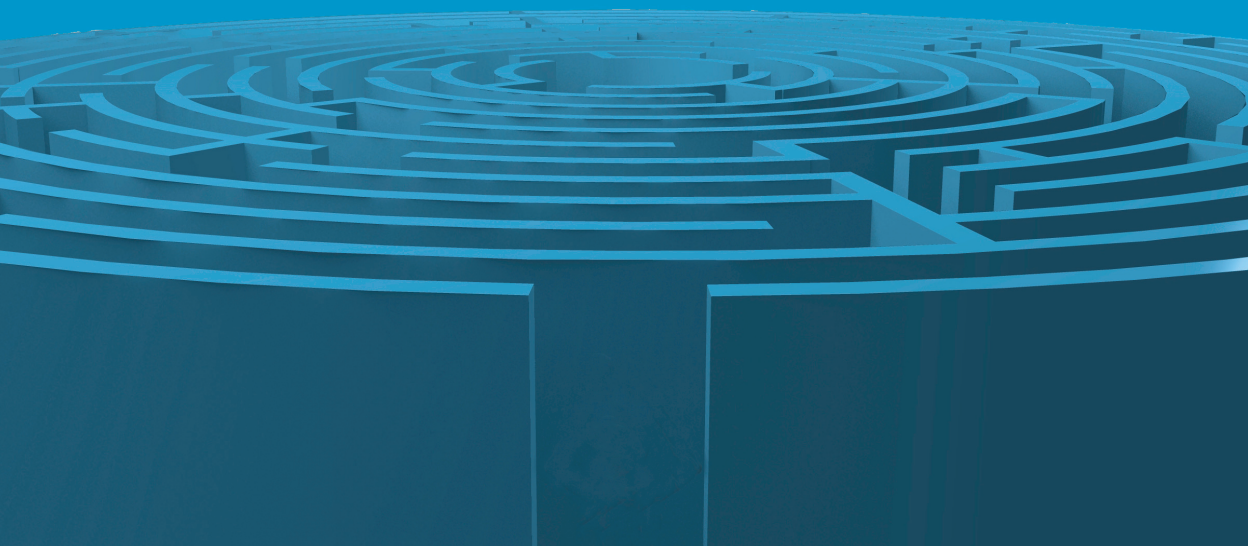


PRACTICES IN HUNGARY CONCERNING THE GRANTING OF NON-EU-HARMONISED PROTECTION STATUSES

Gábor Gyulai



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written by
Gábor Gyulai

Budapest, September 2009

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Research for this publication was made possible by the Ministry of Justice and Law Enforcement of the Republic of Hungary. The views expressed in this publication are those of the author and do not necessarily reflect the views of the Ministry of Justice and Law Enforcement or any other entity.

This study reflects the situation as on 27 August 2009.

The author wishes to thank Márta Pardavi, Júlia Iván, Nóra Novoszádek and Gábor Győző for their valuable contributions to this study.

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Executive Summary

In recent years, Hungary transposed the EU asylum *acquis* and thus harmonised its asylum legislation with other member states in many key aspects. An EU-conform refugee status, temporary and subsidiary protection regime, as well as related procedures based on common minimum standards were created. However, the harmonisation process did not extend to all protection statuses. This study presents an overview of protection statuses available to foreigners that are based on human rights, humanitarian or compassionate grounds but which are *not* regulated by common EU rules. Furthermore, it outlines the relevant procedural framework and analyses the main differences between protection standards, rights and guarantees ensured by harmonised and non-harmonised statuses.

Currently, four non-EU-harmonised protection statuses exist in Hungarian law:

- Tolerated status (*befogadott*);
- Victims of human trafficking;
- Unaccompanied minors;
- Stateless persons.

A comparative table summarises the main characteristics of these statuses, also indicating the parallel features of EU-harmonised statuses.

The main findings of the study can be summarised as follows:

- Through its non-EU-harmonised protection statuses, Hungary strives to fulfil its obligations under international law (such as *non-refoulement*, the struggle against human trafficking, respect for the best interest of the child and the protection of stateless persons).
- Non-EU-harmonised protection statuses fall under the scope of alien policing (immigration) law in Hungary, with the partial exception of tolerated status, which can also be granted in an asylum procedure.
- Entitlement to all these statuses is determined on individualised grounds and according to set legal criteria (despite debates concerning the actual application of these criteria in some cases).
- Non-EU-harmonised protection statuses entail less favourable legal and social conditions than refugee status or subsidiary protection in most aspects. The difference is particularly outstanding with regard to the length of the right to reside in Hungary, access to the labour market and to public health care services and naturalisation possibilities. In comparison with harmonised statuses, non-EU-harmonised protection statuses usually offer limited possibilities for integration and self-reliance.

- Hungarian aliens legislation is notable for its specific statelessness determination mechanism and a separate stateless status. Notwithstanding this progressive and exemplary approach, the stateless protection regime suffers from a number of significant shortcomings that may result in excluding a number of stateless persons from applying for protection, as well as in scarce possibilities for integration and self-reliance, even on the long run (disregarding the usually enduring character of statelessness as a situation).
- Hungarian authorities tend to grant all non-EU-harmonised protection statuses in practice; however, tolerated status is used more frequently than the others.
- The relevant protection regimes have been in place only since July 2007. Thus, in most cases, no in-depth research has been conducted so far on the actual application of the provisions presented in this report. The main relevant professional debates concern the application of tolerated status (the applicability of which is questioned by some actors), and – to a lesser extent – on statelessness legislation.

EU-Harmonised Statuses		Tolerated Status	Victims of Trafficking	Unaccompanied Minors	Stateless Persons
Basis / personal scope	Refugee: persecution on Convention grounds Subsidiary protection: serious harm	Non-refoulement (prohibition of return to persecution on Convention grounds; torture, cruel, inhuman or degrading treatment or punishment and death penalty) – no additional element compared to refugee status and subsidiary protection	Third-country national victims of trafficking who cooperate with the authorities in crime investigation providing significant assistance in gathering evidence	Third-country national children born in Hungary and removed from the custody of their guardian having custody according to Hungarian law; third-country national children who arrive in Hungary unaccompanied by an adult responsible for them or left unaccompanied after entering Hungary	A person who is not recognised as a citizen by any country under its national law (<i>de jure</i> stateless)
Exclusion	For having committed <ul style="list-style-type: none"> a crime against peace, a war crime or a crime against humanity a serious non-political crime a crime contrary to the purposes and principles of the UN For violating national security (only subsidiary protection)	No	No	No	For having committed <ul style="list-style-type: none"> a crime against peace, a war crime or a crime against humanity a serious non-political crime a crime contrary to the purposes and principles of the UN
Can be obtained in an...	Asylum procedure	Both asylum and alien policing procedure	Alien policing procedure	Alien policing procedure	Alien policing procedure (dedicated statelessness determination procedure)
The procedure starts...	Upon request (asylum claim)	Either <i>ex officio</i> or upon request depending on the circumstances	<i>Ex officio</i> (initiated by crime investigating authorities)	<i>Ex officio</i> (initiated by guardianship authorities)	Upon request (claim for stateless status)
Residence / identity document	Refugees: unlimited in time, Hungarian ID card Subsidiary protection: 5 years, renewable, Hungarian ID card	Maximum 1 year, renewable, humanitarian residence permit	Maximum 6 months, renewable, humanitarian residence permit	Maximum 1 year, renewable, humanitarian residence permit	Maximum 1 year, renewable, humanitarian residence permit
Access to the labour market	Unlimited	Limited – only with work permit	Limited – only with work permit and proving that there is no qualified, Hungarian or other EEA-citizen applying for the same job	Limited – only with work permit and proving that there is no qualified, Hungarian or other EEA-citizen applying for the same job	Limited – only with work permit and proving that there is no qualified, Hungarian or other EEA-citizen applying for the same job

	EU-harmonised Statuses	Tolerated Status	Victims of trafficking	Unaccompanied minors	Stateless persons
Access to free-of-charge health care without the right to social security services and benefits (e.g. if unemployed)	For 2 years after recognition: <ul style="list-style-type: none"> Basic services (ambulance, examinations and treatment in case of emergency until recovery, vaccination and anti-epidemic measures) General practitioner's regular services Emergency dental care Antenatal and maternity care 	Only the most basic services (ambulance, examinations and treatment in case of emergency until stabilisation, vaccination and anti-epidemic measures)	Only the most basic services (ambulance, examinations and treatment in case of emergency until stabilisation, vaccination and anti-epidemic measures)	Unlimited access	Only most basic services (ambulance, examinations and treatment in case of emergency until stabilisation, vaccination and anti-epidemic measures)
Right to state-funded primary and secondary education	Yes	Yes	Yes	Yes	Yes
Right to state-funded higher education	Yes	Yes	No	—	No
Right to a Hungarian travel document (if not holding one of another state)	Yes	No	No	No	Yes
Right to family reunification	Yes, with preferential conditions (exempted from material conditions if applying within 6 months after recognition)	Yes, according to general rules (livelihood, accommodation and full health insurance must be shown)	Yes, according to general rules (livelihood, accommodation and full health insurance must be shown)	Yes, according to general rules (livelihood, accommodation and full health insurance must be shown)	Yes, according to general rules (livelihood, accommodation and full health insurance must be shown)
Eligibility for a "national permanent residence permit" (if material conditions are fulfilled)	Yes (but has no significant added value)	Yes	Yes	Yes	Yes
Eligibility for an "EU permanent residence permit" (if material conditions are fulfilled) and thus can become a long-term resident in the EU	No	No	Yes	Yes	Yes
Eligibility for obtaining Hungarian nationality after continuous residence in the country for...	3 years after status recognition	8 years after obtaining a permanent residence permit, thus minimum 11 year after status recognition	8 years after obtaining a permanent residence permit, thus minimum 11 year after status recognition	8 years after obtaining a permanent residence permit, thus minimum 11 year after status recognition	5 years after obtaining a permanent residence permit, thus minimum 8 year after status recognition (if not having a "place of residence" on another grounds)

I. Introduction: Purpose and Methodology

I.1 Aims and Context

Since the 1997 Amsterdam Treaty¹, the approximation of asylum policies – including procedures, definitions, reception conditions and responsibility-sharing mechanisms – is considered a key field of harmonisation within the European Union. The Union established its own definition of all main concepts of refugee law, it set minimum standards for a common procedural framework, established minimum norms for reception conditions and established a responsibility-sharing mechanism, the so-called “Dublin system”.² Closely related issues, such as family reunification, long-term residence or return of foreigners were also brought under the scope of community law.³

¹ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts

² See for example: Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (“Temporary Protection Directive”), Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (“Reception Directive”), Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (“Dublin Regulation”), Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (“Qualification Directive”), Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (“Procedures Directive”)

³ See for example: Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (“Family Reunification Directive”), Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (“Long-term Residence Directive”), Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (“Free Movement Directive”), 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 (“Return Directive”), etc.

One of the EU's most ambitious aims in this regard is the harmonisation of protection statuses. Member states recognised that discrepancies and differences between national interpretations of the refugee definition and subsidiary protection undermine all harmonisation efforts in the field of asylum and lead to undesirable secondary movements within the Union. The Qualification Directive⁴ thus not only established minimum criteria for harmonised protection statuses, but – for the first time in history – set a legally binding international definition for subsidiary protection.

Notwithstanding the significant achievements of harmonisation to date, a truly uniform application of these concepts is yet to come. Studies underscore how the understanding of certain concepts varies among member states, which also originates from the fact that so far, the EU has only set minimum standards (a common framework) in this respect, but not mandatory common rules.⁵ Even if we acknowledge the decreasing but persisting differences, EU law now presents a solid basis for full harmonisation in the forthcoming years. The current revision of the relevant asylum directives, as well as the interpretative role of the European Court of Justice⁶ will probably play a central role in this process.

Whilst the harmonisation of refugee status and subsidiary protection within the EU is of unquestionable importance, several other forms of protection, found in national legal regimes, have so far not been in the focus of community harmonisation efforts. Such non-EU-harmonised statuses are often those national forms of complementary protection that already existed well before the establishment of the common subsidiary protection regime. The name of this “C-status” varies from country to country and is often called humanitarian protection, leave to remain, protection for compassionate reasons or tolerated stay. The reasons behind granting such a status are also quite diverse

⁴ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

⁵ See for example European Legal Network on Asylum (ELENA), *The Impact of the EU Qualification Directive on International Protection*, October 2008, viewed on 27 July 2009, http://www.ecre.org/resources/Policy_papers/1244. UNHCR, *Asylum in the European Union: A study of the implementation of the qualification directive*, November 2007, viewed on 27 July 2009, <http://www.unhcr.org/protect/PROTECTION/47302b6c2.pdf>

⁶ See the milestone judgment of *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, European Union: European Court of Justice, 17 February 2009, viewed on 24 August 2009, <http://www.unhcr.org/refworld/docid/499aee52.html> or the on-going Case C-31/09: Reference for a preliminary ruling from the Fővárosi Bíróság (Hungary) lodged on 26 January 2009 – *Bolbol Nawras v. Bevándorlási és Állampolgársági Hivatal*, viewed on 24 August 2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:082:0015:0015:en:pdf>

in different member states: *non-refoulement*⁷ or practical non-removability grounds, medical reasons, environmental catastrophes, etc. What is common, however, that these statuses always afford less rights and a lower level of protection than refugee status (and often than subsidiary protection as well) and are usually more limited in time. Statistics also show that these “residual” statuses play an increasingly important role in today’s European asylum system, while their proportion and use still varies among the member states. Critics often claim that the frequent use of these “C-statuses” weaken protection standards embedded in international refugee law and the EU asylum *acquis* and, furthermore, that such diversity in national practices is clearly incompatible with the aim of harmonised asylum policies in the EU.

The European Commission also noted this phenomenon and identified, in its 2008 Policy Plan on Asylum,⁸ as one of the three main current asylum-related tendencies that

“(…) an ever-growing percentage of applicants are granted subsidiary protection or other kinds of protection status based on national law, rather than refugee status according to the Geneva Convention. This is probably due to the fact that an increasing share of today’s conflicts and persecutions are not covered by the Convention. It will therefore be important during the second phase of the CEAS⁹ to pay particular attention to subsidiary and other forms of protection.”

