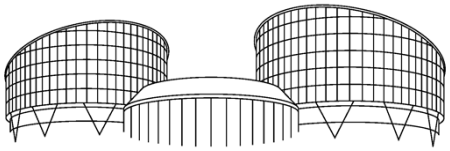

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF M.H. AND S.B. v. HUNGARY

(Applications nos. 10940/17 and 15977/17)

JUDGMENT

Art 5 § 1 • Lawful arrest or detention • Asylum detention of applicants, after they claimed to be minors, arbitrary as not carried out in good faith • Under domestic law unaccompanied minor asylum-seekers could not be detained • Applicants' initial statements they were adults could not justify dismissing their claim to be minors without taking appropriate measures to verify their age • Absence of explanation in relevant detention decisions why less coercive alternative measures not appropriate • No indication that the delays in establishing applicants' age necessary • Burden of rebutting the presumption that they were adults placed on the applicants • Domestic authorities' failure to act expeditiously and with due regard to the children's best interests

Prepared by the Registry. Does not bind the Court.

STRASBOURG

22 February 2024

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.H. and S.B. v. Hungary,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,
Alena Poláčková,
Krzysztof Wojtyczek,
Péter Paczolay,
Ivana Jelić,
Erik Wennerström,
Raffaele Sabato, *judges*,
and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the applications (nos. 10940/17 and 15977/17) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr M.H. ("the first applicant"), and a Pakistani national, Mr S.B. ("the second applicant"), on 4 and 23 February 2017 respectively;

the decision to give notice to the Hungarian Government ("the Government") of the complaints concerning Article 5 § 1 of the Convention and to declare the remainder of the applications inadmissible;

the decision not to have the applicants' names disclosed;

the parties' observations;

Having deliberated in private on 6 February 2024,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The cases concern the asylum detention of the applicants, who were minors at the time of the events in question and whose requests for release from detention were initially refused. It raises issues under Article 5 § 1 of the Convention.

THE FACTS

2. Both applicants were born in 2000 and live in Austria. They were represented by Ms B. Pohárnok and Ms O. Szántai Vecsera, lawyers practising in Budapest.

3. The Government were represented by their Agent, Mr Z. Tallódi, of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

I. APPLICATION NO. 10940/17 LODGED BY THE FIRST APPLICANT

5. After crossing the Hungarian border without authorisation, the first applicant was apprehended by the Hungarian authorities on 29 April 2016. He was convicted of illegally crossing the border and sentenced on 30 April 2016 to expulsion and one year entry ban under section 352/A(1) of Act no. C of 2012 on the Criminal Code. The identity of the first applicant was not questioned during the criminal proceedings. On the same day (30 April 2016), during an interview conducted by officers of the Office of Immigration and Nationality ("the OIN") the first applicant expressed his wish to apply for asylum and the asylum department of the OIN initiated the asylum procedure. The record of the interview indicates that he said that he had been born on 1 January 1996.

6. On the same day, the OIN suspended the immigration procedure in respect of the first applicant, noting that the expulsion order could not be executed while he was entitled to stay in Hungary on account of the pending asylum proceedings in respect of him.

7. On 1 May 2016, during the asylum interview conducted by the OIN, it was again recorded that the first applicant had been born on 1 January 1996. Following the interview, the OIN ordered that he be held in asylum detention, referring to section 31/A(1)(a), (b) and (c) of Act no. LXXX of 2007 on Asylum ("the Asylum Act"; see paragraph 31 below). The OIN further noted that his asylum request was based on concerns about public safety in his country of origin and that he identified Germany as his final destination. The first applicant was detained in the Kiskunhalas Detention Centre. His detention was extended by the Kiskunhalas District Court on 3 May 2016. The court referred to essentially the same grounds as the asylum authority had done.

8. On 4 May 2016 the first applicant indicated for the first time that he was a minor. He did so in his request to be released from detention and placed in an open reception facility. On the same day, his request was sent to the OIN with a note on the file that he was a minor. On 10 May 2016 the first applicant repeated his request for release in English, claiming that he was a minor and had been born in 1999. The OIN obtained a translation of his submission on 18 May 2016 and, on obtaining the consent of the first applicant on the same day, it decided to carry out an age assessment. However, it appears that on 25 May 2016 the OIN decided not to proceed with the age assessment. It informed the first applicant that he had declared himself to be an adult during the criminal, immigration and asylum proceedings and that therefore it had no doubts about his age. Referring to section 5(3) of the Asylum Act (see paragraph 28 below), it further noted that he could prove his age by submitting an original identity document or by having an age assessment carried out at his own expense.

9. On 29 June 2016 the Kiskunhalas District Court decided that the first applicant's asylum detention should be further extended until 27 August 2016 on essentially the same grounds as before. The court held no hearing and relied entirely on the OIN's application for the extension of the first applicant's detention without mentioning his assertion that he was a minor.

10. On 30 June 2016 the first applicant's legal representative asked the OIN to terminate his asylum detention, stating that the first applicant was an unaccompanied minor and was severely traumatised. She also asked for a forensic expert to be appointed to assess the first applicant's age. Attached to the request was a copy of the first applicant's Afghan identity document, which suggested, on the basis of his appearance, that he had been fifteen years old in 2015. The OIN obtained a translation of the document on 28 July 2016. On 4 August 2016 the OIN received a copy of another personal identity document submitted by the first applicant and certifying that he was a minor, which was likewise translated by the OIN.

