Hungarian Helsinki Committee

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Council of Europe
DGI - Directorate General of Human Rights and Rule of Law
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Of the European Court of Human Rights

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COMMUNICATION
In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements by the Hungarian Helsinki Committee

CASE OF ILIAS AND AHMED v. HUNGARY (Application no. 47287/15) (Grand Chamber)

Dear Madams and Sirs,

The Hungarian Helsinki Committee (HHC) hereby respectfully submits its observations under Rule 9(2) of the "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements" regarding the execution of the judgment of the European Court of Human Rights (hereinafter: ECtHR) handed down in the Ilias and Ahmed v. Hungary case (Application no. 47287/15, Grand Chamber judgment of 21 November 2019), and the Hungarian Government's related action report of 20 October 2020 (hereafter: "Action Report").

The case concerns the authorities' failure to discharge their procedural obligation under Article 3 to assess the risks of ill-treatment before removing the two asylum-seeking applicants to Serbia in 2015. The Court noted in particular that: there was an insufficient basis for the Government's decision to establish a general presumption concerning Serbia as a safe third country; the expulsion decisions disregarded the authoritative findings of the UNHCR as to a real risk of denial of access to an effective asylum procedure in Serbia and summary removal from Serbia to North Macedonia and then to Greece; the authorities exacerbated the risks facing the applicants by inducing them to enter Serbia illegally instead of negotiating an orderly return (§ 163). The case is under enhanced supervision procedure.

The HHC is an independent human rights watchdog organisation and since 1998, the only entity providing regular, free-of-charge legal assistance to asylum-seekers, refugees and stateless persons in Hungary. Through its network of attorneys representing applicants in their asylum procedures before the administrative authorities, domestic and European courts, the HHC gains first hand knowledge on the issues relevant for this communication and on those relied on by the Government in their Action Report. The representative of the applicants in the Ilias and Ahmed case, Ms B. Pohárnok, a staff attorney of the Hungarian Helsinki Committee, was also a representative in the CJEU cases referred to in this communication below.

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Executive summary

The HHC is of the opinion that Hungary failed to comply with the general measures resulting from the judgment handed down by the European Court of Human Rights in Ilias and Ahmed case, as it still does not adequately discharge its procedural obligations under Article 3 when assessing the risks of ill-treatment before expelling asylum-seeking applicants to a "safe third country". The latter is supported by the following examples:

I. The asylum authority of the National Directorate General for Aliens Policing (hereinafter: NDGAP) is still applying (as in Ilias and Ahmed case) the safe third country inadmissibility ground [Section 51(2)(e) of the Act no. LXXX of 2007 on Asylum (hereinafter: Asylum Act)], based on the Governmental Decree no. 191/2015. (VII.21.), despite the Court's finding that the establishment of that particular list of safe third countries concerning Serbia did not meet required standards under Article 3.

II. A new inadmissibility ground (Section 51(2)(f) of the Asylum Act), a hybrid of the concepts of "safe third country" and "first country of asylum", is in effect from 1 July 2018. By this ground the Government tried to bypass the legal safeguards prescribed by EU law, when returning someone to a "safe third country" (in practice Serbia). Although this inadmissibility ground was found incompatible with EU law by the Court of Justice of the European Union (hereinafter: CJEU) in the case C-564/18 (LH)[1] (hereinafter: CJEU LH case) and joined cases C-924/19 and 925/19 (FMS and SA)[2] (hereinafter: CJEU FMS and SA case) and is currently not applied in practice, the legislation has not yet been amended.

III. Current, recently introduced legislation makes it eventually impossible to apply for asylum within Hungarian territory, and results in de facto expulsions of asylum seekers to third countries without a prior procedure entailing the assessment of the risks under Article 3 of the Convention. Those trying to seek protection in Hungary need to first leave Hungary and travel to the Ukraine or Serbia to submit a "statement of intent" at the Hungarian embassy in Belgrade or Kyiv. This system presupposes that both the Ukraine and Serbia are safe third countries and obliges asylum seekers to leave Hungary (de facto expulsion) before any assessment with respect to the potential risks under Article 3 of the Convention takes place. Moreover, when such a statement of intent is rejected, it contains no reasoning, therefore it is absolutely not clear based on which criteria it is rejected and why Serbia or the Ukraine are considered to be safe.

IV. Despite the CJEU judgement in the infringement procedure[3] that ruled that Hungary's legalisation of moving illegally staying third-country nationals to a border area breaches EU law, Hungarian authorities continue to implement the law and summarily remove asylum seekers to Serbia, denying them the opportunity to apply for asylum in Hungary. This system as well presupposes that Serbia is safe, but the removal proceedings lack any procedural steps to assess the risk of ill-treatment under Article 3 before removing the applicants to Serbia.