Based on the above, the European Migration Network (EMN) embarked on a comparative research initiative in order to explore the different non-EU-harmonised protection statuses existing in the member states. The National Reports, as well as the final

⁷ A core principle of international customary law meaning the prohibition of a person’s expulsion or removal to or a territory where she would face torture, inhuman or degrading treatment or punishment, or where her life or freedom would be threatened. In EU member states, this principle primarily emanates from Article 33 of the 1951 Convention Relating to the Status of Refugees (commonly referred to as 1951 Refugee Convention), Article 7 of the 1966 International Covenant on Civil and Political Rights (and its interpretation by the UN Human Rights Committee), Article 3 (1) of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3 of the 1951 European Convention for the Protection of Human Rights and Fundamental Freedoms (and its consecutive interpretation by the European Court of Human Rights) and Article 19 (2) of the 2000 Charter of Fundamental Rights of the European Union

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Policy Plan on Asylum, an Integrated Approach to Protection Across the EU, Brussels, 17 June 2008, COM(2008) 360 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0360:EN:NOT>

⁹ Common European Asylum System

Synthesis Report are to provide national and EU policy-makers and other stakeholders (NGOs, human rights advocates, the UNHCR, academics, etc.) with factual information on how to address this issue in the next phase of harmonisation towards a Common European Asylum System. The present study has been prepared in the framework of this EMN research initiative.

Two factors can be referred to as adding country-specific relevance to this report in a European context:

- Hungary is currently one of the two countries in the world¹⁰ that set detailed rules for statelessness determination and provide for a separate stateless status in legislation; hence establishing an important, non-EU-harmonised protection status for stateless persons.
- On-going professional debates concern the application and the features of the non-EU-harmonised “tolerated status” in Hungary, which well illustrates the most problematic aspects that gave rise to the present research at a European level.

1.2 Methodology

The present study is based on research conducted in July-August 2009 and draws its conclusions from three main sources:

- Desk research: analysis of asylum and aliens legislation and other relevant legal sources (e.g. labour, health care, education or naturalisation laws), statistics, position papers and recent studies;
- Practical experience of the author as well as the Hungarian Helsinki Committee;
- Information shared in the course of personal and telephone interviews by other stakeholders, such as the Menedék Association for Migrants and the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Central Europe.

Detailed references to a concrete source are specified wherever relevant throughout the entire report.

The author did not encounter any notable difficulties during the research process. All stakeholders were cooperative and all relevant statistics were accessible upon request. In cases where stakeholders do not agree on the interpretation of a certain rule or phenomenon, diverging views are equally presented.

All translations in this study are unofficial.

¹⁰ Together with Spain

II. Protection Statuses Granted in Hungary

II.1 Aspects of Analysis and Comparison

This chapter presents the different protection statuses currently existing in Hungarian law. “Protection” in this context is understood as

A concept that encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law. Protection involves creating an environment conducive to respect for human beings, preventing and/or alleviating the immediate effects of a specific pattern of abuse, and restoring dignified conditions of life through reparation, restitution and rehabilitation.¹¹

More specifically, for the purposes of this study a “protection status” is understood as any legal status that is available for non-nationals residing on the territory of Hungary, which meets the following criteria:

- It is based on the country’s obligations under international law or any other compassionate or humanitarian consideration(s). It is not based on the demographic, economic or scientific interests of the host country.
- It is not dependant on the fulfilment of material conditions such as livelihood, accommodation or health insurance coverage.

Consequently, the present study does not discuss “classic immigration statuses” (such as residence for the purpose of gainful employment, pursuit of studies or scientific research) or statuses with a humanitarian aspect but foreseeing strict material conditions (such as residence on the grounds of family union).

¹¹ UNHCR, *Master Glossary of Terms*, June 2006, Rev.1, viewed on 27 July 2009, <http://www.unhcr.org/refworld/docid/42ce7d444.html>

Protection statuses are classified in two groups:

- EU-harmonised statuses: based on a commonly agreed definition and established by community law;¹²
- Non-EU-harmonised statuses: not defined and regulated at EU level (regardless of whether they are based on international law).

This chapter will first provide a brief overview of EU-harmonised statuses, to serve mainly as a comparative context for a more detailed analysis of non-harmonised statuses. The following main questions will be addressed:

- 1) What is the definition of the protection status? On what sort of harm, risk, danger or other consideration is it based?
- 2) Is this status regulated in the framework of asylum or migration legislation?¹³
- 3) Does this definition establish clear legal criteria to be applied in the course of its application, or does it grant significant discretionary powers to the decision-maker?
- 4) Is this status assessed on an individualised ground or is it granted on a group basis?
- 5) Are there any exclusion grounds from this form of protection? Are public order grounds or national security concerns considered in this context?

Chapter III will deal with procedural issues (such as evidence assessment, legal remedies etc.) and the rights attached to the different protection statuses.

II.2 Overview of EU-Harmonised Protection Statuses

This sub-chapter presents a brief overview of EU-harmonised protection statuses, mainly for purposes of comparison, as an in-depth analysis would exceed the scope of the present study.

¹² See Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (“Temporary Protection Directive”) and Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (“Qualification Directive”)

¹³ The term “alien policing legislation” is commonly used in Hungary as an equivalent of “immigration legislation” in other countries

All EU-harmonised protection regimes, namely refugee status, subsidiary and temporary protection were duly transposed into Hungarian asylum legislation, creating three different statuses: refugee status (*menekült*), beneficiary of subsidiary protection (*oltalmazott*) and beneficiary of temporary protection (*menedékes*).¹⁴

Section 6 (1) of the Act LXXX of 2007 on Asylum (hereinafter Asylum Act) stipulates that

The Republic of Hungary shall recognise as a refugee a foreigner who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of her/his origin and is unable or, owing to such fear, unwilling to avail herself/himself of the protection of that country.

Section 12 (1) of the Act sets the criteria for subsidiary protection:

The Republic of Hungary shall grant subsidiary protection to a foreigner who does not satisfy the criteria of recognition as a refugee but there is a risk that, in the event of her/his return to her/his country of origin, she/he would be exposed to serious harm and is unable or, owing to fear of such risk, unwilling to avail herself/himself of the protection of his/her country of origin.

Harms that give rise to these protection needs – “persecution” in the case of refugees and “serious harm” in the case of subsidiary protection – are defined in line with the parallel concepts in EU law.¹⁵ The only noteworthy difference is that the Hungarian legislator decided to leave out the criterion of “individual” threat when transposing Article 15 (c) of the Qualification Directive (which originally reads as “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”). According to the Hungarian Helsinki Committee’s experience, this modification did not trigger any significant effect in the actual application of the provision in question.

Either of these statuses may be granted in the course of an individualised asylum procedure.

Exclusion from both protection statuses for “undeserving” applicants is foreseen in the Hungarian Asylum Act based on the 1951 Refugee Convention and the Qualification Directive.¹⁶ Section 8 (1) of the Asylum Act stipulates that

¹⁴ No adequate, one-word equivalent exist for *oltalmazott* and *menedékes* in English

¹⁵ See Asylum Act, Section 60 and 64 and Qualification Directive, Article 9-10 (persecution), as well as Asylum Act, Section 61 and Qualification Directive, Article 15 (serious harm)

¹⁶ Convention relating to the Status of Refugees, Article 1F; Qualification Directive Articles 12 and 17

A foreigner shall not be recognised as a refugee in respect of whom any of the disqualifying circumstances determined in Article 1, paragraph D, E or F of the Geneva Convention prevails.

Section 8 (2) specifies that in this context

(...) an act qualifies as a serious, non-political, criminal act upon the commission of which, with regard to the totality of the circumstances, including the objective intended to be attained through the crime, the motivation of the crime, the method of commission and the means used or intended to be used, the ordinary legal aspect of the crime dominates over the political aspect and it is punishable by imprisonment of five years or longer according to the relevant Hungarian legal provisions.

Section 15 sets out the exclusion grounds from subsidiary protection:

Subsidiary protection shall not be granted to a foreigner

- a) in whose case it is well-founded to assume that
 - aa) she/he committed a crime against peace, a war crime or a crime against humanity as defined in international instruments;
 - ab) she/he committed a crime which is punishable by imprisonment of five years or more under Hungarian law;
 - ac) she/he committed a crime contrary to the purposes and principles of the United Nations;
- b) whose stay in the territory of the Republic of Hungary violates national security.

The Hungarian Helsinki Committee as well as other organisations criticised these provisions for its erroneous, inflexible and too strict interpretation of the “serious non-political crime” concept.¹⁷ It should be noted, however, that in a number of areas, the Hungarian Asylum Act provides for higher standards than several provisions of the Qualification Directive.¹⁸

¹⁷ For a detailed analysis see European Legal Network on Asylum (ELENA), *The Impact of the EU Qualification Directive on International Protection*, October 2008, viewed on 27 July 2009, pp. 158, 229–230. http://www.ecre.org/resources/Policy_papers/1244

¹⁸ Ibid. pp. 55–56

In addition to both of these statuses, which are based on clear legal criteria emanating from international and EU law, Section 7 (4) of the Asylum Act also allows for recognition of refugee status based on “special considerations”.¹⁹ In such cases, it is directly the minister responsible for asylum matters (instead of the Office of Immigration and Nationality) who grants refugee status based fully on discretionary powers, in cases where Geneva Convention recognition grounds would otherwise not apply.²⁰ According to information available, this rather unusual regime (which already existed before the transposition of the EU asylum *acquis*) is not applied in practice. Only one case has become known in recent years: an ethnic Hungarian asylum-seeker family from Vojvodina (Serbia) was recognised as refugee in 2004 under this provision. Taking into account its specific character and extremely rare application, the recognition of refugee status based on “special considerations” appears to be a rather theoretical possibility and therefore it need not to be analysed in more detail.

As for temporary protection, Section 19 of the Asylum Act stipulates that²¹

The Republic of Hungary shall grant temporary protection to a foreigner who belongs to a group of displaced persons arriving in the territory of the Republic of Hungary *en masse* that

- a) was recognised by the Council of the European Union as eligible for temporary protection (...), or
- b) was recognised by the Parliament as eligible for temporary protection as the persons belonging to the group had been forced to leave their country due to an armed conflict, civil war or ethnic clashes or the general, systematic or gross violation of human rights, in particular, torture, cruel, inhuman or degrading treatment.

In this case, there are no further legal criteria; the decision is left to the discretion of the Council or the Hungarian Parliament. The decision is obviously made on a group basis (reflecting the special challenges of an *en masse* refugee influx); however, the applicant will have to prove or substantiate that she/he is actually a member of the group in question.²²

¹⁹ No adequate translation exists for this Hungarian legal term (*méltányossági menekültstátusz*); literally it means “refugee status based on equity”.

²⁰ See procedural issues in Sub-chapter III.1

²¹ Cf. Temporary Protection Directive, Article 5 and 7

²² Asylum Act, Section 77 (1)

Section 21 of the Asylum Act defines the grounds for exclusion from temporary protection, transposing the relevant provision of the Temporary Protection Directive:

- (1) Temporary protection shall not be granted to a foreigner
 - a) in whose case it is well-founded to assume that
 - aa) she/he committed a crime against peace, a war crime or a crime against humanity as defined in international instruments;
 - ab) she/he committed a serious, non-political criminal act outside the territory of the Republic of Hungary prior to the submission of the application for recognition as a beneficiary of temporary protection;
 - ac) she/he committed a crime contrary to the purposes and principles of the United Nations;
 - b) whose stay in the territory of the Republic of Hungary violates the interests of national security;
 - c) in whose case a final court judgment established that she/he had committed a crime which is punishable by imprisonment of five years or more under Hungarian law.
- (2) In the course of implementing Section 1, paragraph a, subparagraph ab), an act qualifies as a serious, non-political, criminal act upon the commission of which, with regard to the totality of the circumstances including the objective intended to be attained through the act, its motivation, method of commission and the means used or intended to be used the ordinary legal aspect of the criminal act dominates over the political aspect and it is punishable by an imprisonment of five year or longer term according to Hungarian law.

The temporary protection regime (which already existed before the transposition of the relevant EU directive) has not been applied in practice since the mid-nineties.

It can be concluded that all three EU-harmonised protection statuses appear in Hungarian legislation in line with the relevant provisions of international and EU law (not forgetting, however, the problematic interpretation of the “serious non-political crime” concept in connection with the exclusion clauses). Nevertheless, only refugee status and subsidiary protection will be referred to for comparison throughout this report, as

- only these two statuses are determined on an individual basis (similarly to non-EU-harmonised statuses) and
- only these are actually applied in practice.

II.3 Non-EU-Harmonised Protection Statuses

Hungarian law currently foresees four non-EU-harmonised protection statuses:

- tolerated status,
- humanitarian residence permit for victims of human trafficking,
- humanitarian residence permit for unaccompanied minors and
- stateless status.

All of these statuses are determined on an individual basis.

II.3.1 Tolerated Status

The most frequently used non-EU-harmonised status is the “tolerated status” (*befogadott*).²³ This protection regime is based both on the asylum and aliens legislation. Section 45 of the Asylum Act provides that

- (1) The prohibition of *refoulement* prevails if the person seeking recognition is exposed to the risk of persecution due reasons of race, religion, nationality, membership of a particular social group or political opinion or to death penalty, torture, cruel, inhuman or degrading treatment or punishment in her/his country of origin for, and there is no safe third country which would admit her/him.
- (2) In the case of an unaccompanied minor, the prohibition of *refoulement* also prevails if the unification of the family or any state or other institutional care is not possible either in her/his country of origin or in another state receiving her/him.
- (3) In its decision relating to the refusal of an application for recognition or the revocation of recognition, the asylum authority shall establish whether the prohibition of *refoulement* prevails or not.
- (4) In the event of the existence of the prohibition under Sub-section (1) or (2), based on the proposal of the asylum authority, the alien policing authority shall grant the foreigner tolerated status.

