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REPORT by the Parliamentary Commissioner for civil rights

in case number **AJB 7120/2009**

Affected bodies: Office of Immigration and Nationality of the Ministry of Justice and Law Enforcement

Fejér County Local Authority Child Protection Centre
Bicske Borough Authority Guardian Agency

January 2010

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The opening of the procedure

Pursuant to Section 16(1) of Act LIX of 1993 (hereinafter referred to as the 'Ombudsman Act'), the Parliamentary Commissioner's procedure shall be opened basically upon a petition. Pursuant to Section 16(2) of the Ombudsman Act, if the requirements of the procedure are met, the Parliamentary Commissioner may act *ex officio* in order to stop any infringement related to fundamental rights. Since the situations upon which the *ex officio* procedure may be based are not specified in the Ombudsman Act, the Parliamentary Commissioner therefore has the right to order such a procedure at his sole discretion.

Pursuant to Section 2(f) of Act LXXX of 2007 on asylum (hereinafter referred to as the 'Asylum Act'), 'an unaccompanied minor shall mean a foreigner below the age of 18 years who entered the territory of the Republic of Hungary without the company of someone of adult age responsible for his/her supervision, whether by law or custom, or who remained without supervision following entry; as long as he/she is not effectively taken into the care of such a person'. Children separated from their adult relatives lack the care and protection of their parents or legal guardian; consequently, they suffer serious social and psychological disadvantage and therefore special attention should be paid to the enforcement of their constitutional rights in the host country.

In the case of children who are foreign nationals and who are separated from their adult relatives, it can be presumed with good reason that, due to their exposed situation, they would not even be able to complain if their constitutional rights were infringed; that is why I, as a Special Ombudsman for children's rights, acting in my power granted by Section 16(2) of the Ombudsman Act and Section 11(2) of Act XXXI of 1997 on the protection of children and on the guardianship administration, have *ex officio* examined the living conditions of those persons living in the homes of unaccompanied minors.

Method of the audit

According to Article 22 point 1 of the Convention on the Rights of the Child signed in New York and dated November 20, 1989 and promulgated in Hungary in Act LXIV of 1991 (hereinafter referred to as 'UNCRC'), "a child separated from his/her adult relatives (hereinafter referred to as 'unaccompanied minor') shall be entitled to treatment equal to that provided to any child of the nationality of the host country or lawfully residing in that country." Since, according to the abovementioned provision of the UNCRC, the asylum or alien status of the unaccompanied minor is of secondary importance (i.e., he/she must be treated primarily as a child), in the course of my inquiry I concentrated first of all on how the Hungarian institutions responsible for admitting and treating unaccompanied minors meet that requirement.

I surveyed the 'Home for Unaccompanied Minors' on November 11, 2009 in an on-site inspection without prior notice. My colleagues involved in the inspection visited the buildings for housing minors; they inspected the furniture and equipment thereof, inspected documents, spoke with a few young people and social workers responsible for their care and consulted with the director of the local guardian office and the director of the Fejér County Authority's Child Protection Centre.

Participants in the on-site inspection: dr. Katalin Haraszti – Deputy Head of Department
dr. Zita Retkes – legal rapporteur

The facts of the case as established

At the time of the investigation there were three accommodation centres operating in Hungary. As a result of the reorganisation ordered by the Office of Immigration and Nationality in 2007, foreigners can stay in any of the three institutions in accordance with the phase of judging their application for asylum. At the time of opening the procedure, the applicants submitted an application for an asylum stay in Békéscsaba in order to perform any medical screening and to undertake the Dublin procedure. The average duration of the stay in Békéscsaba is 15 days. In the next phase of the official procedure, the foreigners live in the Debrecen accommodation centre until the final judgment of their application, which can persist for years if a judicial review is performed. All foreigners who are beneficiaries of refugee status granted by the Hungarian authorities are transported to the Accommodation Centre in Bicske (hereinafter referred to as the 'Accommodation Centre') for the purpose of integration; this can continue for 6 months but may be extended once, by not more than 6 months.

Pursuant to Article 19(2) of Directive 2003/9/EC of the Council of the European Union, laying down minimum standards for the reception of asylum seekers (hereinafter referred to as the 'Reception Directive')¹ unaccompanied minors who make an application for asylum shall be placed by the Member State concerned, from the moment they are admitted to its territory, with adult relatives, with a foster-family, in accommodation centres with special provisions for minors or in other accommodation suitable for minors. The 'accommodation centre suitable for placing and boarding unaccompanied minors separately' in the territory of the Republic of Hungary, as laid down in Section 33(4) of Government Decree No. 301/2007 (XI.9.) on the implementation of the Asylum Act, has been operating in the area of the Accommodation Centre in buildings located in an area protected by a wire fence since 1 January 2008. All resources and equipment required for the operation of the Unaccompanied Minors' Home, the accommodation of the young people and their meals three times per day, as well as any equipment for meals and cleaning, are provided by the Accommodation Centre; however the social workers performing their education and providing personal care to them have been the employees of the Hungarian Interchurch Aid ('Magyar Ökumenikus Segélyszervezet', hereinafter referred to as the 'Interchurch Aid'). All costs related to the social workers' operation have been covered by the European Refugee Fund on the basis of an application jointly submitted by the Interchurch Aid and the Accommodation Centre.