V. Based on the points above, and taking into account our responses to the arguments of the Government's Action Report, we do not agree with the Government's point of view that any general measures concerning the regime at issue in the present case are obsolete.

[1] CJEU C-564/18, LH v. Bevándorlási és Menekültügyi Hivatal, 19 March 2020, ECLI:EU:C:2020:218.
[2] CJEU Joined cases C-924/19 PPU and C-925/19 PPU, preliminary reference procedure, FMS, FNZ (C-924/19 PPU), SA, ifj. SA (C-925/19 PPU) v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, Judgment of the Court (Grand Chamber) of 14 May 2020, ECLI:EU:C:2020:294.
[3] CJEU C-808/18, (Grand Chamber), European Commission v. Hungary, 17 December 2020, ECLI:EU:C:2020:1029.

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General measures

I. Government Decree no. 191/2015 on safe third countries still in force and used in practice

As of writing this submission, Article 2 of Government Decree no 191/2015 of 21 July 2015, which sets out a list of countries considered to be safe third countries, including Serbia (as candidate State for accession to the European Union) is still in effect and is being used by the NDGAP.

From July 2018 until August 2019, most asylum applications were declared inadmissible based on Section 51(2)(f) of the Asylum Act (see the next point no. II). In 2020, Hungarian authorities returned to the application of the safe third country concept of Section 51(2)(e) of the Asylum Act and started again to rely on the very same provision of the Government Decree with the list of safe third countries, the application of which was the subject matter of the assessment of the ECtHR in the Ilias and Ahmed judgment.

The HHC is aware of one asylum case[4] where the Government Decree, the safe third country concept and expulsion to Serbia were applied in 2020, in a decision that suffers from the same deficiencies that resulted in the ECtHR finding violation of Article 3 of the Convention in the Ilias and Ahmed case.

The applicants of the case are the Iranian applicants (Iranian Christian convert father and son who arrived at the Röszke transit zone on 5 December 2018 and applied for asylum) of the main proceedings of the CJEU's FMS and SA case (see the next point no. II). In the case of S.A., after Serbia refused to take back the applicants (end of March 2019)[5] following their asylum decision and expulsion based on the safe transit country concept (Section 51(2)(f) of the Asylum Act, see next point no. II.), the applicants submitted a new request for asylum, which the asylum authority first rejected as inadmissible as being a subsequent application (without new element). Upon the applicants' appeal, the Szeged Court quashed the rejection and ordered the asylum authority to reopen the administrative procedure and deliver a new decision. In the reopened asylum procedure, on 15 October 2020, the asylum authority again rejected the asylum claim as being inadmissible, this time ruling that Serbia qualifies as a safe third country under Section 51(2)(e) of the Asylum Act, ignoring the fact and evidence proving that Serbia had already denied the applicants' readmission and their entry to Serbia, which excludes the applicants' access to the Serbian asylum procedure.

Despite the general measures indicated by the ECtHR in the Ilias and Ahmed judgment and despite the Government's allegation about the dissemination of the Hungarian version of this judgment among competent authorities (see in point no. III. of the Action Report), the asylum authority's decision suffers from the same deficiencies identified in the Ilias and Ahmed judgment. The decision essentially relies on Section 2 of the Government Decree no. 191/2015 (VII.21.) on safe third countries and finds that Serbia is a safe third country because of being included on that list. In addition, the decision merely relies on i) claiming the absence of an internal armed conflict in Serbia, ii) the existence of asylum legislation in Serbia, presenting minimal information about how asylum applications can be submitted according to the law, iii) the fact that the applicants had stayed for a longer period (2 years) in Serbia before coming to Hungary and falsely claiming that they did not (not even wished to) apply for asylum there[6] iv) falsely stating that the applicant provided no statement to rebut the presumption on Serbia in three days the law provides for rebuttal.

[4] The reason that there was only one such case can be attributed to the fact that due to the current legislative system in place, there are almost no asylum seekers in Hungary (see point no. III.)
[5] By this time, Serbia, which has been refusing to apply the readmission agreement since 2015 in relation to rejected third country national asylum seekers, continued that practice by explicitly refusing the readmission in individual cases as well.
[6] The applicants in fact did not have the possibility to apply for asylum in Serbia. By the time of their stay in Serbia, the Serbian asylum system expected asylum seekers – including the applicants – to move on and have their asylum case

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Although the decision does not mention the sources of the country information it relies on, it notes that the source used highlighted practical problems in the functioning of the Serbian asylum system, e.g. that the practical difficulties of registration of asylum claims can result in misdemeanour proceedings and expulsions to third countries (North Macedonia or Bulgaria) or to the countries of origin and that safe third country concept is also applied in Serbia as a basis for rejecting asylum claims. However, these issues were not duly taken into account when making an assessment of the situation in Serbia.