11. The asylum authority terminated the first applicant's detention on 5 August 2016, referring to his submissions and finding that he was an unaccompanied minor. The OIN designated the Károlyi István Children's Centre in Fót as his place of residence for the remainder of the proceedings.

12. The OIN's decision of 18 August 2016, by which the asylum proceedings were terminated, indicates that the first applicant had not been issued with a humanitarian residence permit.

II. APPLICATION NO. 15977/17 LODGED BY THE SECOND APPLICANT

13. After crossing the Hungarian border unlawfully, the second applicant was apprehended by the Hungarian authorities on 16 June 2016. Subsequently, he was interviewed by the border police and requested asylum on that occasion. The records of the interview indicate that he was born in 1998 and that his cousin was travelling with him.

14. The records of the asylum interview conducted by the OIN on 17 June 2016 indicate that the second applicant said that he had been born in 1998 and was travelling with his cousin. Following the interview, the OIN ordered that he be held in asylum detention under section 31/A(1)(a), (c) and (f) of the Asylum Act, referring to his lack of financial resources, his unauthorised entry into Hungary with the assistance of a people-smuggler, the alleged fact that his application was based on concerns about public safety in his country of origin and that he saw Italy as his final destination, his lack of connections with Hungary and the resulting risk that he would abscond. The second applicant was detained in the Kiskunhalas Detention Centre.

15. On the same day, the OIN suspended the asylum proceedings on account of a pending procedure under Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 ("the Dublin

procedure") by which the second applicant was to be returned to Bulgaria under European Union law for consideration of his asylum claim.

16. On 20 June 2016 the Kiskunhalas District Court extended the second applicant's detention on the basis of section 31/A(1)(a) and (c) of the Asylum Act. The court based its decision on essentially the same grounds as the OIN had done (see paragraph 14 above).

17. On 23 June 2016 the second applicant submitted a request to be placed in an open reception facility, stating that he was a minor. On 5 July 2016 the OIN informed him that he had declared himself to be an adult during the immigration, asylum and court proceedings and therefore it had no doubt about his age. He was told that he could prove his age by submitting an original identity document or by having an age assessment carried out at his own expense. On 21 July 2016 the second applicant asked the OIN to conduct an age assessment, noting that he had no financial resources to cover the cost of one himself, but his request was denied.

18. On 26 July 2016 the second applicant repeated his request for an age assessment, stating that he could now pay for the procedure. However, on 2 August 2016 the medical service provider informed the OIN that it was not able to provide this type of service for "private individuals". Subsequently, on 4 August 2016, the second applicant repeated his previous request to the OIN and explained that the wrong age had been recorded as a result of a mistake by the interpreter.

19. On 5 August 2016 the OIN noted that in the course of the Dublin procedure the Bulgarian authorities had indicated that the second applicant had been registered in Bulgaria as a minor and therefore could not be returned there. As a result, the OIN concluded that the transfer of the second applicant could take place if it was established that he was an adult and not a minor. On 10 August 2016 the OIN initiated the age assessment procedure at public expense. The second applicant consented to the procedure.

20. On 11 August 2016 the OIN requested that the detention of the second applicant be extended for sixty days and noted that on 23 June 2016 he had declared himself to be a minor and that on 10 August the OIN had ordered an age assessment.

21. On 15 August 2016, the Kiskunhalas District Court decided that the second applicant's asylum detention should be further extended until the completion of the age assessment and the execution of the Dublin procedure. It referred to the same grounds as before and to the fact that the second applicant had no personal identity papers. The court also relied on section 31/A(1)(f) of the Asylum Act and referred to the pending Dublin procedure. It found no basis for applying less restrictive measures.

22. On 19 August 2016 the forensic expert established that the second applicant was a minor between the age of 16 and 17. On receiving the medical expert's opinion, the OIN terminated his asylum detention on 23 August 2016, referring to the findings in the opinion and the second applicant's

request of 23 June 2016 (see paragraph 17 above). At the same time, the OIN designated the Károlyi István Children's Centre as the second applicant's place of residence for the remainder of the proceedings.

23. On 13 September 2016, during his asylum interview, the second applicant said that the police had recorded his date of birth upon arrival and that his statement that he was a minor had been ignored. According to the record of the interview, his uncle, whose full name was recorded, was then being held in the Kiskunhalas Detention Centre and was seventeen years old. Furthermore, the second applicant was recorded as saying that his grandfather had disappeared, his father and two cousins had been killed and many relatives, including his uncle who was in Hungary and with whom he had left, had received threats, presumably in their country of origin. At the interview, the second applicant's legal guardian noted that the second applicant had cognitive difficulties as a result of the trauma he had experienced.

24. After the second applicant was released from detention and placed in the Károlyi István Children's Centre in Fót, a psychologist of the Cordelia Foundation (an organisation specialising in providing psychosocial support to traumatised asylum-seekers) examined him several times in the course of supervising his condition. On 21 September 2016, at the request of his legal representative, the Cordelia Foundation issued an expert psychological opinion finding that the second applicant had been subjected to serious trauma and was suffering from the consequences. It also noted that he found it difficult being separated from his uncle, who remained detained in Kiskunhalas, and that he had arrived at the Children's Centre in a poor psychological state.

25. The second applicant was issued with a residence permit on humanitarian grounds pending the outcome of the above-mentioned asylum proceedings.

