

ASYLUM IN HUNGARY: DAMAGED BEYOND REPAIR?

ECRE'S CALL FOR STATES TO END TRANSFERS TO HUNGARY UNDER DUBLIN AND BILATERAL ARRANGEMENTS.

I. INTRODUCTION

Consecutive changes to Hungarian legislation governing the asylum procedure and the rights and obligations of applicants for and beneficiaries of international protection since August 2015 have seriously undermined the right to asylum as well as the rule of law in the country. The European Council on Refugees and Exiles (ECRE), a pan-European alliance of 98 non-governmental organisations advocating for fair and humane asylum policies in Europe, is alarmed by the recent developments in law and practice which form part of a series of measures aiming at deconstructing the institution of asylum in Hungary.

This document provides a succinct analysis of the most problematic aspects of the Hungarian asylum system and legal framework, and the most egregious human rights violations asylum seekers currently face in the country, including at its external border with Serbia. The analysis is based on information collected and reported by ECRE member organisation Hungarian Helsinki Committee (HHC), including as part of the Asylum Information Database (AIDA) country report on Hungary,¹ as well as by UNHCR and other reputable international human rights organisations such as Amnesty International and Human Rights Watch.

This document does not intend to provide a comprehensive overview of the deficiencies and structural flaws of Hungary's asylum procedure and reception system, as this is extensively covered by various sources. Rather it focuses on: (1) access to the asylum procedure for and application of the "safe third country" concept to Dublin returnees and expansion of Hungary's summary returns policy; (2) reception and detention; including the scope of the legislative amendments adopted on 7 March 2017 introducing automatic detention; and (3) increased risks of destitution of beneficiaries of international protection. A final part sketches out jurisprudential developments in EU Member States and Schengen Associated Countries regarding Dublin transfers to Hungary.

A series of legislative changes adopted in 2015 and 2016 have created an extremely hostile environment towards asylum seekers in Hungary, conducive to violating the right to asylum, the principle of non-criminalisation of refugees and undermining the fairness and access to the asylum procedure, contrary to

1 AIDA, *Country Report Hungary*, Update 2016, February 2017, available at <https://goo.gl/dj6XYR>.

Hungary's obligations under international human rights and EU law.

In October 2015, ECRE called on States to refrain from transferring applicants for international protection to Hungary under the Dublin Regulation in view of the (retroactive) automatic applicability of the "safe third country" concept to persons entering Hungary through Serbia and the risks of *refoulement* upon their return to Hungary. As discussed below, far from addressing the procedural and structural shortcomings in the Hungarian asylum system, acknowledged by the European Court of Human Rights (ECtHR) as giving rise to violations of the European Convention on Human Rights (ECHR), legislative changes and administrative practice in 2016 and 2017 have further exacerbated such risks. In this regard, legislative changes which entered into force on 28 March 2017 further add to the establishment of a legal framework which allows for systematic detention and summary returns of persons without an individual assessment of their protection needs.

During 2016 a significant decrease in the number of asylum seekers transferred to Hungary from other EU Member States and Schengen Associated Countries has been noted. Compared to 1,402 incoming transfers in 2015, Hungary received 513 transfers in 2016. Nevertheless, the country has continued to receive high numbers of Dublin requests (26,698) namely from Germany (11,843), Austria (9,044) and France (2,283), despite the extremely low rate of actual transfers carried out.² The stark discrepancy between the number of Dublin procedures initiated and transfers effected speaks to the extent of undue administrative burden on asylum authorities, coupled with legal uncertainty and limbo for individual applicants for and beneficiaries of international protection. As is shown in this document, Dublin requests are not permissible on human rights grounds, and are therefore a questionable use of resources.

Hungary's legal framework, including alarming recent changes, puts rights at risk due to (1) the lack of access to asylum procedure (2) the application of "safe third country" concept to Dublin returnees (3) the expansion of summary returns policy (4) inadequate reception conditions and automatic use of detention, and (5) increased risks of destitution. Below, ECRE sets out the reasons for the reiteration of its call on all States not to transfer applicants for and beneficiaries of international protection to Hungary.

