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REPORT

by the Parliamentary Commissioner for Civil Rights

in cases number **AJB 2629/2010** and **AJB 4196/2010**

Rapporteur: Dr Katalin Haraszti

Affected bodies: Guardianship Agency of Budapest District V
(*Budapest Főváros V. Kerületének Gyámhivatala*)
Budapest Regional Child Protection Service
(*Fővárosi TEGYESZ*)
Office of Immigration and Nationality
(*Bevándorlási és Állampolgársági Hivatal*)

September 2010

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Opening of the procedure

In case number **AJB 2629/2010**, the Hungarian Helsinki Committee and the SOS Children's Villages Hungary Foundation (*SOS Gyermekfalu Magyarországi Alapítvány*) (hereinafter, jointly: "petitioners") contacted me in connection with the transfer to Brasov of a three-and-a-half-year-old child born in Hungary and citizen of Romania. The petitioners alleged that the competent Guardianship Agency had not informed the foster parent before the child, living in foster care in the SOS Children's Village in Kecskemét (hereinafter: "SOS Children's Village"), was transported out of Hungary, and that the foster parent had not been informed of the child's future residence either. The staff of the SOS Children's Village were only able to contact the staff of the Brasov Guardianship Agency through personal contacts a couple of days before the transportation. The Brasov Guardianship Agency's personnel were only informed then that the child only speaks Hungarian. The professionals participating in take-over did not take this fact into consideration, nor was the place of care selected with regard to this fact. Also, the SOS Children's Village staff's personal contacts had been needed to make sure that a Hungarian-speaking Romanian child protection professional would be present at the handover-takeover procedure at the state border and that the child would be given into the foster care of a person with Hungarian ethnicity for one year.

In case number **AJB 4196/2010**, I was contacted by the SOS Children's Villages Hungary Foundation in connection with the transfer to Romania of a one-and-a-half-year-old child born in Hungary and citizen of Romania, who in the past had also lived in the SOS Children's Village. The petitioner alleged that it had not been possible to contact the Romanian foster parent before the child was handed over; therefore the child's handover to a new place of care was carried out without the preparatory phase customary in Hungarian child protection practice.

The petitioners' position is that the practice of handing over minors born in Hungary with an unknown citizenship status registered and not under parental authority to the authorities of countries recognising them as citizens (hereinafter: "repatriation") not only violates the child's right to appropriate physical and mental development, but also disregards the requirements of international documents aimed at the protection of unaccompanied minors and the related practice under international law.

The petitioners allege that because the authorities' decisions ordering the repatriation of minors born in Hungary and not under parental authority and the decisions ordering the handover of such children foreign authorities of countries recognising them as citizens do not cite the legal provisions on which these decisions are based, nor do they include information on legal remedies, these decisions are thus unconstitutional.

Participants in the investigation: Dr Katalin Haraszti, Deputy Head of Department
Dr Zsuzsanna Györffy, legal rapporteur

Purpose of the investigation

In the Committee on the Rights of the Child's General Comment No. 6 (2005) to the UN Convention on the Rights of the Child signed in New York on 20 November 1989¹ entitled Treatment of Unaccompanied and Separated Children outside their Country of Origin², unaccompanied children (also called unaccompanied minors; hereinafter: "unaccompanied minors") are children - as defined in article 1 of the Convention - who have been separated from both parents and other relatives and who are not being cared for by an adult who, by law or custom, is responsible for doing so.³

According to Article 20 point 1 of the Convention on the Rights of the Child promulgated in Hungary through Act LXIV of 1991 (hereinafter: "UNCRC"), a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. Children who are not citizens of the state of their residence and lack the care and protection of an adult relative are particularly vulnerable. Thus, special attention should be given to the protection of their fundamental rights and to finding a permanent and satisfactory solution as soon as possible.

Under Article 2 of the Convention on the Rights of the Child, states must guarantee the rights set forth in the 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. Last year, I examined the enforcement of the constitutional rights of unaccompanied minors not born in Hungary seeking asylum in case **AJB 7120/2009**.

A minor subject to the jurisdiction of the Republic of Hungary and lacking the care of an adult is, both socially and psychologically, in an extremely disadvantageous situation. The child's citizenship, asylum or alien status is of secondary importance, thus the minor must be treated primarily as a child. My investigation was aimed at discovering how the child protection care of the unaccompanied minor born in the territory of Hungary, the repatriation of the child to the country recognising the child as a citizen and the practical application of the repatriation served the enforcement of the child's rights and the protection of the child.

Method of the investigation

Guardianship cases of non-Hungarian citizen minors staying in the territory of the Republic of Hungary have been within the exclusive competence of Guardianship Agency of Budapest District V (hereinafter: "Guardianship Agency") for the entire country since 1 January 2004. With regard to the provisions of Article 2 of the Convention on the Rights of the Child, we have reviewed the cases of each child born after 1 January 2004 in addition to the cases mentioned by the petitioners.

¹ See Act LXIV of 1991 on the promulgation of the Convention on the Rights of the Child signed in New York on 20 November 1989.

² The Committee on the Rights of the Child General Comment No. 6 (2005) TREATMENT OF UNACCOMPANIED AND SEPARATED CHILDREN OUTSIDE THEIR COUNTRY OF ORIGIN
<http://www2.ohchr.org/english/bodies/crc/comments.htm>

³"Unaccompanied children" (also called unaccompanied minors) are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.

My colleagues involved in the investigation visited the offices of both the Guardianship Agency and the Budapest Regional Child Protection Service (Fővárosi TEGYESZ; hereinafter: “Budapest Child Protection Service”) and held on-site inspections at both venues, studied the documents, made photocopies of all relevant documents and consulted with the officials involved in the cases. One member of the Budapest Child Protection Service's staff consulted by my colleagues was the former temporary legal guardian of one of the minors whose case had been brought up by the petitioners. This guardian accompanied the child until the child was handed over to the Romanian foster parents in case no. **AJB 4196/2010**.

I contacted the head of the Central Hungary Regional State Administrative Office's Agency for Guardianship and Social Affairs (*Közép-magyarországi Regionális Államigazgatási Hivatal Szociális és Gyámhivatala*; hereinafter: “State Administrative Office”) to examine the pending repatriation cases and the repatriation cases closed in 2010 at the Guardianship Agency as the Agency's superior and to inform me of any conclusions. The head of the State Administrative Office replied to my queries on 16 April 2010.

I requested information from the Minister of Social and Labour Affairs on the measures that the Ministry wishes to take and the statutory amendments the Ministry is planning to put forward for the purpose of solving the problems related to the status of children with unknown citizenship. I asked the Minister to consult with the Ministry of Justice and Law Enforcement and the Ministry of Foreign Affairs before answering my letter. The Child and Youth Protection Department of the Ministry of Social and Labour Affairs held a meeting on 6 April 2010 attended by the officials of the competent ministries and of the Prime Minister's Office, the Director of UNICEF's Hungarian National Committee, the officials of the Ministry of Justice and Law Enforcement's Office of Immigration and Nationality and my colleagues concerned in the matter. The Ministry of Social and Labour Affairs sent me the memorandum of the meeting detailing the content of the discussions.

As both children specified by the petitioners left the territory of the Republic of Hungary at the Ártánd Border Crossing Point (hereinafter: “Border Crossing Point”), my staff involved in the case contacted the head of the Border Crossing Point to inquire about the circumstances of the two children's departure and handover at the state border.

The facts of the case as established

Between 1 January 2004 and 15 May 2010, the Guardianship Agency's staff were involved in 715 children's cases (altogether from 39 countries). Among these children, 135 were Serbian, 91 Afghan, 90 Kosovar, 85 Romanian, 44 Moldavian, 35 Pakistani, 27 Albanian, 19 Somali, 15 Ukrainian, while the others were citizens of other countries. In the category of children from other countries, there were less than 10 children from each country.

Between the date on which the Guardianship Agency was given exclusive competence and 15 May 2010, proceedings were started in the cases of 86 children having unknown citizenship. On 15 May 2010, proceedings were pending in the cases of **43** unaccompanied minors of unknown citizenship, **14** of who had been born in 2009.

In 2010, in the period before the State Administrative Office's examination was concluded, the Guardianship Agency had repatriated 5 unaccompanied minors born in Hungary, including the former inhabitant of the SOS Children's Village in case no. **AJB 4196/2009**. At the time the State Administrative Office's inspection was completed, there were three additional minors who were about to be handed over as the foreign state contacted by the Guardianship Agency was willing to recognise them as citizens. All these children are Romanian citizens.

The child concerned in case no. **AJB 2629/2010** was born in Budapest (District VII) on 27 May 2006 in a healthcare institution. When the birth was registered, the sixteen-year-old mother verified her Romanian citizenship by showing a valid Romanian passport. As the newborn child had no documents, the child was registered as a person with an unknown citizenship status. The birth register's entries regarding the father were not filled in.

According to the documents the Guardianship Agency has at its disposal, the mother, who speaks Hungarian and is presumably of Hungarian ethnicity, told the hospital's child welfare officer that she had become pregnant by rape, and that she therefore did not want to take the child with her when she left the hospital. Leaving her child behind, the mother left the hospital on 31 May 2006 for an unknown destination.

On 7 June 2006, the child was transferred temporarily by the Guardianship Agency of the Budapest District VII Mayor's Office to the Budapest Local Government's Children's Home for Infants, Small Children and the Disabled (*Budapest Főváros Önkormányzatának a Csecsemőket, Kisgyermeket és Fogyatékosokat Befogadó Gyermekotthona*, address: Kmetty utca 31, District VI Budapest) and the case was handed over to the Guardianship Agency having exclusive competence.

On 27 July 2006, the Guardianship Agency appointed a temporary guardian for the minor and, on the same day, the Agency contacted Romania's Embassy in Budapest (hereinafter: "Embassy") sending the Embassy the child's birth records and the official decision verifying the child's place of residence. The Guardianship Agency sent the Embassy the personal data of the mother and notified the Embassy that a mother of Romanian citizenship whose current residence was unknown had given birth to a child in Hungary as evidenced by the attached documents. The Guardianship Agency requested a statement from the Embassy whether Romania recognises the child not under parental authority as a Romanian citizen and, if yes, whether Romania wants the child to be repatriated or transfers the guardianship rights to the competent Hungarian authorities. The Guardianship Agency asked the Embassy to send the Guardianship Agency a document verifying the Romanian citizenship of the child, insofar as the child is a Romanian citizen. The Guardianship Agency needed this document in order to record the child's citizenship in the birth register.

On 27 July 2006, the Guardianship Agency, again with a temporary effect, specified the Budapest Child Protection Services' children's home at the address Rege utca 2, District XI, Budapest as the child's new place of care until the Embassy's reply. The Guardianship Agency declared that the temporary custody would be reviewed once every six months in accordance with Section 73 (4) of the Child Protection Act (hereinafter: "Child Protection Act").

In this decision, the Guardianship Agency appointed one of the Budapest Child Protection Services' official guardians as the child's temporary guardian. The temporary guardian is the unaccompanied minor's legal guardian, and is responsible for making the legal statements required for the administration of the unaccompanied minor's affairs, especially in obtaining a social security number, a public health services certificate and a residence document.

