



# Hungary

## As a Country of Asylum

Observations on restrictive legal measures  
and subsequent practice implemented  
between July 2015 and March 2016

May 2016

## Contents

<b>A. Introduction</b> .....	3
<b>B. Executive Summary</b> .....	4
<b>C. Background</b> .....	5
<b>D. Border procedure in the transit zones at Hungary's borders with Serbia and Croatia</b> .....	8
a) Legal basis of the border procedure in the transit zones .....	8
b) Implementation of the border procedure in practice.....	10
<b>E. Safe third country concept</b> .....	13
a) Introduction of the safe third country concept into the asylum procedure in 2010 .....	13
b) Government Decree 191/2015 establishing a national list of safe third countries as amended by Government Decree 63/2016 (III.31) .....	14
c) Amendments of July and September 2015 to the Act on Asylum introducing procedural changes to the application of the safe third country concept.....	16
d) Application of the safe third country concept in practice .....	17
<b>F. Discontinuation of the asylum procedure</b> .....	18
<b>G. Criminal offence of unauthorized crossing of the border fence</b> .....	19
a) Criminal offences related to the border fence.....	19
b) Compatibility of the Criminal Code with EU law .....	20
c) Prosecutions of individuals for unauthorized crossing of the border fence .....	21
d) House arrest in detention centres.....	24
<b>H. Returns to Serbia</b> .....	25
<b>I. Conclusions</b> .....	26

## A. Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) is mandated to supervise the application of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (hereinafter jointly referred to as the 1951 Convention) under its Statute,<sup>1</sup> in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol.
2. In July and September 2015, the Government of Hungary expedited legislation through Parliament<sup>2</sup> and issued related Decrees,<sup>3</sup> amending and affecting various existing Acts, including the 2007 Act on Asylum.<sup>4</sup> The Government did so without consulting UNHCR. It is the first time since the establishment of UNHCR's presence in Hungary in 1989 that the Office's views had not been sought on planned national legislation fundamentally affecting refugees and asylum-seekers.
3. This paper presents UNHCR's observations on the legal measures and practice that Hungary has adopted between 1 July and 31 March 2016, in the course of the unfolding refugee and migration challenges in Europe. From UNHCR's perspective, these measures and practice effectively limit the right of asylum-seekers to seek international protection in Hungary. This paper is based on information available to UNHCR up to 31 March 2016, unless stated otherwise.

<sup>1</sup> Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 8(a), <http://www.unhcr.org/refworld/docid/3ae6b3628.html> ("Statute").

<sup>2</sup> See: (i) Act CXXVII of 6 July 2015 on the Establishment of Temporary Border Security Closure and on Amending Acts related to Migration, which entered into force on 1 August 2015 and *inter alia* amended Act LXXX of 2007 on Asylum, Act LXXXIX of 2007 on the State Border, and Act II of 2007 on the Entry and Residence of Third country Nationals, available in Hungarian at <http://tinyurl.com/odwquq2>; (ii) Act CXL of 4 September 2015 on the Amendment of Certain Acts relating to the Management of Mass Immigration, which entered into force on 15 September 2015 and *inter alia* amended the Act on Asylum, Act III of 1952 on the Code on Civil Proceedings, the Act on the State Border, Act XIX of 1998 on Criminal Proceedings, and Act C of 2012 on the Criminal Code, available in Hungarian at <http://tinyurl.com/no5nexx>. See also the keynote speech of Hungarian Minister of Justice László Trócsányi to the Hungarian Parliament on 4 September 2015, <http://tinyurl.com/o9kvlhv>, in which the Minister asked Parliament to adopt Act CXL on the Amendment of Certain Acts relating to Mass Immigration. Note that a second Act of relevance to refugees and asylum-seekers was also adopted in September 2015, namely Act CXLII of 21 September 2015 on the Amendment of Certain Acts in the Context of Defending the State Borders of Hungary and Addressing Mass Immigration, available (in Hungarian) at <http://tinyurl.com/nft9ce>, but it is not considered in this Note.

<sup>3</sup> See, in particular: (i) Government Decree 191/2015 of 21 July 2015 on the National Designation of Safe Countries of Origin and Safe Third Countries, which entered into force on 22 July 2015, available in unofficial English translation at <http://www.refworld.org/docid/55ca02c74.html> and in the Hungarian original at <http://tinyurl.com/pxw7fdt>; (ii) Government Decree 269/2015 of 15 September 2015 Announcing a Crisis Situation Caused by Mass Immigration and Establishing the Rules related to the Declaration, Maintenance and Termination of the Crisis Situation, which entered into force on 15 September 2015, available in unofficial English translation at <http://www.refworld.org/docid/55f90f614.html> and in the Hungarian original at <http://tinyurl.com/npjg4bn>; (iii) Government Decree 270/2015 of 18 September 2015, available in Hungarian at <http://tinyurl.com/qh6gmhh>, which entered into force on 18 September 2015 and extended to the counties of Baranya, Somogy, Zala and Vas the crisis situation that had been declared in the counties of Bács-Kiskun and Csongrád by Government Decree 269/105.

<sup>4</sup> Hungary: Act LXXX of 2007 on Asylum [Hungary], 1 January 2008, <http://tinyurl.com/j5avvr2>.

## B. Executive Summary

4. In UNHCR's view, legislation and related Decrees adopted by Hungary in July and September 2015, and progressively implemented between July 2015 and 31 March 2016, have had the combined effect of limiting and deterring access to asylum in the country. These include, most notably, the following.
- (a) the erection of a fence along Hungary's borders with Serbia and Croatia, accompanied by the introduction of a procedure in which individuals arriving at the border who wish to submit an asylum application in Hungary must do so in special "transit zones" in which the asylum procedure and reception conditions are not in accordance with European Union (EU) and international standards, in particular concerning procedural safeguards, judicial review and freedom of movement. (See Section D below). In addition, the government plans to erect a fence along the Romanian-Hungarian border beginning at the Serbian-Hungarian-Romanian triple border.<sup>5</sup>
  - (b) the application of the 'safe third country' concept to countries on the principal route followed by asylum-seekers to Hungary – namely Greece, the former Yugoslav Republic of Macedonia and Serbia – without adequate procedural safeguards, and despite the fact that no other EU Member State applies a presumption of safety to those countries<sup>6</sup> and that UNHCR has recommended that asylum-seekers should not be returned to them. (See Section E below).<sup>7</sup>
  - (c) the criminalization of irregular entry into Hungary through the border fence, punishable by actual or suspended terms of imprisonment of up to ten years – and/or the imposition of an expulsion order. Prison sentences, at variance with the EU Return Directive, are imposed following fast-tracked trials of questionable fairness, and are not suspended in the event that the concerned individual submits an asylum application. The proper consideration of a defence under Article 31 of the 1951 Convention that the individual had come directly from a territory where his or life or freedom was threatened in the sense of Article 1 of that Convention is thus prevented. (See Section G below).

There has also been a reduction of permanent open reception capacity for asylum-seekers through the closure of the centre in Debrecen<sup>8</sup>, which had been the largest open asylum reception centre in the country, at the very time when substantially increased reception capacity for asylum-seekers is needed<sup>9</sup> and the opening of an asylum detention centre in Kiskunhalas.<sup>10</sup> These measures and developments

<sup>5</sup> Hungarian Government, *Hungary is prepared for building fence on Romanian border*, 5 March 2016, <http://www.kormany.hu/en/news/hungary-is-prepared-for-building-fence-on-romanian-border>.

<sup>6</sup> Results of an internal survey of UNHCR country offices in September 2015.

<sup>7</sup> UNHCR, *UNHCR observations on the current asylum system in Greece*, December 2014, <http://www.refworld.org/docid/54cb3af34.html>; UNHCR, *The Former Yugoslav Republic of Macedonia as a country of asylum: Observations on the situation of asylum-seekers and refugees in the Former Yugoslav Republic of Macedonia*, August 2015, <http://www.refworld.org/docid/55c9c70e4.html>; UNHCR, *Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, <http://www.refworld.org/docid/50471f7e2.html>.

<sup>8</sup> Government resolution 1724/2015. (X. 7.) announcing the closure in Debrecen of the open reception centre on 31 October 2015 and of the asylum detention facility on 15 December 2015.

<sup>9</sup> See, for example, the Conclusions of the EU Justice and Home Affairs Council of 9 November 2015, available at <http://tinyurl.com/ps37nle>, in which the Council decided "to encourage Member States and relevant third countries to intensify ongoing efforts to substantially increase reception capacities ..." (para. 1).

<sup>10</sup> Government Decree No. 219/2015. (VIII. 6.) of 6 August 2015.

should also be considered in the context of the wider use of detention in generally inadequate conditions based on previous laws and practices adopted prior to the period covered by this paper.<sup>11</sup>

5. In conclusion, UNHCR considers these significant aspects of Hungarian law and practice raise serious concerns as regards compatibility with international and European law, and may be at variance with the country's international and European obligations.

## C. Background

6. Starting in May 2015, the Government launched a "National Consultation on Immigration and Terrorism", in which all Hungarian citizens aged eighteen or over were mailed a questionnaire to which they were asked to respond by 1 July 2015.<sup>12</sup> The introduction to the questionnaire portrayed asylum-seekers as 'economic migrants' who cross Hungary's borders illegally in order to 'enjoy [Europe's] welfare systems and economic opportunities', and who 'are a new type of threat ... which we must stop in its tracks'.<sup>13</sup> In a radio interview on 24 April 2015 announcing the consultation, Prime Minister Orbán stated that:

*“ [The questions asked] are the most important issues, as these are in contradiction with the rules of the European Union in force today, these are silly rules, in force today, which paralyse the Member States. The common European asylum policy norms, a system of law that we have developed, is more an obstacle than a help. It would be better if the Member States could decide on their own as per their specialities how they want to stop the refugee waves. Should we get this possibility, then we Hungarians would be able to solve our own problems as well' (unofficial translation into English).<sup>14</sup>*

<sup>11</sup> See UNHCR Hungary as a country of asylum – Observations on the situation of asylum-seekers and refugees in Hungary, April 2012, <http://www.unhcr.org/refworld/docid/4f9167db2.html>; Office of the Commissioner for Fundamental Rights National Preventive Mechanism, Report on Monitoring the Debrecen asylum detention facility, April 2015, <https://goo.gl/YOzle3.pdf/4a45943e-f0f6-42d6-acc5-21d050e81f2f>; Amnesty International, Europe's borderlands violations against refugees and migrants in Macedonia, Serbia and Hungary, July 2015, <https://www.amnesty.org/en/documents/eur70/1579/2015/en/>; Hungarian Helsinki Committee, No country for refugees – New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary, September 2015, English note available at: <http://goo.gl/yUYCkL>; Political Capital (Commissioned by the Heinrich Böll Stiftung), Focus on Hungary: Refugees, Asylum and Migration, December 2015, <http://goo.gl/WX9YxU>.