Six social workers working for the Interchurch Aid, who speak foreign languages and have obtained pedagogic as well as theoretical and practical intercultural knowledge, have dealt with the young people placed in the Unaccompanied Minors' Home; they also have assisted young people in learning, organised free-time programs for them, and provided round-the-clock supervision for them over shifts. The Interchurch Aid workers aim to create an atmosphere of intimacy for the young people living in the circumstances of a refugee camp, facilitate their integration to a new cultural environment and ensure their healthy physical and mental development.

¹ COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

At the time of the on-site inspection, the total number of foreigners staying in the Accommodation Centre was 134; of whom 62 persons were residents of the Unaccompanied Minors' Home. Of the unaccompanied minors, 15 persons were asylum seekers, 21 were refugees, 22 were persons enjoying subsidiary protection and 4 were admitted young people. Almost each and every one of the unaccompanied minors were young people who had suffered serious trauma and events giving cause for their escape; they had lost their close relatives and met with innumerable trials during their journey; a few of them suffered from post-traumatic symptoms. In order to ease the accumulated tension, the social workers organised group programmes involving forms of therapy. As indicated by the social workers organising the group programmes, individual care was also provided by the Interchurch Aid psychologist and the Cordelia Foundation psychiatrist, if required, to the young people in an extremely serious condition. The drugs ordered by the psychiatrist from the Cordelia Foundation were given to the young people by the social workers several times per day as required. The drug therapy was clinically followed by the Cordelia Foundation psychiatrist; the medicines were financed by the Accommodation Centre.

The 62 young persons were housed in two buildings with 15 and 11 living rooms respectively, separated by gender, and 2-4 persons were housed in each living room. Most of the young people living in the Unaccompanied Minors' Home were 14-18 years old, except for a child around one and a half years old who was from the result of a relationship between an 18 year-old mother and a 17 year-old father, both living in the Home. In accordance with Section 21(6) of the Implementing Decree of the Asylum Act, the abovementioned three persons lived as a family in one of the living rooms. In addition to the living rooms, there are bathrooms and toilets separated by gender, rooms for the social workers, communal rooms (a sitting-room with a TV-set and a table-tennis table) as well as an Internet room equipped with PCs in the Unaccompanied Minors' Home.

The relevant constitutional rights

The right to legal certainty forming part of the rule of law: 'The Republic of Hungary is an independent, democratic constitutional state.' [Article 2 (1) of the Constitution];

Concordance of the international obligations and the domestic law: 'The legal system of the Republic of Hungary accepts the generally recognised principles of international law, and shall harmonise the country's domestic law with the obligations assumed under international law.' [Article 7 (1) of the Constitution];

The right of children to protection: "In the Republic of Hungary all children have the right to receive the protection and care of their family, of the state and of society as necessary for their satisfactory physical, mental and moral development." [Article 67 (1) of the Constitution].

The applicable laws

Act LXIV of 1991 on the promulgation of the Convention on the Rights of the Child signed in New York on 20 November 1989

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the

child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the Convention.

Article 28

1. States Parties to the Convention recognise the right of the child to education and, with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) make primary education compulsory and available free to all;
- (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in cases of need;

Act IV of 1952 on marriage, family and guardianship

Section 93 – A minor who is not under parental authority shall be subject to guardianship.

Section 94 – (1) The guardian agency shall appoint a guardian to the minor subject to guardianship.

(2) The guardian authority shall *ex officio* take measures to appoint a guardian.

(3) The closest relatives of the minor shall immediately notify the guardian authority if the appointment of a guardian is required for the minor for any reason. The court, the registrar or the bodies conducting the probate proceedings and performing other public administration duties shall notify the guardian authority of all cases where a guardian must be appointed to a minor of which they have obtained knowledge in the course of their official actions.

Act CXL of 2004 on the General Rules of Administrative Proceedings and Services

Section 40 – (5) If the client is a natural person whose whereabouts are unknown or is unable to handle the case in person, and does not have a legal representative or proxy, the competent authority shall contact the guardian office to appoint a guardian ad litem.

Section 58 – (1) An expert shall be consulted or an expert opinion shall be obtained if the competent authority does not have an employee with sufficient expertise, and (a) if special expertise is required to establish a material fact, another circumstance or for the law applicable; or (b) an expert is prescribed as mandatory by legal regulation.

(3) Where a specific expert is prescribed by legal regulation, this organisation, institution, body or person shall be appointed for such expert services. In other cases a judicial expert with appropriate expertise may be appointed by the competent authority in accordance with the Act on expert activities.

Act XI of 1998 on attorneys at law

Section 5 – (1) An attorney

- (a) represents his/her client,
- (b) provides the defence in criminal cases,
- (c) provides legal counsel,
- (d) prepares contracts, petitions and other documents,
- (e) holds valuables deposited with him/her in connection with the activities stipulated in paragraphs (a)–(d).

(2) Unless otherwise stipulated by law, only attorneys are entitled to provide the services listed in subsection (1) in return for consideration.

Act LXXX of 2007 on asylum

Section 35 – (1) An asylum procedure shall be instituted on the basis of an application for recognition submitted to the refugee authority.

(6) If the person seeking recognition is an unaccompanied minor, the refugee authority shall, without delay, provide for the appointment of a guardian ad litem who serves to represent the minor.

(7) In the case of an unaccompanied minor, conducting the asylum procedure shall have priority.

Section 44 – (1) If any doubt emerges concerning the minor status of a person seeking recognition who claims to be a minor, a medical expert examination may be initiated to determine his/her age. The examination may only be performed with the consent of the person seeking recognition, or if the person seeking recognition is in a state which does not permit the issue of a declaration, with that of his/her representative by law or guardian.