On 18 September 2006, the temporary guardian applied for a Hungarian stay permit on behalf of the minor at the customer service department of the Budapest and Pest County Regional Directorate of the Office of Immigration and Nationality. On 25 September 2006, the Budapest and Pest County Regional Directorate of the Office of Immigration and Nationality issued a humanitarian stay permit for the minor, valid until 25 September 2008.

The Guardianship Agency, again as a temporary measure, put the child in the care of one of the official foster parents at the SOS Children's Village as of 23 January 2007. From this time onwards, the child lived with a five-member family in which the child was the

youngest member. The other children living with the foster parent soon came to like and accept this new child, playing with it and taking good care of it.

The Guardianship Agency reviewed the unaccompanied minor's temporary custody with the foster parent once every six months.

In September 2008, the temporary guardian applied for the extension of the child's residence permit. The following documents were attached to the application for an extension: the child's birth register and the Guardianship Agency's decision on the temporary custody of the child with an official foster parent of the SOS Children's Village.

The South Great Plains Regional Directorate of the Office of Immigration and Nationality registered the foster parent's address as the child's Hungarian address. Also, due to a change in the relevant legislation effective from 1 July 2007, the registration certificate for EEA citizens was issued on 26 September 2008. As the child had no valid travel documents, the registration certificate was attached to the case documents. However, the official certificate regarding the issue of the registration certificate was immediately handed over to the temporary guardian.

The Guardianship Agency received the Embassy's reply on 11 August 2008. It stated that the child was indeed a Romanian citizen and that, if the child was repatriated, the child would be received by the Brasov County Child Protection Directorate.

This was the first time since the Guardianship Agency's appointment as an authority of national competence that it was faced with a decision to have an unaccompanied child of recognised Romanian nationality born in Hungary transported out of the country and handed over to the representatives of a foreign state.

On 18 November 2008, the head of the Guardianship Agency and two members of the Embassy's staff consulted on how the child concerned in case no. **AJB 4196/2010** and three other unaccompanied minors recognised as Romanian citizens would be handed over.

The Embassy agreed to transport the children to the Hungarian-Romanian border after they had been handed over by the Hungarian authority, and also agreed to provide notification of the date and time at which the children were handed over to the competent Romanian child protection authority. The Embassy informed the participants of the meeting that, due to the size of the vehicle the Embassy had available, a maximum of two children could be transported at a time.

The Guardianship Agency agreed to issue the decisions terminating the temporary custody of the children by the agreed dates and that it would obtain the photographs required for the issue of travel documents.

The participants of the consultation agreed that the staff member of the Embassy would take over the child concerned in case no. **AJB 4196/2010** and another living in the SOS Children's Village on 15 January 2009, while the other two children would be handed over on 29 January 2009. The building of the Budapest Child Protection Services (address: Alföldi utca 9-13, District VIII Budapest) was selected as the venue of the handover procedure. According to the arrangement, the children were to be accompanied to the Hungarian-Romanian border by a caretaker, the temporary guardian and a staff member of the Embassy, and it was agreed that these people would also be present when the children were handed over.

The Guardianship Agency informed the SOS Children's Village on 8 December 2008 that the child of Romanian citizenship would be received by the Brasov County Child Protection Directorate and that the handover procedure would take place at 10 a.m. on 15 January 2009 in the building of the Budapest Child Protection Services.

The Guardianship Agency asked the foster parent to prepare the child for the handover procedure. In its letter, the Guardianship Agency informed the foster parent that it would

make a decision on the termination of the child's temporary custody in early January 2009, and it would notify the affected persons in writing.

In its decision issued on 6 January 2009, the Guardianship Agency terminated the temporary custody at the official foster parent of the SOS Children's Village as of 15 January 2009. On the basis of the decision terminating the temporary custody, it was the obligation of the SOS Children's Village to make sure that a person would accompany the child on 15 January 2009, to transport the child to the Budapest Child Protection Services' building on the same day and hand the child over to "an authorised person". The SOS Children's Village was also asked to make sure the child would be supervised until being handed over to the Romanian child protection authority's representative. According to the decision, the minor's temporary guardian was also required to "assist in handing over the child and making sure the child is accompanied until the Romanian-Hungarian border".

The operative part of the decision stated that the affected parties had the right to appeal the decision before the Central Hungary Regional State Administrative Office within 15 days from receiving the decision. However, the application for a remedy would not have postponed the repatriation of the child.

According to the documents available to me, the consul of the Embassy received the child in the Budapest Child Protection Services' building on 15 January 2009. It was stated in one document that "the child was received without complaints or injuries". On the same day, the Brasov County Child Protection Agency was handed over the child by the consul of the Embassy, again received "without complaints or injuries". Both documents stated that "the personal belongings of the child and the relevant documents as listed in an attached document were made available by the person handing over to the person taking over the child."

According to the documents, the unaccompanied child left the territory of the Republic of Hungary at the Ártánd Border Crossing Point. However, neither the relevant Border Guard Directorate nor the commander of the Border Crossing Point was informed of the child's departure from Hungary. As the officers of the Border Crossing Point were not notified, we do not have information regarding the exact time of the child's departure and no border guard officers were present when the child was handed over.

The temporary guardian reported to the Guardianship Agency in writing on 20 January 2009 that the Romanian child protection authority's personnel had taken over the child on 15 January 2009 along with the child's documents and personal belongings. The temporary guardian also asked to be relieved of the obligation to act as the temporary guardian as the temporary custody had been terminated.

The child concerned in case no. **AJB 4196/2010** was born in Budapest (District VIII) on 27 August 2008 in a healthcare institution. The mother of the child verified her Romanian citizenship by showing a valid Romanian passport. The birth register's entries regarding the father were not filled in. At the time of birth, the child was registered as having an unknown citizenship status.

According to the documents the Guardianship Agency has at its disposal, the mother, who speaks Hungarian and is presumably of Hungarian ethnicity, told the hospital's child welfare officer that she had no Hungarian address, lived on the streets as a homeless person and made a living from odd jobs. She therefore said that she would not be able to take care of the infant. She said that she would like to give the child up for adoption and, leaving the infant behind, she left the hospital for an unknown destination on the day after the birth.

On 28 August 2010, the child welfare officer of the hospital asked the Guardianship Agency to provide temporary custody for this child born of a mother of Romanian nationality who had left for an unknown destination.

On 29 August 2008, the child was transferred temporarily by the Guardianship Agency to the Budapest Local Government's Children's Home for Infants, Small Children and

the Disabled (address: Kmetty utca 31, District VI Budapest) and the Guardianship Agency appointed a temporary guardian.

The Guardianship Agency put the child in the temporary care of one of the official foster parents at the SOS Children's Village as of 31 October 2008.

The two-month old arrived in a family of eight persons. The child was the youngest of the children. The other children living at the foster parent accepted the child very soon and they even competed amongst themselves to spend time with the baby.

According to the SOS Children's Village staff, the child had bilateral pyelectasis and suffered from a milk allergy. For financial reasons, the previous place of care could not provide the child with the appropriate infant formula it needed for health reasons. Due to this, the child had an eczema-like skin rash when the child arrived to the foster parent. Because of the pyelectasis, the foster parent had to take the child once every three months for medical examination. The new infant formula and the medical treatment significantly improved the child's health condition.

The Guardianship Agency reviewed the unaccompanied minor's temporary custody with the foster parent once every six months.

On 28 November 2008, the temporary guardian of the unaccompanied minor applied for a Hungarian residence permit on behalf of the minor at the customer service department of the South Great Plains Regional Directorate of the Office of Immigration and Nationality. The following documents were attached to the application: the child's birth register and the Guardianship Agency's decision on the temporary custody of the child with an official foster parent of the SOS Children's Village.

The South Great Plains Regional Directorate of the Office of Immigration and Nationality registered the foster parent's address as the Hungarian address of the child. Also, the Office immediately issued the registration certificate for EEA citizens. As the child had no valid travel documents, the registration certificate was attached to the case documents. However, the temporary guardian was immediately given an official certificate regarding the issue of the registration certificate.

On 17 December 2008, the Guardianship Agency contacted the registrar recording the birth and requested the registrar to send the Guardianship Agency the mother's passport number, or, if it was not available, the documents on which the birth records were based. The registrar's reply and the requested documents were received by the Guardianship Agency on 26 January 2009.

On 25 May 2009, the Guardianship Agency sent the birth records and the decision certifying the child's residence in Hungary to the Embassy and notified the Embassy that a mother of Romanian citizenship, current residence unknown, had given birth to a child in Hungary as evidenced by the attached documents.

The Guardianship Agency requested a statement from the Embassy whether Romania recognises the child not under parental authority as a Romanian citizen and, if yes, whether Romania wants the child to be repatriated or transfers the guardianship rights to the competent Hungarian authorities. The Guardianship Agency asked the Embassy to send the Guardianship Agency a document verifying the Romanian citizenship of the child, insofar as the child is a Romanian citizen. The Guardianship Agency needed this document in order to record the child's citizenship in the birth register.

On 5 August 2009, the child's mother visited the Guardianship Agency. According to the transcript of the interview with her, she had been told by her relatives living in Romania that Romanian child protection authorities had wanted to contact her in Romania in relation to her child born in Hungary. The mother repeated her earlier statement that, due to her personal situation, she was still not in the position to bring up the child. She therefore waived her custody rights in order to put the child up for adoption. According to the transcript, the mother

thought that the newborn could be put up for adoption in Hungary. She did not know that because of her Romanian citizenship the Hungarian authorities were not allowed to make long-term decisions on the child's future. The mother approved of the Embassy's decision to repatriate the child and she agreed that the child should be put up for adoption in Romania and said that the child could be adopted by people she does not know. The mother had one request: she did not want to be contacted in Romania about the child in the future. The Guardianship did not notify the SOS Children's village of the mother's visit nor of the legal statements that she had made.

On 6 August 2009, the Guardianship Agency informed the Embassy (by sending a copy of the interview's transcript) that the mother approved of the child's repatriation and adoption. The Guardianship Agency asked the Embassy to forward the mother's statement to the competent child protection authorities in Romania and to have the child repatriated as soon as practicable.

The Guardianship Agency was informed on 18 September 2009 that the child is a Romanian citizen and that, if the child was repatriated, the child would be received by the Covasna County Child Protection Directorate.

On 16 October 2009, the Guardianship Agency notified the SOS Children's Village that the child would presumably be taken over by the Romanian child protection authorities some time during the first half of 2009. The Guardianship Agency asked the foster parent to prepare the child for the handover procedure. The SOS Children's Village staff was also asked to have two colour ID-size photos taken of the child for the issue of the travel documents necessary for the child's departure from Hungary. The Guardianship Agency asked the SOS Children's Village staff to suggest a date for the handover of the child.

In a letter dated 11 November 2009, the head of the SOS Children's Village Foster Parent Network (*Nevelőszülői Hálózat*) stated that, because of the child's health condition, the date of repatriation should not be earlier than 20 January 2010.

In a letter dated 10 December 2009, with reference to the letter sent by the head of the SOS Children's Village Foster Parent Network, the Guardianship Agency told the Agency that the repatriation of the child and the other three children of Romanian nationality should only take place on 20 January 2010 at the earliest.

