Response of the Hungarian Authorities to the Report of the Commissioner for Human Rights of the Council of Europe 15 December 2014

Please find below the Hungarian Government's response to the report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, concerning his visit to Hungary from 1 to 4 July 2014. The report forms part of the reporting on the human rights situation in the member states of the Council of Europe that Mr Muižnieks has published since taking office on 1 April 2012.

During his visit, Mr. Muižnieks met with representatives of the Hungarian government and of non-governmental organizations. Hungary acknowledges the significance of the visit and the consistence of the dialogue held with the Hungarian officials as well as with the civil society on the occasion of his visit.

Hungary expresses its appreciation to the work of the Commissioner for Human Rights and wishes to continue the constructive cooperation with the Commissioner.

Media freedom

Section 63:

Section 63 details the judgment of the ECtHR delivered in the case of Uj vs. Hungary, and the document indicates in Section 64 that in the process of recodification of the Hungarian Criminal Code the legislature failed to decriminalize the crime of defamation. It must be noted that **the judgments did not say expressis verbis that the regulation should be amended**. It served as a basis for the condemnation that "the necessity for the interference has not been convincingly established by the domestic authorities".

The fight against intolerance and discrimination

Section 100:

Section 100 suggests that **Hungary should ratify Protocol no. 12**. Ratification of the Protocol depends on the discretion of the member states and **has not been rendered mandatory by the CoE**. **Ratification by all member states of the CoE is not required** for this Protocol **to enter into force.**

Before drafting the Protocol **the issue of discrimination has been regulated by Art. 14 of the Convention only in conjunction with the rights articulated in the Convention. Therefore the prohibition provided for by this article refers to a much narrower circle than the possible alternatives of discrimination**.

In contrast, Protocol no. 12 declares the general prohibition of discrimination, extending it also e.g. to the coverage of economic and social rights. Consequently, the Court might examine complaints arising in any fields of the legal system or legal practice and is able to establish a violation,

order just satisfaction connected thereto or to potentially impose an obligation to amend the domestic law.

The Protocol took effect under the international law on 1 April 2005 after the elapse of the prescribed period of time counted from depositing the tenth deed of ratification. Until today 18 countries (Albania, Armenia, Bosnia-Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Montenegro, the Netherlands, Romania, San Marino, Serbia, Macedonia, Ukraine, Spain, Andorra and Slovenia) have ratified the Protocol out of 47 CoE member states. We note that **countries having such democratic traditions as Great-Britain, France, Switzerland, Sweden or Denmark have not ratified the Protocol yet, moreover they also failed to sign it claiming that they find its realization dubious.**

Hungary took the position, similarly to the vast majority of the EU member states, that the ratification shall take place only if the country becomes prepared and is in the possession of the necessary information. At the time of the ratification of the Convention in 1992 the Court did already have a case law with regard to most of the human rights articulated in it which practice has given a relatively contoured content to these articles. However, the field of application related to the protection against discrimination will be significantly extended due to Protocol no. 12 in contrast to its previous field of application. As a result it is **reasonable to have knowledge about how, under what scope, how deeply and with what particular content the Court intends to apply the document. It seems that the majority of the EU member states took also a waiting position for the same reasons.**

It also makes sense to see what impacts on the overburdened Court Protocol no. 14 and no. 15 are going to have when coming into force which Protocols entail significant reforms concerning the Strasbourg procedure. The aim of these Protocols was exactly to reduce the almost unbearable workload of the Court. To the contrary, the application of Protocol no. 12 is expected to significantly increase the caseload of the Court.

Therefore ratification needs to be reconsidered at a time when enough information is provided to establish whether the domestic law is prepared and able to secure the appropriate legal solutions for the effective management of complaints related to discrimination. For these reasons we do not intend to prepare the ratification of Protocol no. 12 in the near future.

The human rights of immigrants, asylum seekers and refugees

Section 148:

Given that the number of applications for asylum did not stagnate this year, but to the contrary: we have witnessed an even bigger influx of asylum seekers in Hungary, we would bring attention to the fact that **from September 2014, the number of applications has dramatically increased, even more than in 2013, with 31416 applications for asylum as of 8 December 2014, thus the situation has not stabilized.** We would also like to recall that in 2014, most applicants came from **Kosovo, Syria and Afghanistan**.