²³ No adequate, one-word equivalent exists for *befogadott* in English

Section 2 (f) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (hereinafter Aliens Act) defines tolerated status as:

any person who can not be returned to the country of her/his nationality, or in the case of a stateless person to the country of habitual residence, for fear of facing death penalty, torture, cruel, inhuman or degrading treatment or punishment, and there is no safe third country that would admit her/him, and who is not entitled to refugee or stateless status, subsidiary or temporary protection;

Furthermore, Section 51 (1) of the Aliens Act stipulates that

Third-country nationals shall not be returned or expelled to the territory of a country that fails to satisfy the criteria of safe country of origin or safe third country with regard to the person in question, in particular where the third-country national is likely to be exposed to persecution on the grounds of her/his race, religion, nationality, membership of a particular social group or political opinion, nor to the territory or the frontier of a country where there are substantial grounds for believing that the returned or expelled third-country national will be subjected to death penalty, torture, cruel, inhuman, degrading treatment or punishment (*non-refoulement*).

Third-country nationals granted tolerated status are provided with a humanitarian residence permit (*humanitárius tartózkodási engedély*).²⁴

The tolerated status therefore reflects Hungary's *non-refoulement* obligations under international law, based on:

- The prohibition of return to persecution based on Article 33 (1) of the 1951 Refugee Convention (although it should be noted that the *non-refoulement* provision of the Convention talks about “life and freedom” in this context, instead of “persecution”)²⁵.
- The extraterritorial application of the absolute prohibition of the death penalty as set forth by Article 1 of the Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Concerning the abolition of the death penalty in all circumstances and Article 19 (2) of the 2000 Charter of Fundamental Rights of the European Union.

²⁴ Aliens Act, Section 29 (1) (b)

²⁵ “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.”

- The extraterritorial application of the absolute prohibition of torture, cruel, inhuman or degrading treatment or punishment, based on Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR), Article 3 (1) of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 3 of the 1951 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 19 (2) of the 2000 Charter of Fundamental Rights of the European Union.

The following further general characteristics can be mentioned with regard to the tolerated status:

- It is based on well-defined legal criteria and not on the discretionary power of the decision-maker (even though, there are on-going professional debates about how these criteria should be understood – see details in Chapter V).
- This status may be granted in the course of either an asylum or an alien policing procedure (see in III.1.2 and III.1.3).
- Given the absolute, non-derogable character of the rights protected under this regime, there are no grounds for exclusion from tolerated status (constituting a major difference with refugee status or subsidiary protection).

II.3.2 Victims of Trafficking

Victims of human trafficking are also entitled to protection in Hungary. While this protection regime is based on EU law²⁶, the status and rights it entails are only briefly outlined in the EU Directive on Victims of Trafficking, without setting comprehensive standards (in contrast to the statuses based on the Qualification Directive).

Section 29 of the Aliens Act provides:

- (1) In the absence of the requirements for a residence permit specified in this Act the following persons shall be granted a residence permit on humanitarian grounds: [...]
 - e) for substantial national security or law enforcement reasons – upon the initiative of a public prosecutor, a judge or the

²⁶ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (“Directive on Victims of Trafficking”)

National Security Service – any third-country national, or other affiliated third-country nationals on her/his account, who cooperates with the authorities in crime investigation providing significant assistance in gathering evidence.

Based on Section 30 (1) (e) of the Aliens Act, victims of trafficking are entitled to a certificate of temporary residence (*ideiglenes tartózkodásra jogosító igazolás*) during the so-called “reflection period”, as set forth in Article 6 (1) of the Directive on Victims of Trafficking.²⁷ This, given its strictly temporary character and the limited rights attached thereto cannot be yet considered a protection status. Once the reflection period is over, and the authority considers the condition set by Section 29 (1) (e) of the Aliens Act (see above) fulfilled, it will issue a humanitarian residence permit (*humanitárius tartózkodási engedély*) to the trafficking victim (see III.1.3)

The main general characteristics of this protection status are:

- It is based on well-defined legal criteria and not on the discretion of the decision-maker.
- Protection to victims of trafficking may be granted in an alien policing procedure.
- Relevant legislation does not set forth any exclusion ground (e.g. public order or national security reasons).

II.3.3 Unaccompanied Minors

Non-national unaccompanied minors may have access to protection in Hungary through refugee status, subsidiary protection or even tolerated status.²⁸ In addition to these statuses, which can be obtained in an asylum or aliens procedure, Hungarian aliens law foresees an additional protection regime for unaccompanied minors/separated children. In Section 29, the Aliens Act stipulates that

- (1) In the absence of the requirements for a residence permit specified in this Act the following persons shall be granted a residence permit on humanitarian grounds: (...)

²⁷ “Member States shall ensure that the third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities.”

²⁸ In the first six months of 2009, 59 unaccompanied minors submitted an asylum claim in Hungary.

- d) any third-country national who was born in the territory of the Republic of Hungary who has been removed from the custody of her/his guardian having custody according to Hungarian law, and also unaccompanied minors;²⁹

Section 2 (e) of the Aliens Act defines an unaccompanied minor as

a third-country national under the age of eighteen, who arrives on the territory of the Republic of Hungary unaccompanied by an adult responsible for her/him by law or custom, and for as long as she/he is not effectively taken into the care of such a person, or a minor who is left unaccompanied after she/he had entered the territory of the Republic of Hungary;

Section 72 (1) of the Government Decree 114/2007. (V. 24.) on the execution of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (hereinafter Government Decree) sets forth further rules concerning the applicability of specific regimes and regulations for unaccompanied minors:

In the alien policing procedure the alien policing authority shall examine whether the rules relating to unaccompanied minors included in the Aliens Act and this Decree are applicable to the under-age third-country national in question. In this framework, the authority shall establish in particular

- a) whether the third-country national is under-age,
- b) whether there is a person obliged to take care of the third-country national based on law or custom.

For the purposes of this report, the term “unaccompanied minor” will include both categories mentioned under Section 29 (1) (d) of the Aliens Act.

The main characteristics of this status are the following:

- It is based on well-defined legal criteria and not on the discretionary power of the decision-maker.

²⁹ Note that Hungary’s citizenship legislation is based on the *jus sanguinis* principle. Even though *jus soli* is evoked in certain cases of children born in Hungarian territory (in order to avoid statelessness), it only grants Hungarian citizenship to children of stateless parents with residence in Hungary and foundlings whose parents are unknown and are found in Hungarian territory. The unaccompanied minors falling under the scope of Section 29 (1) (d) of the Aliens Act are thus not entitled to Hungarian nationality.

- Unaccompanied minors may have access to protection in an alien policing procedure, by obtaining a humanitarian residence permit (*humanitárius tartózkodási engedély*).
- The relevant legislation does not set forth any exclusion ground (e.g. public order or national security reasons).

II.3.4 Stateless Persons

Hungary and Spain are currently the only two countries in the world that maintain a dedicated stateless determination mechanism and a separate stateless status, both regulated in a legislative act. While a few other countries provide some type of protection in a rather unregulated manner (France, Belgium) or on an ad hoc basis (Italy), most of the 63 states parties to the 1954 Convention relating to the Status of Stateless Persons (hereinafter 1954 Statelessness Convention) still fail to comply with their obligation to recognise and provide for the international protection needs of the stateless.³⁰ In this context, the Hungarian statelessness legislation is significant.

Section 29 of the Aliens Act provides:

- (1) In the absence of the requirements for a residence permit specified in this Act the following persons shall be granted a residence permit on humanitarian grounds: (...)
 - a) persons recognised by the Republic of Hungary as stateless;

According to Section 2 (b) of the Aliens Act, a stateless person shall mean

a person a person who is not recognised as a citizen by any country under its national law;

The stateless definition of the Aliens Act is thus limited to *de jure* statelessness, complying with the relevant mandatory provision of the 1954 Statelessness Convention, but disregarding several soft law recommendations that call for an equal treatment of *de jure* and *de facto* statelessness.³¹ This issue is further analysed in V.2.

³⁰ For background information see for example: UNHCR, *The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation*, October 2003, viewed on 21 August 2009, <http://www.unhcr.org/refworld/docid/415c3cfb4.html>. Gábor Gyulai, *Forgotten without Reason – Protection of Non-Refugee Stateless Persons in Central Europe*, 2007, viewed on 21 August 2009, <http://www.unhcr.org/497099902.pdf>

³¹ See the Final Acts of the 1954 Statelessness Convention and the 1961 Convention on the Reduction of Statelessness, as well as Articles 6 and 11 (b) of the Council of Europe Parliamentary Assembly Recommendation 696 (1973) on certain aspects of the acquisition of nationality

The statelessness determination procedure is a specific alien policing procedure, regulated by Chapter VIII of the Aliens Act (see III.1.4).³² Hungarian law thus establishes clear legal criteria for the protection of stateless persons, without leaving significant discretionary powers to the decision-maker.

Unlike the three previously described statuses, the statelessness protection regime foresees exclusion clauses, as Section 78 (1) (a) of the Aliens Act directly refers to Article 1 (2) of the 1954 Statelessness Convention:

This Convention shall not apply:

- (i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;
- (ii) To persons who are recognised by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;
- (iii) To persons with respect to whom there are serious reasons for considering that:
 - (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in international instruments;
 - (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
 - (c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

In addition, Section 76 (1) of the Aliens Act makes only lawfully residing foreigners eligible to apply for stateless status, hence persons arriving and staying irregularly in Hungary are excluded from protection. Both the Hungarian Helsinki Committee and the UNHCR have repeatedly expressed concerns about this criterion, qualifying it an additional exclusion clause that is not permitted under international law, as the 1954 Statelessness Convention sets forth an exhaustive list of exclusion grounds. This debate is further analysed in V.2.

³² *Nota bene* that this task is delegated to asylum and not alien policing/immigration authorities in most other countries that operate some sort of protection regime for stateless persons

II.4 Grounds Not Covered by Hungarian Legislation

Even though Hungarian legislation established four additional protection statuses (besides refugee status, subsidiary and temporary protection), certain grounds existing in some national practices or inspired by international law remain uncovered:

- Practical obstacles to expulsion, i.e. when a foreigner cannot be removed from Hungary for a long period due to practical reasons (impossibility of obtaining the necessary documents, lack of cooperation by the country of origin/nationality, etc.);
- *De facto* statelessness, which creates similar protection needs to those of the *de jure* stateless (and which may often manifest itself in the form of the above-described practical obstacles of removal);
- Explicit references to medical grounds (however, these cases, if particularly serious, can be dealt with under the subsidiary protection regime, with reference to the risk of inhuman or degrading treatment for medical reasons);³³
- “Environmental or climate refugees”, forced displacement because of natural disasters.

³³ Section 24 of the Aliens Act enables for the acquisition of a residence permit on the grounds of medical treatment. Nevertheless, this cannot be considered a protection status, as all the usual material conditions for obtaining a residence permit apply (such as the proof of accommodation, livelihood and health insurance ensured in Hungary). Such a residence permit is thus not granted on protection or compassionate grounds.

III. Procedures and Rights

III.1 Procedures for Granting Protection

As shown in the previous chapter, most non-EU-harmonised protection statuses are accessible through an alien policing procedure, with the exception of the tolerated status, which can also be granted in an asylum procedure. This sub-chapter will describe and compare the various procedural ways leading to the statuses in question.

III.1.1 Aspects of Analysis and Comparison

Hungarian law currently includes three main procedures in which the previously described protection statuses may be granted:

- The asylum procedure, only for tolerated status.
- The acquisition of a humanitarian residence permit in an alien policing procedure (for tolerated status, victims of trafficking and unaccompanied minors). Even though the relevant procedures are not completely equivalent, they share significant common characteristics, therefore they will be dealt in a single sub-chapter.
- The statelessness determination procedure, as a specific alien policing procedure, regulated in a more detailed and protection-oriented manner than those mentioned above.

The analysis of various procedural paths to non-EU-harmonised protection statuses in Hungary focuses on the following pertinent questions:

- 1) How does the procedure start? Can the person concerned apply for protection or is it the authority that initiates the procedure *ex officio*?
- 2) Which authority decides at the first instance?
- 3) What special procedural safeguards or guidelines are available (e.g. what kind of evidence needs to be assessed)?
- 4) What kind of legal remedies are available (e.g. administrative appeal and/or judicial review)?

III.1.2 Asylum Procedure

Tolerated status is usually granted in the framework of a standard asylum procedure. The asylum authority (the Asylum Directorate of the Office of Immigration and Nationality), having established that the asylum applicant does not qualify for refugee status or subsidiary protection, examines whether her/his expulsion from Hungary would be in breach of the *non-refoulement* principle.³⁴ The same procedure is followed in the case of the revocation of refugee status or subsidiary protection. If the authority's assessment confirms that the prohibition of *refoulement* prevails in the given case, it grants tolerated stay to the foreigner. The detailed analysis of the asylum procedure falls out of the scope of the present study; therefore only its main characteristics will be outlined in brief.³⁵

The asylum procedure starts once a foreign national expresses her/his wish to seek asylum in Hungary in either oral or written form, in any language. An asylum procedure cannot be started *ex officio*.

Asylum procedures are conducted by the Asylum Directorate of the Office of Immigration and Nationality (OIN) and consist of an admissibility phase (*előzetes vizsgálati eljárás*) and an in-merit phase (*érdemi eljárás*). The deadline for the admissibility procedure is 15 days (if not suspended for a usually much lengthier “Dublin procedure”³⁶). There is no administrative appeal against the denial of tolerated status in the asylum procedure, but judicial review can be requested from the Metropolitan Court (*Fővárosi Bíróság*) in Budapest, which has exclusive jurisdiction in asylum cases. The Court is obliged to take a decision within 60 days; however, in practice these procedures take several months. The Court can dismiss the appeal, quash the first-instance decision and order the OIN to conduct a new procedure, or itself can grant any relevant form of protection (including tolerated status). The latter, however, is extremely rare.³⁷

³⁴ See Asylum Act, Section 45

³⁵ For more detailed information see Hungarian Helsinki Committee, *Asylum in Hungary (A guide for foreigners who need protection)*, 2008, viewed on 13 August 2009, http://helsinki.hu/dokumentum/Asylum_in_Hungary_info_leaflet_2008_English.pdf and the information material on the asylum procedure on the website of the Office of Immigration and Nationality, http://www.bevandorlas.hu/ugyintezes_eljarasrend.php?id=63

³⁶ The determination of which European state is responsible for the assessment of an asylum claim according to Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (“Dublin Regulation”). If the asylum authority approaches another member state, deeming it responsible, the admissibility procedure is usually significantly prolonged.