(2) An application for recognition may not be refused solely on the grounds that the person seeking recognition, the representative by law or guardian ad litem did not consent to the performance of the examination.

Section 49 – (1) In the course of the preliminary assessment procedure, the refugee authority shall examine whether the criteria of the application of Council Regulation 343/2003/EC 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, and Commission Regulation 1560/2003/EC of 2 September 2003, establishing the detailed rules of the application of Council Regulation 343/2003/EC 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 (hereinafter collectively referred to as the “Dublin Regulations”), exist.

Section 50 – (1) If the Dublin procedure is closed with the delivery of the applicant, the preliminary assessment procedure shall be discontinued at the time of the delivery of the applicant.

(3) If the member state contacted does not take delivery of the applicant and the assessment of the application, the preliminary assessment procedure shall be resumed as described in Section 51.

Section 56 – (1) In its resolution referring the application to the in-merit procedure, the refugee authority shall designate, at the request of the person concerned, a private residence as his/her place of residence.

(2) The applicant shall reside at the place of residence designated for him/her on a residential basis during the substantive procedure.

(3) The substantive procedure shall be completed within sixty days of the adoption of the resolution referring the application to the substantive procedure.

Section 70 – (1) If, during the substantive procedure, the conditions set forth for the application of the Dublin procedure prevail, the provisions stipulated by Section 49 subsections (2)-(9) and Section 50 subsections (1)-(2) shall be applied.

(2) If the Member State contacted does not take delivery of the applicant and the assessment of the application, the substantive procedure will commence.

Government **Decree** no. **301/2007** (XI.9.) on the implementation of **Act LXXX** of 2007 on asylum
 Section 21 – (1) The accommodation and boarding to be provided for the person seeking recognition at the Accommodation Centre shall include the following:

- (a) accommodation;
- (b) meals three times per day (breakfast, lunch and dinner);
- (c) tableware, washing and toilet equipment and clothes for personal use.

(2) In the frame of the accommodation and boarding provided at the Accommodation Centre, in addition to the care specified under subsection (1) hereof, a language course shall also be provided to minors over the age 5 applying for recognition, preparing them for participation in public education in the future as well, as from the date of the order referring their application for recognition to substantive procedure.

(3) During the term of the substantive procedure, the refugee authority may provide the possibility of employment to the person applying for recognition in the form of performing work at the Accommodation Centre.

(4) The quantity of work to be performed under subsection (3) may not exceed 40 hours per month.

(5) Upon the recommendation of the Head of the Accommodation Centre, the refugee authority may provide a bonus to the person applying for recognition and working in the Accommodation Centre, the amount of which may not exceed the prevailing minimum monthly amount of the person's wage as prescribed.

(6) When placing asylum seekers at the Accommodation Centre, the refugee authority shall maintain family unity even if the members of the family have different legal status; it shall place the members of a family together unless requested otherwise, and ensure the protection of the family life of the persons placed.

Section 51 – (1) Participation by a refugee, a beneficiary of subsidiary protection or a beneficiary of temporary protection in a basic or intermediate level Hungarian language course of 520 hours organised at an institution specified by the refugee authority shall be free of charge if he/she continuously takes the course in accordance with the requirements defined by the institution, and meets the examination requirements prescribed by the language service provider.

(2) The following shall be granted free of charge:

(a) any state-recognised basic or intermediate level language examination of types A, B or C in the Hungarian language organised at the institution specified by the refugee authority for refugees, beneficiaries of subsidiary protection and beneficiaries of temporary protection;

(b) any coaching course in the Hungarian language organised at the institution specified by the refugee authority for refugees, beneficiaries of subsidiary protection and beneficiaries of temporary protection of school age, engaged in studies within the framework of primary school, special school, secondary school or basic art school education, or at an institution for handicapped children or at a conductive educational institution.

(3) The refugee authority shall reimburse the costs of the course and the examinations defined in subsections (1) and (2) above to the institution.

The findings of the investigation

I. Findings relating to the accommodation and board for unaccompanied minors submitting an application for asylum

According to the reports heard from the foreigners, upon arriving at the border of the Republic of Hungary they indicated to the police acting as alien police authority that they wished to submit an application for asylum. The asylum seekers were heard by the police with the assistance of an interpreter, and minutes were to be prepared on the hearings. The data for each foreigner who arrived without documents suitable for identification were recorded by the police on the basis of the foreigners' statements. Pursuant to Article 4(1) of Regulation 2725/2000/EC of the Council of the European Union, the alien police authority took the fingerprints of every asylum seeker of at least 14 years of age and took photos of them, and then transmitted the data electronically to the Central Unit (hereinafter referred to as 'Eurodac'). As soon as the police officers understood from the date of birth disclosed by the asylum seeker and the circumstances of arrival that the applicant is an unaccompanied minor, they notified the Accommodation Centre, in accordance with Section 52 of the Joint

Instruction No. 1/2008) (V.21.) of the General Director of the Office of Immigration and Nationality and the Chief Commissioner of the Hungarian Police, that the young person heard by them would be transported to the Accommodation Centre. At the time of the on-site inspection, the young people staying in the Unaccompanied Minors' Home are transported there by the police. *During the on-site inspection I noticed no circumstance indicating any irregularity relating to any constitutional right in connection with transporting unaccompanied minors to the Accommodation Centre.*

The alien police authority notifies the Office of Immigration and Nationality of the Ministry of Justice and Law Enforcement (hereinafter referred to as the 'Office') of submitting the asylum application of the unaccompanied minor and of transporting him to the Accommodation Centre. The foreigners arriving at the Unaccompanied Minors' Home are received by the employees of Interchurch Aid. In the course of the admission the foreigners are informed of the procedure and the internal regulations, they receive a package of toiletries and then they are placed in a living-room.

