

Recommendations

by the

Office of the United Nations High Commissioner for Refugees ('UNHCR')

concerning the execution of the judgments of the

European Court of Human Rights in the cases of *Ilias and Ahmed v. Hungary* (Application No. 47287/15; Grand Chamber judgment of 21 November 2019) and *Shahzad v. Hungary* (Application No. 12625/17; Judgment of 8 July 2021)

I. Introduction

1. These recommendations, addressed to the Committee of Ministers of the Council of Europe in accordance with Rule 9.3 of the Rules of the Committee of Ministers for the supervision of the Execution of judgments¹ of the European Court of Human Rights in the case of *Ilias and Ahmed v. Hungary* (Application No. 47287/15; Grand Chamber judgment of 21 November 2019).² This case has been grouped with the case of *Shahzad v. Hungary* (Application No. 12625/17; judgment of 8 July 2021).
2. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for the problem of refugees.³ Paragraph 8(a) of its Statute and the Preamble of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention")⁴ confer responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, whereas Article 35(1) of the 1951 Convention obliges States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention.
3. In accordance with its supervisory responsibility and in light of Hungary's obligations under international and EU refugee law, UNHCR seeks to assist the Council of Europe's Committee of Ministers in its evaluation of the measures necessary for execution of these judgments.

II. General observations

4. In UNHCR's view the existing legal and practical obstacles for the full execution of the *Ilias and Ahmed v. Hungary* and *Shahzad v. Hungary* judgments, need to be in line with the below principles of international refugee law.

¹ Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements: <https://rm.coe.int/16806eebf0>.

² 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, available at: <https://www.refworld.org/docid/5dd6bb634.html>.

³ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), para. 1, available at: <http://www.unhcr.org/refworld/docid/3b00f0715c.html>.

⁴ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, vol. 189, p.137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

5. 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 1948,⁵ and is supported by the legal framework of the 1951 Convention and its 1967 Protocol, to which Hungary is a State party. Article 18 of the Charter of Fundamental Rights of the European Union (the Charter)⁶ similarly provides for the right to asylum. Seeking asylum is not, therefore, an unlawful act.⁷
6. Access to territory is an essential pre-condition to effectively exercise the right to seek asylum. 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.
7. Article 31 of the 1951 Convention specifically provides for the non-penalisation of refugees having entered or stayed irregularly if they come directly from their country of origin, present themselves without delay and show good cause for their illegal entry or stay. States' adherence to Article 31 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.
8. 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 is affirmed in international and European human rights law. Referencing UNHCR's third party intervention as well as Executive Committee Conclusions Nos. 6, 22, 82 and 99, the Grand Chamber of the European Court of Human Rights in *N.D. and N.T. v Spain*⁸ 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).
9. According to UNHCR, the 'safe third country concept' may apply under certain conditions in cases where a person could, in a previous state, have applied for international protection, but has not done so, or where protection was sought but status was not determined. UNHCR considers that the removing State must assess, prior to the removal and subject to procedural

⁵ UNGA, Universal Declaration of Human Rights, ('UDHR') 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

⁶ Charter of Fundamental Rights of the European Union, http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

⁷ UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (hereafter 'Guidelines on Detention'), 2012, Guideline 1, para. 11, <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>. As António Guterres, the UN Secretary General and former UN High Commissioner for Refugees said, "[i]t is not a crime to cross a border to seek asylum".

⁸ European Court of Human Rights, Grand Chamber judgment *N.D. and N.T. v. Spain*, (*Applications nos. 8675/15 and 8697/15*), 13 February 2020, paras. 67, 178, 181 and 185: available at: https://www.refworld.org/cases/ECHR_5e4691d54.html.

safeguards, the appropriateness of the removal for each person individually.⁹ In order to be compatible with international law the removing State must ensure that the third country will treat the person in line with internationally accepted standards,¹⁰ will ensure protection against *refoulement*, and will allow the person to seek and enjoy asylum.¹¹

