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Contribution on theme 2: Rights of asylum seekers

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PROTECTION OF ASYLUM SEEKERS IN PRACTICE
OF THE HUNGARIAN PARLIAMENTARY OMBUDSMEN

There are three levels of Hungarian legislation concerning the institute of the ombudsman:

1. The Constitution establishes the institute of the ombudsman and defines its responsibilities. The Constitution specifically mentions a parliamentary commissioner for civil rights and a parliamentary commissioner for the rights of national and ethnic minorities; however, it rules that Parliament may elect other ombudsmen for the protection of particular constitutional rights.

2. The second level of legislation is the Law on the Ombudsman, which defines the legal status and procedures of ombudsmen. This law also created the post of the Deputy Parliamentary Commissioner of Citizens’ Rights. Being a general regulation, its validity extends to all ombudsmen.

3. Particular laws governing specific ombudsmen constitute the third level of legislation and define special rules beyond those defined in the Law on the Ombudsman. Such laws are the Law on the Protection of Personal Data and on the Publicity of Data of Public Interest, which established the institute of the ombudsman for data protection, as well as the Law on the Rights of National and Ethnic Minorities.

Parliament elected the first Hungarian ombudsmen in 1995. They are: the parliamentary commissioner for civil rights and her general deputy, the commissioner for minority rights, and the commissioner for data protection. After the expiration of the six year mandate of the first ombudsmen, Parliament elected new officials to these positions with a mandate starting 1 July 2001.

As I report to the parliamentary commissioner for civil rights, I shall focus here on his work as well as that of his general deputy.

The ombudsman’s role

In the classical model of the institution of the ombudsman, it functions as an external check on public administration. Hungary’s Constitution, however, charges the ombudsman with protecting fundamental rights. The Law on the Ombudsman defines the scope of the ombudsman’s responsibilities as consisting not only in controlling public administration but also in protecting fundamental rights. As a result of this normative background, personal choices of the ombudsman in office determine which of the two functions receives greater weight in practice. In the practice of the current ombudsman and his deputy, as in the practice of their predecessors, a particular side of their role, protection of vulnerable individuals, has received special attention. This interpretation of their role goes beyond both checks on public administration and protecting fundamental rights: it can be seen as a broader social engagement.

According to Hungarian law, one of the conditions of the ombudsman’s process is that the complaint concerns a perceived injustice caused by a decision, or lack of decision, made by a government authority or by a public service provider (usually a utility company); or fear of such an injustice being caused imminently. The second condition is that legal remedies be exhausted, and the third condition is that the complaint concerns a violation of a constitutional
right. There are cases when a person or sometimes a group of persons whose rights are violated have no means to exercise their right to legal remedy. For example, we often encounter cases when authorities move detained migrants or asylum seekers to a new location in a distant area of the country without informing them of their decision in advance. Often, such decisions cannot be appealed, or appeals take so long that they are unable to remedy the damage caused, such as removing a schoolchild from his or her school.

A basic rule governing the functioning of the ombudsman is that his processes are launched either in response to petitions or *ex officio*. The law does not specify what circumstances constitute the basis for an *ex officio* process. Such processes are generally based on information provided by the press or on petitions by non-governmental organisations. For the first time in 2001, the General Deputy Commissioner launched an investigation based on a request by the Human Rights Commission of the Hungarian Parliament. This investigation concerned the move of all asylum seekers on Hungarian territory who identified themselves as Afghan citizens to a single refugee reception centre. The Commission subsequently discussed the findings of the investigation at a public hearing. The protection of the rights of an individual who has suffered an injustice may not be forced; in other words, the ombudsman may not proceed against the will of the person who has suffered the injustice. *Ex officio* investigations are a supplementary measure to those based on complaints, and they account for only around 3% of all cases.

The largest body of cases include those concerning the rights of persons in such adverse and vulnerable circumstances that they are unable to complain. The ombudsmen traditionally consider it their task to investigate the protection of the rights of detained migrants and of asylum seekers as belonging to the group of the most vulnerable persons.

**Special problems related to asylum seekers and detained migrants**

Following the 11 September 2001 terrorist attacks against the World Trade Center in New York, the ombudsmen in office dealt with the situation of the constitutional rights of asylum seekers with regard to the security measures taken in Hungary.