III. HUNGARIAN HELSINKI COMMITTEE'S REPORT

26. On 18 August 2016 the Hungarian Helsinki Committee ("the HHC") issued a report on a monitoring visit conducted on 16 August 2016 at the Kiskunhalas Detention Centre of the OIN. According to the report, the HHC monitoring team had met with thirteen asylum-seekers who claimed to be minors. A number of asylum-seekers reported that they had been informed by the OIN that an age assessment could only be carried out if they paid for the procedure. The HHC report includes an account of the second applicant's case.

27. On 30 August 2016 the OIN issued a formal reply to the HHC's monitoring visit report. The OIN noted that if a doctor established during immigration proceedings that a person seeking international protection was a minor, that would be accepted. As to the age assessment, it noted that it was its practice to require those seeking international protection to pay for the

procedure when they had consistently stated that they were adults during the immigration process, the Dublin procedure and asylum hearings and claimed to be minors only later in the proceedings. The OIN covered the costs of the age assessment procedure where a person seeking international protection who had at first claimed to be an adult, after being taken into detention, said that he or she was a minor at the beginning of asylum proceedings and the likelihood of that being true was established by the OIN. With regard to the second applicant, the OIN stated that he had declared himself to be an adult in multiple proceedings and that the OIN had ordered the age assessment after a change in circumstances that had occurred later in the proceedings.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LEGAL MATERIAL

A. Act no. LXXX of 2007 on Asylum ("the Asylum Act")

28. Section 5 of the Asylum Act provides, in so far as relevant, as follows:

"(1) A person seeking recognition [as a refugee, a beneficiary of subsidiary and temporary protection or a person with tolerated residence status] shall be entitled:

(a) to reside in the territory of Hungary, in accordance with the conditions laid down in this Act, and to a permit to reside in the territory of Hungary in accordance with the specific regulations [governing that issue];

(b) in accordance with the conditions laid down in this Act and other legislation, to receive welfare benefits, assistance and accommodation;

(c) to work at the place where the reception centre is located or at a place of work determined by a public-sector employer within nine months following the lodging of the application for asylum and then, after that period, in accordance with the general rules applicable to foreign nationals. ...

(2) A person seeking recognition shall be obliged to:

(a) cooperate with the asylum authority, in particular to explain the circumstances of his flight, to provide his personal details and, to facilitate the confirmation of his identity, to hand over his documents;

(b) issue a declaration with respect to his property and income;

(c) be habitually resident at the place of accommodation designated by the asylum authority for him under the present Act and observe the rules of conduct governing residence at the designated place of accommodation;

(d) subject himself to health tests and to medical treatment prescribed as mandatory by law or required by the health authority and to any missing vaccinations prescribed as mandatory by law and/or required by the health authority in the event of the risk of disease.

(3) If the person seeking recognition is not in possession of documents proving his identity, he must do his best to prove his identity, in particular by getting in touch with his family, relatives, legal representative and – unless he is being persecuted by non-

State persecutors or persons associated with them – the authorities of his country of origin."

29. Section 4(1) of the Asylum Act provides as follows:

"When applying the provisions of this law, the best interests and the rights of the child must be taken into account."

30. Section 45(5) of the Asylum Act, as relevant at the material time, read as follows:

"If the prohibition in subsections (1) and (2) (*non-refoulement*) does not apply, and the asylum authority decides to reject the application for recognition, it shall order the revocation of the foreigner's humanitarian residence permit, and – if the foreigner has no other entitlement to remain in the territory of Hungary – it shall take a decision on the expulsion or deportation of the foreigner in accordance with Act no. II of 2007 on the entry and residence of third-country nationals and shall determine the period during which the [foreigner's] entry ... is banned."

31. Pursuant to section 31/B(1) of the Asylum Act, asylum detention could not be ordered for the sole reason that the person had submitted an application for recognition. Section 31/A, as relevant at the material time, read as follows:

"(1) In order to ensure the conduct of asylum proceedings and transfer under the Dublin procedure, and having regard to the restrictions under section 31/B, the asylum authority may take into asylum detention a person seeking recognition whose right of residence is based only on the submission of an application for recognition if:

(a) the identity or nationality of the person seeking recognition is not clear, in order to establish it;

(b) expulsion proceedings are pending against the person seeking recognition and it can be proved on the basis of objective criteria – including that the applicant would have had an earlier opportunity to submit an application for international protection – or there are good reasons to assume that the applicant is applying for international protection solely to delay or obstruct the execution of a decision to expel him or her;

(c) detention is needed in order to establish the facts and circumstances on which the application for asylum is based, if those facts and circumstances cannot be established in the absence of detention, especially if there is a risk of flight on the part of the person seeking recognition;

(d) the detention of the person seeking recognition is necessary in order to protect national security or public order;

(e) the application has been submitted at an airport; or

(f) it is necessary in order to secure a transfer of the person under the Dublin procedure and there is a serious risk of flight.

...

(2) Asylum detention may only be ordered on the basis of individual deliberation, and only if its purpose cannot be achieved through [other] measures for securing [the person's] availability.

(3) Before ordering asylum detention, the asylum authority shall consider whether the purposes specified in subsection (1) ... can be achieved through [other] measures for securing [the person's] availability.

...

(6) Asylum detention can be ordered for a maximum of seventy-two hours. The asylum authority may seek an extension of asylum detention beyond seventy-two hours from the appropriate district court within twenty-four hours of the detention order being issued. The court may extend the detention by sixty days at most, and this may be extended at the asylum authority's request for another sixty days. The asylum authority may lodge an application for an extension provided that the total detention period does not exceed six months. ... The asylum authority shall give reasons for its application."