<sup>12</sup> The official English language translation of the questionnaire is available at <http://tinyurl.com/ogfpznx>, and the Hungarian original at <http://tinyurl.com/okk77bw>. The consultation deadline was subsequently extended to 15 July 2015, as communicated by the Government Information Centre to the Hungarian MTI News Agency on 30 June 2015.

<sup>13</sup> See UNHCR Press Release, UNHCR calls on Hungary to protect, not persecute, refugees, 8 May 2015, <http://www.unhcr.org/554cc16e9.html>; European Parliament resolution of 10 June 2015 on the situation in Hungary, <http://tinyurl.com/qxldflp>. The questionnaire contained twelve questions as follows: (1) 'We hear different views on increasing levels of terrorism. How relevant do you think the spread of terrorism (the bloodshed in France, the shocking acts of ISIS) is to your own life?'; (2) 'Do you think that Hungary could be the target of an act of terror in the next few years?'; (3) 'There are some who think that mismanagement of the immigration question by Brussels may have something to do with increased terrorism. Do you agree with this view?'; (4) 'Did you know that economic migrants cross the Hungarian border illegally, and that recently the number of immigrants in Hungary has increased twentyfold?'; (5) 'We hear different views on the issue of immigration. There are some who think that economic migrants jeopardise the jobs and livelihoods of Hungarians. Do you agree?'; (6) 'There are some who believe that Brussels' policy on immigration and terrorism has failed, and that we therefore need a new approach to these questions. Do you agree?'; (7) 'Would you support the Hungarian Government in the introduction of more stringent immigration regulations, in contrast to Brussels' lenient policy?'; (8) 'Would you support the Hungarian government in the introduction of more stringent regulations, according to which migrants illegally crossing the Hungarian border could be taken into custody?'; (9) 'Do you agree with the view that migrants illegally crossing the Hungarian border should be returned to their own countries within the shortest possible time?'; (10) 'Do you agree with the concept that economic migrants themselves should cover the costs associated with their time in Hungary?'; (11) 'Do you agree that the best means of combating immigration is for Member States of the European Union to assist in the development of the countries from which migrants arrive?'; (12) 'Do you agree with the Hungarian government that support should be focused more on Hungarian families and the children they can have, rather than on immigration?'

<sup>14</sup> Transcript of interview with Prime Minister Orbán by Radio Kossuth on 24 April 2015, available in Hungarian at <http://tinyurl.com/nqbdth2>.

7. In parallel with the national consultation, the government conducted a billboard campaign which included slogans such as 'If you come to Hungary, you cannot take away Hungarians' jobs'.<sup>15</sup> In September 2015, new posters then appeared that stated '[t]he people have decided: The country must be protected'. On 14 September 2015, the Prime Minister's Office issued an information bulletin stating that the 'biggest problem in the current situation' was that:

*“ We believe that what is at stake at present is Europe, the European lifestyle, and the survival or disappearance of European values and nations or their alteration beyond recognition. We must not let this happen, as then we would lose our identity; without a firm identity, there can be no success – either in economic or cultural senses.”<sup>16</sup>*

One day later, the Government issued a decree declaring a 'crisis situation caused by mass immigration'<sup>17</sup> covering the areas of aliens policing and refugee affairs in two counties, Bács-Kiskun and Csongrád, and closed the remaining gap in the fence that had been built along Hungary's border with Serbia, through which the vast majority of refugees and migrants had been arriving at Röszke. On 18 September, the 'crisis situation' was extended to Baranya, Somogy and Zala counties and on 9 March 2016, the Government extended the 'crisis situation' declaration to the entire country.<sup>18</sup>

8. On 15 September 2015, the new border procedure (see Section D below) and the new criminal offence of illegally crossing the fence (see Section G below) both came into effect. In Röszke, there was an immediate build-up of refugees and migrants in front of the fence, which lies inside Hungarian territory.<sup>19</sup> In principle, people should have been able to enter a "transit zone" that had been built into the fence in order to apply for asylum in Hungary, but in practice entry was<sup>20</sup> restricted to a ceiling of 100 asylum-seekers a day.<sup>21</sup> It should be noted that, between 8 September 2015 and 14 September 2015, several thousand people had been arriving every day prior to the closure of the gap in the fence.
9. The Hungarian authorities did not provide shelter, food, water or medical care to some 2,000 individuals waiting in front of the fence. Tensions escalated on both sides, but the Hungarian authorities did not take up an offer from UNHCR to mediate, and, on 16 September 2015, riot police responded to scenes of disorder with tear gas and water cannon.<sup>22</sup>

<sup>15</sup> BBC, *Hungary's poster war on immigration*, 14 June 2015, <http://tinyurl.com/p6tuplh>.

<sup>16</sup> Prime Minister's Office, International Communications Office, *Hungary's Situation in the Context of Modern-Day Mass Migration*, 14 September 2015, p. 9, <http://tinyurl.com/ncrza8n>. See also, for example, the opinion piece of Prime Minister Orbán in the 3 September 2015 edition of *Frankfurter Allgemeine Zeitung*, available in English at <http://tinyurl.com/osyv9b9>, which states, for example: 'Let us not forget, however, that those arriving have been raised in another religion, and represent a radically different culture. Most of them are not Christians, but Muslims. This is an important question, because Europe and European identity is rooted in Christianity. Is it not worrying in itself that European Christianity is now barely able to keep Europe Christian? If we lose sight of this, the idea of Europe could become a minority interest in its own continent.'

<sup>17</sup> Government Decree 269/2015 of 15 September 2015 (footnote 3 above). The conditions and modalities for declaring a crisis situation caused by mass immigration are defined in Section 80/A of Act LXXX of 2007 on Asylum, as inserted by Act CXL of 4 September 2015. A consolidated version of the Act on Asylum is available in unofficial English translation at <http://www.refworld.org/docid/4979cc072.html>, and in Hungarian at <http://tinyurl.com/oz7xpwf>.

<sup>18</sup> Government Decree No. 41/2016. (III. 9.).

<sup>19</sup> Both sides of the fence, for its entire length lie inside Hungary, at a distance of up to 10 metres from the border with Serbia: see Section 5(1) of Act LXXXIX of 2007 on the State Border, as amended by Act CXXVII of 2015. Note that Section 5(1) of the Act on the State Border was subsequently amended again, by Act CXL of 2015 which extended the 10 metre band to 60 metres.

<sup>20</sup> UNHCR assumes this to be the case since it has received no further communication on the matter from the Ministry of Interior of Hungary since the communication referred to in footnote 21 below.

<sup>21</sup> Communication from the Ministry of Interior of Hungary, *Handling of the event of a state of crisis caused by mass immigration*, September 2015.

<sup>22</sup> For a fuller account, see Amnesty International, *Fenced Out: Hungary's Violations of the Rights of Refugees and Migrants*, 7 October 2015, pp. 24–25, <http://tinyurl.com/oasp4bj>. See also, for example: UNHCR Press Release, *UNHCR urges Europe to change course on refugee crisis*, 16 September 2015, <http://www.unhcr.org/55f9a70a6.html>; UN Office of the High Commissioner for Human Rights, *Hungary violating international law in response to migration crisis*, 17 September 2015, <http://tinyurl.com/odyx8cv>.

10. While some asylum-seekers were allowed to enter Hungary through the transit zone, others were summarily rejected. The Western Balkan route into the EU quickly shifted from Hungary to Croatia,<sup>23</sup> which then directed the flow of refugees and migrants back into Hungary, which in turn directed the flow to Austria until closing the remaining gap in the fence on its border with Croatia at midnight on 16 October 2015.<sup>24</sup>
11. On 6 October 2015, the European Commission sent Hungary an administrative letter regarding the compatibility of the legislative changes of July and September 2015 with EU law, to which Hungary responded in November 2015.<sup>25</sup> On 10 December 2015, the Commission addressed a letter of formal notice to Hungary initiating an infringement procedure regarding some of the concerns that it had raised in its administrative letter. The Commission raised specific concerns with asylum procedures which offered “no possibility to refer to new facts and circumstances” and no automatic suspensive effect in case of appeals. The Commission expressed concern at the lack of interpretation and translation in the context of fast-tracked criminal proceedings for irregular border crossings. The Commission also expressed concern that an asylum application may be rejected without a personal hearing and that decisions may be taken by court secretaries (a sub-judicial level) lacking judicial independence.<sup>26</sup>
12. Following a visit to Hungary in November 2015, the Council of Europe’s Commissioner for Human Rights expressed concern at legislative changes which ‘rendered access to international protection extremely difficult and unjustifiably criminalised immigrants and asylum-seekers.’<sup>27</sup> The Commissioner raised particular concerns regarding: the use of accelerated procedures and transit zones (border procedures) in which asylum applications were not examined on their merits; the risk of *refoulement* to Serbia on the grounds of inadmissibility and application of the safe third country concept; and, increasing arbitrariness and recourse to detention including of vulnerable persons in the absence of identification mechanisms.
13. In December 2015, UNHCR, the Council of Europe and ODIHR jointly urged Hungary to refrain from policies and practices that promote intolerance and hatred with reference to the Hungarian government’s public campaign portraying refugees and asylum-seekers as criminals.<sup>28</sup>
14. On 9 March 2016, the Ministry of Interior submitted a package of legal amendments to the Parliament.<sup>29</sup> Some concerned the Asylum Act and, if adopted, they will lead to a) the termination of all measures to facilitate the integration of beneficiaries of international protection on the grounds that they enjoy the same rights as Hungarian nationals and should not have more advantages than Hungarian nationals; b) the introduction of mandatory and automatic revision of refugee status at least every three years; c) the reduction of the maximum period of stay in open reception centres after recognition from sixty to thirty days, d) a decreased eligibility period for basic health care services following recognition from one year to six months; e) the termination of housing allowances, educational allowances and monthly cash allowances currently provided for asylum-seekers and beneficiaries of international protection; f) the termination of the financial support to beneficiaries of tolerated stay status.

<sup>23</sup> Reuters, *Many Migrants leave Serbian border with Hungary, head to Croatia*, 17 September 2015, <http://tinyurl.com/gqnu2y3>.

<sup>24</sup> BBC, *Migrant Crisis: Hungary Closes its Border with Croatia*, 17 October 2015, <http://tinyurl.com/qerg7lq>.

<sup>25</sup> European Parliament, *Motion for a resolution on the situation in Hungary*, 9 December 2015, para. H, <http://tinyurl.com/hqe9dz4>.

<sup>26</sup> European Commission Press Release, *Commission opens infringement procedure against Hungary concerning its asylum law*, 10 December 2015, <http://tinyurl.com/hcgoh3c>.

<sup>27</sup> Council of Europe – Commissioner for Human Rights – Country Monitoring, *Hungary’s response to refugee challenges falls short on human rights*, <http://tinyurl.com/gvkp8be>.

<sup>28</sup> UNHCR Press Release, *Hungary urged to refrain from policies and practices that promote intolerance and hatred*, available at: <http://www.unhcr.org/5677cf666.html>.

<sup>29</sup> The draft amendments were shared with UNHCR and selected stakeholders on 2 March 2016 with a deadline for providing comments of 8 March 2016. The final submitted version is available on the website of the Parliament: <http://www.parlament.hu/irom40/09634/09634.pdf>.

On 31 March 2016, two Government Decrees were promulgated. Government Decree 62/2016 (III.31)<sup>30</sup> amended Government Decree 301/2007 (XI.9) implementing the Asylum Act. It discontinued benefits such as monthly pocket money, educational allowances, and financial support for housing. Government Decree 63/2016 (III.31)<sup>31</sup> amended Government Decree 191/2015 (VII/21) on national designation of safe countries of origin and safe third countries to the effect that Turkey is now also considered a safe country of origin as well as a safe third country.

## D. Border procedure in the transit zones at Hungary's borders with Serbia and Croatia

### a) Legal basis of the border procedure in the transit zones

15. Under the Act on Asylum, as amended in September 2015, a person seeking asylum in a “transit zone” established at a land border that is a Schengen external border shall not be allowed entry into Hungary (“border procedure”).<sup>32</sup> Further to an amendment of the Act on the State Border in September 2015, transit zones may be established at any of Hungary's land borders that is an external Schengen border – namely Hungary's borders with Croatia, Romania, Serbia and Ukraine – and ‘shall function to temporarily accommodate individuals seeking refugee status or subsidiary protection..., to conduct asylum and immigration procedures, and to accommodate the facilities required for this’ (unofficial translation).<sup>33</sup> The discretion as to when such zones may be established is apparently left to the Government, since no criteria are defined in law. As of 31 October 2015, the authorities had established two transit zones on Hungary's border with Serbia (one at Röszke, the other at Tompa), and two transit zones on Hungary's border with Croatia (one at Beremend, the other at Letenye). The transit zones on the border with Serbia became operational on 15 September 2015, whereas those on the border with Croatia became operational on 21 October 2015.
16. Asylum-seekers who are “persons in need of special treatment”<sup>34</sup> are exempted from the border procedure in the transit zones<sup>35</sup> and must be granted entry to Hungary to pursue their asylum application

Hungary's  
borders with  
Serbia and  
Croatia

<sup>30</sup> Government Decree 62/2016 (III.31) on amending certain migration and asylum related Government Decrees, promulgated in the National Gazette no. 44 on 31 March 2016, <http://tinyurl.com/zcvtx7s>.

<sup>31</sup> Government Decree 63/2016(III.31) on amending Government Decree 191/2015 (VII.21) on national designation of safe countries of origin and safe third countries promulgated in the National Gazette no. 44 on 31 March 2016, <http://tinyurl.com/zcvtx7s>.

<sup>32</sup> Section 71/A of the Act on Asylum, according to which foreigners submitting a claim in a “transit zone” shall not be entitled to enter and stay in Hungary as per Section 5(1)(a) of the Act on Asylum. Note that, as provided in Section 54(3) and Section 72 of the Act on Asylum respectively individuals who make an asylum application at an international air traffic border and individuals who make a “subsequent application”, also do not benefit from Section 5(1)(a) of the Act on Asylum.

<sup>33</sup> Sections 5(1) and 15/A of the Act on the State Border.

<sup>34</sup> “Persons with special treatment needs” are defined in Section 2(k) of the Act on Asylum as: “an unaccompanied minor or a vulnerable person, in particular, a minor, elderly or disabled person, pregnant woman, single parent raising a minor child and a person who has suffered from torture, rape or any other grave form of psychological, physical or sexual violence, found, after proper individual assessment, to have special needs because of his or her individual situation” (unofficial translation into English).

<sup>35</sup> Section 71/A (7) of the Act on Asylum.



through the “in-country procedure”.<sup>36</sup> All other individuals who make an application for asylum in the transit zone are subject to the border procedure. They are denied entry to Hungary pending a final decision on the admissibility of their asylum application,<sup>37</sup> and are only granted entry if the application is found admissible<sup>38</sup> or the final decision on its admissibility is still pending after four weeks.<sup>39</sup> Each admissibility decision within the border procedure must be taken ‘with priority’ and in any event within eight days of submission of the application.<sup>40</sup> As with the “in-country procedure”, the decision on admissibility is taken by the Office of Immigration and Nationality (OIN).

17. Applicants who are going through a border procedure in the transit zones may request a court to review the decision to declare their applications inadmissible, including on the ground that the applicant arrived from a “safe third country”.<sup>41</sup> The court cannot reverse the OIN’s decision but can only annul it, in which case the admissibility procedure must begin again.<sup>42</sup> The judicial review procedure at the border differs from the judicial review procedure for in-country applications in that: (i) a court secretary may act instead of a judge;<sup>43</sup> and (ii) if it is decided that a personal hearing of the applicant is necessary,<sup>44</sup> the hearing must either be held in the transit zone or be conducted remotely through an audiovisual telecommunications network.<sup>45</sup> Otherwise the judicial review procedure at the border is the same as for in-country applications in that: (i) the applicant has seven days within which to request a review of the OIN’s decision;<sup>46</sup> and (ii) the court must decide the review within eight days of the applicant’s request,<sup>47</sup> during which time the OIN’s decision has no suspensive effect, except when the application was found inadmissible on the grounds that the applicant arrived from a “safe third country” (see further Section E below) or in the case of an accelerated procedure where the applicant has entered Hungary unlawfully or extended his/her period of residence unlawfully and failed to submit an application for recognition within a reasonable time, although he/she would have been able to submit it earlier and has no reasonable excuse for the delay.<sup>48</sup> Further, (iii) the review can only consider the facts and the law as they stood at the time of the OIN’s decision, and therefore cannot take into account new facts;<sup>49</sup> (iv) there is no further remedy under national law against the court’s decision.<sup>50</sup>

Hungary’s  
borders with  
Serbia and  
Croatia

<sup>36</sup> In accordance with Section 5(1)(a) of the Act on Asylum they are entitled to stay in Hungary and have their asylum application examined, including whether another Member State participating in the “Dublin system” is responsible for examining the asylum application (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast), <http://www.refworld.org/docid/51d298f04.html>).

<sup>37</sup> Section 71/A (2) of the Act on Asylum.

<sup>38</sup> Section 71/A (5) of the Act on Asylum.

<sup>39</sup> Section 71/A (4) of the Act on Asylum.

<sup>40</sup> Section 71/A (3) of the Act on Asylum.

<sup>41</sup> Section 53(2) of the Act on Asylum in conjunction with Section 51(2)(e) of the Act on Asylum.

<sup>42</sup> Section 53(5) of the Act on Asylum.

<sup>43</sup> Section 71/A (9) of the Act on Asylum. Court secretaries are not yet judges, but have passed the bar exam and have the legal status of judicial staff members pursuant to Section 2(2)(a) of Act LXVIII of 1997 on the status of judicial staff. Section 15(2) of Act CLXI of 2011 on the organization and management of courts provides that in certain cases defined by law a court secretary may act as a single judge.

<sup>44</sup> Section 53(4) of the Act on Asylum. The discretion whether to hold a hearing lies with the court.

<sup>45</sup> Section 71A (10) of the Act on Asylum. Section 326 of the Act III of 1952 on the Code of Civil Proceedings was amended by Act CXL of 4 September 2015 to give the Szeged Administrative and Labour Court exclusive competence for the judicial review of decisions of inadmissibility in the border procedure. It was then amended again by Act CXLVI of 29 September 2015, <http://tinyurl.com/p3qocfs>, such that the court at Szeged retains exclusive competence, with two exceptions: (i) asylum applications submitted in the area falling within the competence of Barcs Local District Court, and in Baranya county, fall within the competence of the Pécs Administrative and Labour Court; and (ii) asylum applications submitted in Zala and Somogy counties – with the exception of the area falling within the competence of the Local District Court in Barcs – fall within the competence of the Zalaegerszeg Public Administration and Labour Court.

<sup>46</sup> Section 53(3) of the Act on Asylum. It should be noted that the request for review must be submitted to the OIN which then has the obligation to forward to request to the court without delay.

<sup>47</sup> Section 53(4) of the Act on Asylum.

<sup>48</sup> Section 53(2) of the Act on Asylum in conjunction with Sections 51(2)(e) and 51(7)(h) of the Act on Asylum.

<sup>49</sup> Section 53(4) of the Act on Asylum.

<sup>50</sup> Section 53(5) of the Act on Asylum.

18. UNHCR is concerned that during the judicial review the court is limited to an *ex tunc* rather than an *ex nunc* examination of both facts and law, i.e. the facts and law as applicable at the time of the original decision, and not that of the review. This may be at variance with the right to an effective remedy under the EU's recast Asylum Procedures Directive (APD)<sup>51</sup> and the European Convention on Human Rights (ECHR).<sup>52</sup> Further, while the court has the discretion to conduct a hearing if necessary, and applicants may request an oral hearing – in UNHCR's view – in practice applicants have access to limited legal aid and thus are not informed of their right to do so. This may give rise to interference with standards of due process and procedural fairness and the right to an effective remedy.
19. Additionally, as noted above in Paragraph 15, the Act on the State Border refers to asylum-seekers being “temporarily accommodated” in the transit zone. The Hungarian authorities claim that such individuals are not “detained” since they are free to leave the transit zone at any time in the direction from which they came. However, as outlined above in Paragraph 16, they are not allowed to enter Hungary. In UNHCR's view, this severely restricts the freedom of movement and can be qualified as detention.<sup>53</sup> As such, it should be governed *inter alia* by the safeguards on detention in the EU's recast Reception Conditions Directive (RCD).<sup>54</sup>

## b) Implementation of the border procedure in practice

20. As of 31 March 2016, no asylum application had been made in the transit zones on Hungary's border with Croatia. The scope of the observations below is therefore limited to the implementation of the border procedure in the transit zones on Hungary's border with Serbia, namely Röske and Tompa.
21. It should be noted that monitoring of the procedure in the transit zones by UNHCR and its NGO partners – Menedek Hungarian Association for Migrants and the Hungarian Helsinki Committee (HHC) – has not always been possible because of difficulties in obtaining full and unimpeded access to the transit zones.<sup>55</sup> While for the most part UNHCR has obtained access upon request, even if that access has not always been prompt, the same cannot be said for Menedek and HHC. At some point HHC in particular was notified that it must request authorization from Police Headquarters three working days in advance of any monitoring visit, which is particularly problematic since the Act on Asylum provides for only three days within which to rebut the presumption that an asylum application may be rejected as inadmissible on safe third country grounds (see Section E below).
22. After the transit zones became operational on 15 September 2015, the Ministry of Interior informed UNHCR that a maximum of 10 asylum-seekers would be permitted to enter each transit zone at any one

<sup>51</sup> Article 46(3) and (5) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (“the recast APD”), <http://www.refworld.org/docid/51d29b224.html>.

<sup>52</sup> Article 13 taken in conjunction with Article 3 of the European Convention on Human Rights (ECHR), <http://www.refworld.org/docid/3ae6b3b04.html>. For a discussion of relevant case law of the European Court of Human Rights, see Chapter 2.3 (Procedural safeguards against *refoulement*) of UNHCR, *Manual on the Case Law of the European Regional Courts*, June 2015, <http://www.refworld.org/docid/558803c44.html>.

<sup>53</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, paras. 5-7, <http://www.refworld.org/docid/503489533b8.html>. See also, *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, <http://www.refworld.org/docid/3ae6b76710.html>, in which the European Court of Human Rights held that despite its name the international transit zone of an airport does not have extraterritorial status, and that the holding of asylum-seekers in such a zone can amount to a deprivation of liberty within the meaning of Article 5 of the ECHR even if they are free to leave for another country. Note further that the applicants in that case were less restricted in their freedom of movement in the transit zone at Paris-Orly Airport than asylum-seekers who are held in the transit zones in Hungary.

<sup>54</sup> See Articles 8 to 11 of Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (“the recast RCD”), available at <http://www.refworld.org/docid/51d29db54.html>.

<sup>55</sup> Note the requirements in Article 8(2) and Article 29 of the recast APD for access of UNHCR and NGOs, in particular NGOs working on behalf of UNHCR, to asylum-seekers at the border and in transit zones.

time, and a maximum of 100 asylum-seekers a day per zone would be processed by the OIN between 06:00 and 22:00.<sup>56</sup> On 21 February 2016, the processing capacity was reduced to 50 people a day and, on 22 March, following the introduction of level 2 security level in the whole country, it was further reduced to 30 people a day. However, such ceilings may be incompatible with Hungary's obligations under EU law. The EU Asylum Procedures Directive (recast) makes express provision to ensure that basic principles and guarantees are respected in the event large numbers of asylum-seekers arrive and need to be dealt with under border procedures.<sup>57</sup>

23. In practice, OIN did not register 100 asylum applications per day. Between 15 and 19 September 2015, several thousand individuals arrived at Röszke wanting to enter Hungary and they were made to camp out in front of the entry door to the transit zone without water, food or shelter. Many left for Croatia after waiting for two days or more and only 352 individuals were allowed to enter and submit asylum applications<sup>58</sup> After 22 September 2015, UNHCR observed that single males and persons who were not visibly in need of special treatment were actively discouraged from approaching the transit zones. Official – government contracted – interpreters, told them that their asylum applications would be denied. Vulnerable people are not systematically prioritized and the lack of a clear admission system leads to frustration among the asylum-seekers. Families with small children have to wait outside the transit zone with no shelter, water or food. They are not given information on the procedures and interpretation is not always available.
24. Between 15 September 2015 and 31 March 2016, according to OIN, a total of 1,705 individuals applied for asylum in the transit zones: 742 at Tompa and 963 at Röszke.<sup>59</sup> OIN deemed 1,466 individuals to be in need of special treatment and referred them to open reception centres. At the same time, OIN rejected 188 individuals as inadmissible on the grounds that Serbia was a safe third country, and discontinued 51 cases on the grounds that the individuals concerned had withdrawn their applications. None of the rejected and discontinued applicants were allowed to enter Hungary within the meaning of the Act on Asylum and have their applications assessed on their merits.
25. For asylum-seekers subject to the border procedure, the OIN skipped the “Dublin procedure”<sup>60</sup> and moved straight away to the admissibility examination, in which all applications were declared inadmissible. Except in the case of some asylum-seekers who entered the transit zone late in the evening, and who had their applications examined the following day, asylum applications were declared inadmissible the same day that they were submitted, often within one or two hours of the individuals concerned entering the transit zone. The standard wording of the decisions suggests that there was no individual assessment of cases. They included an order for expulsion and for a one-year or two-year entry ban to the EU to be entered as an alert in the Schengen Information System.<sup>61</sup>

<sup>56</sup> Ministry of Interior of Hungary, *Handling of the event of a state of crisis caused by mass immigration*, communicated to UNHCR on 17 September 2015.

<sup>57</sup> Article 43(3) of the APD(recast) provides in respect of border procedures that '[i]n the event of arrivals involving a large number of third country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practice to apply there the [basic principles and guarantees of Chapter II of the recast APD], those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone'.

<sup>58</sup> This was notwithstanding Hungary's obligations under the recast Reception Conditions Directive, which arguably applied to those individuals who were formally inside its territory and who were waiting to enter the transit zone to apply for asylum.

<sup>59</sup> Note that a greater number of individuals entered the transit zones than the number that actually applied for asylum since not everybody wished to apply for asylum once they learned what it entailed.

<sup>60</sup> While Hungary is entitled to assume responsibility for asylum claims under the Dublin Regulation, the process could also have revealed the presence of family members and/or other elements based on which responsibility for claims may have been found to rest with other Member States.

<sup>61</sup> Since the individuals concerned had not “fail[ed] to comply with national regulations on the entry or residence of third country nationals”, entering an alert into the Schengen Information System was arguably incompatible with Article 24(3) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), <http://tinyurl.com/qfgq2c4>.

26. Most rejected individuals did not submit a request for judicial review upon learning that they could be kept in detention in the transit zone for up to 30 days and left the transit zones in the direction of Serbia. Initially, after exiting the transit zone and being informed about their rights by the HHC, some rejected asylum-seekers told the Police that they wanted to submit a request for judicial review, but were informed that to do this they would have to queue up again in front of the transit zone.
27. In 2015, only nine rejected asylum-seekers registered requests for judicial review. Of these, seven later withdrew their requests, leaving only two Bangladeshi rejected asylum-seekers to pursue judicial review proceedings. The hearings were conducted by a judge over Skype on 21 September 2015, and resulted in the annulment of the OIN's decisions that same day. On 25 September 2015, the applicants were re-interviewed by the OIN, which only informed their legal representatives from HHC two hours beforehand, which was insufficient notice for them to reach the transit zone in time. The OIN informed the applicants that it again considered Serbia as a safe third country in their case, and gave them the required three days' notice to submit evidence in rebuttal. HHC then provided medical evidence that their clients were suffering from post-traumatic stress disorder, but the OIN did not consider this sufficient to exempt them from the border procedure as persons in need of special treatment. On 30 September 2015, the OIN again determined their claims to be inadmissible. The applicants requested judicial review for a second time, but on 5 October 2015, a new judge upheld the latest decisions of the OIN.<sup>62</sup> On 8 October 2015, two applicants left the transit zone in the direction of Serbia. Throughout their stay in the transit zone, the applicants were held in the designated "accommodation" area, which is a barred compound comprised of several containers, which serve as bedrooms, dining-room and bathroom, with a small open space in between.<sup>63</sup> Between 15 September 2015 and 31 March 2016, out of 118 rejected applicants, 114 submitted judicial review requests. UNHCR has no information about the outcome of the judicial reviews in 2016.

<sup>62</sup> The judgment was sent to the legal representatives only later, on 12 or 13 October 2015.

<sup>63</sup> On the other side of the barred compound are another set of containers which serve as offices for the OIN, the Aliens Police, and the other personnel working in the transit zone.

## E. Safe third country concept

### a) Introduction of the safe third country concept into the asylum procedure in 2010

28. The safe third country concept was introduced into the Hungarian asylum procedure by an amendment of November 2010 to the Act on Asylum.<sup>64</sup> The legal approach adopted was that the concept should be applied on a case-by-case basis, as opposed to on the basis of a national list of safe third countries established by law.

29. A safe third country is defined in Section 2(i) of the Act on Asylum as:

*'a country in relation to which the refugee authority has ascertained that the applicant is treated in line with the following principles: a) his or her life and liberty are not threatened on account of race, religious reasons, national affiliation, membership of a particular social group or political opinion, and he or she is not exposed to a risk of serious harm; b) the principle of non-refoulement in accordance with the Geneva Convention is respected; c) the rule of international law, according to which the applicant may not be expelled to the territory of a country where he or she would be exposed to the behaviour defined in Article XIV(2) of the Fundamental Law is respected; and d) the option to apply for recognition as a refugee is ensured, and in the event of recognition as a refugee, protection in conformity with the Geneva Convention is guaranteed'* (unofficial translation).<sup>65</sup>

30. Section 51 of the Act on Asylum goes on to provide that an asylum application is inadmissible 'where there is a third country qualifying as a safe third country for the applicant'<sup>66</sup> which is the case only where the applicant:

*'(a) stayed in a safe third country, and would have had the opportunity to apply for effective protection in the sense of Section 2(i) in that country; (b) travelled through the territory of that third country and would have had the opportunity to apply for effective protection in the sense of Section 2(i) in that country; (c) has relatives in that country and is entitled to enter its territory; or (d) the safe third country requests the extradition of the person seeking recognition'* (unofficial translation).<sup>67</sup>

Section 51 also provides as regards the aforementioned points (a) and (b) that the applicant 'must prove that he or she had no opportunity for effective protection in that country in the sense of Section 2(i) in that country' (unofficial translation).<sup>68</sup>

31. The main country in respect of which the OIN applied the safe third country concept since its introduction was Serbia. In August 2012, UNHCR called on states to refrain from sending asylum-seekers back to Serbia, given shortcomings in its asylum system.<sup>69</sup> Hungary nevertheless continued to apply the safe third country concept to Serbia. In October 2012, UNHCR called on states participating in the "Dublin system", i.e. determining the State responsible for examining an application for international protection

<sup>64</sup> Act CXXXV of 22 November 2010 amending certain migration-related acts for the purpose of legal harmonization, which entered into force on 24 December 2010, available in Hungarian at <http://tinyurl.com/jnd6udt>.

<sup>65</sup> Note that para. (ic) of Section 2(i)(ic) of the Act on Asylum was slightly amended by Act CCI of 23 December 2011. The version of para. (ic) quoted in the text above is that pursuant to that amendment.

<sup>66</sup> Section 51(2)(e) of the Act on Asylum.

<sup>67</sup> Section 51(4) of the Act on Asylum.

<sup>68</sup> Section 51(5) of the Act on Asylum.

<sup>69</sup> UNHCR, *Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, para. 4 and 81, footnote 7 above.

under the Dublin Regulation,<sup>70</sup> to refrain from transferring asylum-seekers back to Hungary, inter alia, because of Hungary's continued application of the safe third country concept to Serbia.<sup>71</sup> Two months later, UNHCR reversed that position<sup>72</sup> after Hungary stopped applying the safe third country concept.<sup>73</sup> However, Hungary resumed application of the concept in September 2015.

32. While Hungary's practice in applying the safe third country concept has changed over time, the abovementioned legal provisions have remained in force.

## **b) Government Decree 191/2015<sup>74</sup> establishing a national list of safe third countries as amended by Government Decree 63/2016 (III.31)**

33. On 30 June 2015, Parliament amended the Act on Asylum to authorize the Government to issue a decree establishing a national list of safe third countries,<sup>75</sup> which the Government duly did on 21 July 2015.<sup>76</sup> Section 2 of that decree establishes the following list of safe third countries: all EU Member States, all EU Candidate Countries,<sup>77</sup> all Member States of the European Economic Area,<sup>78</sup> Bosnia and Herzegovina, Kosovo, Switzerland, Australia, New Zealand, Canada and 'those States of the United States of America that do not apply the death penalty' [sic]. Section 3 of the decree adds that

*'[i]f the applicant stayed in or travelled through a safe third country that is on the European Union list of safe third countries or is among the countries specified in Section 2, the applicant may prove in the asylum procedure under the Act on Asylum that in his or her individual case he or she did not have the opportunity for effective protection in that particular country in the sense of Section 2(i) of the Act on Asylum'* (unofficial translation).<sup>79</sup>

34. The list of safe third countries thus includes all countries along the Western Balkans route, notwithstanding the fact that UNHCR has urged states not to return asylum-seekers to those countries.<sup>80</sup> Moreover, EU law does not provide that Greece and other states participating in the "Dublin system"

Safe third country concept

<sup>70</sup> European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast)*, 29 June 2013, OJ L 180/31-180/59; 29.6.2013, (EU)No 604/2013, <http://www.refworld.org/docid/51d298f04.html>.

<sup>71</sup> UNHCR, *Note on Dublin transfers to Hungary of people who have transited through Serbia*, October 2012, <http://www.refworld.org/docid/507298a22.html>.

<sup>72</sup> *Note on Dublin transfers to Hungary of people who have transited through Serbia - update*, December 2012, <http://www.refworld.org/docid/50d1d13e2.html>.

<sup>73</sup> See *Response of the Hungarian Authorities to the Report of the Commissioner for Human Rights of the Council of Europe*, 15 December 2014, page 3, <http://tinyurl.com/oooudvzd>. According to that response, Hungary stopped applying the safe third country concept altogether after UNHCR had issued a report on Hungary in April 2012. Although UNHCR did issue a report on Hungary in April 2012 (available at <http://www.refworld.org/docid/4f9167db2.html>), according to UNHCR's assessment Hungary did not stop applying the safe third country concept until after the Office had issued its Note of October 2012 as referred to in footnote 78 above.

<sup>74</sup> This decree has been amended through Government Decree 63/2016 (III.31) to include Turkey in the list of safe countries of origin and asylum. Decree 63/2016 was promulgated on 31 March and entered into force on 1 April. The text of amended decree 191/2015 is available at <http://www.refworld.org/docid/55ca02c74.html>

<sup>75</sup> See Act CVI of 30 June 2015 on the Amendment of Act LXXX of 2007 on Asylum, which entered into force on 9 July 2015 and is available in Hungarian at <http://tinyurl.com/pekuclu>. Note that the amendment also authorized the Government to establish a national list of safe countries of origin.

<sup>76</sup> Government Decree 191/2015 of 21 July 2015 on the National Designation of Safe Countries of Origin and Safe Third Countries, footnote 3 above.

<sup>77</sup> The EU Candidate Countries are Albania, Montenegro, Serbia, Turkey and the former Yugoslav Republic of Macedonia,

<sup>78</sup> The European Economic Area comprises all EU Member States plus Iceland, Liechtenstein and Norway.

<sup>79</sup> Section 3(2) of Government Decree 191/2015.

<sup>80</sup> See UNHCR observations on the asylum systems in former Republic of Macedonia, Greece and Serbia, footnote 7 above. Note that the observations on former Republic of Macedonia were issued in August 2015, after Government Decree 191/2015 had been issued.

should be treated as safe third countries in the same sense as other safe third countries.<sup>81</sup> Different procedures apply as regards to states participating in the “Dublin system” and states that do not. For states participating in the “Dublin system” clear criteria for determining the state responsible for examining an application for international protection are provided for in the Dublin Regulation, whereas for other states the determination of the admissibility of applications for international protection with respect to applying the safe third country concept to these states in individual cases is regulated in the recast APD.<sup>82</sup> Further, there is no EU common list of safe third countries, and the recast APD does not provide for such a list.

35. It should also be noted that if an EU Member State chooses to implement the safe third country concept, Article 38(2) (b) of the recast APD requires that rules be laid down in national law ‘on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant’ including, if applicable, as regards ‘national designation of countries considered to be generally safe.’<sup>83</sup> Recital 46 of the recast APD further states that

*‘[w]here Member States ... designate countries as safe by adopting lists to that effect, they should take into account, inter alia, the guidelines and operating manuals and the information on countries of origin and activities, including EASO Country of Origin Information report methodology in Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, as well as relevant UNHCR guidelines.’*

Similarly, Recital 48 of the recast APD states:

*‘In order to ensure the correct application of the safe country concepts based on up-to-date information, Member States should conduct regular reviews of the situation in those countries based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations. When Member States become aware of a significant change in the human rights situation in a country designated by them as safe, they should ensure that a review of that situation is conducted as soon as possible and, where necessary, review the designation of that country as safe.’*

36. It follows that a country may only be designated as a safe third country after a review of an up-to-date, balanced and broad range of information sources – including UNHCR – according to rules laid down in national law. The European Asylum Support Office (EASO) Country of Origin Information report methodology sets out a number of basic standards in that regard, including the need to provide accurate and current information from a range of sources, presented in a traceable and transparent manner.<sup>84</sup> However, aside from the fact that the Act on Asylum authorizes the Government to establish a national list of safe third countries, Hungary does not otherwise appear to have laid down rules in its national law on the methodology by which the competent authorities may satisfy themselves that a third country may be designated as a safe third country within the meaning of Section 2(i) of the Act on Asylum. Nor is any explanation or justification provided in Government Decree 191/2015 as to how the Government arrived at the conclusion that each country listed qualifies as safe. Thus, as regards the inclusion of Greece, former Republic of Macedonia and Serbia on the list, it remains unclear, for example, why the Government did not heed the Opinion of the Administrative and Labour Law Panel of the *Kúria*<sup>85</sup> in December 2012 that: ‘[i]f the asylum system of a third country is overburdened, this may

<sup>81</sup> The States participating in the Dublin system include all EU Member States, Iceland, Liechtenstein, Norway and Switzerland.

<sup>82</sup> Article 33(2)(c) of the Asylum Procedures Directive(recast). Hence, Section 51(1) of the Act on Asylum itself provides: “If the conditions for the application of the Dublin Regulations are not met, the refugee authority shall decide on the question of the admissibility of the application ...” (unofficial translation).

<sup>83</sup> Article 38(2)(b) of the recast APD.

<sup>84</sup> EASO, *EASO Country of Origin Information report methodology*, 10 July 2012, p.6, <http://www.refworld.org/docid/4ffc33d32.html>.

<sup>85</sup> The *Kúria* is the highest Court in Hungary.

result in the impossibility for that country to guarantee the rights to which asylum-seekers are entitled. Such third countries cannot be considered as safe in the context of asylum.<sup>86</sup>

37. Further, notwithstanding the adoption of a safe third countries list, states need to satisfy themselves that the safe third country concept can be applied to a particular applicant, i.e. that the individual will be safe, that s/he has a connection with that country, and that it is reasonable for that person to go to that country.<sup>87</sup> This requires an individual examination, whereby the applicant is permitted to challenge the country is safe or that there is a connection in her or his particular circumstances.<sup>88</sup>

### c) Amendments of July and September 2015 to the Act on Asylum introducing procedural changes to the application of the safe third country concept

38. In 2015, a number of amendments were made to the Act on Asylum as regards the procedural safeguards governing the application of the safe third country concept.

39. Two amendments improved procedural safeguards:

- i) in July 2015, it was stipulated that, if an asylum application is found inadmissible on safe third country grounds, 'where ... the safe third country fails to take over or back the applicant, the refugee authority shall withdraw its decision and continue the procedure' (unofficial translation);<sup>89</sup>
- ii) in September 2015, the time limit for requesting judicial review of a decision of inadmissibility – be it on safe third country grounds or on other grounds – was increased from three to seven days.<sup>90</sup>

40. Other amendments reduced procedural safeguards:

- i) in July 2015, it was stipulated that an asylum-seeker has a maximum of three days to rebut the presumption of the inadmissibility of his or her asylum application on safe third country grounds, upon being notified of that presumption by the OIN;<sup>91</sup>
- ii) in July 2015, it was stipulated that 'the decision on inadmissible applications [including as regards the application of the safe third country concept] ... shall be made within fifteen days from the date of establishment of the reason giving rise to inadmissibility',<sup>92</sup> then in September 2015, it was stipulated that in the border procedure in the transit zones the decision on admissibility shall be made 'with priority' and in any event within eight days;<sup>93</sup>
- iii) in July 2015, it was stipulated that the judicial review of a decision of inadmissibility must be decided within eight days of the asylum-seeker's request for the review;<sup>94</sup>

<sup>86</sup> Conclusion II of Opinion No. 2/2012 (XII.10) KMK of the Administrative and Labour Law Panel of the Kúria. The Kúria revised its opinion on 21 March 2016 and replaced it by opinion no. 1/2016 (III.21).

<sup>87</sup> Article 38(1) and (2) of the APD(recast).

<sup>88</sup> Article 38(2)(c) of the APD(recast). For more information on the scope and quality of the assessment required for the safe third country concept under EU law see: UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, 23 March 2016, <http://www.refworld.org/docid/56f3ee3f4.html>.

<sup>89</sup> Section 51/A of the Act on Asylum, as inserted by Section 35 of Act CXXVII of 6 July 2015, footnote 2 above. See Article 38(4) of the recast APD, which provides: "Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II [of the recast APD]."

<sup>90</sup> Section 53(3) of the Act on Asylum, as amended by Section 18 of Act CXL of 4 September 2015.

<sup>91</sup> Section 51(11) of the Act on Asylum, as inserted by Section 34 of Act CXXVII of 6 July 2015.

<sup>92</sup> Section 47(2) of the Act on Asylum, as amended by Section 30 of Act CXXVII of 6 July 2015. Previously, the deadline for what was then called the "preliminary assessment" was 30 days.

<sup>93</sup> Section 71/A (3) of the Act on Asylum, as inserted by Section 15 of Act CXL of 4 September 2015, footnote 2 above.

<sup>94</sup> Section 53(4) of the Act on Asylum, as amended by Section 36 of Act CXXVII of 6 July 2015.



## d) Application of the safe third country concept in practice

41. Within the period 1 August 2015 to 31 March 2016, OIN found 1,184 applications to be inadmissible<sup>95</sup> (although whether this was always on safe third country grounds, is unclear). In the same period, 387 applicants submitted a request for judicial review of the OIN's inadmissibility decision – including 114 submitted in the transit zones. In 246 cases, the Courts annulled OIN's decision and referred them back to the OIN. UNHCR has been unable to obtain statistics on cases where, upon reconsideration, the OIN has found an asylum application to be admissible.
42. Since January, courts in Debrecen, Szeged and Győr have been annulling OIN's inadmissibility decisions and instructing OIN to assess the application on its merits in the repeat procedure. When annulling the administrative decisions, courts either declare that Serbia is not a safe third country or argue that the administrative authority did not comply with its obligation to satisfy itself that the Serbian authorities will take over or back the applicant pursuant to Section 51/A of the Act on Asylum and in accordance with Article 38 (4) of the Recast APD. In the latter case, the courts take into account that, since 15 September, Serbia is not taking back third country nationals under the readmission agreement except for those who hold valid travel/identity documents and are exempted from Serbian visa requirement, and they conclude that OIN must examine the applications on their merits. Yet, OIN again denies the cases on admissibility grounds and the applicants must submit a second request for judicial review of the OIN's inadmissibility decision. OIN therefore only examines the applications on their merits after the administrative courts render a second decision instructing OIN to do so.
43. In failing to promptly take into account the court's instructions, OIN renders asylum-seekers' right to effective remedy as set out in Article 47 of the Charter on Fundamental Rights as well as Article 13 of the European Convention on Human Rights ineffective.<sup>96</sup>

Safe third country  
concept

<sup>95</sup> Source: OIN. This figure applies to the whole country, not only the transit zones.

<sup>96</sup> UNHCR letter to OIN of 4 March 2016 (HUNBU/OIN/HCR/0018).

## F. Discontinuation of the asylum procedure

44. It should be noted that, pursuant to an amendment of the Act on Asylum in July 2015, where the OIN has previously discontinued the asylum procedure on the grounds that the individual concerned had abandoned the claim, that individual may, for up to nine months thereafter, subsequently request the continuation of the procedure by making the request in person.<sup>97</sup> If the request is made within the required deadline, the OIN must continue the procedure starting from the procedural act preceding the decision on termination.<sup>98</sup> Once the deadline has passed, the individual concerned must submit another asylum application, which will be treated as a “subsequent application”. In that case, notwithstanding the fact that the previous application was not decided on its merits, the subsequent application shall be inadmissible if it does not contain new facts justifying the grant of refugee status or subsidiary protection status.<sup>99</sup>
45. Between 1 August 2015 and 31 March 2016, according to OIN, 86,242 applications for asylum were submitted in Hungary. As of 31 March 2016, decisions were pending on 5,225 applications, including on applications submitted before 1 August 2015. Since the vast majority of asylum-seekers leave Hungary very shortly after submitting their applications, it is likely that nearly all the pending decisions will result in termination of the asylum procedure by the OIN.

Discontinuation  
of the asylum  
procedure

<sup>97</sup> Section 66(6) of the Act on Asylum, as inserted by Section 40 of Act CXXVII of 6 July 2015. This does not apply (contrary to Article 18(2) of the Dublin III regulation) if the asylum-seeker previously withdrew his or her request in writing, but does apply if the asylum-seeker “[did] not appear at the personal interview in spite of a written notice and fail[ed] to submit an appropriate explanation for his or her absence” or if the asylum-seeker “[had] left the designated accommodation or residence without permission for a period of more than 48 hours, for an unknown destination and failed to submit an appropriate explanation for his or her absence” (unofficial translation, see respectively Article 66(2)(b) and (c) of the Act on Asylum). Note that the request for continuation of the procedure pursuant to Section 66(6) of the Act on Asylum can be made only once.

<sup>98</sup> *Ibid.*

<sup>99</sup> Section 51(2)(d) and Section 54(1) of the Act on Asylum.

## G. Criminal offence of unauthorized crossing of the border fence

### a) Criminal offences related to the border fence

46. On 4 September 2015, Hungary's Criminal Code was amended to establish the following criminal offences: unauthorized crossing of the border fence, vandalization of the border fence, and obstruction of the construction works related to the border fence.<sup>100</sup>

47. As regards the unauthorized crossing of the border fence, Section 352/A of the Criminal Code provides:

*'(1) Any person who without due authorisation enters the territory of Hungary through a facility set up to protect the State border is guilty of a felony punishable with imprisonment not exceeding three years.*

*(2) The penalty shall be imprisonment of one to five years if the criminal offence defined in Subsection (1) is committed by*

*a) displaying a deadly weapon,<sup>101</sup>*

*b) carrying a deadly weapon,<sup>102</sup>*

*c) as a participant in a mass riot.*

*(3) Any person who commits the criminal offence defined in Paragraph (1) while displaying or carrying a deadly weapon as a participant in a mass riot shall be punished with imprisonment of two to eight years.*

*(4) The penalty shall be imprisonment of five to ten years if the criminal offence defined in Paragraphs (2) or (3) causes death.'* (unofficial translation)

48. Section 60(2a) of the Criminal Code was also inserted into the Criminal Code in September 2015, and provides that where an individual is sentenced to an actual or suspended term of imprisonment for any of the abovementioned offences, he or she must also be sentenced to expulsion. As regards expulsion, it should be noted that Section 33(4) of the Criminal Code already provided – and continues to provide – that where the penalty for a criminal offence is set at a maximum of three years' imprisonment, the sentence of imprisonment may be substituted inter alia by a sentence of expulsion.

49. If an individual is sentenced by the court to expulsion, the immigration authority is then required under the Act on the Entry and Residence of Third country Nationals to adopt a decision ordering the individual to leave the territory of the EU Member States.<sup>103</sup>

Criminal offence of unauthorized crossing of the border fence

<sup>100</sup> Sections 352/A to 352/C of Act C of 2012 on the Criminal Code, available in Hungarian at <http://tinyurl.com/qat3qv8>, as inserted by Section 31 of Act CXL of 4 September 2015.

<sup>101</sup> Section 459 (1) para. 5 of the Criminal Code defines the term '*displaying a deadly weapon*' as follows: '*Displaying a deadly weapon*' shall mean when the perpetrator carries:

*a) a firearm,*

*b) explosives,*

*c) blasting agents,*

*d) an equipment or device specially designed to initiate explosions,*

while engaged in a criminal act, or displays a replica or imitation of the weapons referred to in para. a)-d) in a threatening manner;

<sup>102</sup> Section 459 (1) para. 6 of the Criminal Code defines the terms '*carrying a deadly weapon*' as follows: '*Carrying a deadly weapon*' shall mean when the perpetrator carries a deadly weapon while engaged in a criminal act aiming to suppress or subdue any resistance.

<sup>103</sup> Section 42(2) of Act II of 2007 on the Entry and Residence of Third country Nationals, available in Hungarian at <http://tinyurl.com/oeuzc3x>. An unofficial English translation of that Act, which does not include amendments since May 2012, is available at <http://www.refworld.org/docid/4979cae12.html>.

## b) Compatibility of the Criminal Code with EU law

50. Hungary exercises its option under Article 2(2)(a) of the EU Return Directive,<sup>104</sup> which provides that Member States may decide not to apply that directive to third country nationals

*'who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.'*

Hungary is therefore not bound by its obligations under the Return Directive in respect of unauthorized crossing of the border fence into the country from both Serbia and Croatia.

51. Although Article 2(2)(b) of the Return Directive provides that Member States may decide not to apply that directive to third country nationals who 'are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law ...', the Court of Justice of the European Union (CJEU) has held that the Return Directive would be deprived of its purpose and binding effect if Article 2(2)(b) of that directive could be interpreted as

*'making it lawful for Member States not to apply the common standards and procedures set out by the said directive to third country nationals who have committed only the offence of illegal staying'.<sup>105</sup> For purposes of the directive the term "illegal stay" means "the presence on the territory of a Member State, of a third country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'.<sup>106</sup>*

52. Similarly, although the CJEU has held that the Return Directive does not preclude EU Member States from classifying an illegal stay as a criminal offence and imposing criminal sanctions to deter and penalize illegal stay,<sup>107</sup> the Member States may not apply criminal law rules which are liable to undermine the application of the common standards and procedures established by the Return Directive and thereby, contrary to Article 4(3) of the Treaty on European Union, deprive that directive of its effectiveness.<sup>108</sup> Thus, the CJEU has held that a criminal sentence of imprisonment solely for illegal stay would undermine the effectiveness of the Return Directive, whether: (i) it precedes the adoption or implementation of a return decision under the directive; or (ii) it is imposed during the return procedure itself.<sup>109</sup>

53. While the CJEU has held that nothing in the Return Directive precludes the decision imposing the obligation to return from being taken – in certain circumstances as determined by the Member State concerned – in the form of a criminal judgment, that was in a case where the expulsion order in the criminal proceedings imposed an immediately enforceable obligation to return which did not require the subsequent adoption

Criminal offence of unauthorized crossing of the border fence

<sup>104</sup> European Parliament and Council, *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*, 16 December 2008, <http://tinyurl.com/6pzvn8n>.

<sup>105</sup> CJEU, *Alexandre Achughbalian v. Préfet du Val-de-Marne (France)*, C-329/11, Judgment [GC] of 6 December 2011, para. 41, <http://tinyurl.com/ntcypud>. See also the guidance at pages 18-19 of the *Return Handbook*, annexed to European Commission, *Commission recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks*, C(2015) 6250 final, Brussels, 1 October 2015, <http://tinyurl.com/oembr9q>.

<sup>106</sup> Article 3(2) of the Return Directive.

<sup>107</sup> CJEU, *Achughbalian*, para. 28; CJEU, *Md Sagor (Italy)*, C-430/11, Judgment of 6 December 2012, para. 31, <http://tinyurl.com/py77m7w>; also affirmed in CJEU, *Abdoul Khadre Mbaye (Italy)*, C-522/11, Order of 21 March 2013, para. 24, <http://tinyurl.com/pzsfjbh>.