The asylum procedure is divided into two parts, i.e. the preliminary examination and the substantive procedure. Pursuant to Section 47 of the Asylum Act, the Office first examines, in the preliminary examination procedure, whether the asylum seeker meets the conditions of applying the so-called Dublin Regulations. Since an unaccompanied minor is a client who cannot act independently in the asylum procedure and, in the absence of parental protection, he/she has neither a legal nor authorised representative, pursuant to Section 40(5) of Act CXL of 2004 on the general rules of administrative proceedings and services (hereinafter referred to as the 'Administrative Proceedings Act'), the Office turns to the Guardian Office of Bicske (hereinafter referred to as the 'Guardian Office') to appoint a guardian ad litem authorised to represent the minor.

Pursuant to Section 5(2) of Act XI of 1998 on attorneys at law, only attorneys may regularly represent clients or provide legal counselling in return for consideration. Consequently the Guardian Office appoints the guardian *ad litem* from among the attorneys practicing in its area to represent the unaccompanied minor. According to the information provided by the Head of the Guardian Office, of the 211 requests for appointment of guardians ad litem registered in 2009, there were 157 cases where the appointment was required for unaccompanied minors.

A member of the staff from the Office hears the unaccompanied minor in the presence of the guardian ad litem with the assistance of an interpreter within 1 or 2 days, and records his/her fingerprints and takes his/her photograph. The Office electronically forwards the unaccompanied minor's data recorded in the preliminary procedure to the Institute for Forensic Sciences and to Eurodac. The assistant performing the hearing takes the necessary measures in order to ensure that the Office issues a humanitarian residence permit for the asylum seeker for the period of the asylum procedure. If any doubt emerges concerning the minor status of a person seeking recognition who claims to be a minor, a medical expert examination may be initiated for the determination of his/her age in accordance with Section 44(1) of the Asylum Act. Pursuant to Article 4(3) of Resolution 97/C 221/03 of the Council of the European Union, „the determination of the age must be objective. In order to ensure such objectivity, the Member States may initiate a medical examination with the consent of the minor and an adult representative or institution appointed especially to him for determining the unaccompanied minor's age, which examination shall be performed by qualified medical personnel.”² According to the international requirement concerning the treatment of unaccompanied minors „the determination of age shall include physical, development, mental and cultural elements. If the determination of the age seems necessary, the procedure shall be

² COUNCIL RESOLUTION of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221/03)

carried out by an independent expert who has appropriate competence and knowledge about the ethnic and cultural circumstances of the child.”³

The Office may prescribe the examination of the age of an unaccompanied minor submitted application for asylum by an order. When determining the age of an asylum seeker, the Asylum Act does not prescribe the involvement of a specific expert (organization, body or person), and so a medical adviser and a paediatrician were ordered for the examination by the Office as „other persons with competence” in accordance with Section 58(3) of Act CXL of 2004 on the general rules of administrative proceedings and services (hereinafter referred to as the 'Administrative Proceedings Act'). Neither the Asylum Act nor the Implementation Decree thereof prescribes the method of forming the expert's opinion. According to the expert's opinion, signed by both experts in the case and checked during the inspection, determination of the age of the persons concerned had been performed using a method „based upon general impressions, inspection of the teeth and physical examination of the secondary sexual characteristics (inspection)”. As reported by the persons heard during the inspection, an X-ray examination of wrist-joints occurred only in exceptional cases i.e. only three times during the two years that had expired prior to the effective date of the Asylum Act. The determination of the age must be performed with special care and increased diligence, minimising the risk of errors; the examination of ethnic and cultural factors, which is in widespread use in international practice, might be an effective method for this. In case of doubt in determining the age, the decision which is more favourable for the child separated from their adult relatives should be adopted. However the medical experts' opinions studied during the inspection do not mention the mental condition of the persons examined or any „ethnic or cultural factor” affecting them.

Disregarding the examination of the mental, ethnic and cultural characteristics of the unaccompanied minor jeopardises the enforcement of the minor's right to the harmonization of the obligations under international law and the domestic law as laid down in Section 7(1) of the Constitution, as well as children's right to receive special protection and care granted in Section 67(1) of the Constitution.

The Office may direct the persons declared of full age by the medical experts to the Accommodation Centre in Debrecen where, due to the absence of the special rights granted in the UNCRC and the Act on the protection of children, they will receive the accommodation and board usual for adult applicants. The importance of the examination of mental, ethnic and cultural factors in determining the age is demonstrated by the case of five Somali young people, declared of full age by the medical experts in the case in 2009, about whom it was discovered during the months spent in the Accommodation Centre in Debrecen that they probably were minors so, upon the final judgment of their application, they returned to the Unaccompanied Minors' Home.

If, according to Eurodac's answer to be received within around 3 days, an asylum procedure has been initiated regarding the asylum seeker in any of the Member States, the Office shall then suspend the procedure and, pursuant to Section 49(4) of the Asylum Act, decide by an order to extradite the person to that Member State within the frame of the so-called „Dublin procedure”. If the Dublin procedure is closed with the delivery of the applicant, the preliminary assessment procedure shall be discontinued at the time of the delivery of the applicant. The minor applicant shall remain in the Unaccompanied Minors' Home until the date of extradition, the period of which varies depending on the cooperation between the competent authorities of the recipient Member State. It often happens that the asylum seeker leaves for an unknown place before the date of extradition. In such a case the Office terminates the asylum procedure pursuant to Section 52(2)(d) of the Asylum Act.

