



VIOLENT PUSHBACKS AND THE ABSENCE OF PROTECTION

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The Hungarian Helsinki Committee, a human rights non-governmental organisation based in Budapest, Hungary, wishes to draw the attention of the Organisation for the Security and Cooperation in Europe (OSCE) to the systemic rights' violations committed against migrants and asylum-seekers in Hungary.

Lack of adequate protection for third-country nationals fleeing Ukraine

- **The availability of adequate protection**

On the eve of 24 February 2022, the day, which marked the start of the full-scale Russian invasion in Ukraine, a new Government Decree entered into force in Hungary, activating the national temporary protection (TP) framework for those fleeing Ukraine.¹ According to the decree, Hungary provided temporary protection to every person, regardless of their nationality, who resided legally in Ukraine before the start of the war in accordance with the provisions of the Asylum Act. However, the national temporary protection scheme was only in effect until 7 March 2022, when the common European protection regime, designed for people fleeing Ukraine was introduced by the decision of the Council of the European Union. As a consequence, the original TP framework was repealed and Government Decree No. 86/2022. (TP Decree) entered into force on 8 March, setting out the new general protection framework for Ukrainians by transposing the provisions of the Council Implementing Decision.²

However, the TP Decree failed to put a protection framework in place, which is fully compatible with the common European temporary protection regime. While the original national protection framework has made temporary protection accessible to nationals of all third countries (not just Ukraine) fleeing the war and legally residing in Ukraine, the TP Decree has narrowed the personal scope of protection by excluding this group of people from temporary protection in Hungary, in breach of EU law. Article 2(2) of the Council Decision provides that:

“Member States shall apply either this Decision or adequate protection under their national law, in respect of stateless persons, and nationals of third countries other than Ukraine, who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country or region of origin.”

¹ Government Decree 56/2022. (II. 24.) on derogations from the temporary rules on asylum procedures set out in Act LVIII of 2020 on Transitional Provisions related to the Termination of the State of Danger and on Epidemiological Preparedness, available in Hungarian: <https://net.jogtar.hu/jogszabaly?docid=A2200056.KOR&dbnum=1>

² Government Decree 86/2022 (III. 7.) on emergency rules for persons recognised as beneficiaries of temporary protection and on the different application of the rules of Act CVI of 2011 on public employment and amending other acts related to public employment, available in Hungarian: <https://njt.hu/jogszabaly/2022-86-20-22.1#SZ2@BE2>

The Hungarian TP Decree sets forth the following:

“In accordance with Article 2(2) of the Council Decision, Hungary shall not apply the provisions of the Council Decision concerning temporary protection who are stateless persons and third-country nationals who can prove that, before 24 February 2022, they were, in accordance with Ukrainian law on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who cannot return in safe and sustainable conditions to their country or region of origin.

With regard to persons referred to [above], the aliens policing authority shall, in accordance with the provisions of the Council Decision, act in accordance with the general rules.”

The contradiction lies in that the Council Decision requires that those non-Ukrainians who have valid Ukrainian permanent residence permit and cannot return to the country of origin shall be eligible either for EU law-based temporary protection, or to an adequate form of protection provided in domestic (e.g. Hungarian) law. The Hungarian TP Decree states that such people are not eligible for EU law-based temporary protection but are dealt with according to the “general rules”.

At the same time, the systemic shortcomings of the general asylum system in Hungary make it virtually impossible for those people fleeing the war and who do not fall under the personal scope of TP in Hungary to seek protection in the country.

- **Limited access to the territory of Hungary**

Ukrainians without biometric passports or other travel or identification documents have been all granted entry to Hungary after 24 February 2022. The same regime was applied at the border crossing points to third-country nationals (TCNs) fleeing Ukraine in 2022. However, as of January 2023 Hungary stopped admitting those non-Ukrainian nationals who entered Ukraine after the start of the invasion, and those who had no residence permit in Ukraine, arguing that returning them to Ukraine is not in breach of *refoulement*.

The legal basis of this change is unknown. According to a letter sent by the Police the following rules are applied: non-Ukrainian citizens fleeing from Ukraine who do not meet the general requirements of entry set out in the Schengen Borders Code,³ must “certify” that they resided lawfully in Ukraine on or before 24 February 2022 and that they have not left Ukraine following 24 February 2022 and must be in possession of valid travel documents. Based on this, those having an entry ban issued by another EU member state, as well as those who received an entry ban from the Hungarian authorities for national security or public safety reason will not be allowed to enter either.

