



**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**

1. Introduction *

1.1. 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 refugees.¹ UNHCR is also responsible for supervising the application of international conventions for the protection of refugees.² UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 18 December 2017.

1.2. In this submission, UNHCR addresses the domestic legislative framework and practice applicable to the treatment of asylum-seekers held in transit zones at the border in Hungary and the application of the Safe Third Country Concept (see section 2 below) and provides UNHCR's interpretation of the relevant principles of international refugee law and human rights law that govern these issues (Part 3) to assist the assessment of the Court.

2. The legislative framework and practice in Hungary at the material time³ giving rise to the complaint

2.1. Legislation and practice regarding the 'temporary accommodation' of asylum-seekers in 'transit zones'

2.1.1. In September 2015, the Government of Hungary expedited legislation through Parliament⁴ and amended the Act on the State Border, to permit the establishment of "transit zones" at any of Hungary's land borders that constitute an external Schengen border (which includes those with Serbia). The legislation provides these "transit zones" 'shall function to temporarily accommodate individuals seeking refugee status or subsidiary protection..., [and] to conduct asylum and immigration procedures [...]'.⁵ On 15 September 2015, two transit zones on Hungary's border with Serbia became operational, one at Röszke, the other at Tompa.

2.1.2. The transit zone is a compound with mobile containers surrounded by approximately 4 meter high fencing with barbed wire on the top. The entire zone is guarded by police officers and armed security guards. At the material time, applicants for asylum were held in the 'designated accommodation area' consisting of approximately 10 mobile containers (approximately 2.5 meters x 5.5 meters in size) furnished with 3-5 beds, a container for sanitary purposes and a bigger container used as a common room furnished with tables and chairs. The accommodation area was externally surrounded by a narrow open-air area (approx. 2.5 meters wide and 40-50 meters long) with high fencing and an exit gate to Serbia.

2.1.3. Hungary imposes prolonged periods of administrative detention upon asylum-seekers without providing avenues to effectively challenge the detention once ordered or considering alternatives to detention. Administrative decisions imposing detention on foreigners for unlawful entry or stay are subject to review conducted by first instance courts. Such reviews are conducted mostly by criminal law judges in a manner normally applied in criminal cases. It is common practice for the court to issue decisions for a group of five, 10, or 15 detainees within 30 minutes, thus significantly decreasing the likelihood of a fair and individualized review.

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

² *Ibid*, para. 8(a).

³ From mid-September to mid-October 2015.

⁴ See UNHCR, *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016* (hereafter 'Hungary as a country of asylum'), May 2016, <http://www.refworld.org/docid/57319d514.html>, wherein UNHCR expressed serious concerns about the compatibility of this legislation and related Decrees with international and European law, and in particular the case of the legal provisions and practice regarding the border procedures in special "transit zones" and the application of the safe third country concept. See also pages 5-8 for details on these legislative changes.

⁵ Sections 5(1) and 15/A of Act LXXXIX of 2007 on the State Border (Act on State Border), 1 January 2008, (unofficial translation).

2.1.4. Under the amended Act on Asylum,⁶ persons seeking asylum in a “transit zone” are subject to a border procedure,⁷ except for those who are “persons in need of special treatment”,⁸ and are denied further entry to Hungary pending a final decision on the admissibility of their asylum application.⁹ They are only granted further entry if the application is found admissible¹⁰ or the final decision on its admissibility is still pending after four weeks.¹¹

2.2. Legislation and practice on the designation and the procedural safeguards regarding the safe third country concept in Hungary

2.2.1. In November 2010, the Government introduced, in Section 2(i) of the Act on Asylum, the safe third country concept into the Hungarian asylum procedure.¹² Section 51 of the Act on Asylum provides that an asylum application is inadmissible ‘where there is a third country qualifying as a safe third country for the applicant’.¹³ This 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’.¹⁴

Regarding Section 51(a) and (b), the applicant, in case she or he wants to rebut the presumption of safety in her or his case, ‘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’.¹⁵

2.2.3. On 21 July 2015, the Government issued a decree establishing a national list of safe third countries¹⁶ including all countries along the Western Balkan route, notwithstanding the fact that UNHCR had urged states not to return asylum-seekers to those countries.¹⁷ Neither the Act on Asylum, nor the Decree set out the methodology by which the competent authorities

⁶ Hungary: Act LXXX of 2007 on Asylum [Hungary], 1 January 2008, <http://tinyurl.com/j5avvr2>.