³ http://www.separated-children-europe-programme.org/separated_children/good_practice/native/index.html

If, according to Eurodac's data, there has been no asylum procedure initiated in the applicant's case in any Member State, or the applicant and the examination of his case is refused to be taken by the Member State addressed, the Office will then proceed with the preliminary examination procedure. If the Office establishes the admissibility of an application, it shall refer the application to the substantive procedure. Pursuant to Section 56 of the Asylum Act, in the order referring the case to substantive procedure, the Office specifies the Accommodation Centre as the place of accommodation for the unaccompanied minor, which will be his habitual residence during the substantive procedure. The substantive procedure shall be completed within sixty days of the adoption of the resolution referring the application to the substantive procedure. *According to the inspection data, the Office meets all administrative deadlines prescribed by the Asylum Act concerning unaccompanied minors; no irregularity relating to any constitutional right has been revealed by the examination.*

The social worker responsible for the minor's education and administration of their affairs is appointed by the workers from Interchurch Aid after two weeks, i.e. basically upon completion of the preliminary procedure. Under Article 28(1) of the Convention on the Rights of the Child, States Parties recognise the right of the child to education, and they shall make primary education compulsory and available free to all. Under the abovementioned provision of the Convention on the Rights of the Child, an unaccompanied minor of school age is entitled to participate in Hungarian public education. In order to ensure the enforcement of the right to primary education, under Section 21(2) of the Implementing Decree, a language course assisting participation in public education should be granted to all minor asylum seekers over the age 5 within the frame of the accommodation and board provided in the Accommodation Centre, as from the date of the order referring the application for recognition to substantive procedure. According to the data of the on-site inspection, in 2008 and 2009 the Hungarian education of all young people placed in the Unaccompanied Minors' Home was started within one or two days of their reception, irrespective of the state of their asylum procedure. The period of language lessons was 90 minutes daily. During this period the costs of the Hungarian language teaching of unaccompanied minors were covered by the Office and the European Refugee Fund in the ratio of 25 to 75 per cent through tender. Contrary to the fact that Hungarian language teaching should be granted to all unaccompanied minors over the age 5 and subject to substantive procedure as a compulsory benefit, at the time of drafting this report I obtained information that in 2010 the Office wishes to cover only the costs of Hungarian language teaching of foreigners recognised as refugees or persons enjoying subsidiary protection. By adopting the UNCRC, the Republic of Hungary agreed that in all actions concerning children, whether undertaken by Hungarian administrative authorities or legislative bodies, the best interests of the child will be a primary consideration (Article 3 point 1).

In addition to the fact that ensuring Hungarian language teaching for all unaccompanied minors over the age prescribed in Section 21(2) of the Implementing Decree and subject to substantive procedure, and facilitating their participation in primary education, is a compulsory duty of the State, the discontinuation of such service does not provide primary consideration to the child's best interests; consequently *this causes an infringement of rights related to legal certainty forming part of the rule of law (Section 2(1) of the Constitution), to the harmony of international obligations and domestic law (Section 7(1) of the Constitution) and to the children's right to receive special protection and care (Section 67(1) of the Constitution).*

II. Findings relating to the accommodation and board of unaccompanied minors recognised as refugees, persons enjoying subsidiary protection or admitted persons

Following the substantive procedure, the Office recognises the unaccompanied minor asylum seeker as a refugee or a person enjoying subsidiary protection; however it may happen that the application is refused. Pursuant to Section 10(1) and 17(1) of the Asylum Act, unless an Act or government decree expressly provides otherwise, a foreign refugee or a beneficiary of subsidiary protection shall have the rights and obligations of a Hungarian national. The majority of “other provisions” are laid down in the Asylum Act and in the Implementing Decree thereof.

As reported by the social workers heard during the on-site inspection and also confirmed by the Head of the Guardian Office, upon finally closing the asylum procedure attorneys apply for release from their function of guardian ad litem. In the case of unaccompanied minors recognised as refugees or persons enjoying subsidiary protection, the Guardian Office acts in accordance with Act IV of 1952 on marriage, the family and guardianship (hereinafter referred to as the 'Family Law Act') as well as Act XXXI of 1997 on the protection of children and the guardianship administration (hereinafter referred to as the 'Child Protection Act'). Pursuant to Section 93 of the Family Code and Section 127(2) of the Child Protection Act, the Guardian Office places the unaccompanied minor under the care of a guardian, and appoints the Director of the Unaccompanied Minors' Home as his/her guardian. In 2009 the Director of the Unaccompanied Minors' Home was appointed as guardian by the Guardian Office in 46 cases. The guardian ensures that a laissez-passer is obtained for the unaccompanied minor certifying his address in Hungary as well as a social insurance ID number and an identity card for him. The address of the Accommodation Centre is recorded in the statutory certificate certifying the unaccompanied minor's address in Hungary. *Relating to obtaining the documents for unaccompanied minors I noticed no circumstance indicating any irregularity in connection with any constitutional right.*