As regards the expulsion measure, the asylum authority concluded that the previous expulsion decision to Serbia (issued within the first inadmissibility decision on the safe transit country) was still in effect and should be implemented.

Based on the above, the Hungarian asylum authority's procedure and decision on the safe third country concept is still not in compliance with the general standards required under Article 3 and is particularly in sharp conflict with the standards the ECtHR indicated in the Ilias and Ahmed judgment. The decision still relies on the Government Decree without examining available and relevant information (including reports from UNHCR and those that deal with specific situation of returnees from Hungary) as to whether the applicants had in practice access to an adequate asylum procedure upon return in the receiving country, protecting them against refoulement and ignored the available evidence (Serbia's denial of readmission of the applicants) that clearly substantiated that absence of access to Serbia and its asylum procedure in the individual case (Ilias and Ahmed judgment §§ 131, 134, 139-141, 158-163). It has to be noted that by ignoring Serbia's prior refusal to readmit the applicants, the asylum authority's decision is in clear violation of the findings of the ECtHR in the Ilias and Ahmed judgment in so far as the ECtHR specifically noted that in the case of the applicants of the Ilias and Ahmed case, expulsion took place in the absence of prior organization of the applicants' return to Serbia in an orderly manner or through negotiations with the Serbian authorities, without any effort to obtain guarantees (Ilias and Ahmed judgment §§ 161, 163).

As a result of the applicants' appeal, the Metropolitan Court in Budapest quashed the asylum authority's decision and ordered the authority to examine their asylum claim in the re-opened administrative procedure. This procedure is now to be re-opened.

However, in light of the Government's statements in their Action Report, it needs to be noted that although the domestic court in this particular case finally quashed the asylum authority's unlawful decision, the case is again before the administrative authority and the case is already a clear illustration of the Hungarian administration's unwillingness to accept and follow the ECtHR's general measures identified in the Ilias and Ahmed judgment.

Therefore, it can be concluded that the Government's statements under point III. of their Action Report, claiming that *"authorities/courts take into account the judgment in their daily practice"* is evidently not reflective of reality.

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examined by Hungary and therefore sign up for the waiting list that enabled entry with consent of Hungary to the transit zones. The asylum seekers entered the transit zone upon the call/invitation of the Hungarian asylum authority when it was their turn on the waiting list. The existence of this system and the waiting lists, including the protracted waiting times for those registered on the list in Serbia was already confirmed by the CJEU in its judgment in the case C-808/18, Commission v. Hungary (see in §§ 71-128).

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II. New inadmissibility ground - "safe transit country" (Section 51(2)(f) of the Asylum Act) - undermining the standards enshrined in the general measure of the judgment

As of 1 July 2018 Hungary introduced a new legal concept in the Asylum Act, the so called "safe transit country" inadmissibility ground in Section 51(2)(f) of the Asylum Act.[7] This new legal concept is an additional legal basis for finding an asylum application inadmissible and for the expulsion of the asylum seeker to the third country, in relation to which the concept is applied. Besides, on 29 June 2018, Article XIV(4) of the Basic Law of Hungary[8] was also amended, excluding the possibility to receive international protection in Hungary in cases where before arriving in Hungary the asylum seeker travelled through a country (third country) in which he or she was not exposed to persecution or a direct risk of persecution.

These new and amended provisions created an alternative to the "safe third country" concept in order to eventually enable expulsions of rejected asylum seekers without guaranteeing the obligatory procedural safeguards required by Article 3 of the Convention, including those precisely indicated by the ECtHR in the Ilias and Ahmed judgment. The aim of avoiding procedural obligations falling also under the scope of the procedural limb of Article 3 of the Convention was in fact acknowledged by the Hungarian Government in their submissions before the CJEU in the preliminary reference proceedings in the LH case. Hungary here argued that it needed a new legal basis to facilitate expulsions to Serbia as earlier practice with safe third country concept did not work.