32. Section 31/A(8)(c) of the Asylum Act provides that asylum detention will be terminated immediately if it is established that a person seeking recognition who is in detention is an unaccompanied minor. Section 31/B(2) further provides that asylum detention cannot be ordered in the case of a person seeking recognition who is an unaccompanied minor.

33. Section 35(6) provides that if a person seeking recognition is an unaccompanied minor, the asylum authority must immediately arrange for the temporary placement of the child and contact the guardianship authority with a view to appointing a legal guardian to represent the minor. The legal guardian must be appointed within eight days of receipt of the asylum authority's request. Pursuant to section 35(7), cases concerning unaccompanied minors should be dealt with as a priority. The asylum authority must arrange for the placement of the unaccompanied minor in a child protection institution (section 48(2)).

34. Section 44(1) provides that a medical examination can be carried out if there is any doubt as to whether the applicant is a minor.

35. Section 71/A, which came into force on 15 September 2015 and which governs border procedures, provided until 4 July 2016, in so far as relevant, as follows:

"(1) If the foreign national, before having been authorised to enter the territory of Hungary, makes his or her application in the transit zone as specified in the State Borders Act this chapter [on the procedure for recognition as a refugee or a beneficiary of subsidiary protection] shall apply with the differences specified in this section.

(2) In the context of a border procedure, the applicant shall not benefit from the rights provided for in Article 5(1)(a) and (c) [the right to reside on Hungarian territory and to work under certain conditions]."

36. As from 5 July 2016 section 71/A provides, in so far as relevant, as follows:

"(1) If the foreign national makes his or her application in the transit zone

(a) before having been authorised to enter the territory of Hungary; or

(b) after being intercepted within 8 km of the external borderline as defined by [Article 2(2)] of the [Schengen Borders Code] or of the sign demarcating the State

border and after being escorted through the nearest gate in the security border fence facility as defined in the State Borders Act

this chapter shall apply with the differences specified in this section.

(2) In the context of a border procedure, the applicant shall not benefit from the rights provided for in Article 5(1)(a) and (c) [the right to reside on Hungarian territory and to work under certain conditions]."

B. Act no. II of 2007 on the entry and residence of third-country nationals ("the Third-Country Nationals Act")

37. Section 29(1)(c) of the Third-Country Nationals Act provides that in the absence of the residence conditions set out in the Act, a humanitarian residence permit must be issued to a third-country national who has requested recognition as a refugee from the asylum authority or requested temporary or subsidiary protection from the asylum authority. Pursuant to section 20(2)(b) (valid until 30 June 2016) and section 20(4)(b) (in force from 1 July 2016), a person holding a humanitarian residence permit is entitled to pursue an occupational activity.

C. Government Decree No. 114/2007 (V. 24.) on the implementation of Act no. II of 2007 on the entry and residence of third-country nationals ("the Third-Country Nationals Decree")

38. Section 70(1)(b) of this Decree provides that the asylum authority should issue or extend of its own motion a residence permit issued for humanitarian purposes in cases within point (c) of section 29(1) of the Third-Country Nationals Act.

39. Section 70(2) reads as follows:

"A residence permit shall be issued to a third-country national applying for recognition as a refugee and requesting temporary or subsidiary protection from the asylum authority within three days of the submission of the application."

D. Government Decree of 301/2007 (XI.9.) on the execution of Act no. LXXX of 2007 on asylum ("the Asylum Decree")

40. Pursuant to section 33(4) of the Asylum Decree, an unaccompanied minor applicant seeking recognition must be placed in a child protection institution established under the child protection legislation, provided that the minor's status has been established by the asylum authority.

41. Section 3 provides that the asylum authority is obliged to examine whether a person seeking international protection requires special protection. It also provides that when in doubt, the asylum authority may engage the help of a medical or psychological expert.

42. Furthermore, section 36/B provides that if a detained unaccompanied international protection seeker states that he or she is a minor, the asylum

authority should contact the appropriate healthcare provider to establish the age of that person.

E. Summary opinion of 23 June 2014 of the *Kúria* Working Group analysing asylum law jurisprudence (*Kúria Menekültügyi joggyakorlat-elemző csoportja*)

43. On 13 October 2014 the Administrative and Labour College of the *Kúria* approved the summary opinion of 23 June 2014 of the Kúria Working Group analysing the jurisprudence of Hungary's asylum law (*Kúria Menekültügyi joggyakorlat-elemző csoportja*). The *Kúria* Working Group had analysed the courts' jurisprudence in relation to, *inter alia*, asylum detention and the compliance of Hungarian law with European law, including the Court's case-law. The *Kúria* Working Group's summary opinion concluded that the reasoning of decisions ordering asylum detention was sketchy since judges were not given the necessary documents by the asylum authorities. They were therefore unable to conduct sufficiently individualised assessments of the necessity of detention. Consequently, the court decisions usually simply repeated the wording of the application submitted by the asylum authority. The *Kúria* Working Group also stated that while immigration detention might correspond to Article 5 § 1 (f) of the Convention, the basis of asylum detention could not be derived from international human rights treaties. Furthermore, it stated that pursuant to section 5(1) of the Asylum Act, a person seeking recognition resided lawfully in Hungary from the moment of lodging an asylum application.