Minors whose parents are unknown and whose education cannot be provided for through an appointed guardian under Sections 95–97 of the Family Code are taken into long-term care in accordance with Section 80(1)(c) of the Child Protection Act. An unaccompanied minor is represented by the Head of the Unaccompanied Minors' Home as guardian in the procedure for long-term care. According to data from the Guardian Office, the subject of the procedure was an unaccompanied minor in 50 cases from among the 54 cases for long-term care in 2008, and in 2009 in 30 cases from the 31 cases for long-term care. *Since the long-term care, the safe placement of the child and the appointment of a guardian all provide primary consideration to the child's best interests, I noticed no circumstance indicating any irregularity concerning any constitutional right relating to taking a minor into long-term care.*

Pursuant to Section 80(2) of the Child Protection Act, simultaneously with taking the child into long-term care, the Guardian Office places the child with a foster parent or, if that is not possible, in a children's home or a home for the disabled or psychiatric patients, and appoints a guardian (professional guardian). Under Section 82(1) of the Child Protection Act, the place of care for the child subject to long-term care procedure will be determined by the Guardian Office following a hearing of the child, also considering the opinion of the County Expert Committee on Child Protection. According to Section 82(7), the County Expert Committee on Child Protection shall comprise at least three members, and for the purposes of the assessment of children with special needs, at least five members. Permanent members of the Expert Committee shall include one paediatrician, one specialist child psychologist and one social worker. The County Expert Committee on Child Protection makes a proposal for the unaccompanied minor's place of care on the basis of the expert's opinion prepared by the paediatrician of the Accommodation Centre and the psychologist, as well as the social workers from Interchurch Aid.

However, due to the lack of assistants speaking foreign languages, especially Arabic or the Pashtu used by Afghans, or who obtained knowledge of the special ethnic and cultural factors as well as due to the lack of further room, the foster parents and institutions operating in Fejér county cannot take unaccompanied minors. However, neither the Accommodation Centre nor the Unaccompanied Minors' Home is recognized by the Child Protection Act so these institutions may not be specified as the place of care for unaccompanied minors. For these reasons the Guardian Office, on the basis of the information No. 9997-0/2008-017/GYFŐ provided by the Department on the Protection of Children and Young Persons of the Ministry of Social Affairs and Labour, specifies the Fejér County Children's Home as the formal place of care for the unaccompanied minor⁴ although the child does not spend even one minute there. Pursuant to Section 41(1) of the Implementing Decree, the refugee and the beneficiary of subsidiary protection, if their accommodation cannot be provided for otherwise, will be entitled to accommodation and board at the Accommodation Centre free of charge for six months upon the date of the final decision on the recognition, which period may be extended by the Office once by another six months. Considering Section 41(1) of the Implementing Decree on facilitating the accommodation for refugees and beneficiaries of subsidiary protection, upon the receipt of the Guardian Office's decision the official guardian may submit an application to the Guardian Office under Section 83(7) of the Child Protection Act to specify the Unaccompanied Minors' Home as the child's place of residence. Pursuant to Section 83(8) of the Child Protection Act, the Guardian Office may refuse the application of the guardian only if the designation or change in the place of care is not in the interest of the child. The Guardian Office must decide on the application within five working days. If no answer is sent upon the application within five working days then it should be regarded as approved. At the time of the on-site inspection, the place of residence for the 21 refugee children and 22 children enjoying subsidiary protection staying in the Unaccompanied Minors' Home was specified in accordance with the abovementioned procedure, with the implicit consent to the change of the place of residence.

According to the examination data, the Accommodation Centre, within the frame of the Unaccompanied Minors' Home, provides any and all board prescribed by the Asylum Act and its Implementing Decree; however the effective laws provide for no institutional or professional requirements for the maintainer of the institution of that type, contrary to other institutions for the protection of children operating in Hungary.

The asylum or alien status of an unaccompanied minor is of secondary importance i.e. he must be treated primarily as a child. Consequently, the lack of laws on the establishment and operation of institutions for the protection of children specified to provide accommodation and board for unaccompanied minors excluded from the service system of foster parents or children's homes and with specific educational needs seriously jeopardises the enforcement of children's rights as included in Section 67(1) of the Constitution.

Under Article 28 of the UNCRC every child has right to the compulsory and free primary education. The states encourage the development of different forms of secondary education, including general and vocational education, and make them available and accessible to every child. Under paragraphs (1) and (2) of Article 10 of the Reception Directive, the Member States provide for participation in the educational system to all minor asylum seekers under the same conditions as valid for the nationals of the host Member State. Access to the educational system may be delayed for a maximum of three months upon submitting the application. According to the data from the inspection, workers from the Unaccompanied Minors' Home can place the child in a primary or secondary educational institution after two or three months. This is the minimum time required by the

⁴ 1 Street Kikinda, Székesfehérvár (Székesfehérvár, Kikinda utca 1.)

unaccompanied minor to more or less recover from the traumas suffered, to be able to walk the road from the Accommodation Centre to the school and back alone, and to learn the Hungarian language at a level that he/she can take part in public education in Hungary. The integrated education of unaccompanied minors could not be implemented until now because most of them have significantly less knowledge than children of the same age participating in the Hungarian public education since the age of six.

Under Article 10(3) of the Reception Directive, should the minor be unable to join in the educational system due to his/her special circumstances, the Member State shall offer him/her another educational possibility. Primary education for unaccompanied minors is provided by the Zsuzsa Kossuth Children's Home Primary School operating in the town and maintained by the Municipality of Budapest, which has the required specialists including a psychologist, a development teacher, a mental hygienic specialist and a psychiatrist, and not by the local primary school maintained by the local government, which lacks any special educational programme required for the development of unaccompanied minors. At the time of the on-site inspection 30 inmates of the Unaccompanied Minors' Home were pupils of that institution. The cooperation of the two institutions was considered successful by the Interchurch Aid workers, which is also supported by the fact that eight unaccompanied minors received a school report certifying the completion of their primary school studies in 2009.

