



UNHCR
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Refugee Agency



Hungarian Helsinki Committee

Asylum Seekers' Access to the Territory and to the Asylum Procedure in Hungary 2013

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I. COOPERATION WITHIN THE FRAMEWORK OF THE BORDER MONITORING PROGRAMME

I.1. INTRODUCTION

This report summarizes the experiences gathered in 2013 in the course of the programme “Asylum Seekers’ Access to Territory and Asylum Procedure in the Republic of Hungary” (Border Monitoring Programme).

The Border Monitoring Project continued to be implemented in 2013 according to the tripartite agreement (Tripartite Agreement) concluded on 28 December 2006 by the Hungarian Helsinki Committee (HHC), the National Police Headquarters (Police) and the United Nations High Commissioner for Refugees (UNHCR).

The report is based on individual border monitoring visits and gives an account of the events and activities organized by the parties of the Tripartite Agreement in 2013.

In accordance with the Tripartite Agreement, the parties met three times during 2013, on 4 January 2013, 13 March 2013 and 24 June 2013 within the framework of the Working Group – created by Section 1 of Chapter V of the Tripartite Agreement (“Working Group”) – to evaluate the experiences gathered throughout the Project. The parties continued to place great emphasis on tripartite cooperation efforts, as well as on joint assessment of practical issues and maintaining professional working relationship as it facilitates efficient cooperation among the parties implementing the Agreement. In our view, this also results in the effective exchange of information and positively influences the practice of the collaborating parties.

As a result of internal restructuring of the activities of the Helsinki Committee no border monitoring activities were undertaken at the Ukrainian-Hungarian border or at the Budapest Liszt Ferenc International Airport in the year of 2013. Monitoring visits exclusively focused on the most frequented Serbian-Hungarian border section.

In line with previous years’ practice, the Police’s supplementary remarks to the findings are indicated in bold, italicized font.

Reports from previous years are available on the website of the HHC.¹

I.2. METHODOLOGY OF BORDER MONITORING

Within the framework of the Tripartite Agreement the attorney contracted by the HHC performed border monitoring at one section of Hungary’s borders, namely the Serbian-Hungarian border.

In general, the cooperation of police officers at all border checkpoints and field offices with the HHC monitors met preliminary expectations. Multilingual information brochures produced jointly by the UNHCR and the HHC for arriving asylum-seekers were regularly displayed in the UNHCR information dispensers in a clearly visible location along with the contact information of the attorney contracted by the HHC.

Similarly to previous years, in accordance with the border monitoring methodology, the contracted attorney collected information during individual visits on the conditions of the foreigners who had been expelled or had been returned and thus had no access to the territory of Hungary. Within the framework of the programme, two visits per month were carried out at the above-mentioned border section and at the alien policing departments in Kiskunhalas and Szeged.

One out of the two monthly visits carried out at the field offices of the given border section focused on whether the intercepted foreigners had been provided access to the asylum procedure and whether they received adequate information to start the asylum procedure. If an intercepted foreigner was present during the visit, the monitor had the opportunity for a personal conversation with him or her. The second visit examined the anonymous documents on record on the foreigners who had been expelled or returned from Hungary during the preceding month. On the basis of the interview records, the opinion of the Office of Immigration and Nationality (OIN) as well as the decisions made, the monitor tried to reconstruct the events taking place between the interception and the foreigner’s deportation, bearing in mind respect for the principle of non-refoulement.

Pursuant to the Agreement, the Police ensures that monitors have access to – in previously specified categories and nationalities – copies of foreigners’ official files even if the foreigners had already been removed from

¹ <http://helsinki.hu/en/border-monitoring-2007>

Hungary. In these cases, the monitor had access to copies of files concerned that had been made anonymous in accordance with data protection law in force. The anonymous case files still present an obstacle to precisely following up what happened to the foreigners following their expulsion.

Two days prior to each monitoring visit, the HHC informs the UNHCR and the Police about the planned visit, indicating the time and venues of the visit. When deemed necessary, the monitors are allowed to have interpreters accompanying them; in such cases a specific entry permit from the Police had to be obtained for the interpreter as well.

Under the Tripartite Agreement, the monitors prepare a report of each visit to the HHC and these reports have to be sent to the Police and the UNHCR within 15 days of the visit. The Parties to the Tripartite Agreement can make comments, remarks and recommendations to each report.

II. THE LEGAL FRAMEWORK OF ACCESS TO TERRITORY AND ASYLUM PROCEDURE

II.1. GENERAL LEGAL FRAMEWORK

Hungary, as a state party to the United Nations Convention relating to the Status of Refugees, adopted on 28 July 1951 ("1951 Geneva Convention"), and the Protocol relating to the Status of Refugees, adopted on 31 January 1967 ("1967 Protocol"), must respect and implement the provisions of these international instruments. Pursuant to Section XIV(3) of the Hungarian Fundamental Law, effective as of 1 January 2012, Hungary shall grant the right of asylum to those non-Hungarian citizens who are persecuted in their homelands or regular residence based on their race, religion, nationality, membership of a particular social group or political opinion or if there is well-founded fear of such persecution.

The prerequisite of protection of persons seeking international protection is their access to the country's territory where protection is available, meaning the entry to and stay on the territory is allowed while their asylum applications are pending. The Police can return all foreigners not in need of international protection to a country where the law permits² and/or execute expulsion ordered by the alien policing authority or the court. During the execution of these orders the Police is obliged to respect the principle of non-refoulement.³ The Police is also an alien policing authority and as such it is entitled to order the expulsion when it detects the illegal border crossing (or the attempt of such) during its border security activities as defined in Article 2 (9) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the execution of the expulsion of the third-country national is based on a readmission agreement.

II.2. RESPECT FOR THE PRINCIPLE OF NON-REFOULEMENT AND ARTICLE 33 OF THE 1951 GENEVA CONVENTION

Article 33 (1) of the 1951 Geneva Convention sets forth the general principle of non-refoulement:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

In accordance with the relevant international norms, Section 51 of the TCN Act accords with the principle of non-refoulement by setting forth under which conditions return or the enforcement of expulsion is prohibited. The Police is required to contact the OIN in cases of doubt concerning the risk of torture or inhuman, degrading treatment or punishment⁴ the foreigner(s) may face upon return.