³⁷ Only one case was reported in 2008, in which the Metropolitan Court itself granted protection to an asylum-seeker.

The Asylum Act foresees several procedural guarantees, in order to reflect the protection-oriented character of the asylum procedure and the difficult situation many asylum-seekers face. Such safeguards are, for example, the mandatory personal interview of the asylum-seeker at both the administrative and judicial instance of the procedure, access to interpretation, legal assistance and the UNHCR, the mandatory use of country information as objective evidence when confronting the statements of the applicant or a more flexible standard of proof³⁸.

It can be summarised that granting tolerated status in the asylum procedure, from a procedural point of view, does not differ significantly from the assessment of the other two protection statuses (refugee status and subsidiary protection). The proceeding authority, the evidence used, the procedural safeguards are all similar. The asylum authority considers the tolerated status as a “C-status” (in addition to refugee status and EU-harmonised subsidiary protection), attaching equal importance to all three regimes in its practice. The Hungarian Helsinki Committee disputes the well-foundedness of this policy; the on-going debate is briefly described in Chapter V.

III.1.3 Grant of a Humanitarian Residence Permit in an Alien Policing Procedure

Tolerated status can also be obtained in the course of an alien policing procedure, which also serves as a framework for granting protection to victims of trafficking and unaccompanied minors. While the three relevant procedures show some differences, there are certain common characteristics that justify why they are jointly presented under this sub-chapter:

- Protection is granted in all these cases in the form of a humanitarian residence permit (which is actually true for all the non-EU-harmonised protection statuses dealt with in this report).
- The person concerned usually cannot request these forms protection, only the competent authority can initiate the procedure *ex officio* (constituting a major difference with the asylum and statelessness determination procedures).³⁹
- Even though the law provides some guidance on what questions should be clarified when deciding about these statuses, it does not establish complex procedural standards and safeguards (unlike in the asylum and statelessness determination procedures).

³⁸ For example, Sections 7 (1) and 13 (1) of the Asylum Act stipulates that the asylum-seeker shall “prove or substantiate” that the conditions for the recognition of refugee status or subsidiary protection (respectively) prevail in her/his case.

³⁹ With the exception of the case when a penitentiary judge establishes the unenforceability of an expulsion measure upon the initiative of the foreigner concerned (see later in this sub-chapter).

The individual characteristics of the three procedures will be outlined below.

Alien policing authorities must assess the risk of *refoulement* in each case where a foreigner is returned at the border or expelled from Hungary. According to Section 52 (1) of the Aliens Act:

The alien policing authority shall observe the prohibition of *refoulement* in proceedings related to the ordering and enforcement of return at the border and expulsion measures.⁴⁰

Section 124 of the Government Decree sets the procedural framework for such decisions:

- (2) If doubts arise during the ordering or enforcement of return at the border concerning the prevalence of *non-refoulement* obligations, the proceeding alien policing authority⁴¹ shall request the opinion of the asylum authority. The latter shall answer the alien policing authority's query without delay.
- (3) The proceeding alien policing authority, during the ordering or enforcement of expulsion measures, shall obtain the opinion of the asylum authority in order to assess the prevalence of *non-refoulement* obligations. The asylum authority shall answer the alien policing authority's query without delay.
- (4) The alien policing authority, in the proceedings related to enforcement of expulsion measures, shall inform the person concerned that she/he has the right for legal representation or to request the assistance of a registered human rights organisation.
- (5) If there is no safe country that would readmit the third-country national,
 - a) in case of prohibition of return at the border, the Regional Directorate [of the OIN] responsible according to the place of border-crossing,

⁴⁰ "Return at the border" (*visszairányítás*) can only take place if the Police refuse the entry of a foreigner into the territory of Hungary at the border and only within 72 hours following the refusal of entry (or 8 days in case of arrival by airplane). With its more immediate character, strict time limit and weaker procedural guarantees, return at the border significantly differs from expulsion (*kiutasítás*). See Sections 40–41 of the Aliens Act.

⁴¹ The Police, as responsible authority for controlling the borders of Hungary – cf. Section 40 (1) of the Aliens Act

- b) in case of prohibition of expulsion, the proceeding Regional Directorate [of the OIN] establishes, in the form of a decision, that the Republic of Hungary grants tolerated status to the third-country national and takes the necessary measures according to Section 29 (1) (b) of the Aliens Act aiming at the issuance of a humanitarian residence permit.

The expulsion of a foreigner can also be ordered by a court, as a form of auxiliary punishment (usually applied in criminal procedures against foreign nationals).⁴² Section 52 of the Aliens Act sets the procedural rules in such cases:

- (2) The prohibition of the enforcement of an expulsion measure ordered by a court is to be established by a penitentiary judge.⁴³
- (3) In such a case, the person concerned can directly request the judge to establish the prohibition of the expulsion measure's enforcement. If she/he submits her/his request to the alien policing authority, it shall forward the request – with its opinion attached – to the penitentiary judge without delay.
- (4) The procedure of the penitentiary judge has a suspensive effect on the enforcement of the expulsion measure.

Furthermore, Section 124 (1) of the Government Decree stipulates:

If the third-country national submitted her/his request according to Section 52 (3) of the Aliens Act directly to the penitentiary judge, the judge shall approach the asylum authority, which shall send its opinion concerning the prevalence of a *non-refoulement* obligation without delay.

Tolerated status, based on the above legal provisions, can therefore be obtained in three ways:

- The Police may establish that the *non-refoulement* provision of Section 51 (1) of the Aliens Act prevails in the case of a third-country national in the course of return at the border. In this case, requesting the asylum authority's opinion is optional (only “if doubts arise”).⁴⁴ If the Police establish that the risk of *refoulement* exists, the Regional Directorate of the OIN, competent according

⁴² See Section 61 of the Criminal Code (Act IV of 1978)

⁴³ Usually on *non-refoulement* or family unity grounds

⁴⁴ Government Decree, Section 124 (2)

to the place of border-crossing, shall grant tolerated status and a humanitarian residence permit to the foreigner.⁴⁵ The deadline for the entire procedure is 72 hours (or 8 days at the airport).⁴⁶ There is no possibility of administrative appeal against a decision ordering the return of a foreigner (thus establishing that there is no risk of *refoulement*), but the person concerned can request judicial review of the decision.⁴⁷ In these cases county courts (competent according to the place of border-crossing) conduct the judicial review proceedings. The court procedure does not have an automatic suspensive effect on return proceedings, but the judge can order the suspension of the return until her/his decision is taken, upon the request of the foreigner concerned. It is rather questionable, however, to what extent a foreigner under a rapid return procedure at the border is able to make use of existing procedural guarantees (she/he may easily fail to understand the complicated procedural framework, access to legal counselling is not ensured, etc.).⁴⁸

- The OIN may also establish that the *non-refoulement* protection in Section 51 (1) of the Aliens Act prevails in the case of a third-country national in an expulsion procedure. In this case, the alien policing authority is obliged to obtain the asylum authority's opinion on the prevalence of the risk of *refoulement*.⁴⁹ There is no administrative appeal against the OIN's decision on expulsion (which thus also establishes that there is no risk of *refoulement*). Nevertheless, judicial review can be requested within 8 days following the negative decision.⁵⁰ In these cases, county courts operating in cities where the OIN's regional directorates are based carry out the judicial review, with a deadline of 15 days after the receipt of the application for judicial review.⁵¹ In addition to annulling the decision, the court can also change it. No further legal remedies are available against a negative

⁴⁵ Government Decree, Section 124 (5)

⁴⁶ Aliens Act, Section 41 (2)

⁴⁷ Aliens Act, Section 40 (3); Act CXL of 2004 on the Rules of Administrative Procedures, Section 109 (1)

⁴⁸ For more detailed information on problems related to the access to international protection in return procedures at the border see Hungarian Helsinki Committee, *Asylum Seekers' Access to Territory and to the Asylum Procedure in the Republic of Hungary (Report on the Border Monitoring Program's First Year in 2007)*, December 2008, viewed on 18 August 2009, http://helsinki.webdialog.hu/dokumentum/Border_Monitoring_Report_2007_ENG_FINAL.pdf

⁴⁹ Government Decree, Section 124 (3)

⁵⁰ Aliens Act, Section 46 (2)

⁵¹ Aliens Act, Section 46 (2)

court decision.⁵² If the OIN establishes that the risk of *refoulement* prevails, its proceeding Regional Directorate shall grant tolerated status and a humanitarian residence permit to the person in question.⁵³

- If a foreigner was previously found guilty of a criminal act in Hungary, and expulsion and an entry ban was ordered by the court as a form of auxiliary punishment, a penitentiary judge (competent according to the foreigner's place of stay) shall establish whether the expulsion is enforceable.⁵⁴ The procedure can be initiated both by the defendant foreigner and by the alien policing authority acting *ex officio*.⁵⁵ This usually happens when the person, having served her/his prison term in a penitentiary institution, is about to be released. The judge's procedure has a suspensive effect on the enforcement of expulsion.⁵⁶ Again, it is mandatory to obtain the asylum authority's opinion about the risk of *refoulement*.⁵⁷ The decision of the penitentiary judge can be appealed at the competent county court.⁵⁸

In case of victims of trafficking, a public prosecutor, a judge or the National Security Service shall initiate the alien policing procedure which can lead to granting a humanitarian residence permit.⁵⁹ In these cases, the Regional Directorate of the OIN (competent according to the place of accommodation of the person concerned) issues the humanitarian residence permit. The law does not provide concrete guidance on evidence assessment, nor does it establish specific procedural safeguards for such cases. Legal remedies are available in these cases according to general rules. An administrative appeal can be lodged to the central, second-instance alien policing authority of the OIN within 15 days after the receipt of the first-instance decision.⁶⁰ A motion for judicial review (with reference to the breach of law) may be submitted to the county court competent according to the foreigner's place of accommodation. In specific cases, further extraordinary judicial review can be sought at the Supreme Court.⁶¹

⁵² Aliens Act, Section 46 (3)

⁵³ Government Decree, Section 124 (5)

⁵⁴ Aliens Act, Section 52 (2)

⁵⁵ Law-Decree 11 of 1979 on the Execution of Criminal Sanctions, Section 12 (2)

⁵⁶ Aliens Act, Section 52 (4)

⁵⁷ Government Decree, Section 124 (1)

⁵⁸ Law-Decree 11 of 1979 on the Execution of Criminal Sanctions, Section 6 (3) (c); Act XIX of 1998 on Criminal Proceedings, Section 347 (1)

⁵⁹ Aliens Act, Section 29 (1) (e)

⁶⁰ Act CXL of 2004 on the Rules of Administrative Procedures, Sections 98 (1) and 99 (1)

⁶¹ Act III of 1952 on Civil Proceedings, Sections 270 and 340/A (1)

In case of unaccompanied minors, the competent guardianship authority is entitled to initiate the procedure before the OIN.⁶² The OIN Regional Directorate (competent according to the place of accommodation of the child) will be in charge of conducting the procedure and issuing the humanitarian residence permit in case of a positive decision. Some important procedural safeguards apply in these cases:

- The alien policing authority shall appoint, without delay, a legal guardian in order to protect the child's interests.⁶³
- The alien policing authority shall contact the guardianship authority in charge of ensuring the accommodation of the child.⁶⁴
- The alien policing authority shall contact the consular representation of the child's country of nationality in Hungary.⁶⁵

There is no concrete guidance on what evidence the alien policing authority should assess when deciding about an unaccompanied minor's right to a humanitarian residence permit. Nevertheless, Section 45 (5) of the Aliens Act may serve as guidance in this respect:

An unaccompanied minor can only be expelled if the reunification with her/his family, or state or other institutional childcare is duly ensured in her/his country of origin or any other host country.

By means of analogy with the above provision, the alien policing authority may assess whether any other viable opportunity is available for the unaccompanied minor (family reunification or institutional childcare in another country). If there is no such alternative, the alien policing authority should grant protection to the child in Hungary. Legal remedies are available in these cases according to general rules. An administrative appeal can be lodged to the central second instance alien policing authority of the OIN within 15 days after the receipt of the first instance decision.⁶⁶ A motion for judicial review (with reference to the breach of law) can be submitted to the county court responsible according to the foreigner's place of accommodation. In specific cases, further extraordinary judicial review can be sought at the Supreme Court.⁶⁷

⁶² Government Decree, Section 70 (1) (c)

⁶³ Government Decree, Section 72 (2)

⁶⁴ Government Decree, Section 72 (3)

⁶⁵ Government Decree, Section 72 (3)

⁶⁶ Act CXL of 2004 on the Rules of Administrative Procedures, Sections 98 (1) and 99 (1)

⁶⁷ Act III of 1952 on Civil Proceedings, Sections 270 and 340/A (1)

III.1.4 Statelessness Determination Procedure

The Aliens Act, when it entered into force in July 2007, created a separate legal regime for the protection of stateless persons in Hungary. Even though the legislator decided to include the protection of stateless persons in alien policing law instead of asylum law, this regime shows significant procedural differences in comparison with the above-described procedures aiming at the acquisition of a humanitarian residence permit:

- The statelessness determination procedure starts upon request by the foreigner concerned; the alien policing authority cannot initiate it *ex officio*.⁶⁸ However, accepting the eventual difficulty of “recognising” one’s statelessness and the authority’s interest in clarifying such situations, Section 160 (1) of the Government Decree sets forth that:

If the possibility that a third-country national is stateless arises in any of the procedures under the scope of this Act, the alien policing authority shall inform the person concerned about the possibility of submitting a request for stateless status, the related proceedings, as well as the rights and obligations attached to stateless status. The foreigner shall be asked to sign a record that she/he has received this information.

- Statelessness determination includes more procedural safeguards than other alien policing procedures, often copying the parallel provisions of the asylum procedure.
- In comparison with the procedures described in III.1.3, the legislator provided more concrete guidance on the questions and evidence that should be assessed in statelessness determination.

Based on these characteristics, statelessness determination – as a specific alien policing procedure – is presented here in a separate sub-chapter.