⁷ 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.

⁸ “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). Section 71/A (7) of the Act on Asylum.

⁹ Section 71/A (2) of the Act on Asylum.

¹⁰ Section 71/A (5) of the Act on Asylum.

¹¹ Section 71/A (4) of the Act on Asylum.

¹² Act CXXXV of 22 November 2010, which entered into force on 24 December 2010, available in Hungarian at <http://tinyurl.com/jnd6udt>. 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’. Note that para. (ic) of Section 2(i) 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 reflects that amendment. (unofficial translation).

¹³ Section 51(2)(e) of the Act on Asylum.

¹⁴ Section 51(4) of the Act on Asylum, (unofficial translation).

¹⁵ Section 51(5) of the Act on Asylum, (unofficial translation).

¹⁶ Prior to this decree the application of the safe third concept was applied on a case-by-case basis. 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>.

¹⁷ 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>; UNHCR, *UNHCR observations on the current asylum system in Greece*, December 2014, <http://www.refworld.org/docid/54cb3af34.html>; UNHCR, *The sea route to Europe: The Mediterranean passage in the age of refugees*, July 2015, <http://www.unhcr.org/5592bd059.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>; Note that the observations on the former Yugoslav Republic of Macedonia were issued in August 2015, after Government Decree 191/2015 had been issued.

must 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. 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).

2.2.4. As highlighted by UNHCR at the time,¹⁸ the designation *per se* of these third countries as safe raise a number of key concerns for their application in individual cases, particularly regarding Serbia, the main country in respect of which the Hungarian authorities applied the safe third country concept since its introduction. Indeed, it was the application of such concept to Serbia that led in October 2012, to UNHCR calling on states participating in the “Dublin system” to refrain from transferring asylum-seekers back to Hungary.¹⁹ Two months later, UNHCR reversed that position²⁰ after Hungary stopped applying the safe third country concept to Serbia.²¹ However, in September 2015, Hungary resumed the concept’s application and UNHCR reiterated its concerns.²²

2.2.5. In addition to the establishment of a national list of safe third countries, a number of amendments to the procedural safeguards governing the application of the safe third country concept were made in respectively July and September 2015. While two amendments introduced positive safeguards,²³ others led to a significant shortening of time limits and other restrictions, generating serious due process-related concerns:

- i) asylum-seekers have a maximum of three days to rebut the presumption of the inadmissibility of their asylum applications on safe third country grounds, upon being notified of that presumption by the Office of Immigration and Nationality;²⁴
- ii) ‘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’,²⁵ 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;²⁶
- iii) judicial review of a decision of inadmissibility must be decided within eight days of the asylum-seeker’s request for the review;²⁷
- iv) 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 those applicable at the time of review;
- v) court secretaries, who are not officially nominated judges, are authorized to act in the judicial review of administrative asylum decisions, including that of in-merit decisions.²⁸

¹⁸ UNHCR, *Hungary as a country of asylum*.

¹⁹ UNHCR, *Note on Dublin transfers to Hungary of people who have transited through Serbia*, October 2012, <http://www.refworld.org/docid/507298a22.html>.

²⁰ UNHCR, *Note on Dublin transfers to Hungary of people who have transited through Serbia – update*, December 2012, <http://www.refworld.org/docid/50d1d13e2.html>.

²¹ 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/ooudvzd>. 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 (<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.

