to 2 April 2009, Strasbourg, 8 June 2010, CPT/Inf (2010) 16, § 24.

[34] For the full research report, see: András Kristóf Kádár – Nóra Novoszádek – Adrienn Selei: *Ki rendelt itt védőt? – Egy alternatív védőkirendelési modell tesztelésének tapasztalatai*, Magyar Helsinki Bizottság, Budapest, 2012, available in Hungarian at: http://helsinki.hu/wp-content/uploads/MHB_Ki_rendelt_itt_vedot_2012.pdf.

Ex officio counsel's cases per year	Police headquarters	% as compared to the total number of appointments
453	Nyíregyháza Police Headquarters	23%
372	Kecskemét Police Headquarters	54%
295	Kiskőrös Police Headquarters	82%
289	Győr Police Headquarters	37%
276	Siófok Police Headquarters	70%
265	Miskolc Police Headquarters	29%
232	Tatabánya Police Headquarters	58%
207	Székesfehérvár Police Headquarters	31%
205	Gödöllő Police Headquarters	45%
200	Miskolc Police Headquarters	22%

6.2. Presence of attorneys in the investigative phase

Under the Hungarian law the defence is mandatory e.g. if the defendant is detained, thus in that case defendants either have to retain a lawyer, or an ex officio defence counsel shall be appointed. If the suspect's detention is ordered, it shall be guaranteed that he/she can retain a lawyer before the first interrogation.[35] However, **the mandatory nature of defence does not require the presence of the defence counsel at individual procedural actions in the investigative phase** of the criminal proceeding. (The situation is different is the judicial phase: if defence is mandatory, no hearings may be held without the defence counsel's presence.)

In terms of the legal provisions, with the exception of urgent investigative acts, the counsel shall be notified in due course, at least 24 hours beforehand about all the investigative acts that he/she may be present at.[36] This however still may not mean that the counsel actually has the chance to be present because there is no obligation on the investigating authority to actually wait for him/her. Practitioners also claim that the notice given is often very short, or sent in a way that the chances of the lawyer receiving the notification are practically non-existent (e.g. sending a fax to the lawyer's office during the night). Furthermore, while Act XIX of 1998 on the Code of Criminal Procedure prescribes that the defence counsel should contact the defendant without delay and to use all lawful means and methods of defence at the appropriate times in the defendant's interests[37] (which of course include participation of the defence counsel at all investigative actions open to him/her), if the defence counsel fails to fulfil these obligations, he/she will commit an ethical misdemeanour at most, but this will not prevent the investigative authority from interrogating the defendant or confronting him/her with any witnesses testifying against him/her.

[35] Joint Decree 23/2003. (VI. 24.) of the Minister of Interior and the Minister of Justice on the Detailed Rules of Investigation Conducted by Organisations under the Minister of Interior, Article 6
[36] Joint Decree 23/2003. (VI. 24.) of the Minister of Interior and the Minister of Justice on the Detailed Rules of Investigation Conducted by Organisations under the Minister of Interior, Article 9 (2)
[37] Act XIX of 1998 on the Code of Criminal Procedure, Article 50 (1)

Recommended venues to be visited

Szeged Strict and Medium Regime Prison (*Szegedi Fegyház és Börtön*)

The Hungarian law allows imposing life sentence where the possibility of the review of the sentence takes place after 40 years, and makes it possible – and in certain cases even compulsory – to impose actual life sentence; detention without the review of the sentence ever. Most of the 'actual lifers' are detained in the prison above, and there are detainees in that institution serving life sentence as well.

Judicial and Observation Psychiatric Institute (*Igazságügyi Megfigyelő és Elmegyógyító Intézet, IMEI*)

According to the new Criminal Code, as of 1 July 2013 the length of the compulsory psychiatric treatment (involuntary psychiatric treatment of mentally ill offenders, ordered and supervised by the criminal system) has become indefinite, possibly sustained life-long.