The direct cause of the ombudsman’s investigation was the 21 September 2001 decree of the Minister of the Interior “on introducing further security measures necessitated by the terror acts in the United States” and on implementing them, which ordered the Director-General of the Office of Immigration and Naturalisation to move Afghan citizens from various refugee camps across the country to that in Debrecen, and to move non-Afghan citizens from the Debrecen camp to other camps.

The removal and transportation of the asylum seekers, including families and children, took place with a show of force, under a large police and border guard convoy. This, as well as the tear gas spray, rubber batons, and handcuffs wielded by border guard personnel accompanying the convoy, and the presence of border guard patrols with machine guns and dogs around the camp, created the impression of guarding not asylum seekers but persons punished with a serious restriction in movement against whom the use of very harsh force may be justified.

The investigation showed that the authorities failed both to accommodate Afghan citizens arriving at the Debrecen reception station quickly and efficiently and to provide them with adequate nourishment. These intimidated, frightened people, including families with small children, were left to their own means having to find free bunks. Latecomers without relatives
or acquaintances were left outside the sleeping rooms and were forced to sleep on mattresses in the kindergarten or in windowless storage rooms.

As a result of the Director-Generals order to remove all non-Afghan citizens from Debrecen to institutions in other cities, 41 persons employed at the Debrecen reception centre with UNHCR’s financial support had to leave. Fifteen of them had been employed in the kitchen, while others worked in cleaning the centre. As a result of their departure, the residents, approximately 900 persons, did not receive cooked food between 23 and 25 September.

A tour of the reception station aimed at investigating the conditions of accommodation revealed, in particular, the poor maintenance of the buildings. Several residents complained that two or three families were forced to share the same bedroom, leading to tensions and arguments. Families tried to split the common space using closets or sheets. According to social workers, single women were usually accommodated in shared or sometimes single-family bedrooms designated for that purpose.

In preparing for the swap of the residents, the Director-General gave a verbal order on 22 September 2001 that foreigners staying at reception stations and at contracted accommodation not be allowed to leave their accommodation. The Afghan citizens were moved next day. At the Debrecen reception station, this order stayed in force until 4 October 2001, while residents at other locations were returned their lawful freedom to leave their accommodation on 24 September. The Director-General did not communicate the legal basis of the order either publicly, in the classified documentation pertaining to the order, or in the letter to the General Deputy Commissioner for Citizens’ Rights in which she informed him of the order.

In his report, the General Deputy Parliamentary Commissioner found that the Director-General’s action of limiting the freedom of movement, which the Constitution and the law on asylum guarantees to refugees and asylum seekers, by means of a classified order seriously conflicted with the principle of the state of law, in particular the principle of legal security, as defined in the Constitution.

The General Deputy Parliamentary Commissioner pointed out that the Constitution allows for limitations of freedom of movement and residence, including the right of foreigners legally present in the country to leave their accommodation, beyond cases regulated in laws only in a state of emergency. As a state of emergency had not been declared at the time the move was initiated, by ordering and enforcing a ban on refugees to leave their accommodation, the asylum authority violated its constitutional obligation to protect and respect fundamental rights.

In conclusion:

In dealing with foreign citizens arriving in Hungary illegally, the prosecution of crimes connected to illegal migration must be carried out without infringing upon the constitutional right to asylum. The Parliamentary Commissioner or his deputy do not have the competency to analyse the efficiency of government measures to suppress undesirable social phenomena such as terrorism and illegal migration. Their constitutional obligation is to investigate infringements upon constitutional rights and initiate measures to eliminate them.

Unquestionably, democratic societies confronted with international terrorism face new security risks, which increase distrust toward foreigners, including asylum seekers. However, in tackling these risks, the administration must respect basic rights and constitutional guarantees.
The Constitution of the Hungarian Republic allows for limitations to the freedom of movement and residence of persons legally present in the country, including refugees and asylum seekers. The cases of such limitations and guarantees against their misuse must, however, be legally regulated. Legal guarantees may limit the administration’s room for manoeuvre, but this argument is not an acceptable reason for ignoring constitutionally enshrined values.