II. ANALYSIS

1. DUBLIN RETURNEES AND ACCESS TO PROTECTION

Important changes to Act LXXX of 2007 on Asylum ("Asylum Act") adopted in July and September 2015 have had major human rights implications, not only for first time applicants, but also asylum seekers returned to Hungary under the Dublin Regulation. A national list of "safe third countries" was adopted for the first time in July 2015, which already included Serbia,³ and was subsequently expanded to include Turkey. Secondly, rules governing Dublin transferees' access to the asylum procedure upon their return in Hungary have become more restrictive.

1.1. INACCURATE QUALIFICATION OF DUBLIN RETURNEES AS SUBSEQUENT APPLICANTS

In the current state of the law, Dublin returnees may be unlawfully denied access to the asylum procedure in 3 types of situations.

Firstly, those applicants who are considered to have tacitly withdrawn their application (which is assumed in case the person has moved to another Member State) and whose procedure has been terminated may continue their procedure upon return provided they request for the continuation of the procedure within 9 months of the implicit withdrawal.⁴ Should such request be submitted beyond the 9 month time limit, the

2 ECRE, *The Dublin System in 2016. Key figures from selected European countries*, March 2017, 2, available at: <https://goo.gl/DhnhoA>.

3 Government Decree 191/2015 (VII. 21)

4 Section 66(6) Asylum Act.

application is treated as a subsequent application. This is contrary to the Dublin III Regulation, which does not distinguish between applications lodged within or outside the 9 month time limit. In case of discontinuation of the application following its withdrawal before a decision was taken at the first instance, the responsible Member State must give the applicant concerned an opportunity to request completion of the examination of the application or to lodge a new application which cannot be treated as a subsequent application.⁵

Secondly, in case of explicitly withdrawn applications (in writing), applicants cannot request the continuation of their claim but are obliged to submit a subsequent application, which is equally contrary to Article 18(2) second subparagraph of the Dublin III Regulation, which does not distinguish between explicit and implicit withdrawals.

Thirdly, where the Dublin returnee has already received a first instance negative decision on the asylum application but has not appealed such decision, the procedure is not continued. This may deprive the applicant of the right to an effective remedy where the Immigration and Asylum Office has issued a decision *in absentia*, in violation of Article 18(2) third subparagraph of the Dublin Regulation, according to which States must ensure that applicants in such situation have or have had the opportunity to seek an effective remedy in accordance with Article 46 of Directive 2013/32/EU.

1.2. AUTOMATIC APPLICATION OF THE “SAFE THIRD COUNTRY” CONCEPT WITH RESPECT TO SERBIA AND INCREASED RISKS OF (CHAIN) *REFOULEMENT*

Since 2015, Serbia is included in the national list of safe third countries, allowing the Immigration and Asylum Office to systematically reject asylum applications of persons who travelled through Serbia on this inadmissibility ground. This is contrary to UNHCR’s 2012 position that Serbia cannot be considered a safe third country in light of its dysfunctional asylum system,⁶ which has not been revised since. Recent reports concerning the asylum system in Serbia reveal a serious deterioration of reception conditions and a continued systematic application of the safe third country concept, including with respect to countries such as Greece and Turkey, denying applicants a substantive examination of their claim.⁷ This creates risks of chain *refoulement* vis-à-vis applicants returned under Dublin who arrived in Hungary after having travelled through Serbia, in particular in light of persistent protection gaps in the Serbian asylum system stemming from the lack of access to an effective remedy, legal aid and information.⁸ In the case of *Ilias and Ahmed v. Hungary*, concerning the summary return of two nationals from Bangladesh from Hungary to Serbia, the European Court of Human Rights (ECtHR) questioned the position of the Hungarian government with respect to Serbia as a safe third country in light of reservations expressed by UNHCR and respected international human rights organisations. It attached particular importance to the risk of chain *refoulement* to Serbia, then the Former Yugoslav Republic of Macedonia (FYROM) and eventually Greece due to the procedural shortcomings and very low recognition rate in FYROM in particular.⁹