The Hungarian asylum authority and domestic courts systematically applied this concept as a basis for rejecting asylum applications and expelling asylum seekers to Serbia between 1 July 2018 and August 2019.[9] From July 2018 until July 2019, only two positive decisions were issued in cases that started after the introduction of the new inadmissibility ground.[10]

Section 51(2)(f) of the Asylum Act is raised in the present communication because the problems that arise from the legal provision and its application are also relevant from the perspective of the procedural limb of Article 3 of the Convention, identified by the ECtHR in the Ilias and Ahmed judgment. Given that the application of this provision is also the basis for removal from Hungary of asylum seekers to an intermediate/third country (without prior examination of their asylum application) the same principles and procedural guarantees under the scope of Article 3 should be applied as listed by the Grand Chamber in the Ilias and Ahmed judgment.

In essence, the application of the "safe transit country" concept, still in effect in Section 51(2)(f) of the Asylum Act, has the following shortcomings :

[7] Section 51(2)(f) of the Asylum Act: "The application shall be inadmissible if (...)
f) the applicant has arrived in Hungary via a State in which he or she is not exposed to persecution within the meaning of Article 6(1), or a risk of serious harm within the meaning of Article 12(1), or in which an adequate degree of protection is guaranteed. (...)"

[8] Article XIV(4) of the Basic Law of Hungary: "Hungary shall, upon request, grant asylum to non-Hungarian citizens being persecuted or having a well-founded fear of persecution in their native country or in the country of their usual residence for reasons of race, nationality, membership of a particular social group, religious or political belief, if they do not receive protection from their country of origin or from any other country. A person who does not hold Hungarian nationality and who has arrived on the territory of Hungary via a country in which he or she was not exposed to persecution or a direct risk of persecution shall not be able to benefit from the right to asylum."

[9] The application of this provision stopped just before the CJEU's court hearing in case C-564/18 LH took place on 11 September 2019.

[10] HHC, One year after, 1 July 2019, https://www.helsinki.hu/wp-content/uploads/One-year-after-2019.pdf, p. 2.

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- there is no examination of a risk of refoulement/chain-refoulement from Serbia onward (to North Macedonia, then to Greece up to the country of origin),
- the risk of persecution and ill-treatment is assessed only ex tunc with respect to the territory of Serbia (risk that potentially occured in Serbia before entry into Hungary)
- if the asylum seeker failed to apply for asylum in Serbia, his claim would be inadmissible ,
- only existing laws are examined and not the actual practice regarding the access to asylum procedure in Serbia,
- it is not assessed if a person can actually legally enter Serbia (no negotiations of an orderly return with Serbian authorities takes place,
- the above restrictions are further narrowed by Article XIV(4) of the Basic Law of Hungary and the interpretation of the Constitutional Court, which ruled that only risk of persecution is relevant (risk of ill-treatment is excluded from the assessment).

The Administrative and Labour Court of Budapest (Fővárosi Közigazgatási és Munkaügyi Bíróság) reviewing the asylum authority's inadmissibility asylum decision and expulsion to Serbia in the case of a Syrian asylum seeker (LH) initiated the CJEU's preliminary reference procedure in the main judicial proceedings in 21 August 2018, ending in the CJEU's judgment in case C-564/18 (LH) issued on 19 March 2020, ruling that this new inadmissibility ground breaches EU law. The same was confirmed in the joined cases C-924/19 and 925/19 PPU (FMS and SA) and in the infringement case C-808/18 (Commission v. Hungary).

Findings of the CJEU in the above mentioned judgments are relevant for the purpose of the present communication because the CJEU also acknowledged that the assessment of all the elements forming part of a list of conjunctive criteria under the safe third country concept is required for the expelling EU Member State (relying on this concept) to fulfil procedural obligations for the expulsion procedure to be lawful. The criteria (e.g. chain-refoulement risk, access to asylum procedure) and procedural safeguards (found by the CJEU to be missing from the safe transit country concept) are equivalent with those identified by the ECtHR in relation to the procedural limb of Article 3 and under general measures in the Ilias and Ahmed judgment.

Although - according to the HHC's knowledge - Section 51(2)(f) of the Asylum Act has not been applied in asylum cases since August 2019, the Hungarian government has not amended the legislation following the above mentioned judgements and the provision is still in effect and its application therefore can be restarted any time.

III. New asylum system introduced in 2020

On 26 May 2020, the Government issued a Government decree[11] that introduced a new asylum system, the so called "embassy procedure". This new asylum system was later included in the Transitional Act,[12] that entered into force on 18 June 2020. The system was first in place until 31 December 2020, with possibility of prolongation. Such prolongation has already happened and the system is currently in force until 30 June 2021.

According to the new asylum system, those wishing to seek asylum in Hungary, with a few exceptions noted below, must go through the following steps prior to being able to lodge their asylum application:

[11] Government Decree 233/2020. (V. 26.) on the rules of the asylum procedure during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens.
[12] Act LVIII on the Transitional Provisions related to the Termination of the State of Danger and on Epidemiological Preparedness.