On 18 January 2010, the Guardianship Agency notified the head of the SOS Children's Village that the child would be handed over at 10 a.m. on 27 January 2010 in the Embassy's building. The Guardianship Agency requested the head of the SOS Children's Village assistance to make sure that their staff would bring the child to the building of the Embassy on the given date and time and then transport the child to the Romanian-Hungarian border. The Guardianship Agency also requested that a child protection professional of the SOS Children's Village accompany the child until the child was handed over to the representative of the Romanian child protection authority.

According to the relevant documents, on 27 January 2010 the child was not handed over in the Embassy's building but in the official premises of the Bors Border Crossing Point, which is the Romanian side of the Ártánd Border Crossing Point. Similarly to the other case, neither the competent county police nor the commander of the Hungarian border-crossing point were informed of the child's departure. As a result, the officers of the Border Crossing Point were not able to provide us with information regarding the exact time of the child's departure and they had no information of the handover procedure of the child.

There is no information in the documents detailing who handed over the child on behalf of Hungary to the Embassy's consul, nor where and when this procedure took place. There is also no information specifying which staff members of the SOS Children's village accompanied the child to its new place of care.

The SOS Children's Village staff members stated that it had been their request to hand over the child at the border and not in Budapest, and that they had wanted to accompany the child all the way to the Romanian place of care, and not only to the border. This request was made because the SOS Children's Village staff had been informed through personal contacts that the Guardianship Agency had not informed the Romanian child protection staff of the unaccompanied child's health condition. As the minor suffered from a milk allergy and pyelectasis, and thus required the utmost level of attention to its care, feeding, and treatment of the rash, the foster parent insisted in informing the Romanian staff in person of the child's key health information.

According to a letter sent by the Embassy on 25 March 2010 to the Budapest Child Protection Services and according to the attached Romanian documents, the child was handed over by the consul of the Embassy to a staff member of the Covasna County Council's Social Support and Child Protection Directorate.

The temporary guardian reported to the Guardianship Agency in writing on 30 March 2010 (and sent the Agency the relevant documents) that the Romanian child protection authority's personnel had taken over the child. The temporary guardian also asked to be relieved of the obligation to act as the temporary guardian as the temporary custody had been terminated.

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 to legal remedy: "In the Republic of Hungary everyone may seek legal remedy, in accordance with the law, to judicial, administrative or other official decisions which infringe their rights or legitimate interests. An Act of Parliament passed by a majority of two thirds of the votes of the Members of Parliament present may impose restrictions on the right to seek legal remedy in the interest of, and in proportion with, the adjudication of legal disputes within a reasonable period of time." [Article 57 (5) of the Constitution];

The right of free movement and the right to freely select the place of stay: "A person legitimately staying in the territory of the Republic of Hungary has the right of free movement and the right to freely select his or her place of stay, including the right to select his or her residence and the right to leave the country, except for the cases defined by Act of Parliament.

A person legitimately staying in Hungary may only be expelled on the basis of a decision passed in accordance with the relevant Acts of Parliament." [Article 58 (1) and (2) 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 right to non-discriminatory treatment: "The Republic of Hungary will guarantee to each person staying in the territory of Hungary his or her human and civil rights without any discrimination of any kind, irrespective of the person's race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." [Article 70/A (1) of the Constitution].

Applicable laws:Act IV of 1952 on marriage, family and guardianship

Section 41 (1) A fictitious person or persons must be registered in the child's birth certificate as the father or as the parents immediately after birth if the child's parents are unknown, or, if the father cannot be identified, when the mother requests so or ex officio after the third birthday of the child. The guardianship authority is entitled to register such fictitious person/persons in the birth certificate.

(2) In such cases, the family name of the father shall be the family name of the closest known male antecedent of the mother on her mother's side, if the mother is known. At the mother's request, the father's family name may also be

a) the mother's family name;
b) some other family name specified by the mother, insofar as that does not violate the legitimate interests of another person.

(3) No family name may be selected that is injurious to the child.

(4) The guardianship authority will define the other personal data of the child at its own discretion; however, these may not violate the legitimate interests of others.

Section 42 (1) The child shall either use his or her mother's or father's family name, depending on the agreement between the parents. If the parents are married, all their common children born during the marriage shall have the same family name. If the spouses share the same matrimonial name, their children may only be given their common matrimonial name. If the parents keep their own family name, they may agree that the children shall have both family names. The child's family name may not consist of more than two words.

(2) If there is no person identified as the father of the child, the child shall use his or her mother's family name until the fictitious father is registered in the birth certificate. In the procedure to register the fictitious person in the birth certificate, the mother may choose that the child continue to use her family name.

(3) The child's given name is selected by the parents.

Minister of the Interior Decree 6/2003 (III.7.) on the births, deaths and marriages register, on the marriage procedure and on names

Section 48 (1) The registrar shall leave the entries of the child's family name and of the father's data empty in the birth register and will not finalise it by a signature if the father's identity cannot be established at the time the birth is registered. In the Notes section of the birth register, the mother's marital name shall be indicated if the child is named pursuant to Section 25 (1) d) or (3) of Act IV of 1952 on marriage, family and guardianship (hereinafter: the "Family Code").

(2) The registrar will keep a separate register of births registered without the father's data. The register will be reviewed once in every six months and the registrar will ask the mother or the guardianship agency charged with the case to obtain the missing data. If the missing data are not registered within 3 years from the birth of the child, the registrar will ask the guardianship agency to establish the data of the fictitious father *ex officio*.

Act LV of 1993 on Hungarian citizenship

Section 4 (1) A non-Hungarian citizen may apply for naturalisation if:

a) the person resided in Hungary continuously for a period of eight years prior to the submission of the application;

b) according to Hungarian law, the person has a clean criminal record, and at the time of the decision on the application, there are no pending criminal proceedings against him or her before a Hungarian court;

c) his or her livelihood and residence are assured in Hungary;

d) his or her naturalisation does not violate the interests of the Republic of Hungary; and

e) he or she provides proof of having passed the relevant examination of basic constitutional studies in the Hungarian language, or proof that he or she is not required to take this exam by virtue of this Act.

(2) If the conditions defined in subsection (1) items b) to e) are satisfied, a non-Hungarian citizen who has resided in Hungary continuously over a period of at least three years prior to the submission of the application may be naturalised on preferential terms, provided that

a) the person has lived in a valid marriage with a Hungarian citizen for at least three years, or if the marriage has ended as a result of the spouse's death;

b) the person's child of minor age is a Hungarian citizen;

c) the person has been adopted by a Hungarian citizen, or

d) the person has been recognised as a refugee by a Hungarian authority.

(3) If the conditions defined in subsection (1) items b) to e) are met, a non-Hungarian citizen claiming to be of Hungarian ethnicity and who has lived in Hungary for at least one year at the time of the submission of the application, and at least one of whose antecedents was a Hungarian citizen, may be apply to be naturalised on preferential terms.

(4) A non-Hungarian citizen who has had a residence in Hungary for at least five consecutive years before the date of submission of the application, and if the conditions defined in subsection (1) items b) to e) are met, may be naturalised on preferential terms if the applicant

a) was born in the territory of Hungary;

b) established residence in Hungary while a minor;

c) is stateless.

(5) The criteria of continuous residence in Hungary for the periods of time defined in Subsections (1)-(4) may be waived for minors if the minor's petition for naturalisation is submitted together with that of the parent's or if the minor's parent has been granted Hungarian citizenship.

(6) Minors may be granted Hungarian citizenship if adopted by a Hungarian citizen, regardless of the child's residence.

(7) On recommendation of the Minister responsible for citizenship affairs (hereinafter: "Minister"), the President of the Republic may grant an exemption from the criteria of continuous Hungarian residence as specified in paragraphs (1) to (4) and the condition specified in paragraph (1) items c) and e) if the naturalisation of the petitioner touches upon an important interest of the Republic of Hungary.

Act II of 2007 on the entry and stay of third country nationals

Section 29 (1) Even if the requirements for a residence permit specified in this Act are not met, the following persons shall be granted a residence permit on humanitarian grounds:

d) any third-country national born in the territory of the Republic of Hungary and who has been removed from the custody of his or her guardian having custody under Hungarian law, as well as unaccompanied minors;

Section 76 (1) Proceedings for the recognition of the status of statelessness are opened upon the submission of an application to the refugee authority for the recognition of the status of

statelessness by a person lawfully residing in the territory of the Republic of Hungary (hereinafter: “applicant”). The application may be presented orally or in writing.

(2) Any request submitted orally shall be recorded in writing in the form of minutes by the immigration authority.

(3) Upon submitting the application, the immigration authority shall inform the applicant of his or her rights and obligations in the proceedings, the legal consequences of any breach of such obligations and of the designated place of accommodation.

(4) The acknowledgement of the information shall be recorded in the form of minutes.

Section 77 (1) The applicant shall attend the proceedings in person and must obligatorily be heard.

(2) During the proceedings, the applicant may use his or her native language or a language he or she understands for verbal and written communication.

(3) The applicant shall be provided access to legal counselling.

Section 78 (1) An application for the establishment of the status of statelessness shall be rejected by way of a formal resolution if the applicant

a) falls within the scope of Paragraph 2 of Article 1 of the United Nations Convention relating to the Status of Stateless Persons signed in New York on 28 September 1954, promulgated by Act II of 2002; or

b) terminated his or her nationality deliberately, with a view to obtaining stateless status.

(2) The refugee authority shall discontinue the proceedings if the applicant

a) dies;

b) withdraws his or her application in writing;

c) does not appear at the personal interview in spite of a written notice and fails to appropriately justify his or her absence;

d) has departed for an unknown destination and therefore makes it impossible to continue the proceeding.

Section 79 (1) In the proceedings for the recognition of stateless status, the applicant is required to prove or substantiate his or her stateless status, with particular regard to the State

a) of his or her place of birth;

b) where his or her previous permanent or habitual residence was located; and

c) of the nationality of his or her family members and parents.

(2) In the procedure referred to in (1), the refugee authority shall provide administrative help through the Hungarian diplomatic missions upon request.

Section 80 (1) It is not possible to appeal against a decision in the procedure for the establishment of the status of statelessness.

(2) A request for judicial review may be filed with the refugee authority within 15 days from the receipt of the decision. The authority shall forward the request for judicial review together with the documents of the case (and its opinion on the request for judicial review) to the court without delay.

(3) The Municipal Court of Budapest, which has exclusive competence over such cases, shall decide on the statement of claim within ninety days of receipt of the statement of claim. The court must hear the applicant in person. No personal hearing is necessary if the applicant cannot be summoned from the specified address or leaves the address for an unknown destination. The court may overturn the decision.

(4) The procedure for the recognition of statelessness is free of charge.

Section 81 The representative of the United Nations High Commissioner for Refugees may take part in any phase of the procedure for the recognition of statelessness. As part of this,

- a)* the representative may attend the personal interview of the applicant;
- b)* may provide administrative help to the applicant;
- c)* may view the documents generated in the course of the procedure and may make copies thereof;
- d)* the refugee authority will send the administrative and the judicial decision to the representative.