In addition to the systematic application of the “safe third country” concept with respect to first time applicants arriving in Hungary from Serbia, subsequent applications lodged by Dublin returnees who have travelled through Serbia prior to their arrival in Hungary are routinely dismissed as inadmissible on the same ground.¹⁰

The jurisprudence of Hungarian Courts relating to the qualification of Serbia as a safe third country varied

5 Article 18(2) second subparagraph Regulation 604/2013; Article 28(3) Directive 2013/32/EU.

6 UNHCR, *Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia*, August 2012, available at <https://goo.gl/iivJ51>.

7 In 2016 the Serbian Asylum Office rendered 53 decisions dismissing the asylum applications of 65 asylum seekers. In 95% of these cases the safe third country concept was applied. The reasoning in these decisions relied on the Decision Determining the List of Safe Countries of Origin and Safe Third Countries. See AIDA, *Country Report Serbia*, 2016 Update, 29-30, available at <https://goo.gl/6xKP5y>.

8 Since its establishment in 2008, the Serbian Appeals Commission has only ruled on the merits of an appeal in 1 case. After the mandate of the members of the Appeals Commission expired in September 2016, no new members were appointed by the Government, leaving the Appeals Commission inactive since. *Ibid.*, 22-23.

9 ECtHR, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, Judgment of 14 March 2017, par. 118-122.

10 See AIDA, *Country Report Hungary*, 2016 Update, 31.

in 2016, following the withdrawal of Hungarian Supreme Court's opinion of 10 December 2012 which established guidance on the application of the safe third country concept and required courts to take into account credible country of origin information available at the time of rendering their judgment, as well as the country information issued by UNHCR. While the Szeged Court started to reject most appeals against inadmissibility decisions on safe third country grounds, by the end of the year, it reversed its practice again but other courts have rejected several appeals on the basis that Serbia can be considered as safe, despite a UNHCR letter to the courts confirming its 2012 position.¹¹

In addition, the border procedure in the transit zone operates without essential procedural guarantees being in place, which further increases risks of (chain) *refoulement*.

This was confirmed by the ECtHR in the case of *Ilias and Ahmed*, where it found the border procedure applied in the transit zone, pursuant to Sections 71/A et seq. Asylum Act, not to provide the necessary protection against a real risk of inhuman and degrading treatment. The Court points in particular to the authorities' reliance on a schematic reference to the list of safe third countries, their failure to carry out an assessment of the risk of ill-treatment upon return of their own motion in light of freely ascertainable information documenting the existence of such risk, the unfair and excessive burden of proof imposed upon the applicants and the lack of sufficient information on the procedure.¹² As a result, the Court found that the applicants did not have access to "effective guarantees which would have protected them from exposure to" a real risk of being subjected to a violation of Article 3 ECHR.¹³

While the presumption of safety is rebuttable, this remains largely theoretical in practice due to the short deadline of 3 days for the applicant to submit evidence that Serbia is not safe in their individual circumstances, often without access to legal assistance and the 15-day deadline for the Immigration and Asylum Office to decide, rendering a thorough and individual assessment illusory in most cases.

