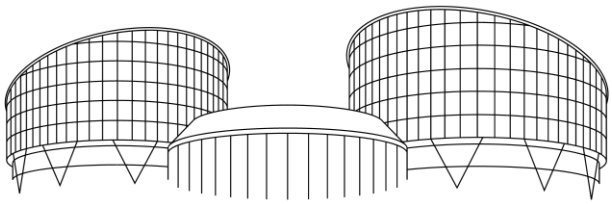

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF LOKPO AND TOURÉ v. HUNGARY

(Application no. 10816/10)

JUDGMENT

STRASBOURG

20 September 2011

FINAL

08/03/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lokpo and Touré v. Hungary**,**

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

Françoise Tulkens, *President,*
Danutė Jočienė,
David Thór Björgvinsson,
Giorgio Malinverni,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 30 August 2011,

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

PROCEDURE

1. The case originated in an application (no. 10816/10) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Ivorian nationals, Mr Paul Thibaut Lokpo and Mr Ousmane Touré ("the applicants"), on 18 February 2010.

2. The applicants were represented by Mr T. Fazekas, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr L. Höltzl, Agent, Ministry of Public Administration and Justice.

3. The applicants alleged that their detention between 9 April and 10 September 2009 had been unlawful, a situation not remedied by judicial supervision. They relied on Articles 5 §§ 1 and 4 and 13 of the Convention.

4. On 25 August 2010 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1990 and 1984 respectively. At the time of introducing the application, they lived in Budapest and Nyírbátor respectively.

6. The applicants entered Hungary illegally and were intercepted and arrested by the police on 10 March 2009. On the next day their expulsion was ordered but suspended because of practical difficulties. Their detention under immigration law was ordered until 20 March, with a view to their eventual expulsion. However, on 18 March they applied for asylum, claiming that they were persecuted in their home country for being homosexual.

7. The asylum proceedings started on 25 March and, on 9 April, the applicants were interviewed by the refugee authority, an agency belonging under the jurisdiction of the Office of Immigration and Nationality. On the same day their case was admitted to the in-merit phase. Under section 55(3) of the Asylum Act (see below in Chapter II), once a case reaches this stage, the alien administration authority (another agency of the Office of Immigration and Nationality) shall, at the initiative of the refugee authority, terminate the detention of the asylum-seeker. Nevertheless, the applicants' detention continued. After another interview on 28 May, on 19 June their asylum requests were dismissed. The applicants' action to challenge this decision in court was unsuccessful.

8. Relying on section 55(3), the applicants' lawyer then requested their release. However, since the refugee authority had not initiated their release, the request was denied by the alien administration authority. On 20 July 2009 the applicants' lawyer requested judicial review of their detention. This motion was rejected by the Nyírbátor District Court on 19 August 2009 with the formal reasoning that since the refugee authority had not initiated the applicant's release, the alien administration authority had been under no obligation to order their release and that therefore their detention was lawful.

9. The applicants were released only on 10 September 2009, after the maximum period of detention in such cases had expired.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

1. Act no. CXL of 2004 on the General Rules of Administrative Proceedings and Services (Administrative Procedure Act)

Section 13

"(2) This Act applies to ... (c) proceedings related to the admission and residence of persons entitled to the right of free movement and admission, and third-country nationals, and also to asylum procedures; ... if the act pertaining to the type of case in question does not provide otherwise."

Section 20

"(2) In the event of an authority's failure to comply with the obligation described above within the relevant administrative time-limit, the supervisory organ shall take prompt action to investigate the reason within five working days from the time of receipt of the request to this effect or upon gaining knowledge of the fact, and shall order the authority affected to conclude the proceedings within the time-limit prescribed, consistently with the case-type in question and considering the progress in the decision-making process...

(6) [...I]f in the case in question there is no supervisory organ or the supervisory organ fails to execute its vested authority, the court of jurisdiction for administrative actions shall, at the client's request, order the authority to conclude the procedure..."

2. Act no. II of 2007 on the Admission and Right of Residence of Third Country Nationals (Third Country Nationals Act)

Section 51

"(2) Any third country national whose application for refugee status is pending may be turned back or expelled only if his or her application has been refused by a final and enforceable decision of the refugee authority."

Section 54

"(4) Detention ordered under the immigration laws shall be terminated immediately:

a) if the conditions for carrying out expulsion are secured;

b) if it becomes evident that expulsion cannot be executed; or

c) after six months from the date when the detention was ordered."

3. Act no. LXXX of 2007 on Asylum (Asylum Act)

Section 51

"(1) Where the Dublin Regulations cannot be applied, the decision to determine as to whether an application is considered inadmissible lies with the refugee authority.