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1. A foreigner must personally submit a "statement of intent for the purpose of lodging an asylum application" (hereafter: statement of intent) at the Embassy of Hungary in Belgrade or in Kyiv.[13]
2. The Embassy must then forward the "statement of intent" to the asylum authority of the NDGAP in Budapest, which shall examine it within 60 days.[14] During this period the NDGAP might remotely interview the foreigner.
3. The NDGAP should make a proposal to the Embassy whether to issue the 'would-be' asylum seeker a special, single-entry permit to enter Hungary for the purpose of lodging an asylum application.[15]
4. In case the permit is issued, the would-be asylum-seeker must travel on her/his own to Hungary within 30 days, and upon arrival, immediately avail her/himself to the border guards.[16]
5. The border guards must then present the 'would-be' asylum-seeker to the asylum authority within 24h.[17]
6. The 'would-be' asylum-seeker can then formally lodge her/his asylum application with the NDGAP.

Only people belonging to the following categories are not required to go through the process described above:[18]

- Beneficiaries of subsidiary protection who are staying in Hungary.
- Family members[19] of refugees and beneficiaries of subsidiary protection who are staying in Hungary.
- Those subject to forced measures, measures or punishment affecting personal liberty, except if they have crossed Hungary in an 'illegal' manner.

It is therefore clear that anyone who arrives at the border with Hungary, anyone who enters Hungary unlawfully and anyone who is legally staying in Hungary and does not belong to the three categories mentioned above, cannot apply for asylum in the territory of Hungary.

Those trying to seek protection in Hungary need to therefore first leave Hungary and travel to a third country to submit a "statement of intent" at the Hungarian embassy in Belgrade or Kyiv. This system presupposes that both the Ukraine and Serbia are safe third countries and obliges asylum seekers (despite the fact that they have already indicated to the asylum authority their wish to seek asylum in Hungary[20]) to leave Hungary before any procedure entailing the assessment with respect to the potential risks under Article 3 of the Convention takes place. Therefore, these new asylum law provisions in practice qualify as de facto expulsion in case of those asylum seekers who are already in Hungary and try to apply for asylum within the country.

For example, the HHC represents an Iranian asylum seeker (A.H. case) who was lawfully staying in Hungary on a student visa but in the meantime he had to apply for asylum due to his fear of persecution for his political engagement. With the assistance of his legal representative he eventually managed to submit a written application at the Budapest office of the NDGAP. However, his application was rejected by the NDGAP referring to the current law, based on which the applicant cannot apply for asylum in Hungary, but has to first submit a "statement of intent" in Belgrade or Kyiv. The applicant was therefore obliged to leave Hungary, when his residence permit expired, in order to avoid unlawful stay.

[13] Section 1 of Government Decree 292/2020 (VI. 17.).
[14] Section 2 (3)-(4) of Government Decree 233/2020. (V. 26.) and Section 268 (3)-(4) of the Transitional Act.
[15] Section 2 (4)-(5) of Government Decree 233/2020. (V. 26.) and Section 268 (4)-(5) of the Transitional Act.
[16] Sections 3 and 4(2) of Government Decree 233/2020. (V. 26.) and Sections 269 and 270 (2) of the Transitional Act.
[17] Section 4 (3) of Government Decree 233/2020. (V. 26.) and Section 270 (3) of the Transitional Act.
[18] Section 271 (1) of the Transitional Act.
[19] According to the Section 2(j) of the Asylum Act, family members are only spouses, minor children and children's parents or an accompanying foreign person responsible for them under Hungarian law.
[20] See CJEU C-36/20 PPU Ministerio Fiscal v. VL, 25 June 2020, ECLI:EU:C:2020:495, §94. According to the CJEU's judgment, EU Member States are obliged to deal with the asylum claim (before any removal can take place) regardless of the form in which it was communicated and regardless of which type of Hungarian authority received the asylum request.

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Moreover, this system is indifferent to the fact whether asylum seekers are able to legally enter Serbia or the Ukraine and whether they are able to cater for their needs while waiting for the NDGAP to process their "statement of intent" in the third country (which can take up to 60 days). Asylum seekers are not entitled to reception conditions during this phase and do not enjoy any protection either. They can be, both in practice and by law, detained, expelled, deported by the authorities of the host country where the embassy is located.