²² On 16 September 2015 (<http://www.unhcr.org/news/press/2015/9/55f9a70a6/unhcr-urges-europe-change-course-refugee-crisis.html>) UNHCR stated “Hungary has also begun to return asylum-seekers to Serbia, against standing UNHCR advice to governments. The argument that refugees can be denied entry because it is possible to be returned to Serbia does not take into account the asylum system Serbia is currently building is not able to cope with the magnitude of the current inflow of people who require effective protection.”. In April 2017 UNHCR further urged States to suspend any Dublin transfer of asylum-seekers to Hungary (<http://www.unhcr.org/news/press/2017/4/58eb7e454/unhcr-urges-suspension-transfers-asylum-seekers-hungary-under-dublin.html>).

²³ The two positive amendments, respectively in July and September 2015, were as follows:

- i) 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 - Section 51/A of the Act on Asylum, as inserted by Section 35 of Act CXXVII of 6 July 2015);
- ii) 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 (Section 53(3) of the Act on Asylum, as amended by Section 18 of Act CXL of 4 September 2015).

²⁴ Section 51(11) of the Act on Asylum, as inserted by Section 34 of Act CXXVII of 6 July 2015.

²⁵ 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.

²⁶ Section 71/A (3) of the Act on Asylum, as inserted by Section 15 of Act CXL of 4 September 2015.

²⁷ Section 53(4) of the Act on Asylum, as amended by Section 36 of Act CXXVII of 6 July 2015.

²⁸ Section 71/A (9) of the Act on Asylum, as amended by Section 15 of Act CXL of 7 September 2015. Please note that this provision has been repealed as of 1 January 2018 by Section 94(h) of Act CXLIII of 13 November 2017.

2.2.6. In practice, between September 2015 and March 2016, all the applications of asylum-seekers who were subject to the border procedure were declared inadmissible, although whether this was always on safe third country grounds, is unclear. Furthermore, asylum applications were declared inadmissible the same day that they were submitted, often within one or two hours of entry by the individuals to the transit zone (with the exception of those asylum-seekers who entered the transit zone late in the evening and had their applications examined the following day). As UNHCR noted at the time, the standard wording of all of the decisions suggests that there was no individual assessment of applications.²⁹ Furthermore, while the court has the discretion to conduct a hearing if necessary, and applicants may request an oral hearing, in practice applicants have limited access to legal aid and interpretation is not always available, thus seriously hindering access to legal representation and information by the persons concerned.³⁰ As a result of these difficulties, in 2015 only nine rejected asylum-seekers registered requests for judicial review. Of these, seven later withdrew their requests, leaving only two rejected asylum-seekers to pursue judicial review proceedings.³¹

3. The relevant principles of International and European refugee and human rights law on detention

3.1. International refugee and human rights law on detention

3.1.1. The right to seek and enjoy asylum is a basic human right under Article 14(1) of the *Universal Declaration of Human Rights* 1948,³² and is supported by the legal framework of the 1951 Convention and its 1967 Protocol, to which Hungary is a State party. Seeking asylum is not, therefore, an unlawful act.³³

3.1.2. As elaborated upon below, 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. It further provides that restrictions on movement shall not be applied to such refugees other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country.³⁴ In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation. The position of asylum-seekers may thus differ fundamentally from that of migrants in that they may not be in a position to comply with the legal formalities for entry.³⁵ The drafters of the 1951 Convention were aware of such difficulties and the Executive Committee of the High Commissioner's Programme (hereafter "ExCom")³⁶ itself recognised "the importance (...) to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens".³⁷

²⁹ UNHCR, *Hungary as a country of asylum*, para. 25.

³⁰ *Ibid*, paras. 18 and 23.

³¹ *Ibid*, para. 27.

³² UNGA, *Universal Declaration of Human Rights*, ('UDHR') 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

³³ 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". <http://www.unhcr.org/news/press/2015/9/55f9a70a6/unhcr-urges-europe-change-course-refugee-crisis.html>.