² Section 40(1) of Act II of 2007 on the conditions of entry and residence of third-country nationals ("Third-Country Nationals Act", hereinafter referred to as TCN Act)

³ Section 52(1) of the TCN Act: „The alien policing authorities are obligated to examine the principle of non-refoulement in all procedures regarding the order and execution of return and/or expulsion."

⁴ Article 3 of the European Convention on Human Rights

As previous reports on border monitoring programme⁵ have pointed out, return is generally a measure that is enforced within a relatively short period of time and due to its special procedural characteristics it is not preceded by a substantive interview with the foreigner. Nevertheless, by introducing such an interview in the Hungarian alien policing legislation, the Police would be in a position to gather more information about the reasons why the foreigner left his/her country of origin and proceeding authorities could carry out a substantive assessment on refoulement. In 2013, potential asylum-seekers were typically not affected by returns as an alien policing measure on the Serbian-Hungarian border section. Similarly to previous years' experiences, groups of migrants mainly entered Hungary via the green border without personal identification documents, thus in their cases the Police applied expulsion instead of return measures.

Furthermore, our experience shows that asylum seekers may only introduce an asylum claim to the asylum authority if communication between the Police and the foreigner allows the latter to express the wish to seek asylum in a way that is clear and comprehensible for the Police. It is of particular importance that the interpreter appointed at the first meeting between the foreigner and the authorities appropriately translates all relevant information and that the authority records this in a precise manner.

The foreigner can express his/her intention to apply for asylum at any stage of the police procedure, which will then be registered by the proceeding authority and forwarded to the competent asylum authority. The foreigner is informed about this opportunity with the assistance of an interpreter already during the short-term arrest. The information leaflet handed over to him/her includes, among others, this specific right of the foreigner. The HHC information leaflets available in several language versions also provide information to foreigners on the asylum procedure as a whole as well as on the process of submitting an asylum application.

In 2013, the number of asylum applications submitted by third-country nationals increased significantly, which was an important change as compared to previous years. The attorney carrying out the border monitoring experienced that the identification of the intention to seek asylum as well as the lodging of applications was carried out much swifter than in previous years.

Out of the 19,035 foreigners against whom short-term arrest was applied at the Serbian-Hungarian border section, 17,117 individuals submitted asylum applications during the alien policing procedure. In all cases, the Police took implied conduct into consideration as an application for asylum.

II.3. CHANGES IN HUNGARIAN ALIEN POLICING AND ASYLUM LAW IN 2013

The amendment of the Hungarian alien policing and asylum legislation was put on the agenda at the end of 2012 and again several times in 2013 as well as a result of EU harmonization requirements (e.g. due to the partial transposition of the recast Reception Conditions Directive⁶ as a part of the modified EU asylum package). Furthermore, a pilot procedure launched by the European Commission in 2012 due to anomalies detected in the Hungarian asylum practice also resulted in changes in legislation.

Among the amendments concerning the border monitoring activities, it is important to underline the introduction of Section 51(2) under Act II of 2007 (hereinafter referred to as "TCN Act") – effective as of 1 January 2013 – setting out that lodging an asylum application and the start of the asylum procedure constitute an explicit ban on return and expulsion.⁷ With this apparently self-explanatory modification the legislator has introduced a legal guarantee ensuring asylum seekers' access to the territory and asylum procedure. As a result of this modification the Hungarian practice is now in line with the judicial interpretation of law regarding the expulsion of foreigners during pending asylum procedures.

The modification of Section 51(2) of the TCN Act is definitely to be welcomed as it sets out that, while their asylum procedure is pending, asylum seekers have the right to remain in the country's territory, and hence expulsion may not be ordered or executed against them. The application of this provision gains particularly importance in the course of border management as well as border monitoring activities. The wording of the

5 Further findings with reference to the implementation of Article 33 of the Geneva Convention can be found in border monitoring reports from previous years.

6 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)

7 "If the third-country national is under a pending asylum procedure, return and/or expulsion may not be ordered and executed, if the third-country national has the right to remain in the territory of Hungary pursuant to other laws."

legislative provision is ambiguous (“if the third-country national is subject to an asylum procedure”) as neither the TCN Act nor its implementing Government Decree 114/2007 (V.24.) provide interpretative guidance for the authorities as to what specific procedural act would meet the condition set by Section 51(2) of the TCN Act: whether it is the communication of the intent of seeking asylum, the recording of the asylum application or the first procedural act made by the competent asylum authority. The HHC and the UNHCR is of the view that the lack of clear implementing provisions results in legal uncertainty.

The foreigner can express his/her intention for international protection at any stage of the police procedure, which will then be recorded by the proceeding alien policing authority and forwarded without delay to the competent asylum authority. The person will be handed over to the asylum authority without delay. The alien policing procedure must be suspended until the final end of the asylum procedure.

Accordingly, following the modification that entered into force on 1 January 2013, a foreigner subject to a pending asylum procedure can no longer be taken or held in alien policing detention, as the legal basis for detention (i.e. ensuring the execution of expulsion) is absent.