Act XXXI of 1997 on the protection of children and on guardianship administration

Section 4 (1) The Act applies to:

a) children, young adults and their parents who are Hungarian citizens staying in the territory of the Republic of Hungary, and, unless otherwise provided by an international treaty, to persons settled down in Hungary, who are immigrants, received persons, recognised as refugees, persons subject to subsidiary protection or stateless persons, with the exceptions specified in (2) and (3) below;

b) a person authorised to enter and move freely as per the Act on the entry and stay of persons with the rights of free movement and stay (hereinafter: “Free Movement Act”) if the person applying for the support exercises his or her right of free movement and his or her right of stay over three months in the Republic of Hungary in accordance with the Free Movement Act and has a registered residence in the Republic of Hungary in accordance with Act LXVI of 1992 on the personal data and address register of citizens.

(2) For the purposes of the extraordinary child protection benefit, in addition to the persons listed in paragraph (1), the scope of the Act scope will extend to the children of citizens of states parties to the European Social Charter who are lawfully staying in the Republic of Hungary.

(3) In addition to the persons listed in paragraphs (1) and (2), the effect of this Act shall also extend to the protection of any child without Hungarian citizenship staying in the Republic of Hungary if the failure to provide temporary custody for the child, or the failure to order the supervision of the raising of the child or the failure to appoint a temporary guardian would endanger the child or cause the child irreparable damage. The provisions of this Act will apply to the procedure for the protection of a child having established a habitual residence in Hungary and having the right of free movement and stay in Hungary, provided that, in marriage related cases and in procedures related to parental responsibility, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters (repealing Regulation (EC) 1347/2000) does not provide otherwise.

Section 72 (1) If the child is left without supervision, or if the child or his or her family present a risk to the child’s physical, mental, emotional or moral development, thus requiring immediate custody, the local government's official, the guardianship agency, the police, the public prosecutor, the court or the head of the penal institution (hereinafter: “referring body”) will temporarily place the child

a) with a parent capable of raising the child and living separately, or with another relative or person if custody with a parent is not possible;

b) a foster parent providing care to children placed temporarily, or, if this is not possible, at a children's home capable of providing temporary custody, and will notify the guardianship agency without delay, and, if the child is a foreign citizen (excluding a person specified in Section 4 (1) *b)*), will also notify the guardianship agency appointed by the Government.

(3) The referring body will ensure that the children are transported to the place of care.

(4) When the child is given into temporary custody, the parent's right to care for and raise the child is suspended. The decision of the referring body is non-appealable.

Section 73 (1) With the exception specified in paragraph (3), the guardianship agency, after temporary custody is ordered, regardless of the referring body in question, will

a) within 22 working days, terminate the temporary custody insofar as there is no reason for it to remain in effect,

b) within 27 working days, order the placement of the child in temporary or long-term care, or

c) within 45 business days, start litigation to maintain or modify the effect of the temporary custody or for the change of custody, or for the termination of the parent's right of supervision.

(2) A court decision of custody may only be modified through the legal proceedings defined in Section (1) c) if the reasons on which the court's custody decision was based have since changed significantly.

(3) After the temporary custody of a child of foreign nationality (excluding the person specified in Section 4 (1) b)), the guardianship agency appointed by the Government will promptly

a) *notify the competent police station to settle the child's continued stay in Hungary, if applicable, and/or*

b) *initiate a legal assistance procedure for the purpose of placing the child under guardianship or putting the child up for adoption; or*

c) *notify the relevant diplomatic mission for the repatriation of the child to the country of his or her nationality.*

(4) The guardianship agency appointed by the Government will review the temporary custody of the child of foreign nationality (excluding the person specified in Section 4 (1) b)) immediately after the arrival of the reply from the country of origin, and *ex officio* once every six months. On the basis of the findings of the review, the guardianship agency will decide whether to maintain temporary custody, to change of the place of care or, if it is not prohibited by domestic or international law, to place the child under guardianship or to put the child up for adoption.

The findings of the investigation

I. Findings relating to the registration of the birth, the right to a name and the registration of the nationality

According to **Article 7 (1) of the Convention on the Right of the Child**, every child has the fundamental right to be *registered* immediately after birth and to have the right from birth to a *name*, the right to acquire a *nationality* and as far as possible, the right to know and be cared for by his or her parents.

According to Section 9 of Law-Decree no. 17/1982 on the births, deaths and marriages register, on the marriage procedure and on names (hereinafter: "Law-Decree"), all births must be reported to the competent registrar by no later than the first working day after the birth for the purpose of registration.

According to the data of the investigation, the health institutions complied with their obligation to report the birth of a child of a foreign mother on the first working day after the birth; thus I find no infringement relating to any constitutional right in this regard.

A birth that takes place in a healthcare institution must be reported by the head of the institution, using the standard form provided for this purpose. The form for reporting births must be completed on the basis of the document used for establishing the parents' identity. Foreign citizens verify their identity by presenting a valid travel document, an ID card issued by the Hungarian authorities or, if applicable, by showing a document issued by the refugee authorities or foreign police authorities.

Since Section 3 (1) of Act LV of 1993 on Hungarian citizenship (hereinafter: "Citizenship Act") states that a child of a Hungarian citizen becomes a Hungarian citizen by birth, the registrar registering the birth must examine *ex officio* whether the parents have Hungarian citizenship.

The registrar registers the woman who has given birth to the child as the child's mother. If at the time of birth the mother is not married and if it is impossible to establish the identity of the father in any other way, the registrar leaves the entries of the register about the father's data blank. In such cases, the child is registered with a birth name consisting of the mother's family name and a first name selected by the mother.

If only one parent - that is, the mother - of the child born in Hungary is known, the registrar will only check her nationality. If the mother has no identification documents, the registrar will register her personal data and nationality on the basis of her statement. In these cases contested by the petitioners, both mothers verified their Romanian citizenship by presenting Romanian passports; as a result, this is what the registrars registering the births entered in the birth register. The children of the Romanian citizen mothers, both born in Hungary from an unknown father did, not receive Hungarian citizenship through either parent. At the time of their birth was registered, the children had no valid travel document or other document verifying their nationality. As a result, the registrars registered them as having "unknown citizenship".

I found no circumstance indicating any infringement relating to any constitutional right in connection with the registration of the children's births, family names, first names and citizenship at birth.

If a child is born in Hungary to a foreign citizen and if the foreign citizen does not hold the right of asylum, the registrar will issue a copy of the birth certificate of the birth in Hungary and will send it to the registrar's supervisory organ within five working days. If the child's father is unknown, the supervisory organ will, within 30 days, send a copy of the birth certificate to the diplomatic authorities of the foreign country of the mother's citizenship based on an international convention or reciprocal agreement.⁴ According to a staff member of the Ministry of Justice and Law Enforcement, the birth certificates of the newborn children of the Romanian mothers were mailed to the Embassy by the administrative offices. Neither the staff of the Ministry of Justice and Law Enforcement nor the staff of the administrative offices knew what had happened to the birth certificates mailed to the address of the Embassy. As the Parliamentary Commissioner for Civil Rights, I am only allowed to examine the actions of Hungarian authorities. As a result, I do not have the authority to contact the Embassy to ask what had happened to the birth certificates.

According to Article 18 of the Convention on the Rights of the Child, parents or legal guardians have the primary responsibility for the upbringing and the development of the child.

It is the parents' obligation to ascertain the legal status of the non-Hungarian citizen child, and especially to obtain the documents required to prove the child's identity and nationality.

If the foreign citizen parent verifies his or her Hungarian-born child's nationality with a document, this must immediately be registered by the registrar in the birth register. After this,

⁴ See Section 102 of Minister of the Interior Decree no. 6/2003 (III.7.).

the foreign citizenship verified by the parents will appear on the birth documents issued by the Hungarian authorities.

When the citizenship of a child staying in Hungary is unknown and the child is unaccompanied, it is the obligation of the child protection services to ascertain the legal status of the child, and especially to establish the nationality and identity of the child and to obtain the documents required for verifying these.

The system and operation of the child care provided to children under the jurisdiction of the Republic of Hungary by state and local government entities are regulated by Act XXXI of 1997 on the protection of children and the guardianship administration (hereinafter: “Child Protection Act”).

Section 4 (1) of the Child Protection Act states that the scope of the Act extends to children, young adults, and their parents who are *Hungarian citizens* staying in the territory of the Republic of Hungary, and to *those having settled in Hungary*, or who are *immigrants, received persons*, recognised as *refugees*, or who are *subject to subsidiary protection*, are *stateless* or who are *EEA citizens exercising their right of stay and free movement for a period exceeding three months in the territory of the Republic of Hungary*. In addition to the persons listed above, the Child Protection Act must also be complied with in relation to the protection of a non-Hungarian citizen child staying in the Republic of Hungary if the failure to provide *temporary custody* for the child, the failure to order the supervision of the raising of the child or the lack of appointing a temporary guardian would put *the child in danger or cause irreversible damage*. *The Child Protection Act does not use the term “minor of unknown citizenship” nor the term “unaccompanied minor”*.

If the parent leaves behind a child that does not have the documents to verify his or her identity or citizenship and the parent's destination is unknown, the guardianship agency must take any temporary measure that is required to be taken in the interest of securing the child's custody, support and care. These measures are regulated by Section 167 of Government Decree 149/1997 (IX. 10.) on the implementation of the Child Protection Act (hereinafter: “Government Decree”). The guardianship agency must notify the relevant diplomatic mission of the temporary measure undertaken to assist in the repatriation of the child to the country of the *child's nationality*.

Neither the Child Protection Act nor the Government Decree on its implementation regulates who should be notified by the guardianship agency applying the temporary measure if the child is of *unknown citizenship*, is unaccompanied and only has a birth certificate issued by the relevant Hungarian authorities.

Of any temporary measure taken in relation to an unaccompanied minor born in Hungary and of unknown citizenship, the Guardianship Agency will notify the diplomatic mission of the child's alleged or actual citizenship. If only the mother's identity is known, the Guardianship Agency will contact the diplomatic mission of the mother's nationality.

Section 73 (3) requires the Guardianship Agency to notify the relevant diplomatic mission *without delay* of the decision on the temporary measure. According to the documents available, in case number **AJB 2629/2010** the Guardianship Agency notified the Embassy on 27 July 2006 of the temporary custody ordered on 7 June 2006, while in the **AJB 4196/2010** case, the Embassy was only notified of the temporary custody on 25 May 2009, in spite of the fact that the date of the decision was 29 August 2008.

*Although it is difficult to define the exact deadline when the Child Protection Act requires the measure to be taken “without delay”, it is safe to say that the seven-week delay in the **AJB 2629/2010** case but especially the nine months of delay in the **AJB 4196/2010** case of notifying the Embassy constitute a delay which was sufficient to amount to an infringement of legal certainty rights under the rule of law as guaranteed under Article 2 (1) of the Constitution.*

Every state proceeds in accordance with its domestic law in deciding whether to grant citizenship to a person or to recognise a person as a citizen. Therefore, if one state is contacted by another in such an issue, its reaction will be governed by its domestic law.

According to the administrators interviewed during the procedure, some of the diplomatic missions reply the queries of the Guardianship Agency in writing. In general, it takes months before the reply arrives, but sometimes (such as in case **AJB 2629/2010**) it may take over a year to get a reply from the mission.