Since the introduction of the new system, only four individuals were allowed to enter Hungary and make an asylum application.[21] All other applications were rejected in an email, in one paragraph stating that the NDGAP decided not to suggest the issuance of a single-entry permit. The NDGAP's response to the statement of intent contains no reasoning (NDGAP even denies to call it a "decision") and the law does not foresee any remedy. It is therefore absolutely not clear based on which criteria it is rejected and why Serbia or the Ukraine are considered to be safe for the individual asylum seeker. This clearly denies asylum seekers' access to a fair and efficient asylum procedure as it raises fundamental concerns over the possibility of a substantive assessment without appropriate procedural guarantees - also identified by the ECtHR in the Ilias and Ahmed judgment - being in place as required by international and EU law.[22]

Hungary therefore again introduced a system in its asylum legislation that in itself allows for ignoring the general measures established in the Ilias and Ahmed judgement and Article 3 standards. The European Commission launched an infringement procedure against Hungary because of the new asylum system in October 2020, which is pending at the time of this communication.[23]

IV. Continuation of unlawful summary removals to Serbia

On 5 July 2016, a legal provision entered into force, prescribing that those third-country nationals who are apprehended within an 8 km zone from the border fence are to be escorted and removed to the external, Serbian side of the border fence.[24] As of 28 March 2018, according to Section 5(1)(b) of the Act LXXXIX of 2007 on State Borders (State Borders Act), these removals can happen from anywhere in the country. The law does not prescribe any procedure to be conducted, in fact it explicitly authorizes removals without any prior procedure; no identification or documentation is required before, during, or after the removal takes place. Those removed from Hungary to the Serbian side of the border fence do not have the right to seek asylum before or during the removal and are not handed over to the Serbian authorities. After apprehension in Hungary, Hungarian police officers transport the third country nationals to the gates that are built into the border fence at certain intervals (not at international border crossings), make them cross these gates to the Serbian side and order them to leave the area in the direction of Serbia.

According to the experience of the HHC gained through representation of asylum seekers, if a person enters Hungary illegally by plane and applies for asylum at the airport, Section 5(1)(b) of the State Borders Act is equally applied and the person is removed to Serbia, even if the person concerned has never been to Serbia

[21] Source: response of the NDGAP to a freedom of information request of the Hungarian Helsinki Committee.
[22] UN High Commissioner for Refugees (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.
[23] See the statement of the European Commission of 30 October 2020: https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687.
[24] Section 5(1)(a) of Act LXXXIX of 2007 on State Borders.

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before. Although in this case the person is identified and the intent to apply for asylum is officially documented, the person is nevertheless not given the possibility to access asylum in Hungary.[25]

Since the legalisation of collective expulsions, the Police publish daily statistical updates on the number of such expulsions it carried out to Serbia.[26]

Year	Collective expulsions reported by the Police
2016 (5 July – 31 December)	8 466
2017	9 259
2018	4 151
2019	11 101
2020	25 603
2021 (1 January – 15 March)	8 703

In the infringement procedure in the case C-808/18 the CJEU ruled in December 2020 that Hungary's legalisation of such removals breaches EU law.[27] Still, the Government refuses to implement the judgment and summary removals continue to take place. The Minister of Justice decided to challenge the CJEU judgement at the Constitutional Court.[28]

This system as well presupposes that Serbia is safe, but the removal proceedings of those wishing to seek asylum lack all procedural steps to assess the risks of ill-treatment under Article 3 before removing the applicants to Serbia. Such removals are also against general measures established in Ilias and Ahmed case, where the Court explicitly ruled that in all cases of removal of an asylum seeker from a Contracting State to a third intermediary country without examination of the asylum requests on the merits, regardless of whether the receiving third country is an EU Member State or not or whether it is a State Party to the Convention or not, it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement (Ilias and Ahmed judgment, § 134). The ECtHR's finding about the lack of prior arrangements of the removal of the applicants with the Serbian authorities, which further exacerbated the risk of denial of access to an asylum procedure in Serbia (and the summary removal from that country to North Macedonia and then to Greece is also relevant in this context (Ilias and Ahmed judgment §§ 161, 163).

[25] See also CJEU C-36/20 PPU Ministerio Fiscal v. VL, 25 June 2020, ECLI:EU:C:2020:495, where the CJEU ruled that such a case where the authorities fail to forward the asylum claim to the competent authority is in breach of EU law (Article 6 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection). See also the CJEU reiterating this obligation in the case C-808/18, Commission v. Hungary.

[26] Daily statistical update of 30 January 2021 pertaining to 29 January 2021: http://www.police.hu/hu/hirek-es-informaciok/legfrissebb-hireink/helyi-hirek/orszagos-osszesito-2368. These daily reports are saved in a database by the HHC, which is shared upon request.