Another important modification of the alien policing laws is clarifying the definition of ‘persons in need of special treatment’ in the interpretative provisions of the TCN Act, which enables the authorities to recognize such foreigners at the initial stages of the alien policing procedure and thus to provide adequate reception conditions and assistance for them.⁸ Identifying foreigners needing special treatment is a complex task and it may be necessary to include other experts in the process i.e. a doctor or psychologist, which is recommended, though not required, by the government decree implementing the TCN Act.⁹

In addition to the above-mentioned modifications, the UNHCR 2012-2013 regional project “Response to Vulnerability in Asylum”¹⁰ bears importance, in which project all three organizations have actively participated. The aim of the project was to create practical tools for authorities in order to identify foreigners’ vulnerabilities at an early stage of the procedure, thereby contributing to establishing solutions within their own standard operating procedures to be able to adequately respond to the specific procedural and reception needs of persons. Within the framework of the project, with the aim of building the capacity of authorities, a procedural protocol was elaborated to enable authorities to carry out procedures with more efficiency and confidence, keeping in mind the specific needs of vulnerable asylum seekers. The UNHCR report on the experiences gathered within the framework of the project was released in December 2013.¹¹

Beyond the UNHCR project, in the interest of early identification of persons with special needs, relevant police personnel also participated at the training organized by the Cordelia Foundation within the framework of the PROTECT-ABLE project. The aim of the training was to broaden the officers’ legal and psycho-social knowledge on specific vulnerable groups and to ensure the proper use of the PROTECT questionnaire.

Further to the above, Section 29 of TCN Act was also amended by extending the list of foreigners granted a residence permit on humanitarian grounds with those whose expulsion failed. From 1 July 2013, pursuant to Section 29(1a) in the event of withdrawal of expulsion order or a ban on entry and stay under Subsection (10) of Section 47, the immigration authority shall – in the absence of residence requirements specified in the TCN Act – issue a residence permit to the third-country national on humanitarian grounds if the third-country national:

- a) cooperated with the immigration authority in the process of carrying out the expulsion;
- b) complied with the prescribed rules of conduct and with regular reporting obligations; and
- c) is not subject to criminal proceedings and does not have a criminal record.

Beyond the changes in the alien policing legislation, one of the most important changes in 2013 was the

⁸ Section 2(t) of TCN Act: person in need of special treatment: the unaccompanied minor or vulnerable person – minor, elderly, disabled, expectant mother, single parent of a minor or victims of torture, rape or other severe forms of psychological, physical or sexual violence –, whose individual evaluation determined the presence of special needs.

⁹ Section 113(3) of the Government Decree: „In case of a doubt, the proceeding alien policing authorities may seek assistance from physicians or psychologists in order to determine whether the expelled foreigner is in need of special treatment.”

¹⁰ Full project name: Ensuring Effective Responses to Vulnerable Asylum-seekers: Promotion of Adequate Standards for Identification and Claim Determination for People with Special Needs, funded in part by the European Refugee Fund

¹¹ Response to Vulnerability in Asylum – Project Report, available at: <http://www.unhcr-centraleurope.org/pdf/what-we-do/caring-for-vulnerable-groups/response/response-to-vulnerability-in-asylum-project-report.html>

introduction of asylum detention and 'measures securing availability' as alternatives to detention. Partial transposition of the Recast Reception Conditions Directive provided an opportunity to the legislator to introduce these amendments. The law-maker wished to decrease the drastically increased number of asylum claims by creating legal grounds for detaining asylum applicants for even a six-month period of time. In its communication, the Foreign Affairs Ministry explicitly stated that Hungary introduced asylum detention from 1 July 2013 as the first among EU Member States to respond to "the drastic increase in the number of the asylum-seekers in the year of 2013 and the high number of absconding among asylum-seekers".¹²

Sections 31/A-H of Act LXXX of 2007 on Asylum (Asylum Act) regulate asylum detention, with the primary aim to secure the applicant's availability during the asylum procedure if other less restrictive measures would presumably not be successful. The asylum authority is obliged to examine whether the application of an alternative measure is possible in the individual case – e.g. asylum bail, designated place of residence or regular reporting obligation – and can only order asylum detention if these alternative measures cannot be applied. The maximum duration of asylum detention is six months.

The HHC, the UNHCR and other NGO's strongly criticized the introduction of asylum detention, especially having regard to the fact that both conditions of detention and its judicial review show close similarities with the already much criticized alien policing detention.¹³

The Police is not an asylum authority, as a result it cannot order asylum detention.

II.4. DESCRIPTION OF MONITORED FACILITIES

The implementation of the border monitoring programme in 2013 concerned the Serbian-Hungarian border section where the attorney contracted by the HHC carried out the border monitoring activity.

Serbian-Hungarian border section

The HHC's monitor at the Serbian-Hungarian border section visited the following locations as part of the border monitoring activity:

Alien policing Department of the Bács-Kiskun County Police Headquarters:

Alien policing Department (Kiskunhalas), Bácsalmás, Bácsbokod, Hercegszántó and Kelebia Border Control Field Offices, and related border crossing points (Bácsalmás, Tompa, Kelebia).

Alien policing Department of the Csongrád County Police Headquarters:

Alien policing Department (Szeged), Szeged Border Control Field Offices and related border crossing points (Röszke, Mórahalom, Tiszasziget).

In general, it can be said that the HHC monitor found that material conditions in all police facilities visited were satisfactory. In general, the equipment and cleanliness of these short-term holding facilities were found to be satisfactory. Nevertheless, at the Szeged Border Control Field Office, due to the exceptionally great number of apprehensions, the courtyard car garages had to be converted into short-term lock-ups where foreigners were kept for a maximum of 24 hours. At first these temporary lock-ups were not equipped with bathrooms or with heating and foreigners had to sit on the floor. Throughout the year the Police took steps to improve conditions and bring them in line with international standards requiring dignified conditions. As such, bathrooms were built next to the lock-up facilities. However, due to the extremely large number of arrivals, the conditions remained uncomfortable and overcrowded.

12 http://www.mfa.gov.hu/NR/rdonlyres/36ABFF3C-18F5-472A-8A03-603ACCB6741A/0/valtozasok_a_menekultugyi_szabalyozasban2.pdf

13 See Opinion of the Curia Working Group analyzing the judicial review practice of alien policing detention. The Working Group found that the judicial review of detention is not effective in practice, which could be imputed to four reasons: 1) inappropriate case administration in some courts; 2) formal, partial or non-existence of case guardianship; 3) underlying criteria for review and the scope of review is unclear, such interpretation of detention ground which almost exclusively supports the administrative authority's justification; 4) heavy workload on judges dealing with judicial review. The Opinion is available in Hungarian language at the following website: http://www.lb.hu/sites/default/files/joggyak/idegenrendeszeti_osszefoglalo_velemenye_kuria.pdf

In addition to the above, in order to alleviate overcrowding, the Police hired containers for the accommodation of foreigners and mist-sprinklers to stifle the summer heat.