Hajdú-Bihar County Remand Prison (*Hajdú-Bihar Megyei Büntetés-végrehajtási Intézet*)

The excessive use and length of pre-trial detention continues to be one of the most serious problems of the Hungarian criminal justice system. The pre-trial detention is implemented in penitentiary institutions; the circumstances may be less favourable for remand prisoners than for convicted detainees.

Borsod-Abaúj-Zemplén County Remand Prison (*Borsod-Abaúj-Zemplén Megyei Büntetés-végrehajtási Intézet*)

The new Law on Misdemeanours allows for automatically changing a fine or community service to confinement without hearing the offender in case he/she fails to pay the fine or carry out the work. The number of those whose fine or community service decision was automatically changed to confinement has drastically increased recently; the number of pending cases was 43,423 in December 2012. The confinement is implemented in designated penitentiary institutions, such as for example the Borsod-Abaúj-Zemplén County Remand Prison. The Hungarian Helsinki Committee recently paid a visit to the institution and met 14 detainees who did not pay the misdemeanour fine therefore their fine was changed to confinement. One of them will spend more than 280 days in the penitentiary institution.

Károlyi István Special Home for Children (*Károlyi István Gyermekközpont Speciális Gyermekotthon*, 2153, Fót, Vörösmarty tér 2.)

Children in temporary placement, short term or long term foster care, who are older than 10 years and display severe psychic or dissocial symptoms or suffer in psychoactive drug addiction, are placed in the so called special homes. Following a visit paid to the institution in 2012 the ombudsperson heavily criticized the special home as it resembles a penitentiary, each unit of the building is kept closed separately, the windows are equipped with bars, children may be deprived of their right to receive visitors as a result of a disciplinary sanction.

7. Detention of migrants

7.1. Asylum detention

On 1 July 2013, following the adoption of Bill T/11207,[38] new amendments to the Asylum Act entered into force. The transposition of the EU Recast Reception Conditions Directive[39] (not even formally adopted at the time of drafting the amendments) provided a legal background for the adopted changes. Transposition, however, remained limited to provisions concerning the detention of asylum-seekers; while, in contrast, for instance provisions which entail obligations on Member States in relation to the assessment of the special reception needs of vulnerable persons were not transposed.

The amendments to the Asylum Act provide **extensive grounds for the detention of asylum-seekers** under a separate legal regime (separate from immigration detention), so-called "asylum detention".

Grounds for asylum detention under the new rules include:

a) For the verification of the applicant's identity and nationality;
b) The asylum-seeker absconded or hinders the processing of the asylum procedure in any other way;
c) In order to obtain the information necessary for the processing of the asylum claim, if there are serious grounds to presume that the asylum-seeker would delay or hinder the procedure or would abscond;
d) In order to protect the public order and national security;
e) If the claim has been submitted at the airport;
f) The applicant has repeatedly failed to fulfil his/her obligation to attend procedural acts and thus hinders the processing of a Dublin procedure.[40]

In the HHC's opinion, the above grounds are too vaguely formulated, leaving much room for interpretation, and thereby jeopardising legal certainty – an overriding principle confirmed by the jurisprudence of the European Court of Human Rights.

As a more favourable provision compared to the Recast Reception Conditions Directive, it should be noted that asylum-seeking unaccompanied minors cannot be detained. However, no other categories of vulnerable asylum-seekers are excluded from detention.

Alternatives to detention are available in the form of bail, designated place of stay and periodic reporting obligations. The scope of application of the bail as an alternative to detention is not defined clearly enough, which may lead to the non-application of this measure in practice. The amount of bail may vary between EUR 500 and 5000. However, the assessment criteria are not properly defined by law, which casts doubts on the law's transparent and coherent application.

The maximum period of asylum detention is 6 months. Asylum-seeking families with children under the age of 18 years can be detained for up to 30 days.

Asylum detention is implemented in closed asylum reception centres run by the Office of Immigration and Nationality (OIN), in the towns of Bekescsaba and Nyirbator. These facilities previously served as immigration jails.