Claims for stateless status should be submitted to the Regional Directorate of the OIN, competent according to the applicant’s place of accommodation, stay or residence.⁶⁹ The same Regional Directorate conducts the procedure and brings a decision within 60 days.⁷⁰ Administrative appeal is not available against negative first instance decisions; however, judicial review may be requested.⁷¹ The Metropolitan Court (*Fővárosi Bíróság*)

⁶⁸ Aliens Act, Section 76 (1)

⁶⁹ Government Decree, Section 159 (1)

⁷⁰ Government Decree, Section 166 (2)

⁷¹ Aliens Act, Section 80 (1)

has exclusive competence in such cases and shall bring a judgment within 90 days.⁷² In specific cases, further extraordinary judicial review may be sought at the Supreme Court.⁷³

Proving statelessness may be a particularly difficult or even impossible endeavour, considering that it means showing that a person is not a citizen of any of the existing about 200 states in the world. Therefore, the guidance provided by Section 79 (1) of the Aliens Act is very important:

In the statelessness determination procedure, the applicant shall prove or substantiate her/his statelessness in particular with regard to

- a) the country where she/he was born;
- b) the country of her/his former place of stay or residence;
- c) the country of nationality of her/his family members and parents.

In addition, several procedural safeguards apply in the statelessness determination procedure, evoking similar provisions in asylum proceedings:

- A claim for stateless status may be lodged in the form of a written application as well as by a verbal statement.⁷⁴ The authority has to prepare a written record of the statement.⁷⁵ There are no further formal requirements whatsoever concerning the form of the application.
- Both the first instance authority and the Metropolitan Court are obliged to interview the applicant, who has to right to use her/his mother tongue in the procedure.⁷⁶
- The authority has to ensure the applicant's access to legal assistance.⁷⁷
- The standard of proof is lower in the course statelessness determination, by using a formula similar to that in the asylum procedure ("prove or substantiate").⁷⁸

⁷² Aliens Act, Section 80 (3)

⁷³ Act III of 1952 on Civil Proceedings, Sections 270 and 340/A (1)

⁷⁴ Aliens Act, Section 76 (1)

⁷⁵ Aliens Act, Section 76 (2)

⁷⁶ Aliens Act, Sections 77 (1)–(2) and 80 (3)

⁷⁷ Aliens Act, Section 77 (3)

⁷⁸ Aliens Act, Section 79 (1)

- The alien policing authority may – upon request – help to obtain evidence through the diplomatic representations of Hungary in the countries concerned. Nevertheless, the burden of proof is still on the applicant.⁷⁹
- The legislator designated a central judicial body, the Metropolitan Court in Budapest⁸⁰ with the task of judicial review (similarly to asylum procedures). Moreover, the court has the power to change the first instance decision (and grant stateless status), while in many other alien policing procedures it can only quash lower instance decisions and oblige administrative authorities to conduct a new procedure.⁸¹
- The UNHCR is granted special rights in the procedure and the alien policing authority shall take the UNHCR's opinion into consideration.⁸² Section 81 of the Aliens Act stipulates that

The representative of the United Nations High Commissioner for Refugees may take part in any stage of the statelessness determination procedure. Accordingly, the representative

- (a) may be present at the applicant's interview;
- (b) may give administrative assistance to the applicant;
- (c) may gain access to the documents/files of the procedure and may make copies thereof;
- (d) shall be provided with the administrative decision and the court's judgement by the alien policing authority.

The stateless status determination procedure is undoubtedly characterised by important procedural safeguards and useful practical guidance. As a recently created and rather “pioneer” regime, the actual functioning of the above-described statelessness determination mechanism is yet to be monitored by independent research.⁸³

⁷⁹ Aliens Act, Section 79 (2)

⁸⁰ Meaning a limited group of judges specialised – among other issues – in alien policing and asylum matters

⁸¹ Aliens Act, Section 80 (3)

⁸² Government Decree, Section 164 (1)

⁸³ A comprehensive research initiative is foreseen for early 2010.

III.2 Rights Attached to Non-EU-Harmonised Protection Statuses

III.2.1 Aspects of Analysis and Comparison

All non-EU-harmonised protection statuses in Hungary guarantee a set of civil, social and economic rights. These rights, however, usually remain more limited than those attached to harmonised (refugee and subsidiary protection) statuses. This sub-chapter gives an overview of the actual content of these protection statuses, through outlining the main rights they ensure, specifically:

- Length and renewal of the authorisation to reside
- Accommodation
- Access to the labour market
- Access to health care
- Access to education
- Travel document
- Family reunification
- Long-term residence
- Naturalisation

Rights attached to refugee status and subsidiary protection will be used as benchmarks in order to show the main differences between the content of EU-harmonised and non-EU-harmonised protection statuses.

III.2.2 Length and Renewal of the Authorisation to Reside

In Hungary, the residence of recognised refugees is not limited in time, and they are issued a Hungarian identity document valid for 10 years. Subsidiary protection is reviewed and may be renewed after maximum five years following recognition.⁸⁴ Beneficiaries of subsidiary protection also receive a Hungarian identity document. The grounds for revoking both statuses are well-defined in the Asylum Act.⁸⁵

Non-EU-harmonised statuses ensure significantly less favourable conditions in this respect. The humanitarian residence permit of persons who are granted tolerated status, unaccompanied minors and stateless persons is valid for maximum one year, while

⁸⁴ Asylum Act, Section 14

⁸⁵ Asylum Act, Sections 11 and 18

the validity of the residence permit issued for victims of trafficking cannot exceed six months.⁸⁶ These residence permits are renewable for maximum one year or six months respectively. If the humanitarian residence permit was issued upon the initiative of the competent authority (a public prosecutor, a judge or the National Security Service in case of victims of trafficking, guardianship authority in case of unaccompanied minors), the same authority has to approve its renewal or the refusal of its renewal.⁸⁷

The obligation to renew one's residence permit every year or every six months is far more than a simple procedural act. Residence limited in time may often seriously limit a foreigner's access to the labour market (see III.2.4, V.1 and V.2) and thus her/his possibility to become self-reliant and integrated into the host society. In addition, it may cause a continuous feeling of insecurity, entailing negative psychological consequences, particularly for persons fleeing serious human rights violations.

The legislator's intention to limit and frequently review the residence right of victims of trafficking corroborates that this status – while providing a temporary form of protection to the victim – also (or even primarily) serves the interest of investigating authorities and the struggle against trafficking in human beings. Notwithstanding the rights and protection it ensures (see the following sub-chapters), as it is reviewed every six months, this status apparently does not intend to be a durable form of protection aiming at integration into the host society.

Limiting residence to one year may also give rise to concerns in case of the tolerated and stateless status as well (see more details in V.1 and V.2).

With regard to the length and renewal of residence, beneficiaries of non-EU-harmonised protection statuses are treated significantly less favourably than refugees or beneficiaries of subsidiary protection.

III.2.3 Accommodation

Refugees and beneficiaries of subsidiary protection are entitled to stay in a reception centre (*befogadó állomás*) during six months following their recognition as such, provided that they are unable to ensure their own accommodation in another way. This period may be extended by a further six months.⁸⁸ Accommodation at the reception centre includes three meals per day and the provision of basic items for clothing, nutrition and hygienic needs.⁸⁹ In addition, refugees and beneficiaries of subsidiary protection may be

⁸⁶ Aliens Act, Section 29 (2) (a)-(b)

⁸⁷ Aliens Act, Section 29 (4)

⁸⁸ Government Decree 301/2007. (XI. 9.) on the execution of Act LXXX of 2007 on Asylum, Section 41 (1)–(2)

⁸⁹ Ibid., Section 21 (1)

entitled to various forms of financial support aiming to assist them to move out of the reception centre and to establish their own home.⁹⁰ This includes a single allowance⁹¹ upon, or within six months after moving out, as well as a monthly housing allowance⁹² for six months (renewable three times for a further six months).

Beneficiaries of tolerated status and victims of trafficking are entitled to be accommodated free of charge during 18 months after the status has been granted.⁹³ “Accommodation” in case of tolerated status refers to a community shelter (*közösségi szállás*) or a reception centre, or to a specific shelter (or any other shelter operating on a contractual basis) in case of victims of trafficking.⁹⁴ Both categories are entitled to apply for a single allowance⁹⁵ aiming to assist their access to private accommodation, but only within six months after the granting of the status (resulting in a significantly more limited access to this allowance than in case of refugees or persons who were granted subsidiary protection). Beneficiaries of tolerated stay and victims of trafficking are also entitled to a monthly housing allowance for a maximum period of 18 months, but in their case the amount is considerably lower than for EU-harmonised statuses.⁹⁶ Both categories are only entitled to accommodation and these housing allowances, if they do not have any assets and their monthly income (the per capita monthly income in case of a family living together) does not exceed the amount of the minimum old-age pension in Hungary.⁹⁷

⁹⁰ Ibid., Sections 47 and 54

⁹¹ The amount of the minimum old-age pension multiplied by six, per person.

⁹² Calculated per household, not per person. Its amount is the minimum old-age pension, multiplied by two if the household includes at least one minor child, multiplied by three if it includes at least three minor children. The benefit cannot exceed the monthly rental or accommodation fee.

⁹³ In exceptional cases, if the foreigner cannot ensure her/his own accommodation after the 18 months elapsed, the OIN Regional Directorate can permit further stay at the shelter on compassionate grounds.

⁹⁴ Government Decree, Section 77 (1)–(2)

⁹⁵ Three times the amount of the minimum old-age pension, per person (170% of the minimum old-age pension in case of minors). It cannot exceed six times the minimum old-age pension per household. See Government Decree, Section 82 (2)

⁹⁶ Maximum 50% of the monthly rental fee, not more than the minimum old-age pension per person and its double per household (even if those living together do not belong to the same family). See Government Decree, Section 84 (3)

⁹⁷ Government Decree, Section 75 (1)

⁹⁸ See background information (in English) on the placement of children with temporary effect at http://www.magyarorszag.hu/english/keyevents/a_alpolg/a_csalad/a_gyermekvedint20050802/a_gyermekideig|20060627.html

The law also ensures accommodation for unaccompanied minors, who come under the scope of Act XXXI of 1997 on Child Protection.⁹⁸ Under-age unaccompanied foreigners are placed immediately in a childcare institution under a temporary placement measure (*ideiglenes hatályú elhelyezés*), if the child remains without supervision, or if her/his physical, emotional and moral development is at serious risk.⁹⁹ Serious risk means any case when the child is abused or neglected in a manner that her life/his is at risk, or it might cause significant and irreversible harm to her/his physical, mental, emotional or moral development. In the case of a non-Hungarian unaccompanied minor, the Budapest 5th District Guardianship Office (*Budapest V. kerületi Gyámhivatal*) is the competent authority to order temporary placement. The Budapest 5th District Guardianship Office notifies the police headquarters, competent for the area, to arrange the child's residence in Hungary and/or initiate a procedure to arrange the guardianship or the child's adoption, or it shall contact the diplomatic representation of the child's country of origin in order to arrange the child's return there without delay. The temporary placement is reviewed after receiving the diplomatic representation's response, and also *ex officio* at six-month intervals.¹⁰⁰

The law does not foresee any accommodation arrangements or housing allowances for stateless persons.

For a comparative analysis, the following factors should be pointed out:¹⁰¹

- Accommodation of beneficiaries of tolerated status and victims of trafficking in state-run institutions is ensured in a manner that is not less favourable than the regime for EU-harmonised statuses.
- Financial support to assist beneficiaries of tolerated status and victims of trafficking to move out from reception centres/community shelters into private accommodation is much more limited than for EU-harmonised statuses. Therefore, they are treated in a less favourable way in this respect and provided with less financial support in their eventual efforts to establish their private home.
- Stateless persons are treated in a much less favourable manner than EU-harmonised statuses with regard to their accommodation, as no state-funded financial support is provided by law to this end. See more analysis on this issue in V.2.

⁹⁹ Act XXXI of 1997 on Child Protection, Section 72

¹⁰⁰ Act XXXI of 1997 on Child Protection, Section 73 (3)–(4)

¹⁰¹ Given the specific needs and circumstances of unaccompanied minors as for accommodation and care, there is no point in comparing the regime applying to them to EU-harmonised statuses.

III.2.4 Access to the Labour Market

Ensuring effective access to the labour market helps foreigners benefiting from international protection to become self-reliant and decreases their dependence on state aid and benefits. In addition, it facilitates learning the host country's language and promotes local integration in a number of other ways.

Refugees and beneficiaries of subsidiary protection have the right to work in Hungary without any special permit.¹⁰² The legal conditions of their employment are hence not less favourable than those of Hungarian nationals (except for a few specific jobs only available to Hungarian citizens).¹⁰³

Non-EU-harmonised protection statuses ensure only limited access to the labour market. The beneficiaries of all categories need to obtain a work permit (*munkavállalási engedély*) prior to their employment. Taking into consideration the limited validity of the humanitarian residence permit¹⁰⁴ and the usual procedural delays and difficulties in obtaining a work permit, this regime often hinders foreigners' access to employment.¹⁰⁵

In addition, in case of victims of trafficking, unaccompanied minors over 16 years of age¹⁰⁶ and stateless persons, the work permit can only be issued if there is no suitable Hungarian or EEA-citizen¹⁰⁷ applicant for the same post.¹⁰⁸ This condition is fulfilled if:

- The employer notified her/his need for labour force to the competent labour affairs authority 15 to 60 days prior to applying for a work permit for a third-country national (specifying the necessary skills and qualifications);
- No registered job-seeker of Hungarian or EEA nationality (or spouse of a Hungarian or EEA national), having the necessary skills and qualifications, applied for the job between the date of the above notification and the application for a work permit for a third-country national;
- The third-country national applying for the job has the necessary skills and qualifications.

¹⁰² Act IV of 1991 on the Promotion of Employment and Unemployment Benefits, Section 7 (2) (a); Asylum Act, Section 17 (1)

¹⁰³ Asylum Act, Section 10 (2) (b)

¹⁰⁴ Six months in case of victims of trafficking, one year for the other statuses

¹⁰⁵ Even according to the best scenario, several months may pass before obtaining a work permit, the validity of which cannot exceed the validity of the residence permit. With a promise of a work permit valid only for a couple of months, most employers are discouraged to employ such foreigners.