The formal reply received from the diplomatic missions can be one of the following two types. It may happen that the relevant state recognises as its citizens the mother and the child registered in Hungary as a person with unknown citizenship. The Guardianship Agency forwards the citizenship certificate received from the diplomatic mission to the registrar registering the birth even if there is no specific legal provision to this effect. The registrar then corrects the entry stating “unknown nationality” and replaces it with the nationality shown on the foreign document.

In both case **AJB 2629/2010** and case **AJB 4196/2010**, the Guardianship Agency sent the citizenship certificates to the registrars registering the births, who in turn registered the Romanian nationality in the birth registers.

I found no circumstance indicating any infringement relating to any constitutional right in connection with the clarification of the children’s Romanian citizenship and registration of their citizenship in the birth register.

We have come across documents in which the addressed state replied that it does not consider as its citizen the unaccompanied minor of an unknown father specified by the Guardianship Agency.⁵ As there is no relevant procedural rule, the practice is that the Guardianship Agency’s staff attach such documents to the file of the case and take no further action.

According to the case documents reviewed and the interviews with the guardianship agency’s staff, there are two main reasons why unaccompanied minors born in Hungary of an unknown father are not recognised as citizens.

One reason is when the state in question disputes the mother's identity. In this case, the diplomatic mission will notify the agency that it is unable to identify the mother shown in the birth records as its citizen; therefore the child's repatriation is not an option. As neither the Guardianship Agency nor the Hungarian authorities are in a position to correct the data of an unaccompanied child of an unknown father and of a mother whose place of stay is unknown, in practice, such a reply from the diplomatic mission means that both of the child's parents are unknown.

Pursuant to Section 41 (1) of Act IV of 1952 on marriage, the family and guardianship (hereinafter the “Family Code”), if the child’s parents are unknown, fictitious persons must be registered *ex officio* in the child’s birth certificate as the parents immediately after birth. Given the rules on the personal and territorial jurisdiction of the Family Code and the Law-Decree, in such cases the guardianship agencies must identify the fictitious parents as Hungarian citizens. An unaccompanied minor registered in the birth register as an unknown citizen could acquire Hungarian citizenship by descent when the data of the fictitious mother of Hungarian citizenship is registered in the birth register.

According to the interviews with the child protection professionals, Hungarian guardianship agencies generally refuse to register a fictitious parent for an unaccompanied minor of unknown citizenship and born in Hungary even if the diplomatic mission of the mother’s presumed citizenship has declared that the contacted state has no citizen corresponding to the data specified by the Hungarian authority.

⁵ See for instance the reply letter by the consulate of Ukraine located in Nyíregyháza (filing number: VII/K-9887/8).

The interviewed staff members said that the rules on registering a fictitious parent cannot be applied to unaccompanied minors of unknown citizenship for a number of reasons. First, Hungarian law may not be considered the personal law of the child of unknown citizenship and therefore the rules of the Family Code are not applicable. Second, the registration of the fictitious parent may only be effected “immediately after birth”. As a result, the deadline specified in Section 41 (1) of the Family Code typically expires by the time the Hungarian authority receives the diplomatic mission’s reply (months after the birth). Finally, the staff of the healthcare institution where the birth took place actually met the foreign woman, that is, the biological mother, thus the mother’s identity is not unknown. The staff members argued that, for legal purposes, it is irrelevant that the mother cannot be identified later on the basis of the data she has given or even evidenced by documents.

If the minor of “unknown citizenship” is not recognised as a citizen by the parents’ state of origin nor by any other state, it is a possibility that the child is *de facto* stateless.

The other reason why recognition as a citizen is denied is in the case that the domestic law of the state contacted by the Guardianship Agency provides that when a child is born abroad of parents of that state, only the parents may apply for citizenship on behalf of the child. Therefore, if the parents do not apply for the recognition of the foreign-born child as a citizen, the minor will not acquire citizenship.

In this case, the diplomatic mission will notify the agency that although it does not dispute the alleged identity or citizenship of the mother shown in the birth records as its citizen, only the parent has the right to apply for citizenship on behalf of the child in that state. When the mother does not apply for the recognition of the citizenship of the child born in Hungary of an unknown father, the procedure cannot be carried out *ex officio* and therefore the repatriation of the child is not an option. That is what happened for instance in the case filed with the Guardianship Agency under no. VII/K-9887/8, when the consulate of Ukraine in Nyíregyháza replied that it does not recognise an unaccompanied child born of an unknown father in Hungary as a Ukrainian citizen because the mother has not applied for the recognition of the child's citizenship. In such cases, there is a chance that the child is *de facto* stateless.

There are special rules in Hungarian law on the registration of the birth of a child whose mother is known but whose father is unknown

According to Section 48 (1) of Minister of the Interior Decree no. 6/2003 (III. 7.) on the implementation of the Law-Decree (hereinafter: “Implementation Decree”), if the father of the child cannot be identified at the time of registering the birth, the relevant entries of the birth register should be left empty. In this case, the registrar will not close the entry, and will instead, once every six months, ask the mother or the guardianship agency of the case to obtain the missing data. According to Section 48 (2) of the implementation decree, if the “missing data are not registered by the registrar within 3 years from the birth of the child, the registrar will ask the guardianship agency to establish the data of the fictitious father *ex officio*.” In my view, the rules of the Law-Decree and its Implementation Decree must be applied to the registration of the birth of any child under the jurisdiction of the Republic of Hungary.⁶ As opposed to this notion, guardianship agencies only register a fictitious mother under section 41 (1) of the Family Code in the case of foundlings of unknown parents if the child's personal law (with regard to Section 3 (3) of the Citizenship Act) is Hungarian law.

⁶Section 11 (4) of Law-Decree no. 13 of 1979 states that if a person's personal law cannot be identified and the person has no residence, the personal law of this person is determined by the place of habitual stay. If a person has multiple places of habitual stay and one of these is in Hungary, the personal law of the person is Hungarian law.

For similar reasons, the rules for the establishment of a fictitious father as referred to in Section 48 (2) of the Implementation Decree are only applied by the guardianship agencies if the child's mother is a Hungarian citizen. My opinion is that even the foreign citizenship of the mother of an unaccompanied minor of unknown citizenship but born in Hungary will not exclude the possibility of establishing a fictitious father of Hungarian citizenship. In this case, the unaccompanied minor of unknown citizenship could acquire Hungarian citizenship by descent when the data of the fictitious mother of Hungarian citizenship is registered in the birth register. The acquisition of Hungarian citizenship through a fictitious father will not prevent the possibility of granting the mother's citizenship to the child if the diplomatic mission contacted by the Guardianship Agency later recognises the child as a citizen.

Given that under Section 50 (2) of the Law-Decree the birth register may only include data of the fictitious parent as established by the Guardianship Agency, the registrars cannot register any data without a formal decision of the Agency.

According to Article 7 (1) of the UNCRC, every child has the right to acquire a nationality. *The practice of guardianship agencies of not applying the legal rules on establishing fictitious parents for unaccompanied minors of unknown citizenship and unknown parents but born in Hungary results in the de facto statelessness of the child, which in turn violates the Republic of Hungary's duty under Article 7 (1) of the Convention on the Right of the Child. This results in turn in an infringement of legal certainty rights forming part of the rule of law (Article 2 (1) of the Constitution), to the harmonisation of international obligations and domestic law (Article 7 (1) of the Constitution) and to the right of the child to be protected by the state (Article 67 (1) of the Constitution).*

It sometimes happens that the contacted state does not reply to the Guardianship Agency's letter for a longer period despite additional requests to proceed urgently in the matter. There is no rule stating how long the Guardianship Agency is required to wait for the diplomatic mission's reply and there is no rule on what the Agency must do if there is no reply from the mission within a reasonable period. The Agency's staff members said that the Guardianship Agency from time to time tries to contact these diplomatic missions again; it sometimes persists in trying to establish contact for years. If there is no formal recognition of nationality, the unaccompanied child of unknown citizenship is a *de facto* stateless person.

If the diplomatic mission contacted by the Guardianship Agency refuses to recognise the unaccompanied child as a citizen, or until the reply of the mission arrives, the birth certificate of the child records the child as a person of unknown citizenship.

As the Guardianship Agency has no obligation to take measures, during the investigation the Guardianship Agency did not have records of the number of the cases concerning children among the 43 unaccompanied minors of unknown citizenship in which the contacted state had declared that the child was not recognised as a citizen of that state. Also, there are no statistics of the number of cases in which the diplomatic missions have not replied for at least a year, even in spite of repeated requests to respond in the matter.

II. Findings related to the legal stay of the unaccompanied minor of unknown citizenship in Hungary

According to Article 69 of the Constitution, each Hungarian citizen has the fundamental right to stay in the Republic of Hungary. As a child, having no ancestors of Hungarian citizen, born of a foreign parent in Hungary does not acquire citizenship by descent without a Hungarian parent, the child may only stay in Hungary in accordance with the rules applicable to foreigners.

Foreign citizens need a valid ID card or a passport and, in certain cases, a visa to travel to the Republic of Hungary and to stay in the country. For prolonged visits (typically

exceeding 3 months), foreign citizens will also need, in addition to the documents listed above, a residence permit for staying in Hungary. Not even an unaccompanied child of unknown citizenship is exempted from the obligation to obtain this document.

Similarly to the other Member States of the European Union, there are different regimes applicable to the entry and stay of the citizens of the European Economic Area (hereinafter: “EEA”) and to the entry and stay of the citizens of so-called “third countries”.

Act I of 2007 on the entry and stay of persons with the rights of free movement and stay applies to the citizens of EEA Member States and their families (hereinafter: “Act I of 2007”), while Act II of 2007 on the entry and stay of third-country nationals (hereinafter: “Act II of 2007”) applies to citizens of third countries.

In spite of the fact that an unaccompanied minor born in Hungary is registered by the registrar as an unknown citizen, the “*unknown citizen*” status does not appear as a status in either Act I of 2007 or Act II of 2007. As their status is unclear, the rights and obligations of minors of unknown citizenship cannot be established beyond all doubt.

According to Constitutional Court decision no. 9/1992 (I. 30.), “legal certainty is an indispensable element of the state under the rule of law. Legal certainty requires the state (and primarily the legislative branch) to ensure that the law as a whole, the individual fields of law and also the individual regulations are clear, unambiguous, and reliable and that their impact is foreseeable for those bound by the rules. Thus, legal certainty requires that both the individual norms and the operation of individual legal institutions be unambiguous.”

It causes an infringement of constitutional rights related to legal certainty forming part of the rule of law (Article 2 (1) of the Constitution) that there are no laws whatsoever regulating the status of a foreigner of unknown citizenship staying in the territory of the Republic of Hungary.

The permits and documents required for the legal stay of the unaccompanied minor of unknown citizenship in Hungary must be obtained by the temporary guardian of the child.

As there is no clear status, in the course of issuing the residence papers, the Office of Immigration and Nationality treats an unaccompanied child of unknown citizenship born in Hungary as a citizen of the mother’s country of origin (as shown in the birth certificate).

As in both case **AJB 2629/2010** and case **AJB 4196/2010** the mothers of the unaccompanied children of unknown citizenship were Romanian nationals, when making its decision on permitting their stay in Hungary, the Office of Immigration and Nationality followed the rules of Act I of 2007 even before the children were formally recognised as Romanian citizens.