Furthermore, the effectiveness of the remedy against inadmissibility decisions is undermined because of the reduced time limit of 3 days for lodging an appeal¹⁴ in such cases, the fact that applicants are prohibited from invoking new facts or evidence that has not been presented at first instance and that a personal hearing at the appeal stage is not guaranteed.¹⁵

Finally, in the absence of permanent legal assistance in the transit zones, as well as further recent restrictions on access of legal assistance providers,¹⁶ asylum seekers are effectively deprived of their right to consult a legal advisor during the border procedure at first instance, while opportunities to seek legal assistance on appeal remain extremely limited. In 2016, state legal aid in appeals was only provided in 29 cases in the Rösztke and Tompa transit zones.¹⁷

1.3. EXPANSION OF SUMMARY RETURNS POLICY

Amendments to the Asylum Act and the State Border Act which entered into force on 5 July 2016, already allowed the Hungarian police to automatically return asylum seekers apprehended within 8 kilometres of the Serbian-Hungarian or Croatian-Hungarian border, without giving them a possibility to submit an application for international protection.¹⁸ Between 5 July and 31 December 2016, a total 19,219 migrants, including from Afghanistan, Iraq and Syria, were denied access at the Hungarian-Serbian border.¹⁹ The territorial scope of

11 *Ibid.*, 52.

12 ECtHR, *Ilias and Ahmed v. Hungary*, par. 124.

13 *Ibid.*, par. 125.

14 Following the entry into force of the Law XX of 2017 on the amendment of certain acts to tighten the procedures conducted on the border on 28 March 2017. See footnote 19.

15 AIDA, *Country Report Hungary*, 2016 Update, 33.

16 *Ibid.*, 40.

17 *Ibid.*, 40.

18 *Ibid.*, 17-18.

19 BHC, OPU, HHC, HFHR, PIC, *Pushed back at the Door: Denial of Access to Asylum in Eastern EU Member States*, 2017, 33, available at <https://goo.gl/IJxlDe>.

this unlawful practice is further expanded by amendments adopted on 7 March 2017 and which entered into force on 28 March 2017.²⁰ As of this date, any person irregularly staying in Hungary can be immediately returned to the external side of the border fence with Serbia, without a possibility to apply for international protection, regardless of whether the person was apprehended in or outside the 8 km zone in the vicinity of the external border. All third country nationals intercepted are summarily returned to the Serbian border, regardless of whether they entered through the Serbian-Hungarian border or not.

1.4. RECOGNITION OF PROTECTION NEEDS

Risks of *refoulement* from Hungary to other countries are also significant for asylum seekers whose claims are examined on the merits. Hungary retains some of the lowest first instance recognition rates across the EU, with only 8.4% of cases being granted some form of protection (3% refugee status, 5.3% subsidiary protection, 0.1% humanitarian protection) in 2016.²¹ Extremely low rates are reported even for nationalities such as Syria (9.3%), Afghanistan (6.2%) and Iraq (13%).²²

2. PHASING OUT OF RECEPTION CAPACITY TO INTRODUCE SYSTEMATIC AND ARBITRARY DETENTION OF APPLICANTS FOR INTERNATIONAL PROTECTION

Hungary has taken successive steps to deconstruct its reception system in 2016. The closure of Bicske, one of the country's main reception centres, in December 2016 led to the transfer of persons residing there to facilities including Körmend, a tent camp unsuitable for winter conditions.²³

At the same time, Hungary continues to systematically detain asylum seekers, resulting at times in more persons in detention than open reception facilities in 2016.²⁴ Grounds for detention such as the risk of absconding are interpreted arbitrarily, without an individualised assessment of the necessity and proportionality of detention or consideration of alternatives prior to the imposition of detention,²⁵ while judicial review remains largely ineffective.²⁶ The systematic detention of applicants of international protection without an individual assessment of their personal circumstances is in clear violation of international human rights and EU law, including Article 8 of Directive 2013/33/EU and Article 26 of Directive 2013/32/EU. In the case of *O.M. v. Hungary*, the ECtHR found the detention of an LGBTI applicant to be unlawful under Article 5(1)(b) ECHR *inter alia* because the applicant's case was not assessed in a sufficiently individualised manner.²⁷ In this case, the ECtHR acknowledged that the detention of vulnerable applicants, such as LGBTI persons, "may reproduce the plight that forced these persons to flee in the first place" and therefore authorities should exercise special care to avoid such re-traumatisation from occurring.²⁸