(2) An application shall be considered inadmissible if:

a) the applicant is a national of any Member State of the European Union;

b) the applicant was granted refugee status in another Member State;

c) the applicant was granted refugee status in a third country, where this protection also applies at the time of examination of the application, and the country in question is liable to re-admit the applicant;

d) the applicant has lodged an identical application after a final refusal."

Section 55

"(1) If the refugee authority finds an application admissible, it shall proceed to the substantive examination of the application ...

(3) If the refugee authority proceeds to the substantive examination of the application and the applicant is detained by order of the immigration authority, the immigration authority shall release the applicant at the initiative of the refugee authority."

Section 56 (The in-merit procedure)

"(1) In the order admitting the request to the in-merit phase, the refugee authority shall assign the asylum seeker – upon the latter's request – to a private accommodation or, in the absence of such, to a dedicated facility or another accommodation, unless the asylum-seeker is subjected to a ... measure restraining personal liberty. ...

(2) During the in-merit examination and the eventual judicial review of the decision adopted therein, the asylum seeker is obliged to stay at the designated accommodation.

(3) The in-merit procedure shall be completed within two months from the adoption of the decision ordering it."

4. Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status

Article 18 (Detention)

"1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum."

THE LAW

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

10. The applicants complained that their detention between 9 April and 10 September 2009 had been arbitrary and had not been remedied by judicial supervision. They relied on Articles 5 §§ 1 and 4 and 13 of the Convention. The Government contested that argument. The Court considers

that the application falls to be examined under Article 5 § 1 of the Convention alone, which reads as relevant:

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

A. Admissibility

11. The Government argued that the application should be declared inadmissible because the applicants had not submitted to the domestic courts all those arguments about the alleged unlawfulness of their detention which they had submitted to the Court; in particular, before the Nyírbátor District Court, they had not specifically argued under section 54(4b) of the Third Country Nationals Act that their detention should be terminated since their expulsion could not be executed. Moreover, they had not introduced a motion under section 20 of the Administrative Procedure Act which would have been a judicial remedy capable of redressing their grievances.

12. The applicants argued that a motion under section 20 – administrative, extraordinary and discretionary in its character – would not have been an effective remedy in the circumstances. This was so in particular because their motion challenging the lawfulness of their detention had already been rejected judicially, rather than only administratively, when the Nyírbátor District Court had reviewed the administrative decision denying their release (see paragraph 8 above). The latter decision had been adopted by the alien administration authority – an institutional unit belonging to the same State agency, namely the Office of Immigration and Nationality of the Ministry of Justice, as the refugee authority. In these circumstances, it could not be expected that this supervisory administrative organ would remedy their situation.

13. The Court notes that the applicants requested the judicial review of the lawfulness of their detention, primarily arguing section 55(3) of the Asylum Act. The court hearing this case rejected their request, observing that the refugee authority had not initiated their release (see paragraph 8 above). In these circumstances, the Court is satisfied that the applicants submitted to the domestic authorities the substance of the alleged grievances of their Convention rights. It moreover considers that, in addition to the judicial review, the applicants cannot be required to have availed themselves of the procedure under section 20 of the Administrative Procedure Act. For the Court, it could not reasonably be expected that the common supervisory organ of the alien administration authority and the

refugee authority would remedy a perceived omission of the latter, whereas a court decision had already upheld the conduct of the former. In any event, the Court considers that, by pursuing a judicial review, the applicants did afford the domestic authorities the opportunity of putting right the alleged violation of the Convention. It follows that the application cannot be rejected for non-exhaustion of domestic remedies. The Court also notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

14. The applicants argued that had section 55(3) of the Asylum Act been applied properly, their release should have been initiated by the refugee authority once the asylum proceedings had reached the in-merit phase. Its failure to do so had rendered their continued detention unlawful. In any case, the ambiguous wording of section 55(3) entailed a discretionary administrative practice, inasmuch as the release of those asylum-seekers whose cases were admitted to the in-merit phase was, as a pattern, not initiated by the refugee authority. In their view, the expression "at the initiative of the refugee authority" must be interpreted as establishing an obligation on the refugee authority's side, otherwise there was inadmissible legal uncertainty in this field. Moreover, in view of section 51(2) of the Third Country Nationals Act, their expulsion was not imminent while the asylum proceedings were still in progress, which made their continued detention unjustified. Lastly, the District Court's procedure resulting in a laconic decision upholding their continued detention solely on the formal ground that the refugee authority had not initiated their release had not qualified as "proceedings by which the lawfulness of [their] detention [was] decided speedily by a court", for the purposes of Article 5 § 4 of the Convention.

