

## Swiss Federal Administrative Tribunal judgment concerning Dublin transfer to Hungary<sup>1</sup>

### Unofficial translation from French of section 9.2 of judgment

That being so, there is no need to consider, with regards to Hungary, that any transfer of an asylum applicant to this state would, in principle, be unlawful. Nonetheless, the presumption of safety in respect of Hungary's respect for the human rights conventions (see 4.1), cannot be maintained without reservation (see, by analogy, ATAF 2012/27 regarding Dublin transfers to Malta). The authority must undertake a complete examination of the situation in this country of destination, given that this situation may change over time. In order to do this, it must take into consideration not only past facts, insofar as they can shed light on the current situation and its probable evolution, but also and above all, current conditions, which are decisive; in this examination, it will assess, firstly, the most recent public information relevant to this country situation and will take into account their impact on the individual case, insofar as they are objective and reliable (see the 11 January 2007 judgment of ECtHR in the case of *Salah Skeekh v The Netherlands*, Application Number 1948/04, § 135; see in the same sense Constantin Hruschka, Grundrechtsschutz Verfahren in Dublin, in: *Rechtsschutz bei Schengen and Dublin*, Stephan Breitenmoser, Sabin Gless, Otto Lagodny (ed.), Zurich / St Gall 2013, p. 170). Therefore, the proof of a real risk of a violation of the principle of *non-refoulement* or of ill-treatment may be easier for asylum applicants, who will only need to invoke the factual elements personal to them. The authority can no longer hide behind the presumption of safety to refrain from adequately verifying whether the transfer poses a serious and real risk of non-respect for the fundamental rights of the individual concerned.

The Tribunal does not have objective and reliable reports of clearly defined categories of persons at particular risk of detention contrary to the ECHR, if transferred under Dublin. In order to verify whether there are serious and substantial grounds of a real risk of being subjected to ill-treatment in Hungary or of *refoulement* contrary to the ECHR or the Refugee Convention, it is in particular necessary to take into consideration, on an individual basis, whether or not a sufficient number of indications of detention on the basis of the new legal provisions exist and how they are applied in practice, as well as the situation of vulnerability of the person concerned.

Given the concerns raised by observers that the new Hungarian standards concerning retention (or detention) of asylum applicants is not accompanied by sufficient guarantees concerning vulnerable persons or certain categories of them, it may be necessary to suspend the transfer, in particular in cases where it is likely that vulnerable persons fall within the criteria where detention is applied. Additionally, attention must be paid to how the new provisions are applied and the question as to whether judicial review of the legality of detention will prove sufficiently broad and effective so as to correspond to the requirements set out in Article 5 ECHR. It is also a question of establishing whether observers' fears that the detention provisions are being applied to a greater extent in the context of increased arrivals of asylum applicants from certain countries, are confirmed (see CHH, op. cit., June 2013).

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<sup>1</sup> For full judgment in French see *A (Afghanistan) contre Office fédéral des migrations (ODM)*, Switzerland: Tribunal administratif fédéral, 9 October 2013, available at: <http://www.refworld.org/docid/5272190e4.html>.