In spite of the fact that the mothers of the vast majority of unaccompanied minors of unknown citizenship born in Hungary are Romanian citizens, Act I of 2007 does not recognise the status that should be applied to EEA citizen children “who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so”.

As both unaccompanied minors were under temporary custody by the Guardianship Agency, meaning that they had accommodation and support in Hungary, the Office of Immigration and Nationality issued both children address cards certifying the Hungarian residence of EEA citizens and issued documents allowing them to stay in Hungary for a period exceeding three months. As the children had no travel documents, both EEA residence permits remained in the possession of the issuing authority. For the child considered an EEA citizen, the Immigration and Nationality Office issued an official certificate that was not an identity document but which certified that the child had obtained a proper residence permit although it had not been possible to hand that over as the child had no valid passport.

Under section 23 (1) c) of the Citizenship Act, an unaccompanied minor of unknown citizenship holding a registration certificate issued to EEA citizens may be obtain Hungarian

citizenship after a specific statutory period has elapsed. Under section 4 (3) of the Citizenship Act, an unaccompanied minor from a mother of Hungarian origin of unknown citizenship but having a Hungarian address and holding a registration certificate issued to EEA citizens may be naturalised and the application for naturalisation may be submitted on the day after the residence permit is issued; there is no statutory period that must elapse before the naturalisation application is submitted.

In each of the two cases, the mothers of the children were of Hungarian origin and spoke Hungarian, therefore the temporary guardian could have applied for naturalisation on 27 September 2008 on behalf of the child specified in case no. **AJB 2629/2010** and on 29 November 2008 on behalf of the child in case no. **AJB 4196/2010** before the registrar or local government official of the area of the children's residence.⁷ Given that in the naturalisation procedure of applicants who are of a very young age no national security screening is required, their cases, after proper preparations, could have been submitted to the President of the Republic within three months.

The acquisition of Hungarian citizenship would not have excluded the possibility of acquiring the citizenship of the unaccompanied child's known parent if the state contacted by the Guardianship Agency recognised the child as a citizen. However, the acquisition of Hungarian citizenship would have made it possible to put the child in case no. **AJB 4196/2010** up for adoption in Hungary, in accordance with the mother's original wishes. However, as the temporary guardians appointed by the Guardianship Agency failed to apply for the naturalisation of the two children, they had no chance of acquiring Hungarian citizenship.

The Act on the entry and stay of third-country nationals uses the category of unaccompanied minors. Section 2(e) of Act II of 2007 defines "*unaccompanied minors: citizens of a third country* below the age of 18 years who have entered the territory of the Republic of Hungary without the company of a person of adult age responsible for their supervision under law or custom, or who remained without supervision following entry; as long as they are not effectively taken into the care of such a person."

As the children of unknown citizenship and born of mothers who were citizens of third countries did not "enter" the territory of Hungary, they are not unaccompanied minors but persons who were "born in the territory of the Republic of Hungary and who have been removed from the custody of their guardians having custody according to Hungarian law."

Under Section 29 (1) d) of Act II of 2007, a *humanitarian residence permit* is issued by the Office of Immigration and Nationality "to any third-country national born in the territory of the Republic of Hungary and who has been removed from the custody of the guardian having custody according to Hungarian law, and to unaccompanied minors". The humanitarian residence permit is valid for a year and may be extended by periods of a maximum of one year at a time.

According to Section 4 (1) of the Child Protection Act, the Act's scope does not include foreigners living in Hungary and holding a document called "residence permit" and therefore it includes neither unaccompanied minors who are citizens of a third country nor children of unknown citizenship and born of third-country national parents.

In spite of the fact that both unaccompanied minors are citizens of a third country and minors born of third-country nationals in Hungary but then removed from the custody of the person responsible for them are considered *children lacking a family environment*, once they have obtained a *humanitarian residence permit*, neither one is entitled to receive additional child protection support beyond measures of a temporary effect.

⁷ See Section 13 (1) a) of Act LV of 1993 on Hungarian citizenship

At the time of the investigation, the Budapest and Pest County Directorate of the Office of Immigration and Nationality knew of three such minors holding a humanitarian residence permit and born in Hungary of third-country national parents “who were born in the territory of the Republic of Hungary and who have been removed from the custody of the guardian having custody according to Hungarian law.”

While the Guardianship Agency’s competence extends to the entire country, the residence permits of such minors are issued by the regional directorates of the Office of Immigration and Nationality having jurisdiction according to the child’s place of stay. As a result, the Budapest and Pest Country Regional Directorate could not give us information on the total number of such children in Hungary.

According to Article 3 (1) of the Convention on the Rights of the Child, 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. When the staff of the Office of Immigration and Nationality treats an unaccompanied child of unknown citizenship as a citizen of the mother’s presumed or actual country of origin (as there is no legal rule to the contrary), they disregard the fact that the child should be primarily treated as a child instead of as a foreign citizen.

If an unaccompanied minor of unknown citizenship born in Hungary is granted a humanitarian residence permit, it will mean that the child is denied the full child protection support granted to children in similar life situations but holding the registration certificates EEA citizens are entitled to. *This situation, partly caused by the inadequate regulations of Section 4 (1)-(2) of the Child Protection Act and partly by Section 29 (1) d) of Act II of 2007, results in the discriminatory treatment of a child of unknown citizenship and holding a humanitarian residence permit, and therefore infringes the right to the harmonisation of the obligations under international law and domestic law as laid down in Article 7 (1) of the Constitution, as well as the child’s right to receive protection from the state as granted in Article 67 (1) of the Constitution and the prohibition of discrimination specified in Article 70/A (1) of the Constitution.*

After the Guardianship Agency’s staff attach to the case file the letters in which the diplomatic mission refuses to recognise the unaccompanied child as a citizen and takes no further action, the Office of Immigration and Nationality is not notified that the child is definitely not the citizen of the country specified in the birth register and thus presumably stateless. In these cases, when the officials of the Office of Immigration and Nationality extend the residence permits, they still treat the child as a citizen of the mother’s presumed country of origin.

The situation when the diplomatic mission of the mother’s presumable country of origin does not react to the Guardianship Agency’s query is even more uncertain than when recognition is formally rejected. One reason for the failure to reply is that the mother could not present identification documents at the time of the birth registration and therefore her personal data and citizenship were registered on the basis of her statement which was later proven to be false. Sometimes the document shown by the mother to verify her identity and citizenship is later shown to be invalid. It also happens that the diplomatic mission contacted by the Guardianship Agency does not reply because there are no appropriate records for the state’s relevant authorities to tell whether the mother (whose place of residence is unknown) is a citizen of the given state.

Although the Guardianship Agency does not have a formal statement disputing the identity or the nationality of the mother when the diplomatic mission does not reply, the prolonged silence of the relevant states is definitely an indication that the state will not recognise the unaccompanied child born in Hungary as a citizen of that state. Despite the fact that in such cases there is a possibility that the child is *de facto* stateless, the Guardianship

Agency does not notify the Office of Immigration and Nationality that the Agency has not received a reply.

According to Article 3 (1) of the Convention on the Rights of the Child, in all actions concerning children undertaken by administrative authorities of the states, the best interests of the child will be a primary consideration.

The Guardianship Agency should make sure that the Office of Immigration and Nationality, acting through the temporary guardian, initiates the recognition of the child as a stateless person under Section 76 (1) of Act II of 2007 especially when the recognition as a citizen of an unaccompanied child with a humanitarian residence permit is formally rejected or when the diplomatic mission does not reply to the query for a longer period.

As the proceedings for the recognition of statelessness status “are opened upon the submission of an application to the immigration authority for stateless status by a person lawfully residing on the territory of the Republic of Hungary” and as “the application may be presented orally or in writing”, the Office of Immigration and Nationality is not authorised to carry out the procedure if the legal guardian does not apply for the recognition.

According to Section 11 (3) of Law-Decree no. 13 of 1979, a stateless person's personal law is Hungarian law if his or her permanent residence or, failing that, if the place of habitual stay is in Hungary. The rules on the registration of the fictitious parents may be applied in the case of a stateless minor, and, even if such rules are not applied, the stateless child may be naturalised after a period of five years has elapsed. The stateless minor is entitled to receive child protection support under the Child Protection Act on the same terms as a child who is a Hungarian citizen staying in Hungary.

The fact that a humanitarian residence permit has been issued cannot be taken into consideration when a decision is made on the application for naturalisation; accordingly, unaccompanied children with such permits cannot be naturalised by a regular procedure. In the absence of formal recognition, an unaccompanied minor of unknown citizenship born in Hungary and holding a humanitarian residence permit is not entitled to receive the child protection support listed in the Child Protection Act nor to the protection available to stateless persons under the various international treaties signed by the Republic of Hungary.

The practice of guardianship agencies of attaching to the case file the reply of the diplomatic mission refusing the recognition of unaccompanied minors of unknown citizenship without further action instead of initiating the recognition as a stateless person, as well as their failure to initiate the recognition of the child's stateless status when there is no reply from the diplomatic mission for a prolonged period, result in an infringement of constitutional rights related to legal certainty forming part of the rule of law (Article 2 (1) of the Constitution), to the harmony of international obligations and domestic law (Article 7 (1) of the Constitution) and to the children's right to be protected by the state (Article 67 (1) of the Constitution).

III. Findings related to child protection support and measures; findings regarding the repatriation of unaccompanied minors

According to Sections 4 (3) and Section 72 (1) b) of the Child Protection Act, if for any reason the child is left without supervision and therefore immediate custody is required, the local government's official, the guardianship agency, the police, the public prosecutor, the court or the head of the penal institution will place the child *temporarily* at a foster parent or in a children's home and will notify the Guardianship Agency if the given child is a foreign national.

The statutory provision on the temporary custody of the child left without supervision must be applied to all children staying in the Republic of Hungary regardless of nationality,

which means that the rule applies to all children staying in Hungary, which thus includes unaccompanied minors of unknown citizenship born in Hungary.

The guardianship agencies immediately took measures to secure temporary custody for the newborn infants of unknown citizenship after the foreign national mothers had left the hospital and they notified the Guardianship Agency of this without delay. In this regard, I found no circumstance indicating any infringement in connection with any constitutional right.

Under Section 73 (1) of the Child Protection Act, the temporary custody of the minor is an interim measure. If it is applied, the Guardianship Agency will, as a general rule, either terminate the custody within 22 working days or orders the temporary or long-term care of the child within 27 working days. During temporary custody, the parent's right to take care of and raise the child is suspended and the unaccompanied minor's legal guardian is the temporary guardian. If the child is taken into temporary or long-term care, a guardian must be appointed.

It is a general principle stated in Section 2 (4) of the Child Protection Act that a child no longer staying with his or her family for any reason must be provided safety, care, education and the opportunity for healthy personal development in accordance with the child's age and needs. It is indispensable for proper mental and moral development that the child be placed in a family as soon as possible. The aim of foster parental care is to provide the unaccompanied minor with the security, personal and emotional bonds that can only be found in a family context. The personal relationship between the foster parent and the minor is both a tool and an objective that helps the development of the child and makes the child's losses tolerable. In such an environment, the child will learn with time how to start and maintain a family and will develop the related skills and abilities. Due to the permanent emotional ties (the essence of the relationship with the foster parent) and the tensions arising out of the temporary custody of the unaccompanied child of unknown citizenship, it is difficult to place such a child into the care of a foster parent's family.