¹⁰⁶ According to Section 72 (1) of the Labour Code (Act XXII of 1992), persons under 16 years of age cannot be employed

¹⁰⁷ European Economic Area, including the EU, Norway, Iceland and Liechtenstein

This procedure creates a further bureaucratic obstacle to the successful employment and integration of the foreigners concerned, as most employers would refrain from becoming involved in such a lengthy and cumbersome procedure solely for the sake of employing a third-country national.¹⁰⁹

From a comparative viewpoint, it can be established that the non-EU-harmonised statuses only allow very limited access to the labour market, providing thus a much less favourable condition in this respect than in case of refugees or beneficiaries of subsidiary protection.

III.2.5 Health Care

Foreigners in need of international protection are often unable to quickly establish a new life (self-reliance, employment, private accommodation) in the host country, which could help them to become eligible for benefiting from the general health insurance scheme and/or to pay for private health care insurance or services. Therefore, the main question to be clarified in this sub-chapter is whether and to what extent protected foreigners who are not otherwise covered by the public social security system may benefit from public health care services.¹¹⁰

Refugees and beneficiaries of subsidiary protection are entitled to a wide range of public health care services for a period of two years following the recognition of their status, even if they are not employed (in which case, contributions deducted from their salaries would entitle them to have access to the public health care system). In summary, these health care services include:¹¹¹

¹⁰⁸ Decree 8/1999 (XI. 10.) of the Ministry of Social and Family Affairs on the Employment of Foreigners in Hungary, Section 3 (1)-(2). The legislator exempted those with a tolerated status from fulfilling this condition – Ibid., Section 6 (1) (k)

¹⁰⁹ This conclusion is confirmed by the Menedék Association for Migrants, which has been providing refugees and migrants with free social assistance for several years.

¹¹⁰ According to Section 5 (1) of Act LXXX of 1997 on Social Security Services, the Entitlement to Private Pension and the Funding of These Services, entitlement to social security services (including health care) is usually linked to gainful employment or other lucrative or productive activities (employees, private entrepreneurs, corporate entrepreneurs, members of cooperatives, persons following professional education based on an “education contract”, church personnel, etc.)

¹¹¹ For more comprehensive information see Sections 26, 28 and 44 (1) of the Government Decree 301/2007. (XI. 9.) on the execution of Act LXXX of 2007 on Asylum, together with Section 17 (1) of the Asylum Act.

- A general practitioner's regular services;
- Health care services (including examinations, treatment, medicines, bandage, hospitalisation, meals while in hospital, etc.) in emergency cases¹¹² and afterwards until the stabilisation of the patient's conditions or her/his recovery;
- Pre-natal and maternity care, abortion¹¹³;
- Emergency dental care (but only the less costly treatment alternative);
- Vaccinations.

Unaccompanied minors are entitled to health care services free of charge.¹¹⁴

A person staying in Hungary with any of the other three non-EU-harmonised protection statuses but without any entitlement to social security¹¹⁵ is also entitled to basic public health care services (similarly to any person residing on Hungarian territory).¹¹⁶ However, the scope of these services is more limited and covers only:¹¹⁷

- Vaccinations, epidemic examinations, mandatory medical examinations, quarantine, transportation of persons suffering from a contagious disease;
- Ambulance services if the person needs immediate help;
- Health care services in emergency cases and afterwards until the stabilisation of the patient's conditions;
- Health care services in case of a disaster.

Some other public health care services (such as pre-natal and maternity care) are only available to those who already have a place of residence (*lakóhely*) in Hungary.¹¹⁸ Victims of trafficking, persons granted tolerated or stateless status may only establish a place of residence in this sense when they have obtained long-term resident status (see III.2.9).

¹¹² Emergency meaning the risk of death or serious or irreparable harm in one's health without medical intervention, see Act CLIV of 1997 on Health, Section 3 (i). Decree 52/2006 (XII. 28.) of the Ministry of Health on Emergency Health Care Services specifies the list of situations which qualify as "emergency".

¹¹³ If the necessary legal conditions are fulfilled

¹¹⁴ Act LXXX of 1997 on Social Security Services, the Entitlement to Private Pension and the Funding of These Services, Section 16 (m)

¹¹⁵ See footnote 110

¹¹⁶ Act CLIV of 1997 on Health, Section 142 (2) (all categories); Government Decree, Sections 79 and 138 (tolerated status and victims of trafficking)

¹¹⁷ Act CLIV of 1997 on Health, Section 142 (2)–(3)

¹¹⁸ Ibid., Section 142 (3)

Therefore, from the point of view of access to the public health care system, non-EU-harmonised protection statuses (with the exception of unaccompanied minors) provide significantly less favourable conditions than refugee status or subsidiary protection.

The following examples show what this difference may mean in practice (the statements all refer to persons who are not covered by the general public social security system – e.g. for not being employed):

- A refugee within two years following the recognition of her/his status has the right to continuous free-of-charge medical care under the scope of a general practitioner's services, while a person with a tolerated, victim of trafficking or stateless status has to pay for the same service.
- A refugee within two years following the recognition of her/his status has the right to free emergency dental care, while a person with a tolerated, victim of trafficking or stateless status has to pay for this.
- While a pregnant woman with a tolerated, victim of trafficking or stateless status has the right to give birth to her baby in a hospital free of charge¹¹⁹, a refugee woman within two years following the recognition of her status can also benefit from free-of-charge pre-natal care and maternity support during her pregnancy.
- Following a medical intervention in case of an emergency, a refugee within two years following the recognition of her/his status is entitled to related health care services free of charge until her/his recovery, a person with a tolerated, victim of trafficking or stateless status only until the stabilisation of her/his conditions.

III.2.6 Access to Education

Pursuant to Section 6 of Act LXXIX of 1993 on Public Education children between 6 and 18 years of age must to attend primary and secondary school in Hungary. This equally applies to children with refugee status, subsidiary protection or any of the non-EU-harmonised protection statuses covered in this report, after at least one year of stay in Hungary (or earlier, upon the request of the parents).¹²⁰ Furthermore, Section 110 (4) of the Act stipulates that non-Hungarian citizens may benefit from public education (including special pedagogical services) under the same conditions as Hungarian

¹¹⁹ As a situation considered as “emergency” according to the Annex of Decree 52/2006 (XII. 28.) of the Ministry of Health on Emergency Health Care Services

¹²⁰ Act LXXIX of 1993 on Public Education, Sections 110 (1) and 110 (3); Asylum Act, Section 17 (1)

nationals. This means that all beneficiaries of these protection statuses enjoy equal access to free-of-charge primary and secondary education.¹²¹

As for higher education, the law in force differentiates between the various protection statuses. Refugees and beneficiaries of subsidiary protection and tolerated status are entitled to enrol in state-funded studies in a higher education institution.¹²² Victims of trafficking and stateless persons may only have access to participate in higher education on a fee-paying basis.¹²³

With regard to primary and secondary education, non-EU-harmonised protection statuses ensure conditions equal to those of refugees, beneficiaries of subsidiary protection and even Hungarian citizens. Nevertheless, victims of trafficking and stateless persons face less favourable treatment than the other categories relating to higher education. This double standard is particularly worrisome in case of statelessness, which usually constitutes a durable need for international protection and consequently for meaningful integration opportunities.

III.2.7 Travel Document

Both refugees and beneficiaries of subsidiary protection are entitled to a travel document issued by Hungarian authorities. Beneficiaries of subsidiary protection are entitled to a travel document issued by Hungarian authorities.¹²⁴ Among non-EU-harmonised statuses, only stateless persons are provided with a specific, bilingual¹²⁵ travel document.¹²⁶ The travel document is valid for maximum one year and it cannot extend beyond the validity of the stateless person's residence permit.¹²⁷

The tolerated, victim of trafficking and unaccompanied minor statuses do not entail the right to a travel document. This unfavourable regime – while for practical reasons seems better-founded in case of the two later statuses – raises particular concerns for persons with tolerated status. Many persons granted this form of protection may not carry a valid passport of their country of origin and thus may easily find themselves stranded in Hungary without an opportunity to visit family members in other European states or to relocate to another country. These categories only gain entitlement to a travel document when they become long-term residents in Hungary (see III.2.9).

¹²¹ Act LXXIX of 1993 on Public Education, Section 114

¹²² Act CXXXIX of 2005 on Higher Education, Section 39 (1) (b); Asylum Act, Section 17 (1)

¹²³ Act CXXXIX of 2005 on Higher Education, Section 39 (2)

¹²⁴ Asylum Act, Sections 10 (3) (a) and 17 (2)

¹²⁵ English and Hungarian

¹²⁶ Aliens Act, Section 85 (1); Government Decree, Section 168 (2)

¹²⁷ Aliens Act, Section 85

III.2.8 Family Reunification

Sections 2 (d), 13 and 19 of the Aliens Act set the legal framework of family reunification of third-country nationals in Hungary. According to these provisions, refugees, beneficiaries of subsidiary protection and foreigners with a non-EU-harmonised protection status are all eligible for family reunification. The scope of “family members” in this respect covers:

- Spouse;
- Under-age child (including adopted child(ren) and the spouse’s child(ren), if the spouse has custody);
- Parents, provided that they are dependant on the foreigner staying in Hungary;
- Other direct-line relatives (e.g. brother or sister), if they cannot care for themselves due to medical reasons.

For a successful application for family reunification, the following conditions should be fulfilled in case of the family member, for the entire period of stay in Hungary:¹²⁸

- Her/his livelihood is ensured (the family has the necessary financial means or regular income to provide for the family member’s needs and to ensure her/his return to the country of origin, if necessary);
- Her/his accommodation is ensured;
- She/he is entitled to the full range of health care services (as family members are usually not entitled to social security services upon arrival, this typically means a rather costly private insurance, at least for the first part of their stay);
- She/he holds a valid travel document recognised by the Republic of Hungary;¹²⁹
- The family link between the persons in question is verified with documentary evidence or in any other credible manner.

¹²⁸ Aliens Act, Section 13 (1); for detailed rules on the practical application of these provisions see Sections 29 and 56 of the Government Decree. Note that there is no exact threshold to establish that the livelihood of foreigner is ensured in Hungary, and alien policing officers assess this condition on a discretionary basis.

¹²⁹ For the list of such travel documents see Government Decree 328/2007 (XII. 11.) on the Recognition of Travel Documents for the Purposes of Entry in Hungary by Third-Country Nationals. Note that Hungary, unlike most EU member states, does not have any alternative regime (e.g. one-way *laissez-passer*) in place for those who do not have a valid travel document but otherwise fulfil all the necessary conditions of entry. In practice, this means that for instance Somali citizens (a rather numerous group among recognised refugees in Hungary) are unable to apply for family reunification, as Hungary does not accept Somali travel documents.

While this general framework equally applies to all protection categories, some more favourable rules apply to refugees and beneficiaries of subsidiary protection:¹³⁰

- If they apply for family reunification within six months after status recognition, they need not show that the relevant material conditions (livelihood, accommodation, health insurance) are fulfilled.¹³¹
- The authority cannot reject the existence of a family link in their case with a mere reference to the lack of documentary evidence.¹³²
- An unaccompanied minor refugee or beneficiary of subsidiary protection may apply for family reunification with her/his parent, or if this is impossible, with her/his guardian (thus the circle of eligible family members is extended).¹³³

At the same time, a more restrictive rule also applies to EU-harmonised statuses: spouses in their case are only eligible for family reunification, if they got married prior to the foreigner's arrival in Hungary.¹³⁴ The Hungarian Helsinki Committee repeatedly criticised this provision for setting an unjustified restriction on the right to family life.

Non-EU-harmonised protection statuses thus provide less favourable conditions for family reunification than refugee status or subsidiary protection (with one exception). This different treatment is of particular concern in case of persons granted tolerated status, as in practice their situation is very similar to EU-harmonised statuses (forced migration in order to escape from grave human rights violations, family members often in danger or unstable situation in another country, etc.). Due to their condition as forced migrants (and all its negative consequences), as well as limited labour market access (see III.2.4), fulfilling the required material conditions often proves to be impossible for these persons.

III.2.9 Long-Term Residence

Obtaining a long-term or permanent resident status is a key step in a foreigner's full integration into the host society. It proves the strong link existing between the person and the country, and often constitutes the door-step of naturalisation. Long-term residence

¹³⁰ Based on Article 12 (1) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification ("Family Reunification Directive"), but applying a more favourable standard (6 months) than the minimum rule set by the Directive (3 months).

¹³¹ Government Decree, Section 57 (3); Asylum Act 17 (1)

¹³² Aliens Act, Section 19 (3); Asylum Act 17 (1)

¹³³ Aliens Act, Section 19 (2) (b); Asylum Act 17 (1)

¹³⁴ Aliens Act, Section 19 (5); Asylum Act 17 (1)

usually creates access to a wide set of rights (e.g. travel document, a wider range of public health care services, better access to the labour market, etc.) and ensures a right to stay in the country for an undefined period of time without the periodical review of the person's entitlement. As the protection statuses are often limited both in time and in scope (see Sub-chapters III.2.2–III.2.8), it is important to examine whether their beneficiaries have the opportunity to improve and “stabilise” their status (and if yes, under which conditions) by obtaining the right to long-term residence after a certain period of time.

Currently Hungary has in place three different regimes for obtaining the right of permanent residence in the country, two of which are of relevance for the purposes of this study¹³⁵; the “national permanent residence permit” (*nemzeti letelepedési engedély*) and the “EU permanent residence permit” (*EK letelepedési engedély*). The existence of these two parallel regimes is due to the fact that Hungary decided to maintain its previous long-term resident status (as a more favourable regime in some aspects) in the course of the EU Long-term Residence Directive's¹³⁶ transposition.

Both regimes foresee a common list of material conditions. In both cases, an applicant shall show that¹³⁷

- Her/his livelihood is ensured;
- Her/his accommodation is ensured;
- She/he is entitled to the full range of health care services (through her/his entitlement to social security services or is able to pay for them);
- She/he holds a valid travel document recognised by the Republic of Hungary.¹³⁸

The law also stipulates additional negative conditions: it is not possible to obtain a permanent residence permit with a criminal record (unless the person has been absolved from its legal consequences), with a ban on entry or if the permanent residence of the person concerned would constitute a risk to national security.¹³⁹

¹³⁵ The third one is available for third-country nationals already obtained the right to long-term residence in another EU member state.