II. INTERNATIONAL MATERIAL

44. As regards the relevant international documents see *M.H. and Others v. Croatia* (nos. 15670/18 and 43115/18, §§ 86-100 and 102, 18 November 2021). In addition, the Court finds it appropriate to refer specifically to the following material.

A. European Union

1. Directives

45. Recital 9 in the preamble to Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ("the Return Directive") specifies that "[i]n accordance with ... Directive 2005/85/EC [which was recast in 2013; see paragraph 46 below], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until

a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force".

46. Article 9 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) ("the Asylum Procedures Directive") provides, in so far as relevant:

> "1. Applicants shall be allowed to remain in the Member State for the sole purpose of the procedure until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit. ..."

47. Article 25(5) of the Asylum Procedures Directive, concerning guarantees for unaccompanied minors, reads in so far as relevant as follows:

> "5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor."

48. Article 26 of the Asylum Procedures Directive, entitled "Detention", provides, in so far as relevant:

> "1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive [2013/33].
>
> ..."

49. Article 43 of the Asylum Procedures Directive, entitled "Border procedures", is worded as follows:

> "1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on:
>
> (a) the admissibility of an application, pursuant to Article 33, made at such locations; and/or
>
> (b) the substance of an application in a procedure pursuant to Article 31(8).
>
> 2. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 1 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive.
>
> 3. In the event of arrivals involving a large number of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practice to apply there the provisions of paragraph 1, those procedures may also be applied where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone."

50. Recital 38 of the Asylum Procedures Directive states:

"Many applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant. Member States should be able to provide for admissibility and/or substantive examination procedures which would make it possible for such applications to be decided upon at those locations in well-defined circumstances."

51. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) ("the Reception Conditions Directive"), in Article 8, entitled "Detention", provides as follows:

"1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive [2013/32].

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

(a) in order to determine or verify his or her identity or nationality;

(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;

(d) when he or she is detained subject to a return procedure under Directive [2008/115] in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

(e) when protection of national security or public order so requires;

(f) in accordance with Article 28 of Regulation [No 604/2013].

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law."

2. Case-law of the Court of Justice of the European Union (CJEU)

52. The CJEU's judgment of 30 May 2013 in *Arslan* (C-534/11, EU:C:2013:343) concerned a request for a preliminary ruling from the Supreme Administrative Court in the Czech Republic with respect to the interpretation of Article 2 § 1 of the Return Directive read in conjunction with recital 9 in the preamble to that directive (see paragraph 45 above). The request had been made in proceedings between Mr Arslan, a Turkish national arrested and detained in the Czech Republic with a view to his administrative removal, who, during that detention, had made an application for

international protection, following which his detention was extended by a further 120 days. The relevant part of the CJEU's judgment reads as follows:

> "48. Consequently, although Article 7(1) [of the Directive 2005/85, which corresponds to the provision cited in 46], does not expressly confer entitlement to a residence permit but rather leaves the decision whether to grant such a permit to the discretion of each Member State, it is clearly apparent from the wording, scheme and purpose of Directives 2005/85 and 2008/115 that an asylum seeker, independently of the granting of such a permit, has the right to remain in the territory of the Member State concerned at least until his application has been rejected at first instance, and cannot therefore be considered to be 'illegally staying' within the meaning of Directive 2008/115, which relates to his removal from that territory."

B. Council of Europe

53. The following material of the Parliamentary Assembly of the Council of Europe is relevant to the present case:

Resolution no. 1996 (2014), "Migrant children: what rights at 18?", 23 May 2014

> "...
>
> 3. The Parliamentary Assembly observes that there is no legal instrument, or even consensus, with regard to procedures for assessing a person's age and stresses the need to apply the benefit of the doubt, bearing in mind the higher interest of the child.
>
> ...
>
> 10. In view of the above, the Assembly calls on member States of the Council of Europe to:
>
> 10.1. take due account of the specific situation of unaccompanied young migrants who are reaching adulthood, bearing in mind the higher interest of the child;
>
> 10.2. give young migrants the benefit of the doubt when assessing their age and ensure that such assessment is made with their informed consent ..."

Resolution no. 2020 (2014) on the alternatives to immigration detention of children, 3 October 2014

> "...
>
> 9. The Assembly considers that it is urgent to put an end to the detention of migrant children and that this requires concerted efforts from the relevant national authorities. The Assembly therefore calls on the member States to:
>
> ...
>
> 9.4. ensure that children are treated as children first and foremost, and that persons who claim to be children are treated as such until proven otherwise..."

Resolution no. 2195 (2017) on Child-friendly age assessment for unaccompanied migrant children, 24 November 2017

"...

6. The many methods of age assessment used in Europe reflect the lack of a harmonised approach and agreed method. The Assembly believes that the development of a child-sensitive, holistic model of age assessment would enable European States to meet the needs of unaccompanied or separated children. It therefore calls on member States to:

...

6.9. identify and provide alternative accommodation options for children awaiting or undergoing age assessment, with a view to avoiding the detention of children during disputes about age, including by temporary placement in centres for children where appropriate safeguards should be in place to protect them and other children in the centres..."

Resolution no. 2449(2022) on Protection and alternative care for unaccompanied and separated migrant and refugee children, 22 June 2022

"...