If the Budapest Child Protection Services' staff manage to find a foster parent willing to take care of the unaccompanied minor of unknown citizenship in spite of the temporary nature of the custody, the Guardianship Agency will select the new place of care for the child with the assistance of the competent child protection expert committee in accordance with Section 82 (1) of the Child Protection Act.

There are at least three members of the child protection expert committee. Its permanent members are one paediatrician, one child psychologist and one social worker. The expert committee may ask certain experts to help with certain cases, if needed, depending on the affected child's health, mental and psychological state. In the case of the unaccompanied minors specified by the petitioners, the Budapest Child Protection Expert Committee consisting of two social workers, a paediatrician and a clinical psychologist examined whether the temporary custody of the children with an official foster parent of the SOS Children's Village would help the children's optimal development and the development of their abilities and whether the foster parent could provide them with appropriate care during the child protection support.

When making the decision on the place of care, the expert committee took into consideration the children's needs, the specialists available at the SOS Children's Village and what services are accessible in the given environment. It was a key factor that specialists capable of meeting the children's health and education requirements and any special needs of the children had to be available at the foster parent's residence.

*According to the findings of the examination, in the SOS Children's Village both minors (the minor in case no. **AJB 2629/2010** and the minor in case no. **AJB 4196/2010**) lived in a balanced and loving environment and therefore I found no infringement related to a constitutional right in connection with their placement with foster parents.*

According to Section 4 (1) a) and b), the Act must be applied regardless of the child's nationality or immigration status. For the reason mentioned above, the Guardianship Agency should treat minors with a registration certificate issued to EEA citizens and minors with humanitarian residence permits differently when a decision is made on the extension of temporary custody.

Under section 73 (4) of the Child Protection Act, the rules of the Act may not be applied to persons defined in Section 4 (1) b) of the same Act, that is, to unaccompanied minors with a Hungarian address and holding a registration certificate issued to EEA citizens. Therefore the Guardianship Agency should have put the child in case no. **AJB 2629/2010** and the child in case no. **AJB 4196/2010** into temporary or long-term care and should have appointed a guardian for them within the deadlines specified in Section 73 (1) of the Child Protection Act after receiving their EEA residence papers. The foster parent who raised the child at home and knew the child's needs well could have been appointed as the guardian instead of the official guardian of the Budapest Child Protection Services' responsible for a temporary guardian's tasks.

However, the Guardianship Agency ordered that both children remain in temporary custody until they were to be handed over to the staff of the Romanian child protection authority regardless of the residence papers the children had been issued and regardless of the fact that they both had registration certificates issued to EEA citizens and a Hungarian address.

The Guardianship Agency has no right to decide at its own discretion whether it will keep the unaccompanied minor holding a registration certificate issued to EEA citizens in temporary custody or whether it will place the child in temporary or long-term care. *The fact that the temporary custody of the unaccompanied minors in cases no. **AJB 2629/2010** and **AJB 4196/2010** was kept in effect beyond the deadlines specified in Section 73 (1) a)-c) of the Child Protection Act violated Section 4 (1) b) of Sections 4 (1) and 72 (4) of the Child Protection Act and therefore infringed the constitutional right to legal certainty as part of the rule of law and as laid down in Article 2 (1) of the Constitution, as well as the children's right to receive protection from the state as granted in Article 67 (1) of the Constitution.*

Under Article 57 (5) of the Constitution, "in the Republic of Hungary everyone may seek legal remedy, in accordance with the law, to judicial, administrative or other official decisions which infringe their rights or legitimate interests". However, Section 72 (4) of the Child Protection Act states that it is not possible to appeal against a decision in the procedure for the establishment of a stateless status.

Since the Child Protection Act excludes the possibility of appeal, it was not possible for a superior authority to recognise and correct the Guardianship Agency's unlawful conduct in relation to the temporary custody of the unaccompanied minor as there was no regular remedy procedure available. This resulted in an infringement of the right to legal remedy guaranteed under Article 57 (2) of the Constitution.

The infringement has already been recognised by the Constitutional Court, who in decision no. 114/2010 (VI. 30.) annulled the second sentence of Section 72 (4) of the Child Protection Act as of 30 September 2010.

Under the rules of Section 4 (1) a) and b), the Act does not apply to unaccompanied minors with a humanitarian residence permit. Under Section 29 (1) d) of Act II of 2007, only a *humanitarian residence permit* may be issued for any third-country national born in the territory of the Republic of Hungary and who has been removed from the custody of his or her guardian having custody according to Hungarian law, and for unaccompanied minors. Consequently, such children *may only be placed under temporary guardianship*.

If statelessness is not officially recognised, an unaccompanied minor born of a mother who is a third-country national and whose citizenship is not recognised by the diplomatic

mission may only be placed under temporary guardianship, just as in the case of a similarly situated child in whose case the diplomatic mission does not react to the Guardianship Agency's query. No permanent guardian may be appointed for an unaccompanied child under temporary guardianship. Also, such a child will not be eligible for the follow-up care (as provided by Section 93 of the Child Protection Act) to which he or she would otherwise be entitled to as a young adult up until the age of 24.

The Child Protection Act does not limit the "temporary" guardianship of a foreign national child ordered under Section 74 (4) of the Child Protection Act. As there is no statutory limit, it is possible that the temporary guardianship of the minor would only expire when the child reaches the age of 18. *A form of care that is provided throughout childhood and until the point the child comes of age can hardly be called "temporary"*. It cannot be maintained beyond the age of majority, as adults no longer have the rights available to the child.

Under Article 2 point 1 of the Convention on the Rights of the Child, states must guarantee the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, that is, 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. As the unaccompanied minor holding a humanitarian residence permit is also a child lacking the care and protection of his or her parents or official custodian, by virtue of Article 2 (1) of the Convention on the Rights of a Child, he or she is entitled to the same level of child protection support as his or her peers holding registration certificates for EEA citizens.

Section 4 (1) a) and b) of the Child Protection Act, by not including unaccompanied minors and minors holding a residence permit, and Section 72 (4), by not limiting the term of temporary guardianship for children holding residence permits, infringe the constitutional right to the harmonisation of the obligations under international law and the domestic law as laid down in Article 7 (1) of the Constitution, as well as the right of children to receive protection from the state as granted in Article 67 (1) of the Constitution and the prohibition of discrimination specified in Article 70/A (1) of the Constitution.

Under Article 8 of the Convention on the Rights of the Child, states must respect the child's right to maintain his or her identity, including citizenship, name and family relations. If the child is deprived of the elements of his or her identity or a part of these, the states will provide appropriate support and protection to make sure the identity is re-established as soon as possible.

With regard to Article 8 of the Convention on the Rights of the Child, after a child of unknown citizenship and no longer under parental supervision has been given into temporary custody, the Guardianship Agency must gather information on the possibility of re-establishing connection between the child and his or her relatives and returning the child to his or her own family in addition to asking the diplomatic mission of the mother's country of origin to recognise the child as a citizen.

Article 2 of the Convention on the Right of the Child declares that it is the state having jurisdiction over the child that is responsible for respecting the child's rights set forth in the Convention. However, in the case of both children holding registration certificates issued to EEA citizens, the Guardianship Agency only asked the diplomatic mission (in addition to the question as to whether Romania recognises the child as a Romanian citizen) whether Romania wanted the child to be repatriated or whether it would transfer the guardianship rights to the competent Hungarian authorities.

According to Article 30 (1) of the treaty between the People's Republic of Hungary and the People's Republic of Romania on mutual assistance in civil, family and criminal law cases signed in Bucharest on 7 October 1958 and promulgated by Law-Decree 19 of 1959

(hereinafter: “legal assistance treaty”), that in guardianship cases of the states’ citizens, unless otherwise provided by the legal assistance treaty, jurisdiction will go to the state party’s authorities of the citizenship of the child under guardianship or no longer under parental authority. Therefore, under the legal assistance treaty, the guardianship cases of unaccompanied minors of Romanian citizenship are governed by Romanian law, regardless of whether the child resides in Hungary.

As the Guardianship Agency failed to apply the legal provisions on the establishment of a fictitious father and registering him in the birth records for both children, and as the temporary guardians did not initiate the naturalisation of the two children (presumably born of mothers of Hungarian origin), the children had no chance of acquiring Hungarian citizenship.

Under the legal assistance treaty, an authority of the state of the child’s citizenship may transfer the guardianship to the competent authority of the other state if the child under guardianship has a permanent residence, a place of habitual stay or property in the territory of the latter state. The transfer of guardianship takes effect when the contacted authority agrees to take it over and notifies the authority initiating the contact.

Before the end of the communist era, Hungary had similar bilateral agreements in place with a number of other communist countries as well in addition to Romania. Although a large part of former communist states and their successor states are now EU Member States, these bilateral agreements have not been revised formally and contrasted with the Community *acquis*. This may be the reason why the legal institution of transferring guardianship and rejecting the transfer which had been used for decades also appeared in Section 73 (3) b) of the Child Protection Act, which took effect on 1 January 1998. As a result, the Guardianship Agency must obtain statements from each Member States’ diplomatic missions regarding the issue in question. Thus, the cited rule of the Child Protection Act extended the possibility of rejecting the transfer of guardianship (as such refusal goes against the best interests of the child) to such countries that had no bilateral agreement with such content in place with Hungary.

As Romania recognised as citizens both minors in cases no. **AJB 2629/2010** and **AJB 4196/2010** and asked for repatriation instead of a transfer of guardianship, the Guardianship Agency started to prepare for the repatriation after the documents recognising the children as citizens had been forwarded to the registrar.

In both case no. **AJB 2629/2010** and case no. **AJB 4196/2010**, the Guardianship Agency terminated the temporary custody of the Romanian national child with reference to the Embassy’s repatriation request and on the basis of Section 76 (1) of the Child Protection Act and Section 98 (2) of the Government Decree. The Guardianship Agency reasoned that the grounds for temporary custody no longer exist and therefore it need not be maintained.

In addition to terminating the temporary custody of the Romanian citizen unaccompanied minors, the Guardianship Agency also decided to repatriate them, that is, ordered them to leave the territory of the Republic of Hungary and arranged that they should be handed over to the Romanian authorities.

According to Article 12 of the Convention on the Rights of the Child, states must assure that a child who is capable of forming his or her views has the right to express those views freely in all matters affecting the child being given weight in accordance with the child’s age and maturity. For this purpose, the child must be provided the opportunity to be heard in any administrative proceedings affecting the child, either directly or through a representative or an appropriate body and in a manner consistent with the procedural rules of national law.

In the documents made available to me, I found no information on whether the Guardianship Agency had heard either of the unaccompanied minors directly or through a representative before ordering the repatriation. The findings of my investigation confirmed

the statement of child protection professionals, that is, that the repatriation of unaccompanied minors holding a registration certificate issued to EEA citizens or a humanitarian residence permit only depends, according to the Guardianship Agency, on whether the diplomatic missions request the repatriation. Meanwhile, no other circumstances, and particularly the best interests of the child as a primary consideration, are examined formally.