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[38] Bill no. T/11207 on the amendment of certain acts relating to law enforcement matters amends the Act LXXX of 2007 on Asylum (Asylum Act). A Hungarian version of the amendment is available at http://parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=39&p_izon=11207 .

[39] On 7 June 2013, the European Parliament adopted the final text of the Recast Reception Conditions Directive (Directive laying down standards for the reception of applicants for international protection).

[40] Section 31/A of the Asylum Act.

During summer 2013, the HHC conducted visits to both facilities and collected the following information:

- Both facilities were operating at full capacity, which means a significant increase in the number of detained asylum-seekers;
- Based on some of the detention orders that the HHC had collected, it can be **observed that the OIN fails to carry out a proper individualised assessment** of the cases before subjecting an asylum-seeker to detention, and thus detention becomes a quasi-automatic measure for – at least – asylum-seekers of certain nationalities;

Concrete examples:

1. Identical detention orders of 6 Pakistani asylum seekers[41]

The HHC collected 6 detention orders that are completely identical in wording, the only difference being the name and personal data of the detainees. The ground for detention is that the asylum seekers would delay or hinder the procedure or would abscond (Section 31/A (c) of the Asylum Act) and the justification for applying this ground is that in the past Pakistani citizens had been mainly transiting the country.

2. Detention order of an asylum seeker from Comoros Island[42]

The ground for detention is that the asylum seeker would delay or hinder the procedure or would abscond (Section 31/A (c) of the Asylum Act). The justification for applying this ground is that the asylum seeker mentioned that he wanted to come to the EU and did not explicitly state that his destination country was Hungary.

Note: These detention orders were already approved by the court in the automatic judicial review procedure.

- Despite the fact that according to the law alternatives to detention must be considered before detention is ordered, **the detention orders do not contain any justification why a certain alternative is not used instead of detention**. From the detainees' testimonies, the HHC gathered that the options of alternatives, such as bail, were not even mentioned to the detainees (even though some of them would be able to pay the bail);[43]
- **Detention conditions for families with children are not appropriate**. There are no social or educational activities for children, the food is also not adequate for children and they have no toys;
- Majority of the social workers working in the asylum detention facilities hardly speak any foreigner language and at the time of the HHC's visits the HHC observed they did not really engage with the detainees. They were mainly performing administrative tasks.
- There are no psychologists working in the asylum detention facilities.

7.2. Immigration detention

In 2013 there are four immigration detention facilities operating under the police in Hungary: at the Budapest Liszt Ferenc international airport, in Győr, Kiskunhalas and Nyírbátor.

Immigration detention is ordered by the alien policing department of the Office of Immigration and Nationality (OIN). According to the Third Country Nationals Act, the maximum period of detention is 12 months (6 + 6 months) and 30 days in case of families with children. Unaccompanied minors cannot be detained, but no other categories of vulnerable persons are excluded from detention.

[41] 9.Ir.393/2013/3., 9.Ir.394/2013/3., 9.Ir.395/2013/3., 9.Ir.396/2013/3., 9.Ir.397/2013/3., 9.Ir.398/2013/3.
[42] 5.Ir.278/2013/3.
[43] The HHC's observations are also based on its previous experience with Hungarian authorities applying immigration detention. For more information on the HHC's previous experience with the extensive and arbitrary use of immigration detention please see: Hungarian Helsinki Committee: Stuck in Jail – Immigration Detention in Hungary (2010), April 2011, available at: http://helsinki.hu/wp-content/uploads/HHC-immigration-detention_ENG_final.pdf

The (non-compulsory) grounds for immigration detention are as follows:
TCN Act Section 54
(1)
In order to secure the expulsion, or transfer in a Dublin procedure, of a third-country national the immigration authority shall have powers to detain the person in question if:
a) he/she is hiding from the authorities or is obstructing the enforcement of the expulsion in another way;
b) he/she has refused to leave the country, or, based on other substantiated reasons, is allegedly delaying or preventing the enforcement of expulsion;
c) he/she has seriously or repeatedly violated the code of conduct of the compulsory place of residence;
d) he/she failed to report to the authorities as ordered, by means of which he/she obstructed the alien policing or Dublin proceedings;
e) he/she is released from imprisonment to which he/she was sentenced for committing a deliberate crime.
(2) The immigration authority may order the detention of the third country national prior to expulsion in order to secure the conclusion of the immigration proceedings pending, if his/her identity or the legal grounds of his/her residence is not conclusively established.