The multilingual information leaflets prepared by the UNHCR and the HHC were available at the monitored facilities and, in accordance with the Tripartite Agreement, the HHC staff continuously refilled these brochures throughout the project period.

III. GENERAL FINDINGS

III.1. MIGRATION TRENDS AND STATISTICS IN 2013

According to the 2013 statistics of the National Police Headquarters, the Police ordered expulsion in 3,936 cases (2012: 4,489) and return in 11,056 cases (this number was 9,316 in 2012) at the airport and at the borders. At the monitored Serbian border section, the number of registered asylum applications increased drastically with a total of 17,117 applications registered in 2013. In addition, 137 individuals submitted asylum applications in a later stage of the alien policing procedure, in alien policing detention ordered by the Police.

2013		Measure applied		
Border section	County	EXPULSION	ASYLUM APPLICATION	RETURN
Serbian-Hungarian	Csongrád	2761	14335	4524
	Bács-Kiskun	910	2782	3055
Ukrainian-Hungarian	Szabolcs-Szatmár-Bereg	210	34	1991
Budapest Liszt Ferenc International Airport		6	109	118
Total		3887	17260	9688

Source: Police

According to the experiences of the border monitoring programme, traffic has never been so high at the Serbian-Hungarian border section as in 2013: as compared to 2012, the number of asylum applications increased 28-fold! Due to the considerably good cooperation between the Hungarian and Serbian authorities and the widely applied quasi-automatic practice of alien policing detention, 86 % (3,142 individuals) of intercepted and expelled foreigners were effectively returned to Serbia.

From the foreigners intercepted at the Serbian-Hungarian border section (19,035 individuals) the Police expelled only 19% (3,671 individuals) and deported 16% of them (3,142 individuals) to the territory of Serbia.

In 2013, the Police apprehended a significant number of unaccompanied minors (417 individuals) at the Serbian-Hungarian border section. Further details on the practises concerning unaccompanied minors are presented under Section IV of this report.

The number of third-country nationals claiming to be unaccompanied minors decreased with approximately 50% (2012: 875 persons, 2013: 465 persons) as third-country nationals no longer provided a fictitious age to the authorities but rather attempted to avoid alien policing detention by relying on the opportunities created by changes in the legal environment.

Although border monitoring activities did not take place in 2013 at the Ukrainian-Hungarian border section, it can be noted based on the statistics above, that the situation was completely different as compared to the Southern border region. Similarly to the previous year, no considerable cross-border movement of irregular migrants took place at this border section, although there was a minor increase in the number of asylum applications registered

(2012: 20, 2013: 34), however, this can be regarded as insignificant compared to the numbers registered at the Serbian-Hungarian border section.

At the Budapest Liszt Ferenc International Airport, the Police reported that 109 asylum applications were registered and 118 individuals were returned in 2013. Due to the legislative framework, at this border point the Police mainly orders return against foreigners who do not comply with entry conditions. Return measures are usually applied at border crossing points where foreigners are usually in possession of some sort of travel document.

During the 2013 border monitoring activities, at the Serbian-Hungarian border section the HHC monitor observed the case files of 262 expelled or returned individuals and interviewed 79 short-term arrested individuals and 2 families.

IV. FINDINGS OF BORDER MONITORING

During the border monitoring carried out at the Serbian-Hungarian border section both the Police and the HHC monitor visiting the facilities reported that in comparison to the previous years, intercepted foreigners had a significantly greater degree of awareness of the possibility to submit an asylum application and were more willing to express their intention to seek asylum to the police personnel. The monitor reported a new phenomenon whereby foreigners started to run towards the police car or the police officer moments before their apprehension by the police, which was unprecedented.

The above-mentioned phenomenon can be imputed to several factors: i) the objective increase in the number of applications, ii) the deterioration of the Greek protection and economic situation, iii) the overburdening of the Bulgarian asylum system, iv) the civil war and asylum crisis in Syria as well as v) the legislative changes that took effect on 1 January 2013 terminating alien policing detention against asylum-seekers also contributed to changing the foreigners' behaviour. Until July 2013, foreigners submitting asylum applications had a reasonable ground to believe that despite having crossed the border in an irregular manner, they will not be detained in alien policing detention. Statistics provided by the Office of Immigration and Nationality (OIN) show that a significant part of the 18,900 applicants absconded to an unknown destination or withdrew their application before the asylum authority examined the application in-merit, as a result the procedure was terminated.¹⁴

The Police was informed about 11,514 cases where applicants absconded from open reception centres maintained by the Office of Immigration and Nationality.

IV.1. THE SITUATION OF UNACCOMPANIED MINORS

In comparison to 2012, the number of unaccompanied minors intercepted by the Police decreased in 2013. In the two counties along the Serbian-Hungarian border section a total of 417 minors were intercepted (363 individuals in Csongrád county and 54 individuals in Bács-Kiskun county). In comparison, in 2012 a total of 875 minors were intercepted in the whole country and just at the Serbian-Hungarian border section a total of 813 minors were apprehended.¹⁵ Notwithstanding the decrease, specific emphasis remained on this group of persons with special needs throughout the border monitoring activities carried out by the HHC during the analysis of case files. In terms of nationality, the majority of minors continued to arrive from Afghanistan (245 individuals), in addition to 72 Kosovar, 46 Pakistani, 21 Bangladeshi, 19 Syrian, 12 Algerian, 8 Serbian, 5-5 Somali and Palestine, 4-4 Turkish, Moroccan and Moldovan, 3 Gambian, 2-2 from Guinea Bissau and Sierra Leone, 1-1 from Albania, Egypt, Ivory Coast, Eritrea, France, Ghana, Croatia, Iran, China, Mali, Mauritania, Nepal and Ukraine unaccompanied minors who were intercepted in 2013 in Hungary.