III. Specific observations

Continuation of automatic removals from the territory

10. In its updated Action Report¹², the Government of Hungary states that “general measures concerning the regime at issue in the present case (are) obsolete” following the delivery of the judgment of the European Court of Justice of 14 May 2020 in the joined cases C-924/19 PPU and C-925/19 PPU.
11. UNHCR notes that the legal framework remained unchanged since the time of the judgments of the European Court of Human Rights in *Ilias and Ahmed v. Hungary* (Application No. 47287/15) and *Shahzad v. Hungary* (Application No. 12625/17), as no legislative amendments were enacted to repeal relevant provisions under national law¹³ authorizing the prevention of entry, interception and automatic removal of all third-country nationals staying irregularly, including those wishing to apply for asylum, under regulations applicable in a “crisis situation due to mass immigration.” This has been extended twelve times since its first enactment and is currently in effect until 7 September 2022.¹⁴ As of March 2017, the “crisis situation due to mass immigration” was extended to the entire territory of Hungary.¹⁵
12. Pursuant to national law in force, as a rule, individuals intercepted anywhere within the territory of the country for irregular stay or entry are subject to “escort” through the border fence, i.e. automatic removal without the ability to access the asylum procedure and without ensuring any legal safeguards, including accessing effective remedies against the removal measure.¹⁶
13. The National Headquarters of the Hungarian Police regularly reports on the number of people prevented from entering Hungary and on the number of people removed through the border fence to Serbia. Since 5 July 2016 until 10 August 2022, the Police implemented more than

⁹ UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, paras. 3(v) and (vi), <http://www.refworld.org/docid/51af82794.html>. See also, 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, available at: <https://www.refworld.org/docid/5acb33ad4.html>.

¹⁰ *Ibid.*

¹¹ ExCom Conclusion No. 85 (XLIX), 1998, para. (aa), <http://www.unhcr.org/excom/exconc/3ae68c6e30/conclusion-internationalprotection.html>.

¹² Action Report (22/10/2021), Communication from Hungary concerning the case of *Ilias and Ahmed v. Hungary* (Application No. 47287/15), available at: [https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD\(2021\)1107E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD(2021)1107E%22%5D%7D).

¹³ Article 5(1) b) of Act LXXXIX of 2007 on the State Border (State Border Act), as amended by Section 11 of Act XX of 2017.”

¹⁴ Government Decree No. 70/2022. (III. 2.)

¹⁵ See Section 11 of Act XX of 2017, introducing Section 5(1)b) of the State Borders Act, effective as of 28 March 2017.

¹⁶ Section 5 (1b) of the State Border Act sets out the following: “at the time of a crisis situation due 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.”

individuals' identity – even if such violations come from a ruling by the Court of Justice of the European Union or from deficiencies in the EU's exercise of power.”²³

16. In practice, and since 15 September 2015, to UNHCR's knowledge, Serbia has not readmitted third-country nationals within the framework of the implementation of the EU-Serbia readmission agreement except those holding valid travel/identity documents or are exempted from Serbian visa requirements.²⁴
17. Automatic removals are implemented to Serbia through the gates of the razor wire border fence erected along the Hungarian-Serbian border. UNHCR and its partners observed that persons of concern have been subject to automatic removal without any individualized assessment of their circumstances or specific needs, including those intending to apply for asylum in Hungary as well as unaccompanied and separated children.
18. Automatic removals apply also to those who entered Hungary from countries other than Serbia and apply whether the individual has ever been in Serbia before. Persons arriving at the Budapest Airport and expressing their wish to apply for asylum are also subject to automatic removal to Serbia.
19. UNHCR recalls that the right to seek and enjoy asylum is protected under international law, and that states are unable to deny access to asylum procedures as a penalty for unauthorised entry onto the territory. The continued automatic removal of all individuals found to be irregularly in Hungary, therefore, is at variance with the right to seek asylum, the principle of *refoulement* and the overall object and purpose of the 1951 Convention.

Right to seek and enjoy asylum severely restricted

20. At the end of May 2020, Hungary introduced a new procedure in domestic law in response to the coronavirus pandemic, which effectively denies asylum-seekers the right to access a fair and efficient asylum-procedure, contrary to international refugee and human rights law and EU law.²⁵ In 2021, the application of the Act was extended on two occasions by reference to the COVID-19 pandemic; currently in effect until 31 December 2022.²⁶

²³ See also Blogpost by Secretary of State for Public Diplomacy and Relations of Hungary: 'Constitutional Court verdict: Hungarian laws on migration take precedence over Brussels regulations', 10 December 2021, available at: <https://abouthungary.hu/blog/constitutional-court-verdict-hungarian-laws-on-migration-take-precedence-over-brussels-regulations>.

²⁴ In the period of 1 January - 30 June 2022, a total of 221 people were readmitted to Serbia within the EU-Serbia readmission agreement, as reported by the National Headquarters of the Hungarian Police. See report under footnote 10.

²⁵ UNHCR, *UNHCR Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020, available at: <https://www.refworld.org/docid/5ef5c0614.html>; UNHCR, 'Access to asylum further at stake in Hungary', 29 June 2020, available at: <https://www.unhcr.org/news/press/2020/6/5efa0f914/access-asylum-further-stake-hungary-unhcr.html>.