Immigration detention may also be applied in case of asylum seekers submitting subsequent asylum applications.

Section 54 (2) of TCN Act provides that before ordering detention, the alien police authority shall consider whether the execution of the expulsion can be ensured by means of alternatives to detention. However, according to the HHC's experience, the OIN only cites the relevant provision from the law, i.e. the grounds for detention in detention orders, but does not provide any concrete justification of why the detention of a particular person meets the legal grounds for detention. **Detention orders are generic in nature and never consider alternatives to detention or take into account individual special circumstances**.

Social workers in immigration jails are staff members of the NGO Menedék - Hungarian Association for Migrants in the framework of a project funded by the national allocation of the European Return Fund, which also provides funding for the presence of one psychologist per immigration jail. Contrary to asylum detention facilities, social workers working in the immigration detention facilities are well experienced, speak several foreigner languages and organize various daily activities for the detainees.

7.3. Judicial review of immigration and asylum detention

First instance courts conduct judicial review of administrative decisions imposing detention on foreigners. Detention may be ordered by the OIN for a maximum duration of 72 hours, and it may be extended by the court at the request of the OIN, which should be filed within 24 hours from the time it has been ordered. The court may extend detention for a maximum duration of 60 days, which OIN needs to request 8 working days prior to the due date for extension.

There are no separate legal remedies against the asylum and immigration detention orders since the OIN's decision on detention cannot be appealed. The lawfulness of detention can only be challenged through an **automatic court review procedure**, performed at 60-day intervals[44] by the district courts, mostly by criminal law judges. According to the HHC's experience, the remedy offered by these courts proved to be **seriously ineffective** in reviewing immigration detention, by approving 99% of immigration detention orders issued by the OIN in recent years.[45] According to a

[44] Meaning that during 60 days the migrant has no opportunity to seek legal remedy or to challenge detention in any way.
[45] Hungarian Helsinki Committee: Access to Protection Jeopardised, Information note on the treatment of Dublin returnees in Hungary, December 2011, page 5, http://helsinki.hu/wp-content/uploads/HHC-Access-to-protection-jeopardised.pdf

current survey conducted by the Curia, the highest court in Hungary, out of some 5000 court decisions made in 2011 and 2012, only 3 terminated immigration detention, while the rest simply prolonged detention without any specific justification.

The hearing in the judicial review procedure is mandatory in the first prolongation procedure (after 72h of detention). The hearings are usually conducted in groups of 5, 10, or 15 detainees within 30 minutes, thus significantly decreasing the likelihood of a fair and individual review. Even though the presence of an officially appointed lawyer is obligatory, the HHC's experienced that the lawyers usually do not object to the prolongation of detention.[46]

7.4. Detention of families with children

According to the HHC, the detention of families is contrary to the UN Convention on the Rights of the Child, in particular against its "best interest of the child" principle, as well as to the guidance of the European Court of Human Rights.[47] The Asylum Act and TCN Act both stipulate that the detention of families can be ordered only as "a measure of last resort." The HHC's experience shows that in practice the law is not applied as a measure of last resort.

7.5. Unaccompanied minors

Despite the clear ban on immigration and asylum detention of unaccompanied children, both the HHC and the UNHCR have identified cases where separated children had been detained due to incorrect age assessment.[48] The age assessment carried out by a police-employed doctor is generally a simplified examination based on their physical appearance.[49]

8. Breach of Article 33 of the 1951 Geneva Convention – "non-refoulement"[50]

8.1. As a party to the 1951 Geneva Convention relating to the status of refugees, Hungary has to respect the principle of non-refoulement enshrined in Article 33 of the 1951 Convention.