Under Section 19 (1) of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter: “Administrative Proceedings Act”), the competence of authorities are defined by law. The law defines the competence by specifying the case type(s) of the official procedure. Neither the Child Protection Act nor the Government Decree contain a provision under which the Guardianship Agency could force an unaccompanied child to leave the territory of the Republic of Hungary or that would require the child to be handed over to a person representing the country of the child's nationality. Unfortunately, this circumstance was not recognised by the staff of the State Administrative Office, not even in the investigative procedure initiated by me.

The right of free movement and the right to select the place of stay freely are guaranteed to the citizens of the European Union. The European Court of Justice (hereinafter: “European Court”) declared in 2004 in the *Chen* case⁸ that even a young child may take advantage of the rights of free movement and it should not be made conditional upon the child's attaining a certain age when the child can enjoy these rights independently.⁹ The European Court stressed the fundamental right nature of EU citizenship and pointed out that the right of free movement guaranteed by Article 18 (1) of the Treaty¹⁰ is directly applicable with regard to the conditions described in secondary law.

In spite of the fact that the European Court declared in the *Costa* case¹¹ as early as in 1964 that Community law has priority over national law, the Guardianship Agency did not even make an attempt to resolve the contradiction of the two sets of laws, that is, between the Child Protection Act and the legal assistance treaty on the one hand and the primary sources of EU law guaranteeing the right to free movement. That is how it came about that the Guardianship Agency ordered the two unaccompanied minors of Romanian nationality holding registration certificates issued to EEA citizens to leave the country and therefore disregarded their right of free movement in the territory of the Republic of Hungary. Although it was possible to appeal against the decision, this did not offer a real remedy. When the Guardianship Agency decided to terminate the custody of the foster parents, it ordered the immediate enforcement of the decision on handing the children over to the Romanian authorities. As a result, the possibility of appeal was not a real legal remedy as the appeal could only have been lodged after the children were handed over the Romanian authorities.

Under section 58 (2) of the Constitution, foreigners staying in Hungary legally may only be expelled from the country on the basis of a decision passed in accordance with the relevant Acts of Parliament; while “foreigners staying in Hungary legally” includes unaccompanied minors holding a registration certificate issued to EEA citizens or a humanitarian residence permit. According to Section 2 of Government Decree 113/2007 (V. 24.) on the enforcement of Act I of 2007 and Section 1 of Government Decree 114/2007 (V. 24.) on the enforcement of Act II of 2007, the immigration authorities have the right and

⁸ Judgment of the Court of 19 October 2004 (1) *Kunqian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department* Case C-200/02

http://www.ena.lu/judgment_court_justice_zhu_chen_case_c_200_02_19_october_2004-020006955.html

⁹ Case C-200/02 para 20

¹⁰ The Treaty Establishing the European Community

¹¹ Judgment of the Court of 15 July 1964 1 *Flaminio Costa v ENEL* 2 <http://www.ena.lu/>

obligation to carry out administrative proceedings related to foreigners' entry to, stay in and expulsion from Hungary.

Under Section 2 d) and Section 31 (1) of Government Decree 114/2007 (V. 24.), in cases no. **AJB 2629/2010** and **AJB 4196/2010** the South Great Plains Regional Directorate of the Office of Immigration and Nationality had competence (and not the Guardianship Agency) to establish that the EEA citizen's right of stay had terminated and to require the person to leave the country. However, the competent immigration authority was only notified by the temporary guardian's letter dated 9 February 2010 that the Guardianship Agency had ordered the repatriation of the child of case no. **AJB 4196/2010** and that the child had been handed over to the Romanian authorities on 27 January 2010.

Under Section 20 (1) of the Administrative Proceedings Act, the authority must carry out all proceeding within its competence and in the territory of its operation. The South Great Plains Regional Directorate of the Office of Immigration and Nationality ordered on 23 February 2010 in decision no. 106-3-2953-1/2010-R that the Romanian citizen unaccompanied minor of case **AJB 4196/2010** would have to leave Hungary by the last day of the third month from the date on which the decision becomes final and non-appealable. It was possible to appeal against the decision within 10 working days from the day on which the decision had been communicated. It is no surprise therefore that no one appealed against the decision ordering the child to leave the country, as the child had been handed over to the Romanian child protection authorities on 27 January 2010 at the Bors Border Crossing Point.

By deciding to repatriate EEA citizen unaccompanied minors residing in Hungary and by handing them over to the Romanian authorities without having statute-based competence for taking this measure, the Guardianship Agency has caused an infringement of rights related to legal certainty forming part of the rule of law (Article 2 (1) of the Constitution), to the right of stay (Article 58 (1) of the Constitution) and to the children's right to be protected by the state (Article 67 (1) of the Constitution)

Article 2 of the Convention on the Right of the Child declares that it is the state having jurisdiction over the child (including unaccompanied minors) that is responsible for respecting the child's rights and for protecting the child. Act I of 2007, Act II of 2007, the Child Protection Act and their implementation decrees do not specify the circumstances which the Hungarian authorities are required to examine before the unaccompanied minor born in Hungary is handed over to the country recognising the child as its citizen and requesting repatriation; as well, there is no rule in the above laws specifying what information relevant to the child (such as the health condition, language spoken by the child etc.) should be given to the authorities of the recipient country.

In the documents available in the investigation, there was no record of the Guardianship Agency having informed the competent Romanian authority of the child's health condition and special care requirements in case no. **AJB 4196/2010**. According to Section 2 (1) of Child Protection Act, the best interests of the child must be a primary consideration of the child protection authorities, institutions and organisations. It is the best interest of an unaccompanied child suffering from a milk allergy and pyelectasis that the child receives the care and medical treatment preserving and providing the best possible health condition of the child.

*The Guardianship Agency has caused an infringement related to the children's right to be protected by the state (Article 67 (1) of the Constitution) by not checking with the Romanian child protection authorities before ordering the repatriation in case no. **AJB 4196/2010** whether the Romanian authority would be able to provide the care and medical treatment required by the child's health condition.*

Summary

The findings of my investigation support the original claim of the petitioners that the repatriation of the two minors in question to the state recognising them as citizens and the execution of the repatriation was, in several respects, carried out in violation of the Constitution, the Convention on the Rights of the Child, the primary sources of law of the European Union and the related international requirements.

I believe that the infringements of constitutional rights found in the course of the investigation were partly caused by inadequate or incomplete legal regulations and partly by the incorrect application of the law by the relevant authorities. I believe that in order to prevent further errors in the application of the law, a training should be organised for guardianship agency officials to further educate them on the birth register, immigration, nationality and on the practical application of EU laws.

The Convention on the Rights of the Child is a statute-level source of law in Hungary. For this reason, the legal regulations affecting unaccompanied minors and the related practice should be reviewed with regard to the standards detailed in Committee on the Rights of the Child General Comment No. 6¹² (the committee was formed under Article 43 to check the progress of the states in implementing the provisions of the Convention).

Proposals

Pursuant to Section 20 (1) of Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights, I hereby suggest that

the *Minister of the Interior*

- should initiate the introduction of the status of a “person of unknown citizenship” and define the related rights and duties,
- should initiate the amendment of Act I of 2007 to clarify the status of unaccompanied minors with the rights of free movement and stay;

the *Minister of Public Administration and Justice*

- with regard to Article 6 (10) item 2 of Act XXX of 2004 should initiate the review of the treaty between the People’s Republic of Hungary and the People’s Republic of Romania on mutual assistance in civil, family and criminal law cases signed in Bucharest on 7 October 1958 and promulgated by Law-Decree 19 of 1959, and any similar bilateral agreements;
- initiate the amendment of Section 41 (1) of Act IV of 1952 on marriage, the family and guardianship to allow the application of the rules on registering a fictitious parent when necessary and not only “immediately after birth”.

the *Minister of National Resources* should initiate the following amendments to Act XXXI of 1997 on the protection of children and on guardianship administration:

- the amendment of Section 4 (1) a) so that the Act will also apply to unaccompanied minors and children with a residence permit;
- the amendment of Section 72 (4) to grant a right of appeal against a decision on temporary custody;
- the replacement of the phrase “the competent police station” in Section 73 (3) a) with the phrase “the competent regional directorate of the Office of Immigration and Nationality”;

¹² The Committee on the Rights of the Child General Comment No. 6 (2005) TREATMENT OF UNACCOMPANIED AND SEPARATED CHILDREN OUTSIDE THEIR COUNTRY OF ORIGIN
<http://www2.ohchr.org/english/bodies/crc/comments.htm>

- the amendment of Section 73 (3) b) such as to require the guardianship agency to gather information on the possibility of returning the child to blood relatives in addition to asking for the child's recognition as a citizen,
- the detailed definition of the tasks of the guardianship agencies in cases where the diplomatic mission accepts, rejects or does not reply within a reasonable period to the request and notification made under Section 73 (3) b) and c);
- the amendment of Section 73 (4) to define a maximum period of temporary custody for unaccompanied minors;
- the amendment of the Act to guarantee that the unaccompanied child and his or her legal guardian are interviewed before repatriation in order to establish what solution serves the child's best interests;
- the amendment of the Act to define which issues affecting the child that the authorities of the country of the unaccompanied child's citizenship must be informed of before the child is repatriated.

Recommendations

Pursuant to Section 20 (1) of Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights I hereby recommend to the head of the Central Hungary Regional State Administrative Office's Social and Guardianship Agency to, in its capacity as a supervisory organ, conduct a thorough investigation of the following:

1. that the staff members of the Budapest District V Guardianship Agency notify the relevant diplomatic mission of any temporary measure taken in relation to an unaccompanied minor born in Hungary and of unknown citizenship as soon as possible in accordance with Section 73 (3) of the Child Protection Act;
2. that the staff members of the Budapest District V Guardianship Agency initiate the recognition of an unaccompanied minor born in Hungary and of unknown citizenship as a stateless person without delay if the relevant diplomatic missions reject the recognition of the minor as a citizen or if the reply does not arrive within one year.

Initiatives

Pursuant to Section 21(1) of Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights, I hereby initiate the following:

that the head of the *Budapest District V Guardianship Agency* in cases involving unaccompanied minors born in Hungary and of unknown citizenship should, acting within its own competence,

1. check the cases in which the registration of a fictitious parent is possible and initiate the registration of such parent(s) in the birth certificate;
2. make the temporary guardian apply for the naturalisation of minors holding a registration certificate issued for EEA citizens and born of parents of presumed Hungarian origin;
3. make the temporary guardian apply for the recognition of statelessness of an unaccompanied minor born in Hungary if the minor's recognition as a citizen has been rejected by the diplomatic mission of the mother's nationality or if the diplomatic mission has failed to reply to the query for at least one year;

4. terminate the temporary custody of unaccompanied minors holding a registration certificate issued to EEA citizens and to put the child into temporary or long-term care depending on the situation;
5. suspend repatriations in progress and request the competent regional directorate of the Office of Immigration and Nationality to start a procedure in relation to cases in which the affected unaccompanied minors are required to leave the territory of the Republic of Hungary.

The head of the *Budapest Child Protection Services*, as the workplace superior of the temporary and official guardians that may be appointed by the Guardianship Agency, should check regularly whether the naturalisation applications of unaccompanied minors holding an EEA registration card are submitted.

Dated: Budapest, [...] 2010

Prof. Dr Máté Szabó

Translation: Afford Fordító- és Tolmácsiroda Kft.
(No proofreading has been conducted!)