Despite the fact that no considerable improvement occurred in the Serbian asylum and reception system since the publication of the UNHCR report on Serbia in August 2012,¹⁶ the monitoring activities showed that the Police expelled several minors to Serbia. It is to be noted that these minors did not necessarily wish to seek asylum in Hungary, nevertheless on several occasions they did give account of past persecution in their countries of origin. Accordingly, in their case, even without an explicit intention to seek asylum, Section 45(5) of the TCN Act could

¹⁴ According to the statistics provided by the Office of Immigration and Nationality for 2013, out of the 18,900 asylum application in 10,491 the asylum authority terminated the procedure in the preliminary phase (1,195 applicants withdrew their application), whereas in 848 cases the procedure was terminated in the in-merit phase without the issuance of an in-merit decision.

¹⁵ Out of this figure 546 individuals were intercepted in Csongrád county and 267 in Bács-Kiskun county in 2012.

¹⁶ UN High Commissioner for Refugees (UNHCR): Serbia as a country of asylum. Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia, August 2012, available at: <http://www.refworld.org/docid/50471f7e2.html>

be applied, according to which an unaccompanied minor may only be expelled if adequate protection is ensured in his country of origin or in a third country by means of reuniting him / her with other members of his / her family or by state or other institutional care. The UNHCR and the HHC is of the view that it is still questionable whether these conditions are met in Serbia and whether children expelled to Serbia have effective access to adequate protection either within the child protection system or within the alien policing or asylum system.

The Belgrade Centre for Human Rights, UNHCR's implementing partner NGO in Serbia, found in October 2013 that less than half of all asylum-seekers in Serbia could be accommodated in open reception centres. Moreover, the analysis found that excessive prolongation of asylum procedures and the application of safe third country concept still pose challenges, as a result of the latter in many case applicants do not benefit from an in-merit examination of their claim.¹⁷ In line with the above, the Council of Europe Commissioner for Human Rights, Nils Muižnieks drew attention to the problems of the Serbian asylum system and in his letter of November 2013 requested the Serbian prime minister, Ivica Dačić to make further efforts to ensure that all persons in need of international protection are afforded with the necessary protection needed and that their human rights are respected.¹⁸

In Hungary – as confirmed by the information provided above – all foreigners have the possibility to submit an asylum application at any stage of the procedure. The Police does not expel asylum-seekers; however, it is not unprecedented that foreigners themselves request to be sent back to Serbia as soon as possible. This is because they would like to avoid being fingerprinted in the Eurodac system and to try again to reach Western Europe in accordance with their original plans. The Police obtains the OIN's opinion regarding the prohibition of refoulement in each expulsion procedure.

Section 56(2) of TCN Act explicitly prohibits the detention of minors facing expulsion. Accordingly, minors are mainly accommodated in children's homes in Csongrád county until their deportation is carried out. Experience shows that many of these minors abscond to unknown destinations before the Police are able to actually carry out the deportation. In these cases the Police issues an arrest warrant against them. The authorities are not aware of the further fate and the whereabouts of the majority of these minors, which gives rise to concerns (as also noted by the Parliamentary Commissioner for Fundamental Rights in its report AJB-2731/2012). In this respect no substantial improvement occurred in 2013 according to the experience of HHC.

The number of those third-country nationals claiming to be minors continuously increased from 2010 and in a growing number of cases the competent child protection facilities declined the Police's request to accommodate minors, referring to capacity constraints. As a result, in early 2012 the Police requested the competent ministries to designate a child protection facility, preferably in the vicinity of the Hungarian-Serbian border, where these individuals could be accommodated. As of 1 February 2013, two children's homes are appointed to accommodate non-asylum seeking unaccompanied minors who are under an alien policing procedure. The facilities are under the control of the Szeged-Csanád diocese and run by the St. Agatha Child Protection Service. The facility in Ópusztaszer has a capacity of 12, while the facility in Hódmezővásárhely has a maximum capacity of 18 persons. These facilities provide temporary accommodation to those unaccompanied minors who are not seeking asylum and are subject to alien policing procedures. As a result of the designation of these homes, the facilities have the possibility to prepare for the special tasks tailored to the needs of these groups (language barriers, special dietary needs, cultural differences etc.).

According to the information from the Police, minors who are expelled to Serbia are awaited by a child protection officer (social worker) at the Serbian border and they are transferred to child protection facilities. Nevertheless, on the basis of the information gathered by HHC from its Serbian partner organizations, access of unaccompanied minors in need of international protection to the asylum procedure continues to be hindered as the asylum procedure is not effectively launched in the case of minors at the Vaša Stajić juvenile correction institute located in Belgrade.

17 Belgrade Centre for Human rights: Asylum in the Republic of Serbia, June-October 2013 Report, available at: http://www.azil.rs/doc/ENG_periodi_ni_izve_taj_FINALNI_jun_oktobar_2013.pdf

18 Council of Europe: Commissioner for Human Rights, Letter from the Council of Europe Commissioner for Human Rights, Nils Muižnieks, to Mr Ivica DAČIĆ, Prime Minister and Minister of the Interior of Serbia, on the human rights of asylum seekers, 27 November 2013, CommDH(2013)26, the document is available at: <http://www.refworld.org/docid/5304897f4.html>

According to the general experience of the HHC, as supported by the information contained in the case files in Hungary the appointed case guardians remain passive throughout the procedure. This, however, raises the question whether the current guardianship system is capable of providing effective protection to minors. In the HHC's view in the current system – whereby appointed guardians practically remain passive during the entire procedure – no effective protection can be provided. It would be essential to organize regular professional trainings for guardians, during which relevant provisions aiming at the protection of the best interests and rights of the child under the UN Convention on the Right of the Child (promulgated by Act LXIV of 1991 as well as under the TCN Act) could be reiterated.