³⁴ The expression "coming directly" in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept "coming directly" and each case must be judged on its merits. Similarly, given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression "without delay". "Illegal entry" would, *inter alia*, include arriving or securing entry through the use of false or falsified documents, the use of other methods of deception or clandestine entry, including entry into State territory with the assistance of smugglers or traffickers. "Illegal presence" would cover, for example, remaining after the elapse of a short, permitted period of stay.

³⁵ They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure. UNHCR, *Guidelines on Detention*, Guideline 1, para. 11.

³⁶ The Executive Committee of the High Commissioner's Programme was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions; the latter includes issuing Conclusions on International Protection (referred to as "ExCom Conclusions"). ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 101 States are Members of the Executive Committee, including Hungary which has been a member since 1993.

³⁷ ExCom Conclusion No. 44 (XXXVII), 1986, para. (d), <http://www.refworld.org/docid/3ae68c43c0.html>.

3.1.3. The effective implementation of Article 31 requires that it applies to any person seeking international protection.³⁸ In consequence, a person seeking international protection is presumed to benefit from the obligation not to impose penalties as stipulated under Article 31 until found not to be in need of international protection following a fair procedure.³⁹ Regarding the material scope of Article 31, it is generally accepted that the term “penalties” as referred to in this article are to be broadly understood⁴⁰ as including administrative detention in the immigration context.⁴¹ Similarly, disadvantages in the asylum procedure as a consequence of irregular entry or presence may also amount to a “penalty” within the meaning of Article 31, particularly where procedural safeguards are not met. It should be further noted that the material scope of Article 31 extends to the territory under a State’s control, which would include border crossings. Article 31 is therefore aimed at reinforcing the rights contained in the 1951 Convention through safeguarding access to asylum.

3.1.4. 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).⁴² 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.”⁴³ 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 others cases such as ... immigration control etc.”⁴⁴

3.1.5. As elaborated upon in UNHCR’s *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, which reflect the state of international law on detention for immigration-related purposes of asylum-seekers, these rights taken together – the right to asylum, the non-penalization for irregular entry or stay and the rights to liberty and security of the person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.⁴⁵

³⁸ “That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt.” *R. v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520, 29 July, 1999, at 527. This was upheld in *R. v. Asfaw* [2008] UKHL31, at para 26.

³⁹ The prohibition of refoulement applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined. ExCom Conclusion No. 6 (XXVIII), 1977, para. (c), <http://www.unhcr.org/excom/exconc/3ae68c43ac/non-refoulement.html>; ExCom Conclusion No. 79 (XLVII), 1996, para. (j), <http://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html>; ExCom Conclusion No. 81 (XLVIII), 1997, para. (i), <http://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html>. See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.refworld.org/docid/3ae68d5d10.html> and Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, <http://www.refworld.org/docid/470a33b20.html>.

⁴⁰ For an analysis of the scope of Article 31 see: Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, <http://www.refworld.org/docid/59ad55c24.html>.

⁴¹ In September 2015, Hungary’s Criminal Code was amended to add the offence of unauthorised crossing of the border fence, vandalism of the border fence and obstruction of the construction works related to the border fence carrying a prison term of between 2 – 10 years depending on the nature and manner of the offence (sections 352/A – 352/C of Act C of 2012 on the Criminal Code. See UNHCR, *Hungary as a country of asylum*, paras 46 – 49. See also, UNHCR, *Guidelines on Detention*, Guideline 4.1.4, para. 32 and UN Working Group on Arbitrary Detention, *Report to the Seventh Session of the Human Rights Council*, A/HRC/7/4/, 10 January 2008, which states: “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.”, para. 53, <http://www.unhcr.org/refworld/docid/502e0eb02.html>.

⁴² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.refworld.org/docid/3ae6b3aa0.html>.