As it is the case for Hungary's summary returns policy, the latest amendments to various laws adopted by the Hungarian Parliament on 7 March 2017 broaden the scope of detention during a "state of crisis" due to mass immigration, as currently pronounced until at least 7 September 2017, or "any crisis" in the future.²⁹ The systematic detention of applicants for international protection in the transit zones is further expanded

20 Hungarian Helsinki Committee, *Hungary: Law on automatic detention of all asylum seekers in border transit zones enters into force, despite breaching human rights and EU law*, 28 March 2017, available at <https://goo.gl/xs9T0P>. Law XX of 2017 on the amendment of certain acts to tighten the procedures conducted on the border, available at <https://goo.gl/lnuq7W>.

21 AIDA, *Country Report Hungary*, 2016 Update, 7.

22 *Ibid.*, 7.

23 *Ibid.*, 59-61.

24 *Ibid.*, 68.

25 *Ibid.*, 70. See also ECtHR, *O.M. v. Hungary*, Application No 9912/15, Judgment of 5 October 2016.

26 AIDA, *Country Report Hungary*, 2016 Update, 80-82.

27 ECtHR, *O.M. v. Hungary*, Application No 9912/15, Judgment of 5 October 2016, par. 52

28 *Ibid.*, par. 53.

29 See Human Rights Watch and Hungarian Helsinki Committee, *Joint letter to Commissioner Dimitris Avramopoulos and Amnesty International, Hungary: Legal amendments to detain all asylum-seekers a deliberate attack on the rights of refugees and migrants*, Public Statement, 9 March 2017, AI Index: EUR 27/5855/2017, available at <https://goo.gl/nlZIQV>.

to include previously exempted categories of applicants with particular vulnerabilities such as families with children, elderly, persons with disabilities and torture victims. Only unaccompanied children under 14 remain exempt from the border procedure. As the adopted amendments allow for the automatic detention of asylum seekers for the entire duration of the procedure, including any appeal, both in the transit zones located at the border and in any area on the territory designated as a transit zone, effectively all asylum seekers in Hungary, with the exception of unaccompanied children under 14 years of age, will be detained. The transfer of vulnerable applicants to the transit zones from open reception centres is already being challenged successfully before the ECtHR. On 27 March 2017 the Court obliged the Hungarian government by way of interim measure to stop the transfer of 8 unaccompanied asylum-seeking children and a traumatised pregnant woman from open reception facilities to the detention facilities in transit zones.³⁰

The automatic detention of applicants for international protection is now codified in national legislation despite the EU law safeguards and the recent ECtHR ruling in *Ilias and Ahmed v. Hungary*, where it classified the committal of the applicants to the transit zone during the examination of the admissibility of their asylum application as deprivation of their liberty. It found a violation of Article 5(1) ECHR, as the applicants in this case were deprived of their liberty without any formal decision of the authorities and “solely by virtue of an elastically interpreted general provision of the law” in absence of any special grounds for detention in the transit zone being provided for in the Asylum Act.³¹

According to the ECtHR, the provisions in the Asylum Act relied upon by the Government did not circumscribe with sufficient foreseeability and precision the prospect of applicants for international protection being deprived of their liberty in the transit zone. Moreover, because of the lack of any possibility to challenge the lawfulness of the detention in the transit zone, which itself is not formalised in an individual decision, the Court found a violation of Article 5(4) ECHR, requiring access to a speedy judicial review in case of deprivation of liberty.³²

3. INCREASED RISK OF DESTITUTION FOR BENEFICIARIES OF INTERNATIONAL PROTECTION

Beyond the serious risks of ill-treatment faced by applicants for international protection transferred to Hungary under the Dublin Regulation, the return of persons granted international protection in Hungary is also liable to raise risks of treatment contrary to human rights law on account of systematic measures to abolish integration support. Throughout 2016, Hungary has taken different steps to lower the content of rights of international protection beneficiaries, including through the elimination of integration support and shortening of the duration of residence permits.