²⁶ See Sections 267-275 of Act LVIII of 2020 'on the transitional rules and epidemiological preparedness related to the cessation of the state of danger and further implementing regulations' ('Act'). Section 83 of Act CXX of 2021 further extended the validity of such provisions until 31 December 2022. Amendments were first introduced in the form of a government decree promulgated in the National Gazette on 26 May 2020, issued in the context of the COVID-19 'state of danger'; see Government Decree No. 233/2020 (V.26.).

21. Pursuant to the new procedure, with limited exceptions,²⁷ asylum-seekers arriving to or present within the territory of Hungary are denied access to the asylum procedure and required instead to first travel to a designated third country (i.e. Serbia or Ukraine)²⁸ and declare their intent to seek asylum there.²⁹ Only certain limited categories of individuals already residing lawfully on Hungarian territory are exempted from this procedure. The new procedure also provides for the immediate removal from the territory of any person who crosses the border unlawfully and indicates an intent to seek asylum.³⁰
22. According to information available to UNHCR, in the period of 27 May 2020 and 30 June 2022, the authorities registered only 91 asylum applications, out of which only 12 people were authorized to enter Hungary for the purposes of submitting their asylum applications through the “embassy /statement of intent procedure” out of total 86 statement of intents submitted.
23. In the period from 27 May to December 2020, a total of 29 asylum applications were registered. In 2021, there were 40 asylum applications, and in the first half of 2022, 22 were submitted.³¹
24. In July 2021, the European Commission referred Hungary to the CJEU arguing that the new asylum procedures set out in the Act introduced in response to the coronavirus pandemic are in breach of EU law as it precludes persons who are on Hungary's territory, including at the border, from applying for international protection there. The Commission also considers that addressing the COVID-19 pandemic, which is the stated objective of the Hungarian law, cannot justify such a rule.³²
25. UNHCR considers that the new procedure introduced under national law whereby with limited exceptions, asylum-seekers arriving or present in Hungary are summarily denied access to the asylum procedure and required instead to first travel to a designated third country and undertake the ‘statement of intent’ procedure there, is not in conformity with Hungary’s

²⁷ Three categories of persons are exempted from the new procedure: 1) beneficiaries of subsidiary protection staying in Hungary; 2) family members of recognized refugees or beneficiaries of subsidiary protection staying in Hungary; 3) persons 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. See Sub-section 271(1) of Act LVIII of 2020.

²⁸ See Issue 144 of 17 June, 2020 of the National Gazette in Hungarian language at:

<https://magyarkozlony.hu/dokumentumok/b18d1fb3c742aa2bd183b15a32fe4425e603f2c2/megtekintes>. See also 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. The standardized template for the so-called declaration of intent is uploaded on the website of the National Directorate-General for Aliens Policing, available at:

http://www.bmbah.hu/images/sz%C3%A1nd%C3%A9knyilatkozat_angol_4.pdf.

²⁹ See further, UNHCR, *Written observations by the Office of the United Nations High Commissioner for Refugees in the case of A.H. v National Directorate-General/or Aliens Policing (11.K.706.750/2020) before the Budapest Capital Regional Court*, 25 November 2020, available at: <https://www.refworld.org/docid/6047394c4.html>.

³⁰ Section 271(2) of Act LVIII of 2020: ‘The police shall direct the foreigner who had crossed the state border of Hungary in an illegal manner - if he/she indicated the intention to submit an asylum application before the police - to the Hungarian embassy located in the neighbouring country from which they had crossed the border.’

³¹ Following the introduction of restrictive border management measures in September 2015 and subsequent legislative amendments, the number of registered asylum applications gradually decreased, as a result of further restrictive measures introduced in May 2020, significantly dropped. In 2016: 29,432, in 2017: 3,397, in 2018: 671, in 2019: 500, in 2020: 117 and in 2021: 40 asylum applications were registered by the asylum authority.