- On the basis of the case file monitoring carried out on 25 February 2013 in Kiskunhalas, an Afghan and a Kosovar unaccompanied minor was expelled and deported to Serbia. According to the records, appointed guardians observed the deportation of the minors, while on the Serbian side a social worker was present during the actual transfer. On the basis of the interview record, the Afghan boy stated that he is keeping contact with his sick mother and his sibling who were staying at that time in Greece. The 15-year old minor also told that his brother had similarly left Greece and could currently be in Austria. Despite the above statements, the Police did not clarify the family relationships in the case, although it would have been useful to contact family members as well as the Austrian authorities in order to trace the elder brother of the minor.
- On the basis of the case file monitoring carried out on 23 February 2013, a 13 year-old Iraqi girl and a 16 year-old Iraqi boy were intercepted on 5 December 2012 in Bácsalmás. The authorities refrained from appointing a guardian, explaining that during weekends, guardians can only be appointed in Kiskunhalas. As it appeared from the interview record, the girl told that the boy intercepted together with her was her husband as a result of which they were treated as adults. Furthermore, she also told the authorities that she left her country of origin due to religious grounds, later both of them expressed their intention to seek asylum in Hungary. Despite this fact the Police initiated the transfer of the two minors to Serbia under the readmission agreement in place between Serbia and the European Community (promulgated by Government Decree No. 53/2010). It is to be positively acknowledged, however, that on the basis of Section 45 of TCN Act the alien policing authority finally decided that the minors could not be expelled given that “due to their age their reunification with their families is not possible”. As a result the minors were transferred to the István Károlyi Children's Home in Fót.

The HHC and the UNHCR find it positive that in this case after a careful individual assessment of the situation the Police did not initiate the minors' expulsion but rather chose to provide adequate accommodation for them in children's home, which is in line with the principle of best interests of the child set out in Article 3 of the UN Convention on the Right of the Child.¹⁹

- On 24 June 2013, a Syrian unaccompanied minor boy was taken into short-term arrest at the police border field office in Bácsalmás. Following a medical examination, the Police accepted him as a minor. During his second interview the minor expressed his wish to be recognized as a beneficiary of subsidiary protection following the information provided to him by the Police as recorded in the interview minutes: “You are informed that you have the right to seek recognition as a beneficiary of subsidiary protection in Hungary as a result of current war and crisis situation in Syria. The competent authority will examine your application and decide on whether you can legally stay on a temporary basis in Hungary.”

The HHC and the UNHCR is of the view that detailed information provision on the assessment of the Syrian situation by the authorities to individuals fleeing from the war in Syria is in principle welcome as individuals are able to make an informed decision about their future.

- On 23 June 2013, a Syrian unaccompanied minor was apprehended by the Police who told the authorities that his parents died in the war and his surviving sibling was staying at that time in Italy. According to the statements made by the minor he suffered from sleeping disorder, moreover scars of injuries were found on this arm. Although the minor was questioned about the availability of his family members during a later interview, the authority did not make any concrete steps in order to trace the family members staying in Italy neither did the guardian initiate any such actions.

¹⁹ Article 3 point 1 of the Convention on the Right of the Child signed on 20 November 1989 in New York, promulgated by Act LXIV of 1991: “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

IV.2. IMPLEMENTATION OF ARTICLE 31(1) OF THE 1951 GENEVA CONVENTION

Article 31 (1) of the 1951 Geneva Convention stipulates:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

As highlighted in our previous reports, the application of Article 31 of the 1951 Geneva Convention continues to be problematic in Hungary. In previous years, HHC attorneys provided legal assistance to asylum-seekers facing criminal prosecution on the basis of falsifying or having used forged travel documents and intellectual forging of authentic documents. The UNHCR and the HHC are of the opinion that in several cases the Hungarian authorities failed to properly apply Article 31 of the Convention as they initiated criminal procedures against asylum-seekers or established their criminal liability without having regard to this particular provision of the Convention.

According to UNHCR, to give effect to Article 31 (1) of the 1951 Geneva Convention — similarly to rights protected by the European Convention on Human Rights — Contracting States must actively take concrete measures to ensure compliance with their international legal obligations. Therefore, UNHCR position is that where criteria set out in Article 31 (1) of the 1951 Geneva Convention are met States must exempt asylum-seekers or refugees from criminal prosecution. As refugee status is declaratory in nature, Article 31 of the 1951 Geneva Convention also covers asylum-seekers whose claim is pending before the asylum authority.

The HHC and UNHCR are of the opinion that if an asylum-seeker is subject to criminal proceedings under the scope of the application of Article 31 of the Convention, Hungarian authorities must find a way to suspend criminal prosecution until the final decision on granting or denying international protection is made.

Positive developments identified in jurisprudence in 2011-2012 are somewhat overshadowed by the fact that the procedure that will eventually result in the acquittal of the refugee or beneficiary of subsidiary protection from criminal prosecution, hence giving effect to Article 31 of the Geneva Convention, can last even five years due to excessively prolonged criminal proceedings.

- The HHC represented a Somali beneficiary of subsidiary protection against whom criminal proceedings were started in 2009. In the repeated first instance procedure, the criminal court (Pest Central District Court, PKKB) in its acquittal judgment of 3 December 2013 gave a detailed analysis of Article 31 of the Geneva Convention as well as related international law requirements.²⁰ The court accepted the long advocated position of the HHC and the UNHCR regarding the application of Article 31 of the Geneva Convention.

The judgment also includes important aspects in relation to the border monitoring programme, in particular regarding the circumstances of the submission of an asylum application and the interpretation and assessment of the statements of the foreigner in this context. On the basis of the individual circumstances of the case the Somali man expressed his intention to seek asylum in Hungary already during his first and second apprehension by the Police. True enough, on both occasions he gave false data about his identity, nevertheless the Szabolcs-Szatmár-Bereg county police unit did not interpret his statements in accordance with their content and on both occasions, ordered his expulsion to Ukraine. In addition, the competent authority issued a four and a three-year entry ban respectively against the Somali man. According to the defendant's testimony, he had not revealed his true identity to the authorities at the time of the apprehension because of fear of being deported to Ukraine.