7. Furthermore, the Assembly underlines that member States are legally responsible for unaccompanied and separated migrant and refugee children within their territory in accordance with Article 8 of the European Convention on Human Rights and, therefore, should offer solid child protection systems, which include strong co-ordination between the competent child protection and migration bodies as well as with other authorities and relevant civil society. Appropriate and sustainable budgeting and investment in human and other resources can ensure adequate and gender sensitive protection and care ..."

THE LAW

I. JOINDER OF THE APPLICATIONS

54. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment (Rule 42 § 1 of the Rules of Court).

II. PRELIMINARY REMARKS

55. The Government argued that the applicants had left Hungary and their representatives had not demonstrated that they had remained in touch with them. They submitted that the application should be struck out (Article 37 § 1 of the Convention).

56. The applicants' representatives submitted that they had maintained contact with the applicants throughout the proceedings and provided the contact details used for their communications, as well as the applicants' current addresses. They also submitted copies of correspondence with the

applicants in which the latter had confirmed that they wished to continue the proceedings before the Court.

57. Having regard to the applicants' submissions, the Court finds no grounds to conclude that they do not intend to pursue their applications within the meaning of Article 37 § 1 (a) of the Convention. It will therefore proceed with the examination of their complaints.

58. The Court further notes that the first applicant argued in his observations that his detention had been in breach of Article 5 § 4 of the Convention. The Court notes that this complaint was declared inadmissible at an earlier stage of the proceedings and therefore no longer forms part of the case under its examination.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

59. The applicants complained that their asylum detention was in breach of Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Admissibility

60. The Court notes that the applications are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

61. Both applicants argued that Article 5 § 1 (f) of the Convention did not apply to their detention because they had been entitled to stay in Hungary pending the determination of their asylum claim and therefore their detention could not have had the purpose of preventing unauthorised entry; no such purpose could be discerned from the legislative material concerning section 5(1)(a) of the Asylum Act. They pointed out the difference between

the legal rules applicable to the present case and those introduced later which had set up a pre-entry procedure in transit zones (see paragraphs 35 and 36 above). While Article 5 § 1 (f) was applicable to the latter, it was not to the former.

62. The first applicant maintained that he had entered Hungary without authorisation with the intention of seeking asylum but had been arrested and convicted in the space of a single day. His request for asylum could not therefore have been regarded as a means to avoid the consequences of his conviction.

63. The applicants furthermore argued that their asylum detention had been unjustified because it had not been based on an individual assessment and had been arbitrary. In the applicants' submission, the domestic authorities had acted in breach of their legal obligation to carry out an age assessment. They had failed to react with the required diligence and promptness once they had been informed that the applicants had asserted that they were minors. The applicants criticised the domestic authorities and the Government for showing indifference when addressing the issue of their status as minors and for ignoring the international standards requiring them to consider the best interests of the child.

64. The Government argued that the applicants' detention fell within the first limb of Article 5 § 1 (f). In their view, the present case could be compared to *Saadi v. the United Kingdom* ([GC], no. 13229/03, ECHR 2008) and *Suso Musa v. Malta* (no. 42337/12, 23 July 2013) because the applicable law was not intended to provide the applicants with the right to enter Hungary but merely with the right to remain – that is, not to be removed – pending the outcome of the asylum proceedings. The Government maintained that they were obliged to prevent unauthorised entry to their territory in order to protect the Schengen zone. They also argued that the Court should follow the approach in *M.K. v. Hungary* ([Committee], no. 46783/14, 9 June 2020), where Article 5 § 1 (f) had been found to apply.

65. The Government argued further that the applicants' detention was fully justified by the need to, *inter alia*, establish their identity. The Government submitted that asylum-seekers who were minors sometimes pretended to be adults until they were advised otherwise. They argued that the authorities had acted diligently, as they had released the applicants once they had obtained reliable information supporting their claim to be minors. As regards the first applicant, the Government questioned the authenticity of the identity document he had submitted and argued that the domestic authorities had given precedence to the principle of protecting a child's interests and that the first applicant had been treated as an adult because he had withheld information, which he had done in bad faith.

2. The Court's assessment

(a) General principles concerning Article 5 § 1

66. The Court reiterates that Article 5 of the Convention enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which individuals may be deprived of their liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Saadi*, cited above, § 43). As regards the question whether Article 5 § 1 (f) applies in the context of asylum-seekers, the Court refers to the principles set out in *Saadi* (cited above, §§ 64-66) and *Suso Musa* (cited above, §§ 90 and 97). It further notes that Article 5 § 1 (b) could also potentially provide justification, in some specific circumstances, for the detention of asylum-seekers (see *O.M. v. Hungary*, no. 9912/15, § 48, 5 July 2016, and *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, § 245, 18 November 2021). However, detention is authorised under sub-paragraph (b) of Article 5 § 1 only to "secure the fulfilment" of the obligation prescribed by law. It follows that, at the very least, there must be an unfulfilled obligation incumbent on the person concerned, and the arrest and detention must be for the purpose of securing its fulfilment and must not be punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist (see *Vasileva v. Denmark*, no. 52792/99, § 36, 25 September 2003, and *Göthlin v. Sweden*, no. 8307/11, § 57, 16 October 2014).

67. Any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f), be "lawful". Where the "lawfulness" of detention is at issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers first to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 additionally requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see *Saadi*, cited above, § 67; see also *Lazariu v. Romania*, no. 31973/03, §§ 102, 13 November 2014, and *Suso Musa*, cited above, § 92).