Under Article 28 of UNCRC, the Member States encourage the development of different forms of secondary education, including general and vocational education, and make them available and accessible to every child. At the time of the on-site inspection, seven inmates of the Unaccompanied Minors' Home were students of the Budapest Károly Thán Secondary School, Special School and Vocational School maintained by the Municipality of Budapest. A Somali boy studied to be a plumber at the Gábor Baross Primary and Vocational School maintained by the Municipality of Budapest 20th District (Pesterzsébet) Authority while an Afghan boy studied cooking in the Hungarian-English Dual Language Primary and Catering School maintained by the Municipality of Budapest 7th District Authority (Erzsébetváros). *According to the experiences of the on-site inspection, the children feel themselves to be doing well in their educational institutions, so no irregularity relating to any constitutional right concerning the primary and secondary education of unaccompanied minors has been revealed by the examination.*

At the time of the on-site inspection four inmates of admitted status lived in the Unaccompanied Minors' Home. According to the examination data, following refusal of the application for asylum the case is transmitted to the alien police authority. If the alien police authority establishes that the unaccompanied minor may not be returned to the country of his nationality temporarily or, in the case of a stateless person, to the country of his habitual residence, for fear of facing the threat of death penalty, torture or inhuman or degrading treatment or punishment, and there is no safe third country which would receive him/her, and he/she is not entitled to any temporary or subsidiary protection, he/she will be recognized as an admitted person under Section 2(f) of Act II of 2007 on the admission and right of residence of third-country nationals. The unaccompanied minor of admitted status is obliged to stay at the Accommodation Centre or in the Unaccompanied Minors' Home as his/her place of residence specified by the alien police authority. Since Section 4(1) is also applicable to children of admitted status, findings of the examination concerning the guardianship, accommodation and education of unaccompanied minors of refugee or subsidiary protection status are adequate relating to them, too.

Summary

Upon the visit I made in the Unaccompanied Minors' Home and the consultation I had with the Head of the Accommodation Centre and the project manager from Interchurch Aid responsible for refugee and migration programmes and the Head of the Guardian Office I have established that the competent organisations make every reasonable effort in order to create an atmosphere of intimacy for the young people living in the circumstances of a refugee camp, facilitating their integration and ensuring their healthy physical and mental development. The irregularities relating to constitutional rights revealed in the course of the examination are basically due to the strongly centralised Hungarian asylum and the decentralised system of child protection, as well as the tension arising from the operation of the institutional system of public education, and, to a less extent, to the incomplete provisions of the Child Protection Act.

In terms of the enforcement of the special rights for unaccompanied minors, the determination of age is of crucial importance. It is attributable to the lack of guarantee provisions in the Asylum Act prescribing the involvement of a specific expert that the procedure for determining the age of the unaccompanied minor asylum seeker disregards the examination of the affected person's mental condition as well as the specific "ethnic and cultural factors" affecting him or her.

Pursuant to Article 22(1) of UNCRC an unaccompanied minor is entitled to treatment equal to that provided to any child of the nationality of the host country or lawfully residing in that country. While the provisions of the Asylum Act and the Implementing Decree thereof basically comply with the relevant rules of both the European Union and the UNCRC, the unaccompanied minors of refugee, subsidiary protection or temporary protection status cannot access the care of foster parents or the children's home system accessible to Hungarian children because the institutions of public education or child protection maintained by the local or county governments are not prepared for their admittance.

In the course of the examination, the workers of both the Guardian Office and the Centre for Child Protection of the Municipality of Fejér County mentioned that they received no preliminary notification of the fact that, as of 1 January 2008, the Accommodation Centre was specified as the institution for the separate accommodation and board for all unaccompanied minors staying in Hungary and subject to asylum or alien procedure. The Office made no attempt at finding out whether the guardian office of the local authority has the special knowledge required for the fast and sound administration of the affairs of unaccompanied minors staying at the Accommodation Centre, or has enough assistants for that work. Due to the centralised accommodation of the unaccompanied minors, the Guardian Office had no opportunity to request professional consultation with another office performing similar duties. The fact that, of the 211 requests for appointment of guardians ad litem registered in 2009 there were 157 cases where the appointment was required for unaccompanied minors proves the sudden increase of the workload of the Guardian Office relating to the administration of the unaccompanied minors' affairs. In 2008, of the 54 cases for long-term care in 50 cases the subject of the procedure was an unaccompanied minor while in 2009 it was 30 cases from the 31 cases for long-term care. Concerning the interpreters required for the official hearing of Afghan, Somali, Congolese, Iraqi etc. unaccompanied minors coming from extra-European countries and not speaking Hungarian, not only the covering of the costs of interpretation but also the search for interpreters speaking exotic languages causes great difficulty. Far from providing professional assistance to the Guardian Office and the county expert committee for the protection of children performing the hearing before taking the child into long-term care, the Office did not even give a list of interpreters.