During the proceedings it became clear that the OIN does not regard Ukraine as a safe third country from an asylum point of view, similarly to the assessment of the UNHCR. Accordingly, the HHC's assessment was confirmed, thus had the asylum-seeker's wish to seek protection been properly recorded in the first place his expulsion to Ukraine should have not taken place on two occasions.

In addition, according to the court's assessment, the foreigner's application was adequately well-founded given that “his accounts clearly contained the grounds on the basis of which his application could have been appropriately interpreted” even without having mentioned the word “refugee”.

20 Judgment no. 7. B. VIII. 20. 776/2013/34., Pest Central District Court, 3 December 2013

The judgment also noted that Act CXL of 2004 on the general rules of administrative proceedings and services (Ket.) also applies to the submission of asylum applications, thus pursuant to Section 34(5) of this Act, applications need to be interpreted on the basis of their content even if the terms used by the client are different. In addition, the court also underlined that it did not find the acts committed by the defendant to pose any threat to society and reiterated the interpretation of the Public Prosecutor's Office set out in its opinion NF.4035/2008/1. According to the assessment of the Public Prosecutor's Office regarding Article 31 of Geneva Convention, recognition as a refugee or a beneficiary of subsidiary protection represents an obstacle to criminal liability pursuant to Section 22 i) of Act IV of 1978 on the Criminal Code.

The court pointed out that regarding obstacles to criminal liability there is no difference between the different modus operandi of document forgery, thus this also extends to the so-called "intellectual document forgery". Moreover, the court underlined that the requirement of "without delay" under Article 31(1) does not require the applicant to voluntarily contact the alien policing authorities, it is sufficient if the foreigner submits its application during his/her first contact with the authorities.

In this context, a relevant legislative amendment took effect on 1 February 2013: violating a ban on entry and stay no longer constitutes a criminal act. Similarly, the new Criminal Code, which entered into force on 1 July 2013 does not render criminal punishment against the non-compliance of these provisions.²¹

V. INTERNATIONAL CO-OPERATION WITHIN THE BORDER MONITORING PROGRAMME

Similarly to the past years the UNHCR places great emphasis on sharing experience of border monitoring programmes within the region. The UNHCR organizes regional and bilateral meetings for this purpose, where participants have the opportunity to become acquainted with the results of each other's work and find solutions for legal and practical problems. The UNHCR promoted the border monitoring programmes in the Central European region in an international information brochure and compiled the experiences of best practices of previous years.²²

The UNHCR Regional Representation for Central Europe (RRCE) organised a conference in Bratislava on 23-24 January 2013 where representatives of national authorities and NGOs participating in border monitoring evaluated the experiences of the last 4-6 years of the programme. During the discussions it was raised that in order to increase the efficiency of the procedure and to strengthen cooperation, each country involved in border monitoring should evaluate their experiences of the project within the framework of tripartite working group meetings. The Hungarian participants of the programme discussed evaluation criteria and put the evaluation on their agenda in 2013.

The UNHCR Regional Representation for Central Europe held a Summer Course on the human rights aspects of border management between 3-7 June 2013 in Gdansk targeting European border guard officials from seven European Union Member States with the participation of Croatia, Macedonia, Moldova, Serbia, Ukraine and Belarus. Two Hungarian border guard officials also participated in the course.

Beyond the further development of regional relationships the HHC consulted Serbian NGOs on several occasions concerning strategic questions as well as on the follow-up of individual cases. The Serbian partners of the HHC were the Belgrade Centre for Human Rights²³, the Asylum Protection Centre²⁴ and the Humanitarian Centre for Integration and Tolerance²⁵.

VI. CONCLUSIONS AND RECOMMENDATIONS

Based on their experiences in 2013, the parties concerned in the Tripartite Cooperation make the following recommendations to the law-maker (particularly to the Ministry of Interior), to the National Police Headquarters and to the partner government agencies (such as the Office of Immigration and Nationality).

21 Infringing on the ban of of entry and stay was considered as a criminal act under Section 214 of the previous Criminal Code.

22 <http://www.unhcr-centraleurope.org/pdf/what-we-do/monitoring-the-border/border-management/refugees-at-the-border.html>

23 <http://www.bgcentar.org.rs/bgcentar/eng-lat/>

24 <http://www.apc-cza.org/en/>

25 <http://www.unhcr.org/48fdec2a2.html>

VI.1. INTERVIEW IN „SIMPLE CASES“

The UNHCR and the HHC continue to strongly recommend that, in order to prevent the unlawful return of any person in need of international protection, **a legal framework must be established by the legislator that obliges the Police to interview all foreigners who – based also on their nationality would presumably – belong to a vulnerable group during the alien policing procedure.** In particular, a longer interview is needed in the case of single women, unaccompanied minors, elderly and sick people, traumatized persons, families with small children etc. to establish the relevant facts of each case to the extent necessary. A longer and detailed interview can also help the Police to better identify persons in need of international protection, especially the ones with special needs among those arriving in mixed migratory flows.

VI.2. APPLICATION OF THE PRINCIPLE OF NON-REFOULEMENT AND ARTICLE 33 (1) OF THE 1951 GENEVA CONVENTION

The HHC and the UNHCR suggest that the Tripartite Working Group – in light of the UNHCR reports on Ukraine of 2013 and on Serbia of 2012 and in light of other readily available up-to-date country of origin information – address the issue of the application of the principle of non-refoulement and the actual risks associated with not respecting these safeguards. The HHC and the UNHCR recommend **that the Hungarian authorities, especially the Office of Immigration and Nationality issuing a mandatory opinion on the application of the principle of non-refoulement, reconsider their position on Serbia as a safe third country in the alien policing procedure due to the deficiencies in the Serbian asylum system.** Especially in cases where **the danger of chain-refoulement** is present (from Serbia even to Greece) and also where the alien policing procedure is initiated against **a person in need of special treatment.** In applying the safe third country concept, the HHC and the UNHCR recommend that the opinion of the Curia's Working Group on Asylum established under the Administrative and Labour Law College be fully taken into account. Due to the large number of expulsions at the Serbian-Hungarian border section it is suggested that continued emphasis is put on the further monitoring of the Serbian asylum system.