In the light of the following cases it shall be noted that although the 1951 Geneva Convention only uses the term "refugee" Article 33 has to be also applied to asylum seekers who already expressed their intention to seek asylum in Hungary. The HHC became aware of several cases where underage Afghan (potentially asylum seeker) separated children had been forcibly returned from Hungary to Serbia by the Hungarian police. It appears that either these minors tried to submit their asylum applications in Hungary but the police did not consider their statements as such and did not let them access to Hungarian territory and asylum procedure or they did not seek asylum in Hungary upon their interception still their rights as children were not entirely respected by Hungarian authorities.

The above cases regard the OIN as well since the return was ordered by the police on the basis of the OIN's background information stating that the persons in question would not be exposed to torture or

[46] HHC visit to the Kiskunhalas immigration jail on 13 December 2011, http://helsinki.hu/megfigyelo-latogatas-a-kiskunhalasi-orzott-szallason

[47] See European Court of Human Rights, *Affaire Popov c. France*, application numbers: 39472/07 et 39474/07, final judgment, 19 April 2012, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108708

[48] HHC visit to the Kiskunhalas immigration jail on 13 December 2011, http://helsinki.hu/megfigyelo-latogatas-a-kiskunhalasi-orzott-szallason

[49] UNCHR, *Hungary as a country of asylum - Observations on the situation of asylum-seekers and refugees in Hungary*, 24 April 2012, p. 10, http://www.refworld.org/docid/4f9167db2.html

[50] Article 33 of the 1951 Geneva Convention foresees that "no Contracting State shall expel or return ("refouler") any 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".

inhuman or degrading treatment or punishment or to any danger to their life or freedom (under Article 33 of the 1951 Geneva Convention).

8.2. Unaccompanied minors refouled

In the course of its border monitoring programme in 2011, the HHC identified 75 cases[51] where unaccompanied minors had been expelled and readmitted to Serbian authorities despite the Hungarian authorities' legal obligations in expulsion procedure to observe the care received upon their readmission -- contrary to Section 45 (5) of the Act II of 2007 on the entry and residence of third-country nationals.[52] In 2012, the HHC registered 34 cases of indirect *refoulement* of unaccompanied minors.

Most of these children remain unassisted in Serbia and have very limited access to international protection either as refugees or as migrant children. As part of its free legal assistance programme for asylum seekers, the HHC met with rejected asylum seekers who stated that after deportation from Hungary to Serbia, they had been subject to further removal to Macedonia. The pattern of deportations shows that there is no "favourable" treatment available to vulnerable persons, such as single mothers with minor children. [53]

Although the Hungarian police usually states that all expulsion decisions at the border are made in full compliance with Hungarian law, the HHC found cases of unaccompanied minors who had been expelled without having their individual situation duly examined by Hungarian officials."

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Recommended venues to be visited:

- **Immigration jail of the Bács-Kiskun County Police in Kiskunhalas (6401 Kiskunhalas, Mártírok útja 25.)**
- **Immigration jail of the Szabolcs-Szatmár-Bereg County Police in Nyírbátor (4300 Nyírbátor, Bocskai út 2.)**

[51] Hungarian Helsinki Committee, National Police Headquarters, UNHCR: Access to Territory and Asylum Procedure in Hungary (2011), p 14., available at: http://helsinki.hu/wp-content/uploads/final_border_monitoring_ENG.pdf

[52] Section 45 (5) of the Act II of 2007 foresees that "An unaccompanied minor may be expelled only if adequate protection is ensured in his country of origin or in a third country by **means of reuniting him with other members of his family** or by state or other **institutional care**."

[53] Hungarian Helsinki Committee: Serbia as Safe Third Country Revisited (2012), p.9, available at: http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf