

Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger

UNHCR Position

1. Introduction

On 26 May 2020, the Hungarian Deputy Prime Minister submitted to the Parliament *Law T/10748 on the transitional rules and health preparedness related to the cessation of the state of danger*, which was subsequently adopted by Parliament on 16 June 2020.¹ On 17 June 2020, *Act LVIII of 2020 on the transitional rules and epidemiological preparedness related to the cessation of the state of danger* (hereafter referred to as “act”) was promulgated in the National Gazette and entered into force on 18 June 2020.² Also on 18 June 2020, two implementing decrees entered into force introducing detailed rules.³

UNHCR has a direct interest in law proposals related to asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.⁴ Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,⁵ whereas the 1951 Convention relating to the Status of Refugees (hereafter referred to as “1951 Convention”)⁶ and its 1967 Protocol oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). This has also been reflected in European Union law, including by way of reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union.⁷ UNHCR regrets that it was neither consulted nor given an opportunity to provide comments and recommendations before this act was adopted by Parliament. Given the timeframes, UNHCR is providing the following observations on a preliminary basis, on which it may see the need to elaborate subsequently.

Based on its supervisory responsibility, UNHCR herewith presents its key concerns regarding this act to the Government of Hungary:

- The requirement for persons irregularly arriving and wishing to seek international protection at the Hungarian border or inside Hungary to first declare their intent to seek asylum at a diplomatic representation (“embassy”) before they are admitted to the territory and the asylum procedure is not in conformity with Hungary’s obligations under international refugee and human rights law, nor with EU

¹ See law in Hungarian language at: <https://www.parlament.hu/irom41/10748/10748-0018.pdf>.

² See Issue 144 of 17 June, 2020 of the National Gazette in Hungarian language at: <https://magyarkozlony.hu/dokumentumok/b18d1fb3c742aa2bd183b15a32fe4425e603f2c2/megtekintes>.

³ See Government Decree No. 292/2020 (VI. 17.) on the designation of embassies in connection with the statement of intent to lodge an application for asylum and Minister of Interior Decree No. 16/2020. (VI. 17.) on the procedure related to the statement of intent to lodge an application for asylum.

⁴ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html>.

⁵ *Ibid*, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of UNHCR’s supervisory function to one or other specific international refugee conventions. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, *UNHCR’s supervisory responsibility*, October 2002, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

⁶ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

⁷ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

law. Most notably, it will expose asylum-seekers to the risk of *refoulement* in violation of Article 33 of the 1951 Convention.⁸

- Further, the act could be at variance with the exemption from the imposition of penalties for unauthorised entry or presence under Article 31 of the 1951 Convention, as well as with other obligations under international and regional human rights and refugee law instruments, including notably the right to liberty and security and the freedom of movement of asylum-seekers in Hungary.

Due to these fundamental concerns, UNHCR urges the Government of Hungary to initiate the withdrawal of the act and to review its asylum system to bring it into conformity with international refugee and human rights law as well as EU law. UNHCR stands ready to support Hungary in this process.

2. Access to territory and asylum and the prohibition of *refoulement*

The act introduces a new procedure, in effect until 31 December 2020, requiring individuals, as a general rule, to express their intent to seek asylum at Hungarian Embassies located in neighbouring States not belonging to the EU as specified by a Governmental decree.⁹ The act only exempts three specific categories of persons from this procedure.¹⁰ Further, the act provides for the immediate removal from the territory of any person who crosses the border unlawfully and indicates an intent to seek asylum.¹¹

- UNHCR recalls that the right to seek and enjoy asylum is a basic human right under Article 14(1) of the Universal Declaration of Human Rights,¹² and is supported by the legal framework of the 1951 Convention to which Hungary is a State Party. The right to asylum is also provided for in Article 18 of the Charter of Fundamental Rights of the European Union.¹³ UNHCR recognizes that States have the legitimate right to control their borders, in a manner which is consistent with their obligations under international law, including the principle of *non-refoulement* and respect for the right to seek and enjoy asylum. This is further supported by international and European jurisprudence. The European Court on Human Rights in the Grand Chamber judgment in *N.D. and N.T. v Spain* of February 2020¹⁴

⁸ See also *UNHCR calls on Hungary to ensure access for people seeking asylum*, 22 May 2020, available at: <https://www.unhcr.org/ceu/12811-unhcr-calls-on-hungary-to-ensure-access-for-people-seeking-asylum.html>.

⁹ See Sections 267 and 268 of the act; see also Section 1 of Government Decree No. 292/2020 (VI. 17.) according to which ‘the statement of intent to lodge an asylum application may be submitted within the territory of diplomatic representations of Hungary, as defined under point a) of Section 3 (1) of Act LXXIII of 2016 on Foreign Representations and Permanent Foreign Service, operating on the territory of non-EU Member States having borders with Hungary’.

¹⁰ Pursuant to Sub-section 271 (1) of the act, the following three categories of persons are exempted from the new procedure:

- ‘a) Recognized beneficiaries of subsidiary protection staying in Hungary;
- b) Family members – within the meaning of the Asylum Act – of recognized refugees or beneficiaries of subsidiary protection who are staying in Hungary at the time of submission of the asylum application; and
- c) Any person who is subject to a coercive measure, measure or penalty affecting his or her personal liberty, except for those who have crossed the state border of Hungary in an illegal manner.’

¹¹ See Sub-section 271 (2) of the act: ‘The police shall direct the foreigner who had crossed the state border of Hungary in an illegal manner to the Hungarian Embassy located in the neighbouring country from which they had crossed the border, if he/she indicated the intent to submit an asylum application before the police.’ The interception and summary removal of individuals who enter Hungary irregularly is based on regulations issued under the “crisis situation due to mass immigration”, in effect until 7 September 2020 with the possibility of further extensions. See Section 5 (1b) of Act LXXXIX of 2007 on the State Border, which sets out the following: ‘At the time of a crisis situation caused by mass immigration, the Police can halt foreigners illegally staying in the territory of Hungary and escort them to the nearest gate of the facility specified in paragraph (1), unless the suspicion of a crime arises.’ See also Government Decree No. 41/2016 (III. 9.) on ordering of a crisis situation caused by mass immigration covering the entire territory of Hungary and on the rules related to the ordering, existence and elimination of a crisis situation.

¹² UNGA, *Universal Declaration of Human Rights*, (‘UDHR’) 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

¹³ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Art. 18, which provides that ‘[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, available at: <http://www.refworld.org/docid/3ae6b3b70.html>.

¹⁴ European Court of Human Rights, Grand Chamber judgment *N.D. and N.T. v. Spain*, 13 February 2020, available at: <http://hudoc.echr.coe.int/eng-press?i=003-6638738-8816756>, paras. 168-171. See also UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights*, 15 November 2015, 8675/15 and 8697/15, available at: <https://www.refworld.org/docid/59d3a81f4.html>; UNHCR, *Supplementary observations by the Office of the United Nations High*

acknowledged the challenges facing European States in terms of immigration control, while also stressing “that the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto.” (paras. 169-170) In particular, the Court emphasized that States are required to make available genuine and effective access to means of legal entry, notably for persons who arrive at the border. Hence, the Court concluded that “the domestic rules governing border controls may not render inoperative or ineffective the rights guaranteed by the Convention and the Protocols thereto, and in particular by Article 3 of the Convention and Article 4 of Protocol No. 4.” (para. 171)

- Effective access to territory is an essential pre-condition to effectively exercise the right to seek asylum. This does not preclude offering access to territory and asylum through protected entry procedures at Embassies. However, any such possibility must complement and not undermine or be presented as an alternative to access to asylum procedures for asylum-seekers arriving at borders or otherwise seeking international protection within the territory. UNHCR’s position is that a State which is presented with an asylum request at its borders is required to provide admission at least on a temporary basis to examine the claim, as the right to seek asylum and the *non-refoulement* principle would otherwise be rendered meaningless. Similarly, the European Court of Human Rights in the Grand Chamber judgment *N.D. and N.T. v Spain*¹⁵ emphasized that “(...) the effectiveness of Convention rights requires that (...) States make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Those means should allow all persons who face persecution to submit an application for protection (...). In the absence of appropriate arrangements, the resulting possibility for States to refuse entry to their territory is liable to render ineffective all the Convention provisions designed to protect individuals who face a genuine risk of persecution.” (para. 209)
- UNHCR recalls that the principle of *non-refoulement* is a cardinal international protection principle, most prominently expressed in Article 33 of the 1951 Convention, recognized as a norm of customary international law, and even *jus cogens*, and also restated in international and European human rights law.¹⁶ In UNHCR’s view, this principle enjoys a wide scope of application due to its fundamental character. As such, UNHCR considers that the prohibition of *refoulement* applies wherever a State exercises jurisdiction, including in situations of non-admission or rejection at the border, on the high seas or on the territory of another State.¹⁷ In addition to refugees who have been recognized as such, the prohibition of *refoulement* also applies to asylum-seekers whose status has not yet been determined, as the determination of refugee status is declaratory at international law.¹⁸ Referencing UNHCR’s observations based on the

Commissioner for Refugees in the case of *N.D. and N.T. v Spain* before the Grand Chamber of the European Court of Human Rights, 5 April 2018, 8675/15 and 8697/15, available at: <https://www.refworld.org/docid/5b92533f4.html>; UNHCR, *Oral intervention before the European Court of Human Rights Grand Chamber hearing in the case of N.D. and N.T. v. Spain* (Application Nos. 8675/15 and 8697/15), 26 September 2018, available at: <https://www.refworld.org/docid/5e2b15684.html>.

¹⁵ European Court of Human Rights, Grand Chamber judgment *N.D. and N.T. v. Spain*, 13 February 2020, available at: <http://hudoc.echr.coe.int/eng-press?i=003-6638738-8816756>, paras. 209.

¹⁶ More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment. See further UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of D.A. and others v. Poland* (application no. 51246/17) before the European Court of Human Rights, 5 February 2018, 51246/17, para. 3.1.4, in particular fn. 29-31, available at: <https://www.refworld.org/docid/5a9d6e414.html>; Article 19 of the EU Charter of Fundamental Rights.

¹⁷ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 24 ff. and 43, available at: <https://www.refworld.org/docid/45f17a1a4.html>; UNHCR, *Submission by the UNHCR in the case of S.S. and Others. v. Italy* (Appl. No. 21660/18) before the European Court of Human Rights, 14 November 2019, available at: <https://www.refworld.org/docid/5dcebff54.html>, paras. 3.1.3.-3.1.7.

¹⁸ Executive Committee of the High Commissioner’s Programme (ExCom), Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i), available at: <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, *Note on International Protection* (submitted by the High Commissioner), A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, available at: <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, paras. 26-31, available at: www.unhcr.org/refworld/docid/45f17a1a4.html.

conclusions of its Executive Committee on international protection pertaining to safeguarding asylum of 1997, the European Court of Human Rights in *N.D. and N.T. v Spain*¹⁹ confirmed “that the prohibition of *refoulement* includes the protection of asylum-seekers in cases of both non-admission and rejection at the border (...).” (para.178) The Court continues, “(...) that the sole fact that a State refuses to admit to its territory an alien who is within its jurisdiction does not release that State from its obligations towards the person concerned arising out of the prohibition of *refoulement* of refugees.” (para.181). The Court further reiterates that the term “expulsion” [for the purposes of the proscription under the European Convention on Human Rights law of collective expulsion, closely related to *non-refoulement* obligations] is to be interpreted “(...) in the generic meaning in current use (“to drive away from a place”), as referring to any forcible removal of an alien from a State’s territory, irrespective of the lawfulness of the person’s stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border.” (para. 185)

- Further, referring or actively transferring asylum-seekers to an Embassy procedure in a third country that is to be concluded in 60 days, without resolving the nature of their stay, accommodation and assistance in that third country, is not in line with international and EU law as the primary responsibility to provide protection and reception conditions rests with the State where asylum is sought.²⁰ Moreover, the law does not clarify the criteria to be considered by the Embassy in deciding on such applications. This may deny asylum-seekers access to a fair and efficient asylum procedure as it raises fundamental concerns over the possibility of a substantive assessment without appropriate procedural guarantees being in place as required by international and EU law. UNHCR appreciates the fact that States face operational demands to manage their borders efficiently and acknowledges that, with adequate safeguards, States may impose procedural requirements, such as claim-processing rules, on asylum applications. However, UNHCR has serious concerns about the closure of the border for asylum-seekers and the introduction of a preliminary asylum procedure at their Embassy. States may not use border management as a means to deter refugees from seeking asylum or to deny protection to asylum-seekers without any individual consideration of their claims, as many individuals will have valid claims to protection as refugees under the 1951 Convention and 1967 Protocol.
- Finally, referring or actively transferring asylum-seekers to an Embassy procedure, under which they are compelled to remain in a third country while they await the outcome of that Embassy procedure, without, as mentioned above, resolving the nature of their stay and access to adequate reception conditions, raises questions regarding readmission to and the lawfulness of stay in that country as well as the responsibility of the transferring State for ensuring protection from persecution and other threats to physical safety and freedom in the third country and access to adequate reception conditions.²¹

In view of the above, UNHCR considers that the procedure introduced by the act is not consistent with the right to seek asylum in Hungary, including at its borders, and exposes asylum-seekers to a risk of *refoulement*, contrary to international refugee, human rights and EU law.

¹⁹ European Court of Human Rights, Grand Chamber judgment *N.D. and N.T. v Spain*, paras. 178, 181 and 185.

²⁰ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: www.refworld.org/docid/51af82794.html.

²¹ UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, para. 4, available at: <https://www.refworld.org/docid/5acb33ad4.html>; UNHCR, *Brief of the United Nations High Commissioner for Refugees before the United States Court of Appeals for the Ninth Circuit in the case INNOVATION LAW LAB, et al., Plaintiffs-Appellees, v. KEVIN M. MCALEENAN, Secretary of Homeland Security, et al. Defendant-Appellant*, 26 June 2019, pp. 17 and 18, available at: www.refworld.org/docid/5d82275b4.html; UNHCR, *Brief of the Office of the United Nations High Commissioner for Refugees before the United States Court of Appeals for the Ninth Circuit in the case East Bay Sanctuary Covenant, et al., v. William P. Barr ("East Bay Sanctuary (II)")*, 15 October 2019, Case No. 3:19-CV-04073, pp. 26 and 27, available at: www.refworld.org/docid/5dcc03354.html.

3. Non-penalization of unlawful entry

The act prescribes the immediate removal from the territory of any person who crosses the border unlawfully, including individuals who express an intent to seek asylum.

- Article 31(1) of the 1951 Convention prohibits the penalization of refugees on account of their illegal entry or presence if they have come directly from a territory where their life or freedom was threatened, present themselves without delay and show good cause for their illegal entry or presence.²² The material scope of Article 31(1) extends to the territory under a State's control, which includes borders.
- In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorization. The effective implementation of Article 31(1) requires that it applies to any person seeking international protection. In consequence, a person seeking international protection is presumed to benefit from the prohibition to impose penalties as stipulated under Article 31(1) until found not to be in need of international protection following a fair procedure.

States' adherence to Article 31(1) is essential to ensuring access to asylum. Under no circumstances can a State deny access to the asylum procedure, by way of a penalty for asylum-seekers or refugees who have arrived or are present without authorisation, who have not come directly, who have failed to present themselves without delay to the authorities, or who have not shown good cause for their irregular entry or presence. They are similarly precluded from imposing procedural or other requirements or preconditions which would in practice prevent refugees from applying or accessing an asylum procedure, or when their imposition will likely result in the return to countries where the asylum-seeker will have a well-founded fear of persecution. Such penalties would be at variance with the right to seek asylum, the principle of *refoulement* and the overall object and purpose of the 1951 Convention.

UNHCR considers that the denial of entry and the immediate removal from its territory of asylum-seekers who cross the borders or who are present within the territory irregularly as provided for by the law, fails to provide the necessary safeguards in this regard in breach of Hungary's obligations under Article 31(1) of the 1951 Convention and EU law.²³

4. Right to liberty and security and freedom of movement of asylum-seekers

The act permits the detention for an initial four weeks of asylum-seekers who have been provided with travel documents to enter Hungary legally, pending the assessment of their claim.²⁴ The act stipulates that the 'asylum authority in an interim decision *may* designate the applicant's place of accommodation in a closed facility', while the explanatory notes attached to the act state that the applicant '*is* placed in a closed reception facility up to four weeks'.²⁵

²² The term "directly" is to be interpreted broadly and not in a literal temporal or geographical sense, meaning that refugees who have crossed through, stopped over or stayed in other countries *en route* may still be exempt from penalties. See UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, para. 39, September 2019, available at: <https://www.refworld.org/docid/5d8a255d4.html>.

²³ See UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Ilias and Ahmed v. Hungary* (Application No. 47287/15) before the Grand Chamber of the European Court of Human Rights, 8 January 2018, para. 3.1.2 and following, available at: <https://www.refworld.org/docid/5dd6bb634.html>. See also UNHCR, *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016, available at: <http://www.refworld.org/docid/57319d514.html>; UNHCR, *UNHCR Observations on the Legislative Amendments Adopted in Hungary in June & July 2018*, 6 November 2018, available at: <https://www.refworld.org/docid/5c6bd18a7.html>; see Recital 21, Articles 6(1), 2(b) and 9 of the Asylum Procedures Directive (European Union: Council of the European Union, 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), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: <https://www.refworld.org/docid/51d29b224.html>); see also Court of Justice of the EU, *LH (C-564/18)*, paras. 37, 42.

²⁴ See Section 270 (5) of the act.

²⁵ According to Article 28 of the Fundamental Law, '[...] courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to

In relation to these provisions, UNHCR wishes to observe that:

- The fundamental rights to liberty and security of the person and freedom of movement are set out in international and European human rights law.²⁶ Article 26 of the 1951 Convention provides for the freedom of movement and choice of residence for refugees lawfully in the territory. Asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision.²⁷
- Detention of asylum-seekers should be a measure of last resort, with liberty being the default position. Children should not be detained as it is not ever in their best interests.²⁸ Restrictions on movement of refugees and asylum-seekers must be necessary, reasonable and proportionate.²⁹ Detention can only be justified on a limited number of grounds, notably public order, public health or national security.³⁰

Against this background, UNHCR considers that the act does not provide adequate safeguards against arbitrary detention and may result in unlawful reception arrangements for asylum-seekers arriving in Hungary.

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the preamble of that law and the justification of the proposal for or for amending the law [...].', available in English at: https://njt.hu/translated/doc/TheFundamentalLawofHungary_20190101_FIN.pdf.

²⁶ The fundamental rights to liberty and security of the person and freedom of movement are proclaimed in the Universal Declaration of Human Rights (UDHR), namely: Article 3 (right to life, liberty and security); Article 9 (right against arbitrary arrest, detention or exile); and Article 13 (right to freedom of movement and residence) as well as in all major international and regional human rights instruments, such as Articles 6, 9 and 12 of the International Covenant on Civil and Political Rights (ICCPR). Art. 9(1) ICCPR materially provides that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention." In its General Comment No. 8 on Article 9, the Human Rights Committee (HRC) made it clear that Article 9(1) "is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as ... immigration control etc. See UN Human Rights Committee (HRC), CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), 30 June 1982, No. 8, para. 1, available at: <http://www.refworld.org/docid/4538840110.html>; Article 6 of the EU Charter of Fundamental Rights.

²⁷ UNHCR, "Lawfully Staying" – A Note on Interpretation, 1988, available at: <http://www.unhcr.org/refworld/pdfid/42ad93304.pdf>; UNHCR, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17, available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>.

²⁸ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 2, para. 14, available at: <https://www.refworld.org/docid/503489533b8.html>. This approach is also supported by ExCom which underlined that "(...) in view of the hardship which it involves, detention should normally be avoided". ExCom Conclusion No. 44 (XXXVII), 1986, para. (b), supra, note 40, available at: <http://www.unhcr.org/4aa764389.pdf>. See also UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Ilias and Ahmed v. Hungary* (Application No. 47287/15) before the Grand Chamber of the European Court of Human Rights, 8 January 2018, para. 3.1.4 and following, available at: <https://www.refworld.org/docid/5dd6bb634.html>. See also Court of Justice of the EU, *F.M.S.* (Joined cases C-924/19 PPU et C-925/19 PPU), paras. 258, 259, 264, and 266.

²⁹ UNHCR, *Guidelines on Detention*, Guideline 4, para. 18, available at: <https://www.refworld.org/pdfid/503489533b8.pdf>.

³⁰ UNHCR, *Guidelines on Detention*, Guideline 4.1, para. 21.