¹³⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

¹³⁷ Aliens Act, Section 33 (1); for detailed rules on the practical application of these provisions see Section 95 of the Government Decree. Note that there is no exact threshold to establish that the livelihood of foreigner is ensured in Hungary, and alien policing officers assess this condition on a discretionary basis.

¹³⁸ Government Decree, Section 94 (1). For the list of recognised travel documents see Government Decree 328/2007 (XII. 11.) on the Recognition of Travel Documents for the Purposes of Entry in Hungary by Third-Country Nationals.

¹³⁹ Aliens Act, Section 33 (2)

The main differences between the two regimes from the viewpoint of the present study are the following:

- The national permanent residence permit requires three years of continuous and lawful stay, while the EU permanent residence permit requires five years.¹⁴⁰ In addition, the national regime foresees exceptional cases of more favourable treatment: spouses of refugees, beneficiaries of subsidiary protection and persons with a permanent residence permit may apply after two years of marriage; children or dependant parents of refugees, beneficiaries of subsidiary protection and persons with a permanent residence permit may apply already after one year of continuous stay, provided that they live in the same household.¹⁴¹
- All protection categories may apply for a national permanent residence permit, while refugees, beneficiaries of subsidiary protection and tolerated status are explicitly excluded from the EU permanent residence regime, based on the relevant provision of the EU Long-term Residence Directive.¹⁴² Acquiring a national permanent residence permit constitutes a meaningful change of status for those with a non-EU-harmonised protection status (with a set of additional rights); in contrast, it does not have a significant added value for refugees or beneficiaries of subsidiary protection (as these statuses often ensure better rights and conditions). However, a national permanent residence permit may provide “protection” in case of a future revocation or cessation of refugee or subsidiary protection status (e.g. with reference to improved conditions in the country of origin).
- Only the EU permanent residence permit entails the wide set of rights attached to long-term residence in another EU member state (including that of settling in another member state and enjoying a status similar to EU-nationals in many aspects).¹⁴³

¹⁴⁰ Aliens Act, Sections 35 (1) (a) and 38 (1). In case of the national permanent residence permit, the condition of “continuous” stay is yet fulfilled if the applicant left Hungary for periods not longer than four months, and the periods spent outside of the country altogether do not exceed 270 days in the three years prior to application (Aliens Act, Section 35 (2)). These periods in case of an EU permanent residence permit are six months, 300 days and five years respectively (Aliens Act, Section 38 (6)).

¹⁴¹ Aliens Act, Section 35 (1) (b)-(c)

¹⁴² Aliens Act, Section 38 (2) (d)-(e); Cf. Long-term Residence Directive, Article 2 (c)–(d)

¹⁴³ See Long-term Residence Directive, Articles 11, 12, 14 and 21

From a comparative point of view the following main conclusions can be drawn:

- EU-harmonised statuses provide a status sharing (or even exceeding) most legal characteristics of permanent residence in Hungary. Thus, for these categories only the EU-conform long-term residence regime could entail significant advantages, the acquisition of which was unfortunately excluded by the relevant EU directive.
- Non-EU-harmonised statuses all make their beneficiaries eligible to apply for a national permanent residence permit, and – with the exception of tolerated status – to an EU-conform long-term residence permit. However, due to limited and difficult labour market access (see III.2.4), meeting the relevant material conditions requirements may often prove to be extremely difficult for these categories. In addition, the requirement of presenting a valid travel document upon application may easily constitute an insurmountable obstacle for unaccompanied minors, victims of trafficking and those with a tolerated status, who often lack such documents and are unable to obtain them from their country of origin (for either protection-related or practical reasons).¹⁴⁴ Thus, it can be concluded that, while the theoretical possibility exists, an important part of the beneficiaries of non-EU-harmonised protection statuses in practice may not be able to apply for permanent residence in Hungary.

III.2.10 Naturalisation

The acquisition of a new citizenship is generally seen as a crucial – and often final – step of integration into the host society. Beyond its great symbolic and psychological importance, citizenship ensures the equal treatment of a migrant in every aspects in her/his new homeland. In addition, although citizenship and naturalisation are usually considered as core areas of national sovereignty, international law does intervene in this field through a set of obligations for states to reduce and prevent statelessness.

In Hungarian law, it is Section 4 (1) of Act LV of 1993 on Hungarian Citizenship that sets the general conditions for obtaining Hungarian citizenship:

A non-Hungarian citizen may be granted Hungarian citizenship upon application, if:

- a) prior to her/his application she/he has been continuously residing in Hungary for eight years;

¹⁴⁴ Stateless persons are entitled to a stateless passport issued by Hungarian authorities (see Subchapter III.2.7).

- b) she/he has no criminal record according to Hungarian law and there is no pending criminal procedure against her/him before a Hungarian court at the time of the application;
- c) her/his livelihood and accommodation in Hungary is guaranteed;
- d) her/his naturalisation would not endanger the interests of the Republic of Hungary;
- e) she/he certifies to have successfully passed an examination on basic constitutional issues in Hungarian language, or is exempted from this examination based on the provisions of this Act.¹⁴⁵

Refugees and beneficiaries of subsidiary protection are treated in a preferential manner, as in their case the condition of eight years of continuous residence in Hungary has been reduced to three years.¹⁴⁶ The required period of residence in Hungary is five years for stateless persons and unaccompanied minors¹⁴⁷ born in Hungary, while other unaccompanied minors, victims of trafficking and beneficiaries of tolerated status are treated according to the general (eight-year) rule.¹⁴⁸

It is crucial to point out that the above-mentioned periods can only be counted from the date when the foreigner establishes a place of residence (*lakóhely*) in Hungary.¹⁴⁹ For EU-harmonised statuses this happens right after the recognition of status. Those with non-EU-harmonised status are usually not entitled to this until they obtain a permanent resident status in Hungary.¹⁵⁰ This means that in these cases, a minimum of three years have to be added to the periods stipulated by the law. Consequently, while refugees can first apply for Hungarian citizenship three years following the recognition of their status, stateless persons (not having a place of residence in Hungary) have the first chance to do so eight years after being recognised as such, even in the most optimistic scenario. The actual waiting period until the first opportunity for naturalisation arises is even longer (eleven years) in the other three cases.

¹⁴⁵ Exceptions are not made on protection grounds, thus none of the protection statuses analysed in this report exempts its beneficiary from the examination in itself.

¹⁴⁶ Act LV of 1993 on Hungarian Citizenship, Section 4 (2) (d); Asylum Act, Section 17 (1)

¹⁴⁷ Note the definition of unaccompanied minor used for the purposes of this report (Sub-chapter II.3.3)

¹⁴⁸ Act LV of 1993 on Hungarian Citizenship, Section 4 (4)

¹⁴⁹ A condition emanating from the wording of Sections 4 (1) (a), 4 (2) and 4 (4) of the Act LV of 1993 on Hungarian Citizenship

¹⁵⁰ Until then, they only have a place of accommodation (*szálláshely*)

Non-EU-harmonised protection statuses thus entail once again less favourable conditions than refugee status and subsidiary protection. The lack of preferential treatment for those granted tolerated status is particularly striking, given the vast similarities between the situation of persons currently granted this status and refugees/beneficiaries of subsidiary protection (see more analysis in V.1).

Another issue of concern is the treatment of stateless persons: considering Hungary's international obligations to reduce statelessness and the typical features of this phenomenon, it is hardly understandable why legislation does not include stateless persons in the most preferential category with regard to naturalisation.

IV. Statistics

The EU-harmonised subsidiary protection regime was transposed into Hungarian law by the Asylum Act, which entered into force on 1 January 2008. The previously described non-EU-harmonised statuses have been existing in their current form since 1 July 2007 (except for tolerated status, which had already been in use for several years as a complementary form of international protection). The rather limited amount of statistics included in this report reflects the short period of time elapsed since the establishment of the current system. All statistics included in this chapter have been provided by the Office of Immigration and Nationality (OIN).

Asylum statistics constitute the first source of relevant data. Table 1 below shows how many persons were granted refugee status, EU-harmonised subsidiary protection and tolerated status since 2004 by the OIN:¹⁵¹

Table 1

Year	Applicants	Total In-merit Decisions ¹⁵²	Refugee Status	% ¹⁵³	Subsidiary Protection ¹⁵⁴	% ¹⁵⁵	Tolerated Status	% ¹⁵⁶
2004	1 600	1 080	149	14	—	—	177	16
2005	1 609	950	97	10	—	—	95	10
2006	2 117	1 316	99	8	—	—	99	8
2007	3 419	1 576	169	11	—	—	83	5
2008 Jan–June	1 218	245	99	40	31	13	1	0
2008 July–Dec	1 900	400	61	15	57	14	41	10
2009 Jan–June	2 269	782	114	15	24	3	54	7

¹⁵¹ The Metropolitan Court (*Fővárosi Bíróság*) unfortunately does not publish asylum or alien policing statistics on a regular basis. However, it extremely rarely grants protection to asylum-seekers, thus the inclusion of this data in the following statistical table would not cause any significant change.

¹⁵² Rejected asylum-seekers + asylum-seekers granted any sort of protection (refugee status or complementary). It does not include cases terminated without an in-merit decision (typically referring to the high number of asylum-seekers who disappear during the procedure). As of January 2008, it does not include admissibility procedures. Thus the actual number of rejected applicants is higher in reality.

¹⁵³ Asylum-seekers granted refugee status / all in-merit decisions

¹⁵⁴ EU-harmonised

¹⁵⁵ Asylum-seekers granted subsidiary protection / all in-merit decisions

¹⁵⁶ Asylum-seekers granted tolerated status / all in-merit decisions

Table 1 clearly indicates that the tolerated status is understood and used as an important complementary form of international protection. It already played a key role in Hungarian asylum policy in the early years of the present decade, when tolerated stay was granted far more frequently than refugee status. Although this practice has changed since then (with the refugee recognition rate increasing), tolerated status is still frequently used. The introduction of an EU-harmonised subsidiary protection regime only changed this practice for a short period (see statistics relating to the first half of 2008); however, tolerated status has again become the dominant form of complementary protection. The Hungarian Helsinki Committee questions this practice (see more details on the on-going professional debate in Chapter V).

Statistics concerning the grant of tolerated status in alien policing procedures were not made available. Nevertheless, this appears to happen quite rarely in practice.

Alien policing authorities did not grant humanitarian residence permits to any victim of trafficking or unaccompanied minor in the first six months following the establishment of these regimes, i.e. between July and December 2007. In 2008, these statuses began to be applied in practice as well, and during the year, 11 victims of trafficking and 57 unaccompanied minors were issued humanitarian residence permits in the framework of the respective protection regimes.

The statelessness determination mechanism also became operative shortly after the new legal regime entered into force on 1 July 2007.

Table 2

Year	Applicants	Total In-merit Decisions ¹⁵⁷	Stateless Status Granted	% ¹⁵⁸
2008	47	25	20	80
2009 Jan–June	15	13	11	85

Bearing in mind the often important gender-aspect of statelessness, it is noteworthy that half of the stateless persons recognised during this period were women (10 in 2008 and 5 in the first half of 2009). The low number of applicants and the high recognition rate are particularly relevant in the context of the debate concerning the shortcomings of the current stateless protection regime (see details in Chapter V).

As a general picture, the above statistics indicate that all non-EU-harmonised protection statuses are operative at the time of writing, and among them, tolerated status is used most frequently.

¹⁵⁷ Rejected applicants + applicants granted stateless status. It does not include cases terminated without an in-merit decision.

¹⁵⁸ Applicants granted stateless status / all in-merit decisions

V. Opinions and Main Points of Debate

The primary aim of the present study – based mainly on desk research – is to present the legal framework of non-EU-harmonised protection statuses in Hungary. An analysis of all the social, economic or other effects of the protection system at hand would exceed the scope of the study. Nevertheless, it is indispensable to briefly introduce the two main issues that have recently given rise to professional debates and which are likely to continue in the future.

V.1 Tolerated Status

Currently, the application of the tolerated status constitutes the most debated question related to non-EU-harmonised protection statuses. The Hungarian Helsinki Committee (HHC), as the main non-governmental organisation providing legal assistance to persons in need of international protection and closely involved in asylum-related policy work at a national and European level, has repeatedly criticised the current practice of the Office of Immigration and Nationality (OIN) in this respect. The manifold debate will be briefly summarised as follows.

The “harm” giving rise to an entitlement to tolerated status includes three elements: persecution on Convention grounds; torture, cruel, inhuman or degrading treatment or punishment and death penalty (the latter two with no requirement of nexus to specific grounds).¹⁵⁹ This means that the basis for tolerated status does not include any additional elements compared to refugee status (based on a well-founded fear of persecution) and subsidiary protection (based on a real risk of suffering a serious harm including death penalty, torture, inhuman or degrading treatment or punishment). However, there are three relevant distinctions:

- Both refugee status and subsidiary protection contain exclusion clauses. In contrast, tolerated status does not, thus fulfilling the obligation under international law to provide absolute, non-derogable protection for persons threatened by torture or death penalty.

¹⁵⁹ See II.2 and II.3.1 for more details

- Tolerated status can be granted in alien policing proceedings as well (often initiated *ex officio*) and therefore its application is broader than asylum procedures.¹⁶⁰
- Tolerated status provides much less favourable legal and social conditions (and thus more limited integration opportunities) to its beneficiaries than EU-harmonised statuses (e.g. more limited time of residence, more difficult access to the labour market, less financial support, worse naturalisation conditions, etc.).¹⁶¹

When creating the current legal framework it appeared that tolerated status – used until then as the only form of complementary protection – would become a secondary regime, a sort of safety net behind the new subsidiary protection status, and would be granted only in exceptional cases (when exclusion clauses apply or when the person concerned did not apply for asylum). Relevant stakeholders confirmed this interpretation at various meetings, trainings and discussions. Initially, after the new Asylum Act entered into force, the OIN’s practice also seemed to adhere to this interpretation: in the first half of 2008, only 1 person was granted tolerated status in an asylum procedure. By mid-2008, this practice changed, and the OIN started granting tolerated status on a regular basis, to the detriment of subsidiary protection.¹⁶²

The Hungarian Helsinki Committee has criticised this practice on many occasions, arguing that there are no grounds for granting tolerated status in asylum procedures, except when the applicant should be excluded from refugee status, because in cases where the person cannot be expelled from the country due to the risk of torture, inhuman or degrading treatment (the usual reasoning for granting tolerated status), she/he would automatically qualify for EU-harmonised subsidiary protection (providing a significantly more favourable status). This interpretation is endorsed by academic literature as well.¹⁶³ In addition, the HHC underlines that the definition of tolerated stay explicitly stipulates that it does not cover persons who are entitled to refugee status or subsidiary protection.¹⁶⁴ The HHC’s view is that this practice “empties” the common EU concept of subsidiary protection and the principle of approximating it to refugee status; instead, it substitutes the EU-harmonised status with a national alternative that is less favourable for the protected foreigner and less costly for the state budget in the short term. Consequently, the progressive approach reflected in the Asylum Act that grants

¹⁶⁰ See III.1.2 and III.1.3 for more details

¹⁶¹ See III.2 for more details

¹⁶² See Chapter IV for relevant statistics

¹⁶³ Zoltán Lékó (ed.), *A migrációs jog kézikönyve [Handbook of Migration Law]*, Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest, 2009, p. 282.