VI.3. APPLICATION OF EFFECTIVE CHILD PROTECTION MEASURES IN CASES OF EXPULSION OF UNACCOMPANIED MINORS

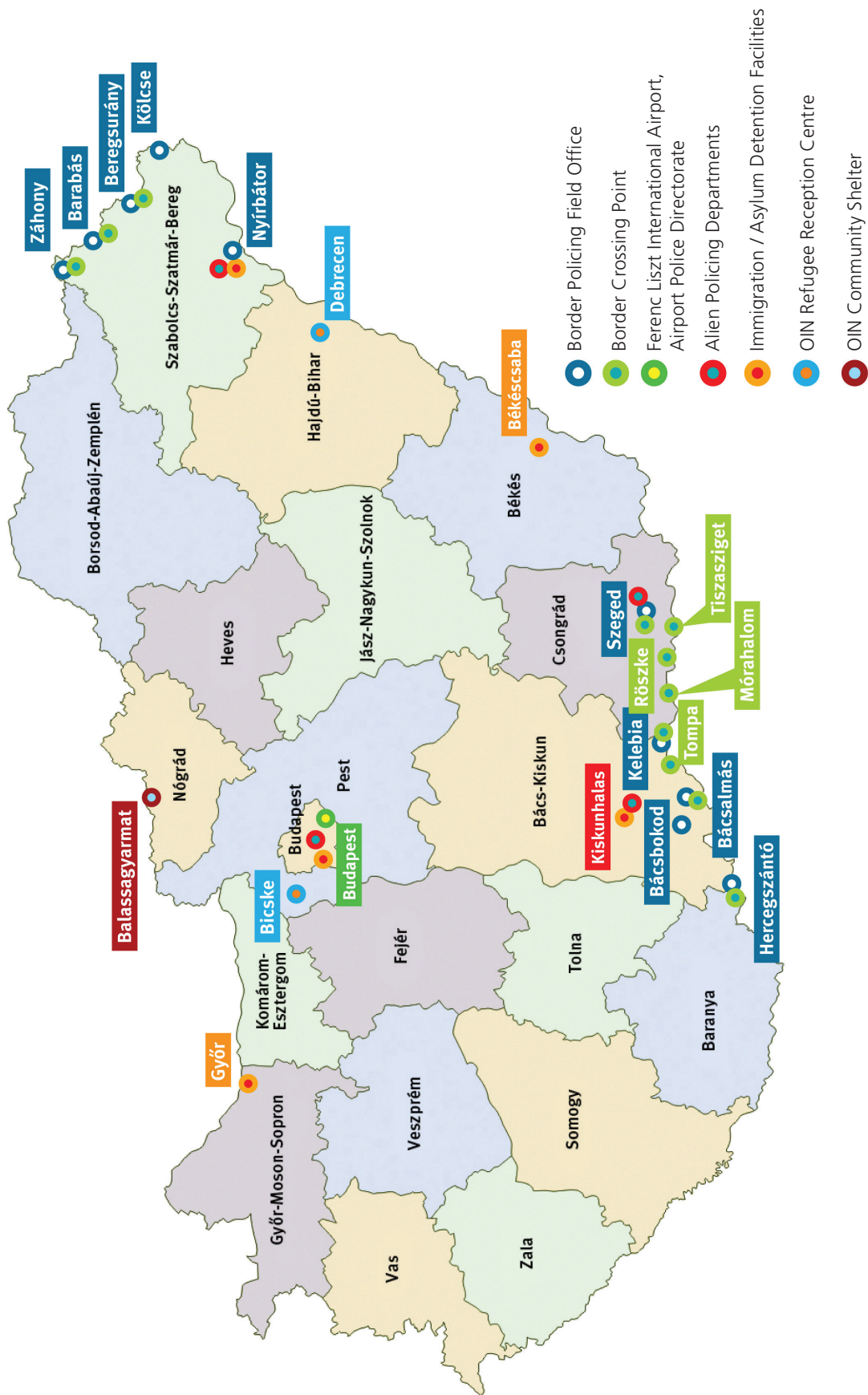
The UNHCR and the HHC strongly recommend **that the authorities – respecting the UN Convention on the Right of the Child – carry out an individual and substantive examination in each case to determine the best interest of the child in expulsion procedures** and make efforts in order that the relevant aspects of child protection criteria are reflected in their decisions. There is a need for a structured cooperation between the alien policing, asylum and child-care authorities, special services and NGOs. The UNHCR and the HHC further recommend that the parties concerned build a professional dialogue and carefully observe and make efforts to implement good practices from abroad focusing on the assessment of the best interest of the child, age assessment and intercultural communication with foreign children.

VI.4. CONSISTENT APPLICATION OF ARTICLE 31 OF THE 1951 GENEVA CONVENTION

The HHC and the UNHCR continue to strongly recommend that the Hungarian authorities **refrain from initiating criminal procedures against asylum seekers whose case invoked the application of Article 31 of the Geneva Convention** and who later benefit from international protection in Hungary. Based on previous professional consensus, courts are advised to suspend criminal procedures with an emphasis on avoiding ordering unjustified, extended pre-trial detentions.

VI.5. FURTHER IMPROVEMENT OF THE BORDER MONITORING METHOD

In the spirit of the conference held in Bratislava in 2013, the HHC and the UNHCR recommend to revisit the possibility of unannounced visits and access to non-anonymous case files as a possible way of the further improved cooperation. Among the border monitoring countries in the Central European region, in two countries, Slovakia and Poland, it is sufficient for the monitors to only give advance notifications about their planned visit on the morning of the visit and no further prior warning is needed. This practice should stand as a good example for the Hungarian partners in further improving their cooperation. Within the Polish border monitoring programme, the NGO conducting the monitoring visits has unlimited access to the selected case files. This highly increases the extent of relevant information which can be accessed during the monitoring, which makes the monitoring more effective. It is recommended that the National Police Headquarters considers the improvement of the Tripartite Agreement in this direction.



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