³² ‘Commission refers HUNGARY to the Court of Justice of the European Union for unlawfully restricting access to the asylum procedure’, 15 July 2021, available at: https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_3440

obligations under international refugee and human rights law, nor with EU law.³³ In May 2020, UNHCR called on the Government to ensure access to territory and asylum in Hungary.³⁴

26. UNHCR underlines that access to territory is an essential pre-condition to effectively exercise the right to seek asylum. Protected-entry procedures or similar facilitated by embassies must complement and not undermine or be presented as an alternative to access to asylum at borders and within territory.³⁵
27. According to UNHCR, the result of legislative amendments introduced in June 2020, alongside additional restrictive measures in place – such as automatic removals from the territory without adequate protection safeguards or standards of treatment - shifts de facto the responsibility for asylum, reception and protection elsewhere, or avoids such responsibility, impeding access to international protection.³⁶

Safe third country concept and ‘safe transit country’ concept under national law

28. UNHCR maintains its position regarding shortcomings existing in domestic legislation concerning the presumption of safe third countries. In particular, national law does not set out the methodology by which the competent authorities must satisfy themselves that a third country may be designated as a safe third country. Further, national law does not require the review of the list at regular intervals, nor does it regulate the process of reviewing the list of safe third countries, as required under Article 38(2) of the Asylum Procedures Directive (APD).³⁷
29. Regarding the inadmissibility ground of ‘safe transit country’ introduced under national law in 2018³⁸, UNHCR wishes to note that despite the judgment of the CJEU of 19 March 2020³⁹

³³ UNHCR, *UNHCR Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020, available at:

<https://www.refworld.org/docid/5ef5c0614.html>; UN High Commissioner for Refugees (UNHCR), Written observations by the Office of the United Nations High Commissioner for Refugees in the case of *A.H. v National Directorate-General/or Aliens Policing* (11.K.706.750/2020) before the Budapest Capital Regional Court, 25 November 2020, available at: <https://www.refworld.org/docid/6047394c4.html>.

³⁴ See UNHCR, ‘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>. UNHCR, ‘Access to asylum further at stake in Hungary’, 29 June 2020, available at:

<https://www.unhcr.org/news/press/2020/6/5efa0f914/access-asylum-further-stake-hungary-unhcr.html>. See also Statement by Felipe González Morales, UN Special Rapporteur on the human rights of migrants, 29 May 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25911&LangID=E>.

³⁵ See UNHCR, *UNHCR Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020.

³⁶ See UNHCR, *UNHCR Note on the "Externalization" of International Protection*, 28 May 2021, available at: <https://www.refworld.org/docid/60b115604.html>; See also UNHCR, *Annex to UNHCR Note on the "Externalization" of International Protection: Policies and practices related to the externalization of international protection*, 28 May 2021, available at: <https://www.refworld.org/docid/60b115b64.html>.

³⁷ UN High Commissioner for Refugees (UNHCR), UNHCR Statement on safe country concepts and the right to an effective remedy in admissibility procedures, issued in the context of the preliminary ruling reference to the Court of Justice of the European Union in the case of *LH v Bevándorlási és Menekültügyi Hivatal* (C-564/18), September 2019, 2.2.3., available at: <https://www.refworld.org/docid/5d7b842c4.html>

³⁸ Amendment to Section 51 (2) f of the Act LXXX of 2007 on Asylum (Asylum Act) by Act VI of 2018. For UNHCR’s position see: UN High Commissioner for Refugees (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>.

³⁹ CJEU Case C-564/18, *LH v. Bevándorlási és Menekültügyi Hivatal*, 19 March 2020, ECLI:EU:C:2020:218.

concluding that such an inadmissibility ground is incompatible with EU law, such contested provisions have not been repealed from domestic law to date.

- 30.** UNHCR notes that currently neither of the safe country concepts are applied in practice due to the introduction of the new asylum procedure described above at paragraph 9, effective as of June 2020.

IV. Conclusion

- 31.** Hungarian national law remains unchanged and authorizes the automatic removal of all third-country nationals intercepted for irregular entry or stay, including those intending to apply for asylum, under regulations applicable in a “crisis situation due to mass immigration.” In addition, legislative amendments introduced as of 27 May 2020, effectively deny asylum-seekers the right to access a fair and efficient asylum-procedure. Both of these measures are contrary to international refugee and human rights law as well as EU law. As a result of these all of these factors, Hungary has de facto shifted the responsibility for asylum, reception and protection elsewhere. In UNHCR’s view, “[m]easures designed, or effectively serving, to avoid responsibility or to shift, rather than share, burdens are contrary to the 1951 Refugee Convention and principles of international cooperation and solidarity.”⁴⁰
- 32.** UNHCR recommends to the Committee of Ministers to continue the supervision of the execution of both judgments and to call on the Government of Hungary to fully implement them.

UNHCR Representation for Central Europe

31 August 2022

⁴⁰ *UNHCR Note on the "Externalization" of International Protection*, 28 May 2021, para. 4, available at: <https://www.refworld.org/docid/60b115604.html>.