[27] CJEU C-808/18, (Grand Chamber), European Commission v. Hungary, 17 December 2020, ECLI:EU:C:2020:1029., §§ 227-266.

[28] See the submission of the Minister of Justice: http://public.mkab.hu/dev/dontesek.nsf/0/09E9E8D16D403300C1258695004AEF0A?OpenDocument.

Hungarian Helsinki Committee

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V. Response to the Government's Action Report

The HHC does not agree that the CJEU judgement in joined cases FMS and SA "rendered any general measures concerning the regime at issue in the present case obsolete".

The closure of the transit zones was indeed a measure the Government communicated as being the consequence of the FMS and SA judgement, which *inter alia* found that the placement of asylum seekers and rejected asylum seekers in the transit zones constitutes unlawful detention. However, the issue of the transit zone placement of asylum seekers and therefore the closure of the transit zones is entirely irrelevant with regard to the issues identified by the Committee of Ministers within the framework of the supervision of the implementation of the Ilias and Ahmed judgement. In this context, given the violations found by the ECtHR in the judgment, the subject matter of the Action Report should have been measures taken to avoid future occurrence of the "authorities' failure to discharge their procedural obligation under Article 3 to assess the risks of ill-treatment before removing asylum seekers to Serbia".

As shown in point I., the Government Decree no. 191/205 on safe third countries is still in force and used in practice; the inadmissibility ground based on the concept of safe third country (Section 51(2)(e) of the Asylum Act) is still being applied in the same way as in the Ilias and Ahmed case, with the same deficiencies and although the judgement in the joined cases FMS and SA ruled the inadmissibility ground based on "safe transit country" (Section 51(2)(f) of the Asylum Act) to be in breach of EU law (for reasons identical to those that rendered these expulsions in breach of Article 3), the provision is still in force.

As shown in points I., III. and IV. above, the assessment of the risks under Article 3 with regard to Serbia is still inadequate or completely absent regardless of where the asylum applicants are placed – be it in semi-open facilities (SA case example), legally staying at a private address (they need to go to Serbia or the Ukraine in order to apply for asylum, such as A.H. case example) or detained in the airport transit zone (when applying for asylum they are forcibly removed to Serbia) or irregularly staying anywhere in the country (summary removals from Hungary to the external side of the border fence in the direction of Serbia).

The HHC is of the opinion that the Government's explanations in the second paragraph of the Action Report under point II. General measures on why the general presumption concerning Serbia as a safe third country was established, bear no relevance in the current procedure, which concerns the implementation of the ECtHRs judgement and cannot lead to findings different from those of the ECtHR. The ECtHR already found in its binding judgement that there was an insufficient basis for the Government's decision to establish a general presumption concerning Serbia as a safe third country and that the expulsion decisions disregarded the authoritative findings of the UNHCR as to a real risk under Article 3. The judgement became final on 21 November 2019. For the same reasons, the fact that there are now cases pending before the ECtHR against Serbia cannot exempt Hungary from respecting procedural obligations resulting from the judgement and cannot justify the Government's more than a year long inaction with regard to the implementation of general measures. It has to be noted that the pending ECtHR cases were already relied on by the applicants' representative in the applicants' written submissions to the Grand Chamber in the Ilias and Ahmed case. The pending cases are only relevant from the contextual perspective in as much as they very well illustrate that Hungary's violation of Article 3 of the Convention was well substantiated. In addition, as some of the cases brought against Serbia concern applicants[29] who had previously been in Hungary before they faced the

[29] M.H. v. Serbia, application lodged on 23 October 2017, communicated on 26 October 2018, http://hudoc.echr.coe.int/eng?i=001-187836, M.W. v. Serbia, application lodged on 29 September 2018, communicated on 26 March 2019, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-192720%22, M.O. v. Serbia, appl. no. 27468/15, in which after the applicant's expulsion from Hungary, the interim measure was granted on 10 June 2015 to

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alleged risks of chain-refoulement from Serbia, we can only conclude that these cases show that violations identified in the Ilias and Ahmed judgment happened on a larger scale than just in the case of the two Bangladeshi applicants or the subsequent cases of three Syrian asylum seekers[30] (one of whose (M.H.) case against Serbia is among those that the Government mentioned).

The Government mentions that the reform of the asylum system is underway, which the HHC welcomes in the hope that the system will be finally aligned with the EU law and will respect the Convention. However, without the Government providing information as to the precise content of the reform, it is impossible to arrive at any conclusion as to whether this reform will serve the adequate implementation of the Ilias and Ahmed judgement. As for now, the fact remains that continuous application of the general presumption that Serbia is a safe third country, the known practice concerning the safe transit and safe third country concepts, the unlawful summary returns and the legal developments concerning the embassy procedure are certainly not in line with the Convention requirements as outlined by the ECtHR in the Ilias and Ahmed judgment.