Section 151:

Adding more details to the report we note that there were EU member states, who have temporarily suspended a number of Dublin returns to Hungary in some individual cases. We also note that following the April 2012 UNHCR report, the Hungarian government has revised the use of the "safe third country principle", not applying it in practice at all. As a result, UNHCR issued a note in December 2012 reviewing its previous observations.

Section 155:

The statement concerning the actual use of **asylum bail** as an alternative to detention is **not correct in terms of the figures**. ('Bail is rarely applied: for example, according to the Hungarian Helsinki Committee, between 1 July 2013 and 31 March 2014 bail was only used in 32 cases '). In reality, between 1 July 2013 (the entry into force of the rules establishing asylum bail) and 31 December 2013, it was used in **7 cases**. However, this year (until 8 December 2014), it was used in **132 cases**, so in the examined period a**ltogether in 139 cases**. The overwhelming majority of the applicants concerned have disappeared during the procedure, i.e. in only 6 cases the bail has been given back to the asylum seekers.

Section 157:

This is not correct that there is no effective legal remedy against a decision ordering asylum detention. This statement may be the result of the misleading English translation of the relevant provision (Article 31/C) of Act No LXXX of 2007 on asylum. According to the law, although there is no administrative appeal or remedy against the first instance administrative decision, there is **judicial review available** for the person concerned: this is called "**objection**" that may be filed "against an order of asylum detention or the use of a measure securing availability [i.e. alternatives to detention]" and the "objection shall be decided upon by the local court having jurisdiction at the place of residence of the person seeking recognition within eight days" [Article 31/C(2)-(3)]. Moreover, it is also stipulated in the Asylum Act that "[b]ased on the decision of the court, the omitted measure shall be carried out or the unlawful situation shall be terminated" [Article 31/C(5)]. Further rules on the local court's procedure in such cases and guarantees attached thereto are enshrined in Article 31/D of the Asylum Act. Besides this kind of judicial review by application, the **subsequent judicial control** of asylum detention is carried out in the way described in the report (***ex officio* judicial review**, performed automatically at sixty-day intervals).

Further to that, the report **mixes up asylum detention with immigration detention**: the quoted report prepared by the Supreme Court of Hungary in 2013 was purely focusing on the judicial review in immigration detention cases and not on asylum detention (which has not existed at that time yet). **Immigration detention** is a distinct legal institution, regulated by **Act No II of 2007 on the entry and stay of third-country nationals** (Articles 54-56), so this Act establishes the separate legal regime for the detention of illegally staying third-country nationals (and only for them). The **difference** between these two separate legal regimes (asylum detention under the Asylum Act and immigration detention under the Aliens Act) should be reflected in the final report.

Section 159:

Regarding the available **age-assessment mechanisms**, it is to be noted that there is a **written protocol for police officers** on conducting age assessment since the beginning of 2014 (Professional Methodological Guidelines of 15 January 2014, issued by the National Headquarters of the Police). In practice, the assessment given by the Police has been in certain cases overruled by the Office of Immigration and Nationality.

As for the age assessment made by the **Office of Immigration and Nationality**, since 1 September 2011, a complex age assessment procedure has been initiated in case of asylum seekers who claim themselves to be minor, if this is disputed by the refugee authority. The complex age assessment usually includes an anthropological, a dental and an X-ray examination and is conducted by qualified medical professionals. The new practice allows for a more holistic approach, a faster examination and also makes age assessment examinations uniform for all asylum seekers. A margin of error is envisaged for each examination applied, therefore if the results of the examination (a range of years, such as 17-19) include the minor age, the person is considered to be a minor. There is no separate legal remedy against the decision determining the age of the applicant, but this decision can be challenged together with the decision taken on the merits of the application.

Section 180:

It is worth mentioning that the **precondition of „lawful stay"** in the country in order to initiate the statelessness determination procedure is now under review before the Constitutional Court, following a *renvoi* made the Metropolitan Administrative and Labour Court in a particular case (having exclusive competence in juridical reviews against the negative decision of the immigration authority). This initiative claims the unconstitutionality of the disputed requirement on account of breaching Hungary's undertaken international obligations and violating the constitutional principle of non-discrimination. The decision of the Constitutional Court is expected to be rendered by the beginning of 2015.