¹⁶⁴ Aliens Act, Section 2 (f), see in Sub-chapter II.3.1

basically equal rights to refugees and beneficiaries of subsidiary protection may easily remain ineffective as in Hungary tolerated status still prevails as the principal form of complementary protection.

The OIN argues that as the legislator did not differentiate between certain harms giving rise to both subsidiary protection and tolerated status, it is the asylum authority's task to distinguish between the two statuses in practice. The OIN position holds that all forms of serious harm would qualify as persecution provided that a *nexus* exists with any of the Convention grounds. Thus, serious harm is a persecution-like violation of human rights, with a clear requirement of individualisation or being "singled out" by the perpetrator, but not for a Convention reason. It refers to Recital 26 of the Qualification Directive, according to which

Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

It furthermore evokes the *Elgafaji* judgment¹⁶⁵, in which the European Court of Justice referred to a "high degree of individualisation" required by Article 15 (b) of the Qualification Directive. The OIN is of the view that based on these provisions a high degree of individualised risk shall be required when granting subsidiary protection with reference to the danger of suffering torture, inhuman or degrading treatment. If the significant level of individualised risk cannot be established, the person may still be eligible for tolerated status, if the security or human rights situation in the country of origin gives rise to serious concerns.¹⁶⁶

The Metropolitan Court, the UNHCR and the Ministry of Justice and Law Enforcement (responsible for policy-making and supervision in asylum and migration matters) have not yet made public clear positions on this question. It has to be underlined that the professional debate shortly presented here is far from being a mere academic controversy on how to distinguish between two legal statuses. As shown in III.2, tolerated status entails quite unfavourable conditions in many aspects, which – as lawyers and social workers working in the field confirm – cause often insurmountable difficulties when these persons attempt to seek employment, travel abroad, be reunited with their family, obtain permanent residence or nationality. This may easily result in social exclusion, extreme poverty, homelessness and a push to migrate to Western European countries by irregular means.

¹⁶⁵ *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, European Union: European Court of Justice, 17 February 2009, Article 22, <http://www.unhcr.org/refworld/docid/499aace52.html>

¹⁶⁶ On the OIN's position see among others the letter no. 106-Ti-15830/2/2008 sent on 30 October 2008 by Zsuzsanna Végh (Director-general of the OIN) to the Hungarian Helsinki Committee

V.2 Statelessness

Undeniably, Hungary took an important step to promote the protection of stateless persons when created its pioneer statelessness determination mechanism and protection regime. Having done so, it shows a progressive example for other states, most of which do not have a similar system (regardless of their obligations under relevant international legal instruments). The procedural guarantees included in the Hungarian statelessness determination procedure have been praised both by the UNHCR and non-governmental organisations. However, the current regime have also been criticised for two significant shortcomings.

Both the UNHCR and the Hungarian Helsinki Committee expressed concerns about the fact that the law excludes unlawfully staying persons from applying for stateless status. The reasoning for this restrictive provision was that this way, foreigners arriving in Hungary in an unlawful manner will not be able to present a *mala fide* claim for stateless status, with the sole purpose of temporarily avoiding forcible return or expulsion.¹⁶⁷ I cannot but qualify this reasoning as senseless for the following reasons:

- Most genuine stateless persons do not carry valid travel documents and have no possibility to obtain documents. The lack of proper identity documents is a frequent characteristic of statelessness. Exceptions exist (e.g. many Palestinians living in the Occupied Territories do have a recognised Palestinian passport, but without having the effective nationality of a state), but even in such cases, meeting strict (financial) requirements for obtaining visas may easily prove to be impossible for those in need of protection for being stateless. Thus, most forced migrants who are stateless are excluded from the protection provided by the current Hungarian legal regime, and exceptions are hardly imaginable.
- Unlawfully arriving or staying foreigners may submit an asylum claim at any point of their return or expulsion procedure, which will have an automatic suspensive effect on the latter measures.¹⁶⁸ This means that regardless of the stateless protection regime, it is anyway possible to delay the enforcement of an expulsion or return measure by submitting a *mala fide* asylum claim. Consequently, allowing unlawfully arriving or staying foreigners to apply for stateless status would not change anything in this respect.
- This provision raises international law concerns as well. The 1954 Statelessness Convention sets forth an exhaustive list of exclusion clauses. Unlawful stay does not figure among them. The current Hungarian legislation can therefore be

¹⁶⁷ Zoltán Lékó (ed.) op. cit., p. 344.

¹⁶⁸ Only in case of the first two asylum claims of a person.

seen as creating an additional *de facto* exclusion ground from protection, raising serious concerns about compliance with the country's international obligations.

- Spain – as the only other country operating a rather similar system and as such the only valid international example – does not require lawful stay as a precondition for the application for stateless status.

The low number of applicants for stateless status that have been submitted since the creation of the regime (in July 2007) may also be indicative of the above concerns.¹⁶⁹ To summarise their consequences, it can be concluded that the current stateless regime only offers prospects for two categories of foreigners:

- Stateless persons lawfully staying in Hungary and already meeting material conditions (i.e. an already significant level of self-reliance or even integration into the host society). For these persons, the only “added value” of stateless status is the possibility to obtain a passport (e.g. if they cannot renew their old one) and eventually the shorter waiting period before being able to apply for Hungarian citizenship.
- Stateless persons holding a passport recognised by Hungary, who are able to enter the country lawfully (e.g. as tourists or students) and then present a claim for stateless status. Again, it is quite difficult to imagine realistic cases with this scenario, as stateless persons as a general rule do not hold valid passports and are even more rarely able to meet the strict material conditions for entering the country as tourists, for example.

The second main concern regarding the current statelessness protection regime is the limited set of rights it provides.

Statelessness is usually a protracted form of a serious human rights violation, from which usually the only way out is the time-consuming process of acquiring a new nationality (see III.2.10). Experience shows that statelessness hardly ever “disappears” from one year to another, for example a nationality once lost is very rarely recovered. In the spirit of the 1954 Statelessness Convention, statelessness should not be looked at as a protection status with a temporary character, but rather as a refugee-like situation with similar protection needs. Consequently, rights limited in scope and time may place an unnecessary burden on stateless persons and seriously hinder their social integration, without providing an alternative “durable solution”.

¹⁶⁹ See Chapter IV for relevant statistics

The current regime foresees rather unfavourable conditions for stateless persons:¹⁷⁰

- The residence permit has to be renewed every year, even if it is hardly imaginable that its legal basis (i.e. lack of nationality) would cease to exist within such a limited period;
- Support measures are unavailable with regard to accommodation (a stateless forced migrant may need temporary accommodation and care similarly to refugees);
- Access to the labour market is very limited, with scarce chances to overcome the bureaucratic obstacles and find employment;
- If unemployed (see above), they can only benefit from basic public health care services (such as anti-epidemic measures or treatment in case of emergency until their condition is stabilised);
- No access to state-funded higher education;
- The earliest point in time when they can apply for Hungarian citizenship is 8 years (three plus five) after stateless status has been granted.

Apparently, the above list raises serious concerns about the extent to which stateless status actually ensures a valid, durable protection status with real integration possibilities (most of all, if compared to EU-harmonised statuses).

V.3 Closing Considerations

Based on the foregoing, the following summary conclusions can be drawn:

1. Through its non-EU-harmonised protection statuses, Hungary strives to fulfil its obligations under international law (such as *non-refoulement*, the struggle against human trafficking, respect for the best interest of the child and the protection of stateless persons).
2. Non-EU-harmonised protection statuses fall under the scope of alien policing (immigration) law in Hungary, with the partial exception of tolerated status, which can also be granted in an asylum procedure.
3. Entitlement to all these statuses is determined on individualised grounds and according to set legal criteria (despite debates concerning the actual application of these criteria in some cases).

¹⁷⁰ See Sub-chapter III.2 for details and references

4. Non-EU-harmonised protection statuses entail less favourable legal and social conditions than refugee status or subsidiary protection in most aspects. The difference is particularly outstanding with regard to the length of the right to reside in Hungary, access to the labour market and to public health care services and naturalisation possibilities. In comparison with harmonised statuses, non-EU-harmonised protection statuses usually offer limited possibilities for integration and self-reliance.
5. Hungarian aliens legislation is notable for its specific statelessness determination mechanism and a separate stateless status. Notwithstanding this progressive and exemplary approach, the stateless protection regime suffers from a number of significant shortcomings that may result in excluding a number of stateless persons from applying for protection, as well as in scarce possibilities for integration and self-reliance, even on the long run (disregarding the usually enduring character of statelessness as a situation).
6. Hungarian authorities tend to grant all non-EU-harmonised protection statuses in practice; however, tolerated status is used more frequently than the others.
7. The relevant protection regimes have been in place only since July 2007. Thus, in most cases, no in-depth research has been conducted so far on the actual application of the provisions presented in this report. The main relevant professional debates concern the application of tolerated status (the applicability of which is questioned by some actors), and – to a lesser extent – on statelessness legislation.

Even though this study does not aim to provide a detailed list of concrete recommendations, the author would like to present some ideas for further consideration:

1. Further in-depth research is needed to assess how foreigners with tolerated status can make use of their rights and any difficulties they face in this process. Information based on personal interviews with social workers and concerned foreigners would help enlighten integration difficulties based on the legal characteristics of this status.
2. The debate concerning the application of tolerated status *versus* subsidiary protection should be resolved in the near future, considering also the result of the above-mentioned research. The Metropolitan Court, the Ministry of Justice and Law Enforcement and the UNHCR should adopt clear positions on this issue.
3. The legislator should consider improving legal conditions and rights ensured by non-EU-harmonised statuses, in order to help the persons concerned become self-reliant and integrate into host society. Such an initiative should touch upon the length of validity of residence permits, access to higher education and

the conditions of obtaining a permanent residence permit (e.g. having a valid passport). The particularly enduring character of statelessness should be taken into account in this respect.

4. Special consideration should be given to access to the labour market. The current restrictive regime cannot be explained with protecting the interests of the domestic work force, as the number of foreigners concerned is insignificant compared to the country's population (approximately 100-200 persons per year). The lack of work opportunities and the often witnessed *de facto* exclusion from the labour market due to bureaucratic obstacles has extremely negative consequences on concerned foreigners' capability to become self-reliant and even exercise other rights (e.g. become entitled to benefit from social security services). The legislator is encouraged to exempt all persons with an international protection status from meeting work permit requirements prior to employment and to explore similar practices in other European countries.
5. It is expected that the Hungarian stateless protection regime may, to some extent, become a model for other European states. Its functioning should therefore be further studied, including decision-making practices.
6. The condition of lawful stay should be eliminated with regard to applications for stateless status.
7. Before the next comprehensive amendment of Hungary's asylum and aliens legislation, it would be desirable to engage all key stakeholders in a dialogue concerning the eventual inclusion of further grounds for protection and related statuses (such as practical obstacles to expulsion, *de facto* statelessness, medical grounds, etc.). Comparative studies (such as the one based on this and similar reports from other EU member states) will be of great use in this process.

Annex

List of Relevant Legislation

- Act LXXX of 2007 on Asylum (Asylum Act)
- Government Decree 301/2007. (XI. 9.) on the execution of Act LXXX of 2007 on Asylum
- Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (Aliens Act)
- Government Decree 114/2007. (V. 24.) on the execution of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals
- Act IV of 1978, Criminal Code
- Law-Decree 11 of 1979 on the Execution of Criminal Sanctions
- Act XIX of 1998 on Criminal Proceedings
- Act CXL of 2004 on the Rules of Administrative Procedures
- Act III of 1952 on Civil Proceedings
- Act XXXI of 1997 on Child Protection
- Act IV of 1991 on the Promotion of Employment and Unemployment Benefits
- Act XXII of 1992, Labour Code
- Decree 8/1999 (XI. 10.) of the Ministry of Social and Family Affairs on the Employment of Foreigners in Hungary
- Act LXXX of 1997 on Social Security Services
- Act CLIV of 1997 on Health
- Decree 52/2006 (XII. 28.) of the Ministry of Health on Emergency Health Care Services
- Act LXXX of 1997 on Social Security Services, the Entitlement to Private Pension and the Funding of These Services
- Act LXXIX of 1993 on Public Education
- Act CXXXIX of 2005 on Higher Education
- Government Decree 328/2007 (XII. 11.) on the Recognition of Travel Documents for the Purposes of Entry in Hungary by Third-Country Nationals
- Act LV of 1993 on Hungarian Citizenship

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- *Remember the Forgotten, Protect the Unprotected*, in *Forced Migration Review*, Issue 32 (special issue on statelessness), April 2009, pp. 48–49.
<http://www.fmreview.org/FMRpdfs/FMR32/48-49.pdf>
- *Asylum in Hungary (A guide for foreigners who need protection)*, Hungarian Helsinki Committee, 2008
http://helsinki.hu/dokumentum/Asylum_in_Hungary_info_leaflet_2008_English.pdf
- *Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU*, Hungarian Helsinki Committee, 2007
http://helsinki.webdialog.hu/dokumentum/COI_in_Asylum_Procedures_US.pdf
- *Forgotten without Reason – Protection of Non-Refugee Stateless Persons in Central Europe*, Hungarian Helsinki Committee, 2007
http://helsinki.webdialog.hu/dokumentum/Statelessness_CentralEu.pdf

