Conclusions of the summary report on the assessment of a country as a safe third country in asylum and immigration cases

In 2013 May the jurisprudence-analysing working group prepared a summary report on the courts' jurisprudence in asylum and immigration cases. The summary report, which analysed court practice in 2011 and the first half of 2012, was discussed and adopted on 23 September.

One large group of the surveyed cases consisted of cases in which extraordinary remedy was available before the Curia (review). This group included cases related to residence, permission to settle down, expulsion order and so-called equity cases. In equity cases persons residing in Hungary illegally – and for this reason allowed to file a request for residence permit only at the embassy located in their respective home countries but not in Hungary – are exempted from this rule on an equitable basis (for example, for the purpose of family unification, when the return of the person having lived a settled life in Hungary for a long time to his country of origin in which he no longer has any personal or social connections would impose a disproportionate burden for the person).

The other large group of cases under examination consisted of cases in which immigration detentions were prolonged after an elapse of 30 days. Such cases are tried by certain appointed district courts in 8-day long special urgency proceedings.

The jurisprudence-analysis had two aims. One was to examine how the cases falling in the first group, especially the immigration cases, could be speeded up, the more so since the protraction of the remedy proceedings may result in unnecessarily lengthy immigration detention for the detained persons. The other aim was to examine the well-foundedness of the criticism expressed in the 2012 Report of the United Nations High Commissioner for Refugees on Hungary as a Country of Asylum. According to this criticism, the periodic 30-day prolongation of the immigration detention – which may last up to 6 months and, in exceptional cases, to another six months, that is, altogether to 12 months (which is usually the case in practice) – cannot be regarded to constitute an effective judicial remedy, and in these proceedings criminal-law approach is maintained because these cases are mainly dealt with by criminal judges and not by administrative judges, whose approach would better suit such cases. The operation of the guardian ad litem system providing legal representation for the applicants has also been strongly criticised.

As to the first question, the survey has led to the following findings:

1. The immigration proceedings of the Office of Immigration and Nationality would become more effective, and the enforcement of the rights of the persons concerned could be speeded up if in expulsion and equity cases the remedy possibility before the Curia were excluded by the legislature. The determination of such cases is simple and, moreover, in equity cases the authority has a wide margin of discretion. A one-level judicial review by the administrative court of the administrative decisions would be much quicker, and such a solution would be in conformity with our international obligations under both EU and international law as well as the Strasbourg case law. Therefore the jurisprudence-analysing working group recommended to enact such a piece of legislation. As a result of such an amendment authority actions taken in

immigration cases against persons illegally residing in Hungary could be quickened and would be more effective.

2. As a result of the proposed changes, the Curia would only deal with more weighty residence- and resettling-related cases, in respect of which the Curia has already approximated the strict and the more liberal approaches that could be found in the judicial panels' interpretation of law, and has already laid down the basis of a uniform, not too liberal and not unwarrantedly strict jurisprudence (e.g. provision of false data, but see in this respect decision no. 2/2015 KJE, adopted subsequently).

As to the judicial review of immigration detentions, the working group's findings supported the criticism that had been expressed by the UNCHR, and the working group formulated the following recommendations to solve the problem:

1. Similarly to the prolongations of pre-trial detentions, judges examined every 30 days whether the grounds for immigration detention continued to exist. Such a ground was, for example, the risk of absconding which, obviously, continued to exist as these cases typically involved persons not having social connections and wishing to get to a Western European country in the hope of a better life. Hence the working group found that from 6-8 thousand decisions there were only 3 cases in which immigration detention was not prolonged. The working group was of the opinion that a better practice would be for the courts to examine the existence of the grounds terminating immigration detention instead of examining the grounds for ordering such detention. From among the grounds terminating the immigration detention the most important is the ground which is aimed at securing the detained person's availability for the purposes of the enforcement of the expulsion decision, consequently immigration detention may only last until there is a real chance for successful enforcement. Where there is no prospect for successful enforcement, immigration detention must be terminated. Therefore judges should examine whether the authority could, in the preceding 30 days, take any such action which promoted enforcement. If it could not, proceedings should be terminated. In this respect a major problem is the unwillingness of certain, mainly Arabic, countries to take back their own nationals and the fact that the rules of the Return Directive, and hence of Hungarian law, may actually be interpreted as allowing for a detention lasting even up to 12 months. However, having examined the practice of other countries – including the exemplary German practice –, the practice of the Court of Justice of the European Union and of the Strasbourg court and the relevant UN documents, the working group has established that the good practice is the one under which the enforcement of the expulsion should be regarded as unsuccessful in case the authority could not take any other action on the merits of the case till the date of the third prolongation (that is, within 90 days). As of 1 July of this year, the law provides for a prolongation every 60 days, hence in the future this presumption should be applied after the elapse of 120 days. Such an interpretation is in conformity with our international obligations, would probably significantly reduce the number of immigration detainees and, in turn, the courts' caseload, which thus would be able to carry out more thorough examinations.

2. The jurisprudence-analysing working group has further established that under the current laws such cases are administrative cases (albeit on this point the legislature was not quite clear), therefore it would be appropriate if such cases were determined

by judges assigned to administrative cases, and even the assignment of such cases to administrative-labour courts could be thought over. Such a practice would provide effective judicial remedy and would be in conformity with our international obligations.

3. The jurisprudence-analysing working group has further established that the current guardian ad litem system operates only formally and does not provide real help to applicants, which is an important reason for its being ineffective. Though this issue falls not within court competence, the working-group has recommended that the Bar Association should, together with the National Office for the Judiciary, organize joint trainings for judges and guardians ad litem, and a remuneration system proportionate to the work performed should be introduced for guardians ad litem and the required resources should be provided.

Several less significant issues were also answered, which also contribute to the provision of prompter and more effective remedies, since based on the summary report judges will be able to determine such issues more quickly .

Decision No. 2/2015 KJE, adopted in the meantime, overruled the position taken by the working group on the issue of the provision of false data, therefore the related statements in the summary report are not applicable.