⁴³ *Ibid*, The Human Rights Committee considered the application of Article 9 in *A v. Australia* (1997), CCPR/C/59/D/560/93), concerning the prolonged detention of an asylum-seeker. The HRC, while agreeing that there was no basis for the claim that it is per se arbitrary to detain individuals requesting asylum, observed that “the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.” (at paras 9.3 - 9.4, <http://hrlibrary.umn.edu/undocs/html/560-1993.html>). See also, *C. v. Australia* (2002), CCPR/C/76/D/900/1999, <http://www.refworld.org/docid/3f588ef00.html>; *Samba Jalloh v. Netherlands* (2002), CCPR/C/74/D/794/1998, <http://www.refworld.org/docid/3f588ef3a.html>; *Omar Sharif Baban v. Australia* (2003), CCPR/C/78/D/1014/2001, <http://www.refworld.org/docid/404887ee3.html>; *Danyal Shafiq v. Australia* (2006), CCPR/C/88/D/1324/2004, <http://www.refworld.org/docid/47975af921.html>.

⁴⁴ 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, <http://www.refworld.org/docid/4538840110.html>.

⁴⁵ UNHCR, *Guidelines on Detention*, Guideline 2, para. 14. 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, <http://www.unhcr.org/4aa764389.pdf>.

3.1.6. Restrictions on movement of refugees and asylum-seekers must be necessary, reasonable and proportionate.⁴⁶ In addition, detention can only be justified on a limited number of grounds, namely public order, public health or national security.⁴⁷ The notion of “public order”⁴⁸ encompasses the following purposes:

- To prevent absconding and/or in cases of likelihood of non-cooperation;
- In connection with accelerated procedures for manifestly unfounded or clearly abusive claims;
- For initial identity and/or security verification;
- In order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention.

3.1.7. The Guidelines on Detention also provide that maximum limits on detention need to be established in law to protect the individual from arbitrary detention⁴⁹ and that once the initial justification invoked for the person’s detention is no longer valid, the asylum-seeker should be released immediately.⁵⁰ Analysis of potential arbitrariness must consider whether there are less restrictive or coercive measures that could be applied to the individual concerned. The availability, effectiveness and appropriateness of alternatives to detention must be considered before recourse to detention.⁵¹ The Guidelines on Detention further provide that decisions to detain or to extend detention must be subject to minimum procedural safeguards,⁵² including access to a fair and efficient asylum procedure⁵³ in order to ensure that persons in need of international protection are properly identified. Access to asylum procedures must be realistic and effective, providing for timeframes for lodging supporting materials that are appropriate for someone in detention, and access to legal and linguistic assistance should be made available. It is also important that asylum-seekers in detention are provided with accurate legal information about the asylum process and their rights.⁵⁴

3.1.8. In UNHCR’s view, holding applicants in a transit zone severely restricts their freedom of movement and can qualify as detention.⁵⁵ “Detention” refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.⁵⁶ Distinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of “degree or intensity and not one of nature or substance”.⁵⁷ Individuals under the border procedures (described at 2.1. above) are effectively prohibited from further entering the country and must remain “temporarily accommodated” in the transit zone.⁵⁸ However, the Hungarian authorities claim that they are not “detained” since they are free to leave the transit zone at any time in the direction from which they came.⁵⁹ However, it must be noted that departure from the transit zone results in the termination of the asylum application without any examination on the merits, thus depriving the applicant from access to the asylum procedure. Furthermore, it is noteworthy that the transit zones were recently visited by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe (CPT), the mandate of which is, by means of

⁴⁶ UNHCR, *Guidelines on Detention*, Guideline 4 para. 18.

⁴⁷ UNHCR, *Guidelines on Detention*, Guideline 4.1 para. 21.

⁴⁸ Within the backdrop of the context that led to the legislative amendments the concept of public order is of particular relevance. See UNHCR, *Hungary as a country of asylum*, paras 6 and 7.