The Fejér County Authority Child Protection Centre responsible for placing the unaccompanied minors taken into long-term care in children's homes faced similar problems

to the ones reported by the Guardian Office. Under Section 80(2) of the Child Protection Act, an official guardian must be appointed to an unaccompanied minor taken into long-term care and placed in children's home. Under Section 84(5) of the Child Protection Act, professional guardians may provide guardianship to a maximum of forty-eight children simultaneously. At the time of the on-site inspection 21 refugees, 22 beneficiaries of subsidiary protection and 4 children of admitted status were living in the Unaccompanied Minors' Home, i.e. the guardian's duties relating to the inmates of the institution practically cover the whole working time of one person.

Pursuant to Article 22(2) of UNCRC, a child separated from his/her parents or adult relatives "shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason" in accordance with the principles laid down in the Convention. Pursuant to Section 93 of Act IV of 1952 on marriage, the family and guardianship (hereinafter referred to as the 'Family Code') "the minor who is not under parental protection shall be under guardianship". In the preliminary procedure the Guardian Office will not appoint a guardian to represent the unaccompanied minor submitting an asylum application but, upon the initiative of the Office as competent authority, will appoint a guardian ad litem under Section 40(5) of the Administrative Proceedings Act. However the guardian ad litem is not qualified to substitute for parental protection; he or she is entitled to provide only legal representation in the administrative proceedings for which his/her appointment is valid. *It is disregarded in the current practice that an unaccompanied minor is in need of special protection, but not because he/she is recognised by the Office as a refugee, a beneficiary of subsidiary protection or as an admitted person. The asylum or alien status of a minor separated from his adult relatives is of secondary importance; he/she must be treated primarily as a child. Since an unaccompanied minor applying for asylum is also a child lacking the care and protection of his/her parents or official custodian, i.e. suffering serious social and mental disadvantage, he/she is entitled to the same level of protection as others who have already received refugee or alien status.*

According to the effective laws, a minor under guardianship has a legal representative; consequently appointing a guardian ad litem to him is out of the question. Since under Article 3(1) the administrative authorities including the Guardian Office primarily take the child's best interest into account when making any decision affecting the child, the question can be raised whether it is a guardian or a guardian ad litem who can provide protection for the interests of an unaccompanied minor subject to preliminary procedure more effectively.

The representation of an unaccompanied minor in an aliens procedure or in an asylum procedure is a duty requiring qualification in law while such a qualification is not necessary for performing the duty of a guardian. However it would be reasonable to appoint a guardian because the unaccompanied minor can also get into a situation for any reason beyond the asylum procedure, for example, in the event of an urgent medical intervention where one has to make a legal statement for or on behalf of someone. It is by no means satisfactory that, during the 5 or 6 months from submitting the asylum application until the specification of the place of residence of the unaccompanied minor taken into long-term care, three different persons are competent to perform the legal representation of the child. Moreover, the office of the official guardian is not located in Bicske but in Székesfehérvár. Under the current circumstances it cannot be expected that a long-term personal relationship is developed between the child and the adults qualified for the protection of his interests.

Furthermore, I am worried about the fact that the unaccompanied minors excluded from the system of county institutions for the protection of children are compelled to live in the area of the Accommodation Centre, in the Unaccompanied Minors' Home, almost throughout the entire period of their integration to Hungary, which is not the ideal way of understanding the Hungarian way of life and of adapting to it. In this situation, in a phase of

the procedure, the Guardian Office is temporarily compelled to treat the Head of the Unaccompanied Minors' Home as a quasi guardian for the institution, based on Section 84(2) of the Child Protection Act. However the Unaccompanied Minors' Home as an institution for children is not recognized by the Child Protection Act so, in addition to the lack of guarantee rules regarding the establishment and maintenance thereof, there is no guarantee that the head of the institution currently financed on a project basis will be able to perform the guardian's duties permanently.

Initiatives

Pursuant to Section 21(1) of Act LIX of 1993 on the Parliamentary Commissioner for civil rights I hereby initiate that

- the General Director of the Office of Immigration and Nationality orders that the determination of the age of unaccompanied minors should be performed, in addition to the method „based upon general impressions, inspection of the teeth and physical examination of the secondary sexual characteristics (inspection)” using another method also covering the child's mental condition as well as the ethnic and cultural factors affecting him;
- the General Director of the Office of Immigration and Nationality provides for granting a language course to unaccompanied asylum seekers over the age 5 to prepare them to participate in public education in the future too, as from the date of the order referring the application for recognition to substantive procedure.

Proposals

Under the power granted to me by Section 25 of Act LIX of 1993 on the Parliamentary Commissioner for civil rights I hereby propose that

- the Minister of Justice and Law Enforcement orders the amendment of Section 44 of Act XXX of 2007 with content ensuring that determination of the unaccompanied minors' age should, in addition to their physiological characteristics, also include the consideration of the child's mental condition as well as the ethnic and cultural factors affecting him/her;
- the Minister of Employment and Social Affairs and the Minister of Justice and Law Enforcement provide for amending Section 4(1)(a) of Act XXXI of 1997 on the protection of children and the guardianship administration, as well as Act LXXX of 2007 on asylum, in order to guarantee that the guardian office immediately places unaccompanied minors still applying for asylum under guardianship; however, the unaccompanied minor should remain entitled to professional legal advice and representation thereafter, too, until the final completion of the procedure;
- the Minister of Employment and Social Affairs and the Minister of Justice and Law Enforcement provide for amending Act XXXI of 1997 on the protection of children and the guardianship administration in order to integrate the

unaccompanied minors' home as an institution providing special care into the Hungarian system of institutions for the protection of children.

Budapest, January 2010

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