The HHC represents several third-country nationals who were denied entry at the Ukrainian border, despite the fact they have Ukrainian family members and thus would be eligible for temporary protection.

Access to territory and the asylum procedure

The Hungarian government with the aim to control irregular migration erected a 175-km border fence along the Hungarian-border in 2015 that was accompanied with a series legislative changes limiting access to both territory and protection in Hungary.

³ Article 6 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399>

- **No access to the asylum procedure**

Between September 2015 and May 2020, asylum applications could only be lodged in the two transit zones set up along the border fence. In May 2020, following a Court of Justice of the European Union (CJEU) judgment that ruled, among others, that placement in the transit zone constitutes unlawful detention, the Hungarian government decided to close the facilities and introduced a new asylum system.⁴ The new system essentially introduces a purposefully under-regulated externalised pre-screening system for those wishing to seek protection in Hungary.⁵

As a rule, asylum-seekers are first required to express their intent to seek international protection at the Hungarian Embassy in Serbia or in Ukraine,⁶ before they are able to access the asylum procedures in Hungary (embassy system).⁷ As a consequence, most foreigners already present in Hungary are summarily denied the possibility of submitting an asylum application and are instead directed to travel to either Serbia or Ukraine,⁸ regardless of whether they have the legal right to enter those countries.

The embassy system does not ensure an effective and genuine access to the asylum procedure in Hungary,⁹ a view also expressed by UNHCR.¹⁰ Between June 2020 and June 2023, only 16 applicants were authorized to enter Hungary to submit their asylum application,¹¹ The Court of Justice of the European Union, in an infringement procedure initiated by the European Commission,¹² ruled on 22 June that that this system was contrary to EU law and must be terminated.¹³ Despite this ruling, the Government plans to extend the ‘embassy system’ until at least 31 December 2024.

- **Legalization of extrajudicial push-backs**

Since 5 July 2016, third-country nationals without the right to stay in Hungary are “escorted” to the external, Serbian side of the border fence built along the Hungarian-Serbian border. Those apprehended are immediately pushed back, have no right to seek asylum. There is no identification, consequently no documentation during these police measures. From 5 July 2016 until 28 March 2017, this rule was applicable only in an 8 km area from the border fence. Since 28 March 2017, the legalisation of push-backs are extended to the entire territory of Hungary.¹⁴ Between 5 July 2016 and 30 September 2023 the Police recorded 361 930 push-backs. The “legalization” of extrajudicial push-

⁴ Government Decree No. 233/2020 (V. 26.), later converted into Act LVIII of 2020 on the transitional rules and epidemiological preparedness related to the cessation of the state of danger (Transitional Act).

⁵ For a detailed description of this new system, see HHC’s note *Hungary de facto removes itself from the Common European Asylum System*, 12 August 2020, <https://helsinki.hu/wp-content/uploads/new-Hungarian-asylum-system-HHC-Aug-2020.pdf>

⁶ Section 1 of Government Decree No. 292/2020 (VI. 17.).

⁷ Sections 267 and 268 of the Transitional Act.

⁸ Ukraine is currently not applicable in practice and the HHC is not aware of any statement of intent ever being submitted at the Hungarian Embassy in Ukraine.

⁹ Hungarian Helsinki Committee, *No access to asylum for 18 months. Hungary’s dysfunctional embassy system in theory and practice*, 15 December 2021: <https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/No-access-to-asylum-1.11.2021.pdf>.

¹⁰ 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: www.refworld.org/docid/5ef5c0614.html.

¹¹ Data supplied by the Hungarian asylum authority, NDGAP at the freedom of information request submitted by the HHC.

¹² C-823/21, Commission v. Hungary, see also the press release: European Commission, Commission refers Hungary to the Court of Justice of the European Union for unlawfully restricting access to the asylum procedure, 15 July 2021: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3424.