Finally, as shown in point I. above, the Government continues to apply the safe third country concept in a way that it is not compliant with the general standards required under Article 3 and is in conflict with the standards the ECtHR indicated in the Ilias and Ahmed judgment. Therefore, it is not surprising that most asylum seekers kept in the transit zones - the majority of whose asylum claim was already rejected by Hungary - moved to another country once they were released. It is because of this phenomenon that the HHC learned with surprise that in the very case, where the asylum seekers (SA case) remained in Hungary, the Hungarian asylum authority decided to maintain the expulsion of the applicants to Serbia on the basis of the Government Decree on safe third countries.

Conclusions and recommendations to the Committee of Ministers

For the reasons above the HHC respectfully recommends the Committee of Ministers to call on the Government of Hungary to provide (for the period starting as of 2.11.2019, the date of the delivery of the Ilias and Ahmed judgment):

1. Information to substantiate the Government's statement in point III. of their Action Report that the Hungarian authorities take into account the Ilias and Ahmed judgment in their daily work and what steps the Government took or are planning to take apart from translation of the judgement to facilitate the implementation of the general measures.
2. Information, including statistical data on the number of cases/asylum seekers where the asylum authority and the domestic courts applied Section 51(2)(f) of the Asylum Act.
3. Information on what steps the Government has taken in order for the Hungarian authorities and courts to avoid application of Section 51(2)(f) of the Asylum Act, which is still in effect, in order to fully comply with the general measures in the Ilias and Ahmed judgment.
4. Information as to how (details of the procedure, type of decision, remedy) the Hungarian authorities fulfil their procedural obligations under Article 3 of the Convention in the framework of the new asylum system, the "embassy procedure" in case of those who are staying in Hungary and try to apply for asylum within Hungary (described above in point III.)
5. Information as to the reform of the asylum system being allegedly underway (see Government Action Report point II), in particular request the Government to explain which provisions of the asylum law are under modification and how exactly the measures introduced in the framework of this reform will

halt the deportation from Serbia. According to information received from the Belgrade Centre for Human Rights (BCHR representing the applicant), M.O's case was struck out of the list of cases by the ECtHR, as he was eventually allowed to access asylum procedure in Serbia. However in that procedure the safe third country concept was applied in relation to Montenegro.

[30] W.A. v. Hungary, appl. no. 64050/16, M.C. v. Hungary, appl. no. 64558/16, M.H. v. Hungary appl. no. 66064/16.

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serve the successful implementation of the general measures identified in the Ilias and Ahmed judgment.

In addition to the above, the HHC respectfully recommends the Committee of Ministers to call on the Government of Hungary to:

6. Suspend the application of Article 2 of the Government Decree no. 191/2015 on safe third countries with regard to Serbia and conduct a new adequate assessment of all existing sources on the situation of asylum seekers in Serbia, in particular to the legal framework and practical realities in relation to the situation of rejected asylum seekers returning to Serbia.
7. Repeal Section 51(2)(f) of the Asylum Act.
8. Amend Section 51(2)(e) and Section 51/A of the Asylum Act to ensure that the "safe third country" concept is applied and expulsion is ordered only if the third country takes back the asylum seeker in an orderly manner, guaranteeing lawful access to its territory.
9. In light of the findings of the Ilias and Ahmed judgement review the second sentence of Article XIV(4) of the Basic Law of Hungary which stipulates: *"(...) A person who does not hold Hungarian nationality and who has arrived on the territory of Hungary via a country in which he or she was not exposed to persecution or a direct risk of persecution shall not be able to benefit from the right to asylum."*
10. Repeal the legislation legalising summary removals and until it is done refrain from the unlawful practice on continuing these removals.
11. Take effective measures to guarantee that rejected asylum seekers do not leave the country in the direction of Serbia (or any other third country) without the consent of the third country to allow them to their territory. Ensure that no asylum seeker, or other third country national is made to exit the gate of the border fence and left in between the borders of the two countries.
12. Take effective measures to guarantee that administrative authorities and courts fulfil their procedural obligations under procedural limb of Article 3 as listed in the Ilias and Ahmed judgment before rejecting and expelling asylum seekers when deciding on the admissibility of asylum claims.
13. Take measures to ensure effective access to territory and procedure for those seeking protection at the borders and on the territory of Hungary regardless of their migratory status.