68. One general principle established in the case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities. The condition that there should be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1. There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see *Saadi*, cited above, § 69).

69. The notion of arbitrariness in the contexts of sub-paragraphs (b), (d) and (e) also includes an assessment of whether detention was necessary to achieve the stated aim, which includes the question of availability of less severe measures (ibid., § 70) as well as, where detention is to secure the fulfilment of an obligation provided by law, a question of balance between the importance of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty (see *Vasileva*, cited above, § 37). In this connection, the Court applies a different approach to detention falling under Article 5 § 1 (f). The principle of proportionality applies to detention under Article 5 § 1 (f) only to the extent that the detention should not continue for an unreasonable length of time (see *Saadi*, cited above, §§ 72 and 73).

70. To avoid being branded as arbitrary under the first limb of Article 5 § 1 (f), detention must therefore be carried out in good faith; it must be closely connected to the purpose of preventing the unauthorised entry of the person into the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"; and the length of the detention should not exceed that reasonably required for the purpose pursued (see *Saadi*, § 74, and *Suso Musa*, § 93, both cited above).

(b) Principles and considerations relevant to the detention of migrant children

71. Various international bodies, including the Council of Europe, are increasingly calling on States to expeditiously and completely cease or eradicate the immigration detention of children (see *G.B. and Others v. Turkey*, no. 4633/15, §§ 67-79 and 151, 17 October 2019, and *M.H. and Others v. Croatia*, cited above, § 236). They clearly recognise the primary importance of the best interests of the child and of the principle of presumption of minority in respect of unaccompanied migrant children reaching Europe (see *Darboe and Camara v. Italy*, no. 5797/17, §§ 139 and 153, 21 July 2022; see also paragraphs 44, 47 and 53 above).

72. The Court has repeatedly emphasised that a child's extreme vulnerability should be a decisive factor and should take precedence over considerations relating to his or her status as an irregular migrant (see *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 55, ECHR 2006-XI, and *Darboe and Camara*, cited above, § 173). It emerges from the Court's established case-law on this issue that, as a matter of principle, the confinement of migrant children in a detention facility should be avoided, and that only placement for a short period in appropriate conditions could be considered compatible with Article 5 § 1 of the Convention, provided, however, that the national authorities can establish that they resorted to such a measure only after having verified that no other

measure involving a lesser restriction of freedom could be implemented (see *M.H. and Others v. Croatia*, cited above, § 237).

(c) Assessment of the present case

73. The applicants argued that their detention did not fall under Article 5 § 1 (f) of the Convention (see paragraph 61 above), which the Government disputed (see paragraph 64 above). In this connection, the Court notes that the first applicant, who had initially been detained in the context of criminal proceedings and against whom an entry ban had been issued, appears not to have been issued with a residence permit (see paragraphs 5 and 12 above). It further notes that the Government argued that the residence permit issued to the second applicant was intended only to protect him from being removed before his application for international protection had been considered by the appropriate authorities and that therefore his detention was meant to prevent his unauthorised entry into Hungary (see paragraph 64 above).

74. The Court takes note of these arguments, but does not find it necessary to rule on whether the applicants' detention fell under the first limb of Article 5 § 1 (f) (compare *M.H. and Others v. Croatia*, cited above, §§ 240-46). It reiterates, firstly, that Article 5 § 1 (b) could also potentially provide justification, in certain circumstances, for the detention of asylum-seekers (see *O.M. v. Hungary*, cited above, § 48) and, secondly, that Article 5 § 1 also requires, regardless of which sub-paragraph is engaged, that detention be in compliance with national law and free from arbitrariness (see paragraphs 67 to 70 above; see also *Mahamed Jama v. Malta*, no. 10290/13, §§ 137-39, 26 November 2015, and *Nabil and Others v. Hungary*, no. 62116/12, § 38, 22 September 2015). For the reasons set out below, the Court finds that this requirement was not met in respect of either of the applicants, and therefore does not find it necessary to rule on whether their detention fell within the permissible grounds under Article 5 § 1 (b) or (f) (see, *M.H. and Others v. Croatia*, cited above, § 246).

75. The Court observes that at the time of the events in question both applicants were minors, as eventually established by the domestic authorities (see paragraphs 11 and 22 above, and, compare, *A.D. v. Malta*, no. 12427/22, § 74, 17 October 2023, and *Darboe and Camara*, cited above, § 131). Under domestic law, unaccompanied minor asylum-seekers could not, under any circumstances, be detained (see paragraphs 32, 33 and 40 to 42 above). However, it cannot be ignored that the applicants appear to have initially provided the authorities with information indicating that they were adults. On the basis of that information, they were detained. They stated only a few days later that they were minors. In such a situation the domestic authorities might have had legitimate concerns as to the reliability of the applicants' statements that they were minors and thus it could have been reasonable from them to refrain from placing them in a children's facility immediately after those statements had been made. However, the mere fact that the applicants claimed

to be minors after they had initially stated that they were adults could not justify dismissing those claims without taking appropriate measures to verify the applicants' age. The Court reiterates that a child's extreme vulnerability takes precedence over considerations relating to his or her status as an irregular migrant (see *Mubilanzila Mayeka and Kaniki Mitunga*, cited above, § 55), and notes that there might be understandable reasons prompting a child immigrant not to reveal his or her real age, such as not being sure of it or a fear of being separated from a group or an adult relative.