⁴⁹ In *Saadi v. United Kingdom*, the Court emphasized that “detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion.” The Court held that “to avoid being branded as arbitrary, [...] detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate [...] and the length of the detention should not exceed that reasonably required for the purpose pursued.” *Saadi v. United Kingdom* (no. 13229/03), paras 66 and 74.

⁵⁰ UNHCR, *Guidelines on Detention*, Guideline 6.

⁵¹ In *C v. Australia*, the HRC observed that: “the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.” HRC, Comm. No. 900/1999, <http://www.unhcr.org/refworld/docid/3f588ef0.html>. See also, *Sahin v. Canada*, (*Minister of Citizenship and Immigration*) [1995] 1 FC 214 <http://reports.fja.gc.ca/eng/1995/1995fca0233.html>.

⁵² UNHCR, *Guidelines on Detention*, Guideline 7 para. 47.

⁵³ UNHCR, *Guidelines on Detention*, Guideline 7, para. 47(vi).

⁵⁴ *Ibid.*

⁵⁵ See UNHCR, *Hungary as a country of asylum*, para 19. See also UNHCR, *Guidelines on Detention*, paras. 5-7.

⁵⁶ UNHCR, *Guidelines on Detention*, paras. 5-7.

⁵⁷ ECtHR, *Guzzardi v. Italy*, App. No. 7367/76, para. 93.

⁵⁸ Pursuant to Sections 5(1) a) and 71/A (2) of the Act on Asylum and Section 15/A(2) of the Act on the State Border.

⁵⁹ UNHCR, *Hungary as a country of asylum*, para. 19.

visits, to “examine the treatment of persons deprived of their liberty”.⁶⁰ In *Amuur v. France*, this Court 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. The Court recognised expressly that holding asylum-seekers in the transit zone of an airport is “acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations”, particularly the 1951 Convention and the ECHR, highlighting that “States’ legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions”.⁶¹

3.2. Relevant EU standards

3.2.1. Article 18 of the Charter of Fundamental Rights of the European Union (the Charter)⁶² provides for the right to asylum. Article 6 emphasizes that “everyone has the right to liberty and security of person” while Article 52 specifies the necessity and proportionality requirements applicable in relation to “any limitation on the exercise of the rights and freedoms recognized by this Charter”.⁶³

3.2.2. The Reception Conditions Directive (recast) which is unequivocally applicable to asylum-seekers “at the border (...) or in the transit zones of a Member State”⁶⁴ requires that an asylum-seeker can only be detained where “it proves necessary and on the basis of an individual assessment of each case [... and if] other less coercive alternative measures cannot be applied effectively”.⁶⁵ The Directive further provides a detailed list of procedural safeguards in favour of the persons concerned.⁶⁶

3.2.3. The Court of Justice of the EU (CJEU) highlighted the importance of the principles of proportionality and necessity in applying the relevant provisions of the RCD (recast), with reference notably to UNHCR’s 2012 Detention Guidelines.⁶⁷ According to the CJEU, the detention of applicants, constitute a serious interference with those applicants’ right to liberty, and needs to comply with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.⁶⁸

3.2.4. Given that the Government of Hungary denied that the stay in the transit zone amounted to detention, it consequently failed to apply relevant safeguards and ensure the necessary predictability, clarity and protection against arbitrariness required under EU and international law.

4. International and European refugee and human rights law on the safe third country concept

4.1. According to UNHCR, in light of the relevant international and European refugee and human rights law outlined below, 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. Application of the concept requires an individual assessment of whether the previous (i.e. third) state will readmit the person; grant the person access to a fair and efficient procedure for determination of his or her protection needs; permit the person to remain; and accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including protection from refoulement. Where she or he is entitled to protection, a right of legal stay and a timely durable solution are also required.⁶⁹

⁶⁰ Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS 126, available at: <http://www.refworld.org/docid/3ae6b36314.html>. See also CPT, *CPT returns to Hungary to assess the situation of foreign nationals detained under aliens legislation*, Press release of 30 October 2017, <https://www.coe.int/en/web/cpt/-/cpt-returns-to-hungary-to-assess-the-situation-of-foreign-nationals-detained-under-aliens-legislati-2?desktop=true>.