<sup>108</sup> CJEU, *Hassen El Dridi (Italy)*, C-61/11 PPU, Judgment of 28 April 2011, paras. 55-56, available at <http://tinyurl.com/qct5phj>; CJEU, *Achughbalian*, paras. 33&43; CJEU, *Sagor*, para. 32; CJEU, *Mbaye*, para. 25.

<sup>109</sup> CJEU, *El-Dridi*, paras. 57-59; CJEU, *Achughbalian*, paras. 37-39&45; CJEU, *Sagor*, para. 33.

of a separate decision concerning the removal of the individual concerned.<sup>110</sup> However, that is not the case in Hungary where a separate decision by the immigration authority is required.

54. Hence, and notwithstanding Hungary's obligations under the Schengen Borders Code,<sup>111</sup> the prosecution of third country nationals and stateless persons for the unauthorized crossing of the border fence would appear to be incompatible with Hungary's obligations under the Return Directive.<sup>112</sup> That is quite apart from Hungary's specific obligations under international law towards refugees and asylum-seekers, which are considered in sub-section (c) below.

### c) Prosecutions of individuals for unauthorized crossing of the border fence

55. On September 2015, Hungary's Act on Criminal Proceedings was amended to include a Chapter on the procedure to be followed in the case of criminal offences connected to the border fence.<sup>113</sup> The amendment inter alia provided for the fast-tracking of cases, including, for example, that: (i) defendants be brought to trial within 15 days of being interrogated where general preconditions are met, or, if caught *in flagrante*, within 8 days, under the rules for arraignment (which derogate from the normal rules relating to the preparation of a criminal trial);<sup>114</sup> (ii) during a 'crisis situation caused by mass immigration',<sup>115</sup> the criminal proceedings are to be conducted prior to all other cases;<sup>116</sup> (iii) there is no requirement to provide a written translation of the indictment or of the judgment to defendants who do not speak Hungarian;<sup>117</sup> and (iv) the Act's special guarantees for children do not apply.<sup>118</sup> While the amendment also provided for the mandatory participation of a defence lawyer,<sup>119</sup> most lawyers appointed by the court only met their clients shortly before the hearing, where in general the indictment is presented orally, without having been served in writing beforehand even in Hungarian.
56. Between 15 September 2015 and 31 October 2015, the Police initiated criminal investigations in 865 cases in relation to criminal offences connected to the border fence.<sup>120</sup> In the same period, 673 cases were brought to trial before the Szeged District Court<sup>121</sup> – all on charges of unauthorized crossing of

Criminal offence of unauthorized crossing of the border fence

<sup>110</sup> CJEU, *Sagor*, paras. 37-39. Note also that the Article 7(4) of the Return Directive only allows for an expulsion order to be immediately enforceable if, further to an examination of the circumstances of the individual case, it is determined that the individual concerned is not entitled to be granted a period for voluntary departure (see *Sagor* at paras. 40-41).

<sup>111</sup> Note that Article 4(3) of the Schengen Borders Code provides: "Without prejudice to ... their international protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. These penalties shall be effective, proportionate and dissuasive." A consolidated version of the Schengen Borders Code is available at <http://tinyurl.com/q9t3dpx>.

<sup>112</sup> 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, available at <http://www.refworld.org/docid/496c641098.html>.

<sup>113</sup> Chapter XXVI/A of Act XIX of 1998 on Criminal Proceedings, available in Hungarian at <http://tinyurl.com/q5s54bm>, as inserted by Section 25 of Act CXL of 4 September 2015.

<sup>114</sup> Section 542/N of the Act on Criminal Proceedings, read in conjunction with Section 517(1) of that Act. The preconditions for bringing the accused to trial within 15 days are: (a) the case is "simple"; (b) the evidence is available; (c) the accused admitted committing the offence.

<sup>115</sup> See para. 7 and footnotes 3 and 17 above.

<sup>116</sup> Section 542/E of the Act on Criminal Proceedings.

<sup>117</sup> Section 542/K of the Act on Criminal Proceedings, stipulating that the provisions on translation in Section 219(3) and Section 262(2) of that Act shall not apply.

<sup>118</sup> Section 542/L of the Act on Criminal Proceedings, stipulating that the provision on minors in Chapter XXI of that Act shall not apply.

<sup>119</sup> Section 542/M of the Act on Criminal Proceedings,

<sup>120</sup> Source: National Police Headquarters.

<sup>121</sup> Communication to UNHCR from the National Judiciary Office, 8 December 2015.

the border fence<sup>122</sup> – typically within a couple of days after being apprehended and detained. The top three nationalities were Syrian (211 cases), Iraqi (155 cases) and Afghan (151 cases).<sup>123</sup> One case was that of a child. By 31 October 2015, in 595 cases the individuals concerned had been convicted at first instance of unauthorized crossing of the border fence and 15 cases had been appealed.<sup>124</sup> Nobody had been acquitted.<sup>125</sup>

57. According to the Szeged court, 2,353 individuals were convicted of unauthorized crossing of the border fence between 15 September 2015 and 31 March 2016. Of these, 1,331 were sentenced to expulsion for one year, 943 to expulsion for two years, 33 to expulsion for three years, one to expulsion for four years and one to expulsion for five years. In addition, two were sentenced to actual imprisonment, 36 to suspended imprisonment, four were issued a warning and two were put on probation. During the same period, four individuals were convicted of destroying the border fence of whom three were sentenced to suspended imprisonment and one to actual imprisonment. Even when not sentenced to an actual or suspended term of imprisonment, the convicted individuals generally remained in immigration detention or – in case they applied for asylum – in immigration detention pending removal to Serbia.
58. All defences raised by the defendants' legal representatives were rejected, such as the defence of coercion<sup>126</sup> (e.g. undue influence by a smuggler) or of mistake<sup>127</sup> (being unaware of the circumstances that made the act a crime), or the defence under Article 31(1) of the 1951 Convention, i.e. of non-penalization for irregular entry or presence.
59. The prosecution of asylum-seekers for unauthorised crossing of the border fence raise serious concerns regarding incompatibility with Article 31(1) of the 1951 Convention. Under this provision, asylum-seekers and refugees shall not be subject to penalties (including fines or imprisonment) on account of their illegal entry or illegal presence, provided they have 'come directly' to the country in which they claim asylum and present themselves without delay to the authorities, and show good cause for their irregular entry or presence.<sup>128</sup> This Article recognises the realities of refugee flight,<sup>129</sup> which mean that asylum-seekers and refugees are often compelled to arrive at, or enter, a territory without the requisite documents or prior authorisation to enter. The term 'directly' should be understood not in

Criminal offence of unauthorized crossing of the border fence

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.* The next highest numbers were from Kosovo (S/RES/1244 (1999)) (69 cases) and Pakistan (25 cases). Note that three Hungarian nationals were also prosecuted.

<sup>124</sup> *Ibid.* The procedure was terminated in four cases, and the documents were sent back to the prosecutor in eight cases. As of 31 October 2015, seven of the 15 appeals had been denied, and eight were still pending before the second instance court at Szeged.

<sup>125</sup> National Judiciary Office of Hungary, *Gyakori kérdések és válaszok a rendkívüli migrációs ügyekkel kapcsolatban*, 6 November 2015, <http://tinyurl.com/jo2ud3a>.

<sup>126</sup> Section 19(1) of the Criminal Code.

<sup>127</sup> Section 20(1) of the Criminal Code.

<sup>128</sup> UNHCR, *Summary Conclusions: Article 31 of the 1951 Convention (Geneva Expert Roundtable, 8-9 November 2001)*, June 2003, available at: <http://www.refworld.org/docid/470a33b20.html>, para. 10(a).

<sup>129</sup> Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 Annex (1950), p. 46, referenced by Noll, G, 'Article 31,' in Zimmerman, A. (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a Commentary* (Oxford University Press, Oxford, 2011) p. 1249.

a narrow temporal or geographical sense,<sup>130</sup> and no strict time limit for the passage through or stop in another country can be applied to the concept.

60. Although the great majority of defendants did not apply for asylum, in none of the cases observed by UNHCR and its NGO partners was the criminal procedure suspended when the defendant made an asylum application during the court hearing, which could have permitted consideration by the court of a defence under Article 31 of the 1951 Convention. Motions requesting suspension of the criminal proceedings that were submitted by the defendants' legal representatives were systematically rejected by the court on the grounds that eligibility for international protection was not a relevant issue to criminal liability. Having declined to suspend the criminal proceedings, the court found as regards the applicability of Article 31 of the 1951 Convention in one case, for example, that:

- (i) *'[i]t may be concluded from the documents that the defendant had not been recognized as a refugee or a beneficiary of subsidiary protection until the court trial, because the defendant submitted a request for protection at the trial and therefore cannot be deemed as a refugee in the present procedure';*
- (ii) *the defendant did not come directly from a territory where his life or freedom was at risk since he had entered Hungary from Serbia, which is included on the national list of safe third countries established by Government Decree 191/2015; and*
- (iii) *the defendant did not contact the authorities immediately after entering since he presented an application for asylum only in court, on the third day after being apprehended by a police officer within a few meters of the State border.'* (Unofficial translation).

61. Individuals who made an asylum application in court were only referred to the asylum authority (the OIN) after being convicted and sentenced to expulsion.<sup>131</sup> While their asylum applications have suspensive effect, and a "penitentiary judge" can impose a prohibition on enforcement of a court sentence of expulsion where the individual concerned is entitled to international protection,<sup>132</sup> that prohibition does not annul the penal sentence, let alone the conviction.

62. UNHCR thus considers that Hungary's law and practice in relation to the prosecution of asylum-seekers for unauthorized crossing of the border fence is likely to be at variance with obligations under international and EU law.

Criminal offence of unauthorized crossing of the border fence

<sup>130</sup> See UNHCR, *Summary Conclusions: Article 31 of the 1951 Convention (Geneva Expert Roundtable, 8-9 November 2001)*, June 2003, <http://www.refworld.org/docid/470a33b20.html>, para 10(c): "Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee." See also UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, <http://www.refworld.org/docid/3fe9981e4.html>, para. 11: "There is no obligation under international law for a person to seek international protection at the first effective opportunity. On the other hand, asylum seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. Their intentions, however, ought to be taken into account." See also Newman J in *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, para. 69, "The Convention is a living instrument, changing and developing with the times so as to be relevant and to afford meaningful protection to refugees in the conditions in which they currently seek asylum. Apart from the current necessity to use false documents another current reality and advance, occurring since 1951, is the development of a really accessible and worldwide network of air travel. As a result there is a choice of refuge beyond the first safe territory by land or sea." See also G. S. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection', in *Refugee Protection in International Law* (2003), pp. 217-218.