76. From the information submitted to it, the Court cannot discern any domestic legal provisions specifically governing the situation of asylum-seekers awaiting or undergoing age assessment. It observes that the Parliamentary Assembly of the Council of Europe in its Resolution no. 2195 (2017) called on the member States to identify and provide alternative accommodation options for children awaiting or undergoing age assessment (see paragraph 53 above). From the Court's perspective, the confinement of migrant children in a detention facility should be avoided; only placement for a short period in appropriate conditions could be considered compatible with Article 5 § 1 of the Convention, provided, however, that the national authorities can establish that they resorted to that measure only after having verified that no other measure involving a lesser restriction of freedom could be implemented (see paragraph 72 above, and *mutatis mutandis*, *Nart v. Turkey*, no. 20817/04, §§ 21 and 31, 6 May 2008).

77. In this connection the Court observes that the first applicant made a statement to the effect that he was a minor on 4 May 2016. He was ultimately asked to prove his age by submitting an original identity document or by having an age assessment procedure carried out at his own expense. On 29 June 2016 the domestic court extended his detention without in any way addressing his claim to be a minor (see paragraph 9 above). After the first applicant's representative had submitted an Afghan identity document on 30 June 2016, followed later by another similar document, the asylum authority terminated his detention on 5 August 2016, finding that he was an unaccompanied minor. No explanation can be found in the domestic decisions as to why the document submitted on 30 June 2016 was not considered sufficient to at least prompt the authorities to order an age assessment, as requested by the first applicant's representative, or why it was translated only a month later (see paragraph 10 above). The Court notes in this connection that the decision to terminate the first applicant's detention because he was a minor was given a day after the second document had been submitted in the original language (ibid.). The first applicant was accordingly detained for three months after he had informed the authorities that he was a minor.

78. The second applicant made a statement to the effect that he was a minor on 23 June 2016. Like the first applicant, he was told that he could prove his age by submitting an original identity document or by having an

age assessment carried out at his own expense. The second applicant eventually offered to pay for an age assessment, but it turned out that it could not be conducted at the request of a private individual. The OIN ordered an age assessment on 10 August 2016, that is, only after it had been informed that the second applicant had been registered as a minor in Bulgaria and could not be returned there unless it was established that he was an adult (see paragraphs 18 and 19 above). The domestic court extended the second applicant's detention, noting the pending age assessment but without addressing the possibility that he was a minor (see paragraph 21 above). Upon receiving the expert medical opinion indicating that the second applicant was between sixteen and seventeen years old, the OIN terminated his asylum detention on 23 August 2016 (see paragraph 22 above), that is, two months after he had indicated that he was a minor. It should be noted that the second applicant appears to have travelled to Hungary with a relative who had initially been described as a cousin but was later referred to as his uncle, and that a psychologist later found that separation from him had had a negative impact on the second applicant's already fragile mental state. That relative, who appears to have remained in detention, was, according to the OIN's record of the second applicant's interview, also seventeen years old (see paragraphs 23 and 24 above).

79. It follows from the above that the applicants remained in detention for a considerable amount of time after they had stated that they were minors. The decisions relating to their detention that were issued after they had claimed to be minors did not explain why less coercive alternative measures would not have been appropriate and there is no indication that the delays in establishing their age were necessary. The Court finds it particularly concerning that the domestic authorities, instead of giving the benefit of the doubt to the applicants and considering their best interests (see paragraphs 71 and 72 above), presumed them to be adults simply on the account of their having changed their statements as to their age. They moreover placed the burden of rebutting that presumption on them (see paragraphs 8 and 17, and also paragraph 27 above), in disregard of the fact that for detained asylum-seekers, let alone children, obtaining the necessary evidence to prove their age could be a challenging and potentially even impossible task.

80. In the Court's view, the above circumstances demonstrate that the domestic authorities failed to act expeditiously and with due regard to the children's best interests, and that the applicants' detention, after they had claimed to be minors, was not carried out in good faith and was thus arbitrary. It was therefore in violation of Article 5 § 1 of the Convention.

81. As regards the period preceding the applicants' statements that they were minors (from 1 to 4 May 2016 as regards the first applicant and from 17 to 23 June 2016 as regards the second applicant; see paragraphs 7, 8, 14 and 17 above), the Court considers that it has dealt with the main legal question raised by the case (see paragraphs 75 to 80 above) and that there is

no need to examine the merits of the remaining aspect of the applicants' complaint (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

83. The applicants each claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

84. The Government disputed the claim.

85. The Court considers that the applicants must have suffered some non-pecuniary damage on account of the violation found. On an equitable basis, it awards the first applicant EUR 6,500 and the second applicant EUR 5,000.

B. Costs and expenses

86. The first applicant also claimed EUR 4,200 and the second applicant claimed EUR 5,700 for the costs and expenses incurred before the Court.

87. The Government found the claims excessive.

88. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 to each of the applicants for the proceedings before the Court, plus any tax that may be chargeable to them.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications,

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention as regards the first applicant's detention from 4 May to 5 August 2016 and the second applicant's detention from 23 June to 23 August 2016;

4. *Holds* that there is no need to examine the part of the complaint under Article 5 § 1 of the Convention that concerns the first applicant's detention from 1 to 4 May 2016 and the second applicant's detention from 17 to 23 June 2016;

5. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) to the first applicant EUR 6,500 (six thousand five hundred euros) and to the second applicant EUR 5,000 (five thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) to each applicant EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 February 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Registrar	Marko Bošnjak President