Amendments to the Asylum Act and Government Decrees 113/2016 and 62/2016, taking effect in April and June 2016, have eliminated all forms of integration support granted to beneficiaries of international protection. Status holders are no longer eligible for housing support, additional assistance and other forms of state support.³³ Due to the extreme difficulties to integrate in local communities in practice, many beneficiaries become homeless if they do not have sufficient resources to afford high fees in the rental market.³⁴ Furthermore, the respective duration of residence was lowered to the minimum set by Directive 2011/95/EU, from 10 years to 3 years for refugees, while for subsidiary protection holders the period was reduced from 5 years to 1 year.³⁵ The issuance of identity cards (ID) takes more than one month in practice, thereby raising risks of destitution given that the law states as of 1 June 2016 that beneficiaries are ordered to leave reception centres within 30 days of being granted status.

4. NATIONAL JURISPRUDENCE ON THE PREVENTION OF DUBLIN TRANSFERS TO

30 Hungarian Helsinki Committee, *Hungary: Law on automatic detention of all asylum seekers in border transit zones enters into force, despite breaching human rights and EU law*, 28 March 2017.

31 ECtHR, *O.M. v. Hungary*, Application no. 9912/15, Judgment of 5 July 2016, par. 68.

32 Gruša Matevžič, *What more can be done? – lost hope in improving judicial review of asylum detention in Hungary*, available at <https://goo.gl/ttSggS>.

33 AIDA, *Country Report Hungary*, 2016 Update, 92.

34 *Ibid.*, 93.

35 *Ibid.*, 85.

HUNGARY

Jurisprudential developments in EU Member States and Schengen Associated Countries regarding Dublin transfers to Hungary indicate growing consensus among the judiciary in many Member States on the need to suspend transfers to Hungary in light of the heightened risks of transferees being subjected to serious human rights violations. As already highlighted in ECRE's case law fact sheet on transfers to Hungary, courts in various jurisdictions have relied extensively on the legislative changes adopted in 2015 as well as NGO reports on the reception and detention of asylum seekers and Dublin returnees to suspend Dublin transfers to Hungary.³⁶

A recent overview of key judgments by national courts halting Dublin transfers to Hungary as of mid-December 2016, confirms this trend.³⁷ Courts in 15 States bound by the Dublin Regulation have stopped transfers of applicants for international protection under the Dublin Regulation because of the lack of effective protection in Hungary against their arbitrary detention or *refoulement*. The risk of onward *refoulement* to Serbia is relied upon frequently, including by the Czech³⁸ and Finnish³⁹ Supreme Administrative Courts as well as the Italian Council of State,⁴⁰ while also the lack of effective identification of vulnerable applicants has been successfully relied upon by applicants in Switzerland.⁴¹

III. RECOMMENDATION

For the reasons stated above, ECRE repeats its call to all States not to transfer applicants for and beneficiaries of international protection to Hungary under the Dublin Regulation or any bilateral arrangements, and to assume responsibility themselves for the examination of these asylum claims.

36 ECRE, *Case Law Fact Sheet: Prevention of Dublin Transfers to Hungary*, January 2016, available at: <http://bit.ly/1VvhZJs>.

37 Hungarian Helsinki Committee, *Summary of bans on/stopping of Dublin returns to Hungary*, 14 December 2016, available at: <https://goo.gl/w9qluG>.

38 Czech Supreme Administrative Court, 5 Azs 195/2016, 12 September 2016.

39 Finnish Supreme Administrative Court, KHO:2016: 53, 20 April 2016.

40 Italian Council of State, 4004/2016, 27 September 2016.

41 Swiss Federal Administrative Court, E-2249/2014, 7 March 2016.