15. The Government argued that the detention of the applicants, susceptible to deportation, was justified under Article 5 § 1 (f) of the Convention. In their view, the applicants' interpretation of section 55(3) was a misconception of the law. In fact, this provision was enacted to ensure compliance with Article 18 of Council Directive 2005/85/EC, that is to ensure that no asylum-seeker be held in detention for the sole reason that he or she was an applicant for asylum. The Government stressed that section 55(3) was sufficiently precise for the purposes of lawfulness within the meaning of the Court's case-law and must be interpreted as creating a possibility for the refugee authority to initiate release if the asylum-seeker's case appeared well-founded, rather than an obligation automatically to initiate release in every case of in-merit examination. Any other

interpretation would lead to the abuse of this provision by illegal immigrants.

16. The Court observes that a person may be deprived of his liberty only for the purposes specified in Article 5 § 1 of the Convention. It notes that it is common ground between the parties that the applicants were detained with a view to their expulsion. Article 5 § 1 (f) of the Convention is thus applicable in the instant case. This provision does not require that the detention of a person against whom action is being taken with a view to expulsion be reasonably considered necessary, for example to prevent an offence or absconding. In this connection, Article 5 § 1 (f) provides a different level of protection from Article 5 § 1 (c): all that is required under sub-paragraph (f) is that "action is being taken with a view to deportation or extradition". It is therefore immaterial, for the purposes of Article 5 § 1 (f), whether the underlying decision to expel can be justified under national or Convention law (see *Čonka v. Belgium*, no. 51564/99, § 38, ECHR 2002-I; and *Chahal v. the United Kingdom*, 15 November 1996, § 112, *Reports of Judgments and Decisions* 1996-V).

17. The Court reiterates, however, that it falls to it to examine whether the applicants' detention was "lawful" for the purposes of Article 5 § 1 (f), with particular reference to the safeguards provided by the national system. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, which is to protect the individual from arbitrariness (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III).

18. The Court must therefore ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 does not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, it also relates to the "quality of the law", requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. "Quality of law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Khudoyorov v. Russia*, no. 6847/02, § 125, ECHR 2005-... (extracts); *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX; *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III; and *Amuur*, loc.cit.).

19. In the present case, the Court notes that there is dispute between the parties as to the exact meaning and correct interpretation of section 55(3) of the Asylum Act, which was the legal basis of the applicants' continued detention, and reiterates that it is primarily for the national authorities to interpret and apply national law.

20. Should the applicants' interpretation of that provision be right, the Court would observe that the applicants' detention was in all likelihood devoid of a legal basis and thus in breach of Article 5 § 1 of the Convention. However, even assuming that it is the Government's interpretation of that provision that is correct – i.e. that there is no obligation on the refugee authority to initiate the release of those asylum-seekers whose cases have reached the in-merit phase – the Court considers that the applicants' detention was not compatible with the requirement of "lawfulness" inherent in Article 5 of the Convention.

21. The Court reiterates that the formal "lawfulness" of detention under domestic law is the primary but not always the decisive element in assessing the justification of deprivation of liberty. It must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1, which is – as mentioned before – to prevent persons from being deprived of their liberty in an arbitrary fashion (see *Khudoyorov*, cited above, § 137).

22. In regard to the notion of arbitrariness in this field, the Court refers to the principles enounced in its case-law (see in particular *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 67 to 73, ECHR 2008-...) and emphasises that "to avoid being branded as arbitrary, ... detention [under Article 5 § 1 (f)] must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that « the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country » (see *Amuur*, § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued". The Court would indicate in this context that it is not persuaded that the applicants' detention – which lasted five months purportedly with a view to their expulsion which never materialised – was a measure proportionate to the aim pursued by the alien administration policy.

23. In the present application the Court notes that the applicants' detention was prolonged because the refugee authority had not initiated their release. That authority's non-action in this respect was however not incarnated by a decision, accompanied by a reasoning or susceptible to a remedy.

24. The reasons underlying the applicants' detention may well be those referred to by the Government, that is to comply with European Union standards and at the same time to counter abuses of the asylum procedure;

however, for the Court the fact remains that the applicants were deprived of their liberty by virtue of the mere silence of an authority – a procedure which in the Court's view verges on arbitrariness. In this connection the Court would reiterate that the absence of elaborate reasoning for an applicant's deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the Convention (see mutatis mutandis *Darvas v. Hungary*, no. 19547/07, § 28, 11 January 2011; and, in the context of Article 5 § 3, *Mansur v. Turkey*, 8 June 1995, § 55, Series A no. 319-B). It follows that the applicants' detention cannot be considered "lawful" for the purposes of Article 5 § 1 (f) of the Convention.

25. The foregoing considerations enable the Court to find that there has been a violation of Article 5 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

26. Article 41 of the Convention provides:

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

A. Damage

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

28. The Government contested this claim.

29. The Court considers that the applicants must have suffered some non-pecuniary damage and awards them the full sum claimed.