⁶¹ *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996.

⁶² Charter of Fundamental Rights of the European Union, http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

⁶³ *Ibid*, Article 52. Article 52(3) further provides that “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention” while this provision “shall not prevent Union law providing more extensive protection.”

⁶⁴ Reception Conditions Directive (recast), Article 3.

⁶⁵ *Ibid*, Article 8(2) RCD.

⁶⁶ *Ibid*, Article 9 RCD.

⁶⁷ CJEU, *J.N.*, C-601/15, 15 February 2016, paras. 54, 56 and 63.

⁶⁸ CJEU, *Al Chodor*, C-528/15, 15 March 2017, paras. 39-40.

⁶⁹ 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*, March 2016, <http://www.refworld.org/docid/56f3ee3f4.html>.

4.2. International refugee and human rights law

4.2.1. UNHCR considers that the removing State must assess, prior to the removal and subject to procedural safeguards, the appropriateness of the removal for each person individually.⁷⁰ 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,⁷¹ will ensure protection against *refoulement*, and will allow the person to seek and enjoy asylum.⁷²

4.2.2. The obligation to ensure that conditions in the third country meet these requirements, in practice, rests on the removing State. It is not enough to merely assume that an asylum-seeker would be treated in conformity with these standards – either because the receiving State is a party to the 1951 Convention or other refugee or human rights instruments, or on the basis of an ongoing arrangement or past practice.⁷³ This assessment by the removing State is required irrespective of which third country is envisaged, the fact that the third country is generally designated as safe, or whether or not the asylum-seeker has expressed an additional fear, including of being further *refouled* from that third country. At a minimum, persons seeking international protection must have the ability to make a formal asylum claim with the competent authority and have access to legal assistance and representation, to relevant information in a language they understand and to necessary facilities and services, including interpretation services. They must also be permitted to remain in the country pending a decision on the claim, including on its admissibility when applying a safe third country concept, and be given a reasonable time to appeal the decision.⁷⁴ Finally, persons seeking international protection must be given the opportunity to contact UNHCR. Simultaneously, pursuant to its mandate,⁷⁵ UNHCR should be given the possibility to contact and visit persons in need of international protection, including at the border, to assess and supervise their well-being.⁷⁶ These safeguards are particularly

⁷⁰ 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>.

⁷¹ This includes: (i) that the person will be admitted to the proposed receiving state; (ii) will be protected against *refoulement*; (iii) will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection; (iv) will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted; and, (v) if recognized as being in need of international protection, will be able to enjoy asylum and/or access to a durable solution. See 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>. Also, ExCom Conclusion No. 8 (XXVIII), 1977, <http://www.unhcr.org/excom/exconc/3ae68c6e4/determination-refugee-status.html>; UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, <http://www.refworld.org/docid/3b36f2fca.html>. ExCom Conclusion No. 85 (XLIX), 1998, para. (aa), <http://www.unhcr.org/excom/exconc/3ae68c6e30/conclusion-international-protection.html>; ExCom Conclusion No. 58 (XL), 1989, para. (f), <http://www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html>; 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.unhcr.org/refworld/docid/3fe9981e4.html>. UNHCR, *T.I. and the United Kingdom. Submission by the United Nations High Commissioner for Refugees*, 4 February 2000, Application No. 43844/98, para. 14, <http://www.refworld.org/docid/42f7737c4.html>.

⁷² ExCom Conclusion No. 85 (XLIX), 1998, para. (aa), <http://www.unhcr.org/excom/exconc/3ae68c6e30/conclusion-international-protection.html>.

⁷³ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(viii), <http://www.refworld.org/docid/51af82794.html>.