¹³ C-823/21, Commission v. Hungary, 22 June 2023:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=274870&pageIndex=0&doclang=HU&mode=req&dir=&occ=first&part=1&cid=268610>

¹⁴ Section 5 (1b) of Act LXXXIX on State Borders, in force since 28 March 2017. See more: <https://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-New-Asylum-Bill-15.02.2017.pdf>

backs is in breach of Hungary's international human rights obligations, and also poses serious security risks by collectively expelling individuals of unknown identity to the territory of another state.

On 17 December 2020, the CJEU delivered a judgment in an infringement procedure initiated by the European Commission, ruling, among others, that the legalisation of collective expulsions breaches EU law.¹⁵ Since the December 2020 judgment has not been implemented, the European Commission decided to bring Hungary back to the CJEU, requesting the Court to impose fines, on 12 November 2021.¹⁶ The case is currently pending.

The HHC represents a number of applicants at the European Court of Human Rights (ECtHR) related to their collective expulsion from Hungary. In the first case, in 2021, in *Shahzad v Hungary* the European Court of Human Rights ruled that Hungary violated the prohibition of collective expulsion.¹⁷ This case was followed by others: *H.K. v Hungary*, application no. 18531/17¹⁸ and most recently by the case of *R.N. v Hungary*, application no. 71/18¹⁹ where the applicant was a minor at the time of his violent push-back.

Most recently, on 5 October, the ECtHR found that Hungary has violated the rights of a pushed back foreigner when his allegations of police ill-treatment were not effectively investigated by the authorities. The Court also found Hungary responsible for the violence as well.²⁰

RECOMMENDATIONS

We call on the OSCE and OSCE Participating States to:

1. Urge the Government of Hungary to fully comply with its Human Dimension commitments, including § 22 of the 1999 Istanbul Document on the rejection of mass expulsions and on the respect of the right to seek asylum, as well as § 38 of the 2003 Maastricht Document on counteraction of violence, intolerance, extremism and discrimination against asylum-seekers and on the respect of individual freedoms of asylum-seekers and migrants. Most notably, the government should be urged to
 - a. revoke legislation that allows the mass expulsion of third-country nationals from Hungary;
 - b. respect the right to seek asylum, and
 - c. grant access to third-country nationals fleeing the war in Ukraine to the territory Hungary without any obstacles and facilitate their access to protection;
2. Urge the Government of Hungary to respect and fully implement the judgments of the European Court of Human Rights and of the Court of Justice of the European Union;
3. Monitor the impact of legislation as well as other measures and related actions (including communication) by state actors and the media targeting asylum-seekers, beneficiaries of international protection, and civil society organisations assisting migrants in Hungary;

¹⁵ Judgment in case C-808/18, *European Commission v Hungary*, § 315, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=235703&pageIndex=0&doclang=EN&mode=lst&dir=&cc=first&part=1&cid=251689>

¹⁶ Case C-123/22, casefile on the Court's website: <https://curia.europa.eu/juris/liste.jsf?num=C-123/22> Press release of the European Commission of 12 November 2021 on referral to Court: https://ec.europa.eu/commission/presscorner/detail/EN/IP_21_5801

¹⁷ *Shahzad v Hungary*, app no.12625/17, <https://hudoc.echr.coe.int/eng?i=001-210853>

¹⁸ Judgment in case 18531/17 of 22 September 2022, <https://hudoc.echr.coe.int/eng?i=001-210853>

¹⁹ Judgment in case <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-224438%22%7D>

²⁰ *Shahzad v Hungary* (2), app. no. 37697/18, <https://hudoc.echr.coe.int/?i=001-227740>

4. Invite the relevant Hungarian authorities to participate at OSCE/ODIHR trainings related to migration;
5. Encourage the Office of the Commissioner of Fundamental Rights (the Hungarian National Human Rights Institution and the National Prevention Mechanism) to begin monitoring the situation of asylum-seekers, refugees and other migrants, possibly in cooperation with other NHRIs, NPMs, as well as civil society organisations with relevant experience.

We call on the Ad Hoc Committee on Migration of the OSCE PA to:

1. Conduct a comprehensive monitoring visit to Hungary with an extended mandate that would include the observation of the situation of third-country nationals pushed back from Hungary to Serbia, the situation of asylum-seekers and migrants in need of international protection in Hungary, and those who had to flee Ukraine since the beginning of the Russian Federation's invasion in 2022.