B. Costs and expenses

30. The applicants also claimed EUR 5,000 jointly for the costs and expenses incurred before the Court. This sum corresponds to 41 hours of legal work, charged at an hourly rate of EUR 120, billable by their lawyer as per the time-sheet submitted, as well as clerical costs in the amount of EUR 80.

31. The Government contested this claim.

32. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 covering costs under all heads.

C. Default interest

33. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds*, by 5 votes to 2, that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds*, by 5 votes to 2,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Hungarian forints at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros) to each of the applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,000 (three thousand euros) to the applicants jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 20 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Françoise Tulkens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Jočienė and David Thór Björgvinsson is annexed to this judgment.

F.T.
S.H.N.

DISSENTING OPINION OF JUDGES JOČIENĖ AND DAVID THÓR BJÖRGVINSSON

We do not agree with the majority of the Chamber in finding a violation of Article 5 § 1 in this case. We agree with the basic principles as stated by the majority in paragraphs 16-18 and 21 of the judgment, but we cannot agree with the application of those principles to the applicants' case and their situation.

A deprivation of liberty under Article 5 § 1 can be justified when it is "lawful" (see paragraph 18 of the judgment) and not arbitrary (see paragraphs 21-22 of the judgment). It is not contested that the original decision to detain the applicants was lawful. However, the applicants claim that their continued detention was unlawful since section 55(3) of the Asylum Act must be understood as establishing an obligation to initiate the release of the applicants.

In this regard, we would point out that it transpires from paragraph 8 of the judgment that the applicants' lawyer requested their release. Since, however, the refugee authority had not initiated their release, the request was rejected by the alien administrative authority. Following that decision, the lawyer requested judicial review of their detention. This motion was also rejected by the Nyírbátor District Court with the reasoning that since the refugee authority had not initiated the applicants' release, the alien administrative authority had been under no obligation to order their release and that therefore their detention was lawful.

The reasons advanced by the majority for finding a violation would seem to be twofold. Firstly, it would seem that they doubt if the interpretation of the relevant national rule by the national courts is correct. Secondly, even assuming that it is correct they consider that the applicants' detention was not compatible with the requirement of "lawfulness" inherent in Article 5 of the Convention, since the authority's non-action must be considered arbitrary, as it was not incarnated by a decision accompanied by a reasoning, nor was it susceptible to a remedy (see paragraph 23 of the judgment). They further add that the deprivation of liberty by virtue of the mere silence of an authority is a procedure verging on arbitrariness (see paragraph 24 of the judgment). They therefore conclude that the detention was arbitrary and thus not lawful.

As regards the interpretation of national law, we reiterate that it is for the domestic courts to interpret and apply the provisions of domestic law; the Court here plays only a subsidiary role (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I; *Korbely v. Hungary* [GC], no. 9174/02, § 72, 19 September 2008; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 140, ECHR 2006-V). The Court cannot substitute its own interpretation of national law for that of the domestic courts. It must therefore be accepted as the correct interpretation of national law that the

refugee authority was under no obligation to initiate the release of the applicants.

As regards the alleged arbitrariness of the detention, we would point out that the lawfulness of the original decision to detain the applicants with a view to their eventual expulsion is not disputed, but only their continued detention after their asylum case reached the in-merit stage. When a case of an asylum–seeker reaches the in-merit stage, section 55(3) of the Asylum Act provides that the alien administration authority shall, at the initiative of the refugee authority, terminate the detention of the asylum-seeker. We would point out that the law does not provide for an unconditional legal obligation to liberate the asylum-seeker in all situations when his/her case reaches the merits stage. The fact that the refugee authority did not take the initiative is, in our view, not enough to render the continued detention arbitrary. It must be assumed that, under these circumstances, the continued detention is based on the same reasons as the original decision. There is nothing in the case file to suggest that the refugee authority in this case behaved differently compared to other similar cases. Furthermore, the continued detention of the applicants was subject to judicial review, in which the applicants' motion was rejected. Finally, we would add that the applicants were released when the maximum period of detention in asylum cases had expired (see section 54(4) c) of the Asylum Act and paragraph 9 of the judgment).

Even accepting that the domestic court limited itself to what the majority labels as "formal" reasoning and a more detailed analysis of the legal basis for the continued detention might have been appropriate, this is not in itself sufficient to render the detention of the applicants, which was based on a clear legal provision, arbitrary.

Therefore, we conclude that the continued detention of the applicants, which was based on the original decision reviewed by the national court, was not arbitrary and thus not deprived of a legal basis. For these reasons, no violation of Article 5 § 1 can be found in the circumstances of this case.

We also think that in this case an examination of the legal basis for the applicants continued detention could have been more appropriate under Article 5 § 4, but this aspect had not been communicated to the Government.