⁷⁴ ExCom Conclusion No. 8 (XXVIII), 1977, para. (e)(i), <http://www.unhcr.org/excom/exconc/3ae68c6e4/determination-refugee-status.html>. See also, ExCom Conclusion No. 81 (XLVIII), 1997, para. (h), <http://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html>; ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii) and (iii), <http://www.unhcr.org/excom/exconc/3ae68c958/safeguarding-asylum.html>; ExCom Conclusion No. 85 (XLIX), 1998, para. (q), <http://www.unhcr.org/excom/exconc/3ae68c6e30/conclusion-international-protection.html>. See also: UN General Assembly, *Recommended Principles and Guidelines on Human Rights at International Borders: Conference room paper*, 23 July 2014, A/69/CRP. 1, Guideline 7, para. 5, <http://www.refworld.org/docid/54b8f58b4.html>.

⁷⁵ 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>. UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, available at: <http://www.refworld.org/docid/5268c9474.html>.

⁷⁶ ExCom Conclusion No. 22 (XXXII), 1981, para. III, <http://www.unhcr.org/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html>. ExCom Conclusion No. 33 (XXXV), 1984, para. (h), <http://www.unhcr.org/excom/exconc/3ae68c6e20/general-conclusion-international-protection.html>. ExCom Conclusion No. 72 (XLIV), 1993, at para (b), <http://www.unhcr.org/excom/exconc/3ae68c4314/personal-security-refugees.html>. ExCom Conclusion No. 73 (XLIV), 1993, at para. (b) (iii), <http://www.unhcr.org/excom/exconc/3ae68c6810/refugee-protection-sexual-violence.html>. ExCom Conclusion No. 79 (XLVII), 1996, at para. (p), <http://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html>. See also UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, p. 7, <http://www.refworld.org/docid/5268c9474.html>, setting out UNHCR's mandate.

important when asylum is requested and/or sought at the border or in transit zones, because of the particular vulnerability of asylum-seekers in that context, which is often beyond public scrutiny.

4.3. Relevant EU law standards

4.3.1. According to Article 33(1) and (2)(c) of the APD, Member States *may* consider an application for international protection as inadmissible if a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38 APD.⁷⁷

4.3.2. For an EU Member State to be able to apply the safe third country concept, specific rules have to be laid down in its national laws, as per Article 38(2) APD, namely:

4.3.3. Rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable to go to that country. The applicant shall be allowed to challenge the existence of a connection between him or her and the third country. Application of the safe third country concept requires a careful and individualised case-by-case examination of whether the principles enunciated in Article 38 APD are respected and whether there exists a connection between the individual and the third country.⁷⁸

4.3.4. Rules 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. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe.

4.3.5. Rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances.

5. Conclusion

5.1. UNHCR is concerned that asylum-seekers face serious challenges in accessing protection in Hungary in line with international and European standards, including because of the use of administrative detention and the application of the safe third country concept without the necessary safeguards. UNHCR considers that the right to seek asylum should not be hindered or applicants penalized through measures to prevent and deter irregular entry and freedom of movement, contrary to Article 31 of the 1951 Convention. UNHCR recalls that to guard against arbitrariness, any detention needs to be necessary, reasonable and proportionate.

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⁷⁷ Pursuant to Article 38(1) APD, a country can be considered as a safe third country for a particular applicant where the competent authorities are satisfied that the applicant will be treated in the third country in accordance with the following principles:

- a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b) there is no risk of serious harm as defined in Directive 2011/95/EU;
- c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;
- d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention

⁷⁸ Recital 44 of the APD introduces the requirement of a 'sufficient' connection to the third country. In UNHCR's view, transit alone is not a 'sufficient' connection or meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between the states involved and the asylum-seekers is treated in accordance with international accepted standards. See: UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(vi), <http://www.refworld.org/docid/51af82794.html>. Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection. Neither does a simple entitlement to entry without actual presence constitute a meaningful link. UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, p. 34, <http://www.refworld.org/docid/4c63ebd32.html>.