<sup>131</sup> According to information informally shared with UNHCR by one police unit, even if the defendant applies for asylum during the criminal investigation phase, the individual is only referred to the asylum authority for the registration of his or her application after the criminal court procedure.

<sup>132</sup> See Section 301(6) of Act CCXL of 2013 on the implementation of criminal punishments and measures, and Sections 51 and 52 of Act II of 2007 on the entry and residence of third country nationals. See also Section 59(2) of the Criminal Code, which provides that: "Persons granted asylum may not be expelled."

## d) House arrest in detention centres

63. On 15 September 2015, the Government introduced an amendment to the Act on Criminal Proceedings in order to allow for “house arrest” of third country nationals, including asylum-seekers, in reception and asylum/aliens detention centre in the event that criminal proceedings have been initiated in connection with border fence offences.<sup>133</sup> If a third country national or asylum-seeker has crossed the border fence in an unauthorized manner, or if he/she has destroyed the border fence or in any way hindered the building or erecting of the fence, and criminal proceedings have been instituted against him/her, the person may be kept under house arrest in the asylum/ aliens detention centre or other facility where he/she is accommodated, during the time that a crisis situation caused by mass immigration prevails.
64. Holding asylum-seekers in closed detention centres is at odds with the ordinary purpose of “house arrest”. Since the specific, more favourable conditions that are otherwise applicable in the context of house arrest<sup>134</sup> – e.g. greater freedom of movement and more flexible communication with the outside world – cannot be ensured in detention, in UNHCR’s assessment, house arrest implemented in an aliens or asylum detention facility, for immigration related purposes, essentially amounts to detention. As such, it would not appear to constitute a less coercive alternative to detention, which Member States are required to apply under Article 8(2) of the Reception Conditions Directive, before resorting to detention.
65. UNHCR is particularly concerned about the regime applied to families under house arrest in asylum/ aliens detention facilities, as the principle of family unity is not upheld in all cases. Sometimes, family members of individuals under house arrest are detained in different locations. Children are sometimes separated from their parents and placed in a children’s home. This situation is clearly at odds with the requirement contained in the amendment itself, which provides that house arrest in asylum/aliens detention centres is made possible to respect the interest of children.<sup>135</sup>

Criminal offence of unauthorized crossing of the border fence

<sup>133</sup> Chapter XXVI/A relevant to crimes related to the border fence (introduced by Act CXL of 2015 As of 15 September 2015). Section 542/H provides that “[i]n case of criminal procedures initiated because of crimes stipulated in Section 542/D (i.e. unauthorized crossing of the border fence [Criminal Code Section 352/A], destroying the border fence [Criminal Code Section 352/B] and the hindering the building/erecting of the border fence [Criminal Code Section 352/C], during a crisis situation caused by mass immigration, as a matter of priority, house arrest shall be ordered, in order to respect the interests of minors, and it shall be implemented in facilities providing reception conditions and detention covered by the Asylum Act and the Aliens Act.” [Unofficial translation].

<sup>134</sup> See Section 138 of Act XIX of 1998 on Criminal Proceedings.

<sup>135</sup> See Section 542/H of Act XIX of 1998 on Criminal Proceedings.



## H. Returns to Serbia

66. The readmission to Serbia of persons residing without authorization in Hungary is regulated by a bilateral Agreement, signed in September 2007, between the European Community and Serbia,<sup>136</sup> and an implementing Protocol that was concluded between Hungary and Serbia in December 2009 pursuant to Article 19 of the Agreement.<sup>137</sup>
67. While not provided for in either the Agreement or the Protocol, in practice a ceiling has been agreed between Hungary and Serbia on the number of third country nationals that can be readmitted by Serbia each day. In 2015, that ceiling was first set at 60 individuals a day (30 individuals through the Röszke – Horgoš border crossing point, and 30 individuals through the Tompa – Kelebija border crossing point), but since October 2015, it has been limited to only 10 individuals a day (five individuals through each of the aforementioned border crossing points). In practice, Serbia has been accepting two individuals a week on average since January 2016.<sup>138</sup>
68. Between 15 September 2015 and 31 March 2016, only 298 individuals (including 78 Serbian nationals) were readmitted by Serbia under the readmission agreement.<sup>139</sup> Hungary has therefore been ordering the expulsion of individuals at a higher rate than it has been able to remove them.
69. Asylum-seekers whose applications were found inadmissible in the border procedure on the grounds that Serbia was a safe third country for them were not returned under the readmission agreement, but were simply made to leave the transit zones in the direction of Serbia.
70. As regards asylum-seekers whose applications have been found inadmissible on safe third country grounds in the in-country procedure, and who are still pending return to Serbia, it remains unclear how long they may have to wait before the OIN is required to withdraw its decision of inadmissibility in their case and to examine on the merits whether they qualify for refugee status or subsidiary protection status (see Paragraph 43 i) above). Where such individuals are detained, the lawfulness of their detention may also be at issue, since under the Return Directive, detention for purposes of removal may only be employed as a measure of last resort and then only provided that there is a reasonable prospect of removal.<sup>140</sup>
71. In any event, UNHCR maintains the position taken in its observations on the Serbian asylum system in August 2012 that asylum-seekers should not be returned to Serbia.<sup>141</sup> While the number of asylum-seekers passing through that country has since greatly increased, leaving its asylum system with even less capacity to respond in accordance with international standards than before, many of UNHCR's findings and conclusions of August 2012 remain valid. For example, between 1 January and 31 August 2015, the Misdemeanour Court in Kanjiža penalized 3,150 third country nationals readmitted to Serbia from Hungary for illegal stay or illegal border crossing, and sentenced most of them to a monetary fine. Such individuals are denied the right to (re) apply for asylum in Serbia.<sup>142</sup>

<sup>136</sup> Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, available at <http://tinyurl.com/hqkd7rn>. The agreement was signed on 18 September 2007 and entered into force on 1 January 2008 (see summary of the Agreement available in the EU Treaties Office Database at <http://tinyurl.com/o4fr88f>).

<sup>137</sup> The Protocol is annexed in authentic Hungarian and English texts to Government Decree 53/2010 (III. 11.) of 11 March 2010, available at <http://tinyurl.com/oznmxwe>. Pursuant to its Article 11(2), the Protocol replaces the previous Agreement between the Government of the Republic of Hungary and the Government of Serbia and Montenegro on the transfer and readmission of persons residing illegally on the territories of the States, signed in Belgrade on 7 November 2001.

<sup>138</sup> Source: Hungarian National Police HQs, October 2015.

<sup>139</sup> The breakdown by nationality was as follows: Serbia (78), Turkey (72), Albania (34), Syria (31), Afghanistan (31), Kosovo (25) Iraq (14), former Republic of Macedonia (5), Somalia (2), Others (6). Source: Hungarian Police.

<sup>140</sup> Article 15 of the Return Directive.

<sup>141</sup> See footnote 7 above.

<sup>142</sup> Note that Article 8 of the Law on Asylum of Serbia provides that "An asylum seeker shall not be punished for unlawful entry or stay in the Republic of Serbia, provided that he/she submits an application for asylum without delay and offers a reasonable explanation for his/her unlawful entry or stay."

## I. Conclusions

72. While the concerns expressed in this paper are not exhaustive, they illustrate the principal means by which Hungary has been progressively limiting access to its territory and deterring asylum-seekers from applying for protection in 2015 and the first quarter of 2016.
73. The first limitation upon access to Hungary's territory discussed in this paper is the introduction of transit zones in which asylum applications are handled through a border procedure. UNHCR is concerned about restrictions introduced to the judicial review of admissibility decisions taken in border procedures in the transit zones, in particular regarding the scope of the review and the possibility of a hearing. UNHCR considers that the judicial review procedures may not meet the requirements for an effective remedy under the EU recast Asylum Procedure's Directive as well as the European Convention on Human Rights.
74. Further, UNHCR considers that restrictions on the freedom of movement of individuals who enter the transit zones amount to detention. Although those who enter the transit zones may be free to leave via the routes through which they entered, the restrictions placed on their movement effectively limit access for asylum-seekers to the asylum procedure. As a form of detention, UNHCR considers that the safeguards on detention as laid down in the EU Reception Conditions Directive should govern the temporary accommodation of persons in the transit zones.
75. In UNHCR's opinion, the practice of allowing only a limited number of people into the transit zones is incompatible with Hungary's obligations under EU and international law. Pursuant to EU law, in the event of large numbers of third country nationals arriving and lodging applications for international protection at a border or in a transit zone, border procedures may also be applied where and as long as third country nationals are accommodated normally at locations in proximity to the border or transit zone. Thus, in response to a large influx of asylum-seekers, EU law requires accommodation close to the border or transit zone – and not of limiting the number of asylum-seekers that may enter the transit zone.
76. Another substantial barrier to accessing the Hungarian asylum procedure has been introduced by a decree establishing a national list of safe third countries, which includes inter alia Greece, former Yugoslav Republic of Macedonia and Serbia. UNHCR has repeatedly urged States not to return asylum-seekers to these countries, as UNHCR considers that they do not meet their protection obligations vis-à-vis refugees, and can thus not be considered "safe".
77. Asylum-seekers are also deterred from making an application for international protection as a result of an amendment to the Criminal Code that criminalizes the unauthorized crossing of the border fence, vandalism of the border fence, and obstruction of the construction works related to the border fence. This amendment was followed by another amendment that provides that where an individual is sentenced to an actual or suspended term of imprisonment for any of these offences, he or she must also be sentenced to expulsion. UNHCR is of the opinion that these provisions undermine the effectiveness of the EU Return Directive. The prosecution of asylum-seekers for crossing the border fence without authorization furthermore would appear to be inconsistent with Article 31 of the 1951 Convention, which exempts asylum-seekers from penalties for irregular entry where the relevant conditions are fulfilled. In addition, the use of 'house arrest' for people suspected of unauthorized crossing of the border fence constitutes detention. 'House arrest' involving minors and families, without additional safeguards or appropriate conditions to address their specific needs, would also be variance with international and European legal standards.

78. UNHCR is further concerned by the number of persons kept in detention while awaiting expulsion to Serbia. Since there are limitations on the number of individuals that are actually accepted back by Serbia, the situation of those in detention pending expulsion is unclear. The detention of such people, without clear time limits or effective access to the means to challenge its ongoing legality, may be inconsistent with European and international legal standards governing detention.
79. In conclusion, UNHCR considers that significant aspects of Hungarian law and practice, as described above, raise serious concerns as regards compatibility with international and European law.