

Situation at the Hungarian- Serbian border, 2016

FRO Observations

I. Introduction

The Fundamental Rights Officer (FRO) is concerned that European Border and Coast Guard Agency (the Agency) might be operating under conditions which do not commit to the respect, protection and fulfilment of the rights of persons crossing the Hungarian-Serbian Border and seeking international protection, that may put the Agency in situations that *de facto* violate the Charter of Fundamental Rights of the European Union (Charter) and the applicable regional and international law regulating the status of refugees.

The objective of this report, FRO Observations, is to highlight the work of the Agency in that operational area, and to highlight the impact the legislative and procedural framework of Hungary may have on the fundamental rights of persons returned back to Serbia, and how this impact can eventually reflect in the work of the Agency. The Observations are supported by an Annex of compilation of fundamental rights publically available related information, which has been gathered in light of lack of internal reports (SIRs, Legal assessments) or request for support on analysing fundamental rights implications of those allegations.

II. Framework and allegations

In July 2016, a new law amending several provisions related to border procedures and the asylum procedures at the border entered into force.¹ The law provides powers for law enforcement officers to counter pressure from mass migration at the border between Hungary and Serbia with certain enforcement measures. *“(1a) The police may apprehend the foreigner illegally staying in the territory of Hungary within 8 kilometres of the border sign or border line of the state border as defined by Article 2 (2) of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, and may escort him/her through the gate of the closest facility as defined in paragraph (1), except upon suspicion that a criminal offence has been committed.”*²

The new law imposes the obligation to press criminal charges against persons that have destroyed the fence in the process of having irregularly crossed the border and obliges the officers to return them back to the fence with Serbia, when found within 8 kilometres of the border. In practice, this measure seems to be of a summary nature as persons are returned back without any registration nor assessment of their individual situation or circumstances, including international protection claims.

Moreover, a recent UNHCR's assessment declares Serbia as an unsafe country of asylum.³ Hungarian national police report for August 2016 illustrates systematic use of expulsions to the Serbian border. It reveals that the police dealt with “illegal entry attempt” in 4,148 cases, “prevented entry” in 2,306 cases

1 Hungarian Government, 18 June 2016, “2016. évi törvény a határon lefolytatott menekültügyi eljárás széles körben való alkalmazhatóságának megvalósításához szükséges törvények módosításáról”

2 Ibid., Section 5 of Act LXXXIX of 2007 on the State Border shall be supplemented with the following paragraph (1a)

3 <http://www.unhcr.rs/media/UNHCRSerbiaCountryofAsylumScreen.pdf>

and had “escorted” 1,842 persons from transit zones to Serbia. In total 8,296 persons were subjected to these summary measures in the period of 30 days.⁴

The new legislation foresees the only possibility to submit a claim for international protection under the **“transit zone’s fast-track asylum procedures”**. The amendment foresees that Section 71/A (1) of the Act LXXX of 2007 on Asylum shall be replaced by the following: *“(1) If the foreigner submits his/her asylum application a) before entering the territory of Hungary, or b) following his/her escort through the gate of the facility established for protecting the order of the state border as defined by the Act on the State Border following his/her apprehension within an 8 kilometre area of the border line or border sign of the external border as defined by Article 2 (2) of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders... in the transit zone, the provisions of this chapter shall be applied as outlined in this Section.”*

However, there is a concern by all sources consulted (see Annex for further information) that each individual case is not examined with the safeguards foreseen by the EU and international law. For example, the claims of single men are summarily dismissed through procedure that lasts for few hours only with appeal period limited to eight days.⁵ Another measure used under the new legislation i.e. entry limit of 30 asylum-seekers per day⁶ further impedes the right to asylum of those forced to wait in Serbia, in particular for vulnerable groups for whom no prioritization system exists.

Further and worrisome **allegations of physical violence** are reported to take place during the course of the expulsions to the fence by well known organizations such as UNHCR, *Médecins sans frontières*, Human Rights Watch and Amnesty International, among other open sources. These reports speak about cases of alleged beatings, use of pepper spray, police dog bits, and a case of drawing as an indirect result of “push backs”.⁷ The excessive use of force and abuses allegedly include beatings with sticks, also exercised against women and children.⁸ Noteworthy, in August, the National Police acknowledged that excessive use of force may have occurred at the border with Serbia. As a result, the Prosecutor’s Office opened four investigations against law enforcement officers.⁹

4 Hungarian National Police, “Illegal border crossings on the Serbian-Hungarian border, preventions of entry and returns across the temporary security barrier in the last thirty days”, http://police.hu/sites/default/files/illegalis_hataratlepes_megakadalyozas_atkiseres_szerb_szakaszc_2016.08.31._24.00-ig.pdf, accessed 29.09.2016.

5 Human Rights Watch (13 July 2016), “Hungary: Migrants Abused at the Border”, <https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border>, accessed 03.10.2016.

6 Amnesty International (2016), “Stranded Hope, Hungary’s sustained attack on the rights of refugees and migrants”, p. 5

7 UNHCR, William Spindler (15 July 2016), “Hungary: UNHCR concerned about new restrictive law, increased reports of violence, and a deterioration of the situation at border with Serbia”, <http://www.unhcr.org/news/briefing/2016/7/5788aae94/hungary-unhcr-concerned-new-restrictive-law-increased-reports-violence.html?query=hungary>, accessed 29.09.2016.

8 Human Rights Watch (13 July 2016), “Hungary: Migrants Abused at the Border”, <https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border>, accessed 03.10.2016.

9 HIR TV (24 August 2016), “The police are investigating the alleged abuses”, https://translate.google.com/translate?sl=auto&tl=en&js=y&prev=_t&hl=en&ie=UTF-8&u=http%3A%2F%2Fhirtv.hu%2Fahirtvhirei%2Fa-rendorseg-vizsgalja-az-allitolagos-tulkapasokat-1358455&edit-text=&act=url, accessed 29.09.2016.

UNHCR reported that, as of 21 September 2016, 506 asylum seekers had been waiting on the Serbian side of border to enter into Hungary. The majority of them are Afghan, Iraqi and Syrian among whom there are women and children including pregnant women, unaccompanied minors and disabled people.¹⁰ Waiting times are sometimes more than a month in harsh living conditions.¹¹ Since there are no official camps at Serbia's northern border, persons become afraid to lose their place in the queue for asylum, and are making improvised shelters. Reportedly, there is only one tap with cold non-potable water, 10 mobile toilets cleaned every second or third day, and no showers.¹² The humanitarian organizations are trying to assist but the conditions are not humane, especially not for children, elderly and people with disabilities.

The political climate in which allegations of collective expulsions are implemented also raises concern. The Parliamentary State Secretary at the Ministry of Interior stated that "migration and terrorism go hand in hand", and "hundreds of terrorists might have entered Europe with the help of migrants".¹³ To respond to the needs under the state of emergency, the Ministry of Interior is additionally recruiting 3,000 persons to carry out the duties of so-called "border hunter action units". The recruits will undergo six-month specialised training upon which they will get armed and exercise the powers of law enforcement officers.¹⁴

III. The European Border and Coast Guard Agency in the Hungarian-Serbian Border

In September 2016, the Agency deployed [REDACTED] at the Hungarian – Serbian border [REDACTED]

[REDACTED]

[REDACTED]

②

In 2016, FRO has received three Serious Incident Reports from Hungarian operational areas, as follows:

10 UNHCR, William Spindler (15 July 2016), "Hungary: UNHCR concerned about new restrictive law, increased reports of violence, and a deterioration of the situation at border with Serbia",

<http://www.unhcr.org/news/briefing/2016/7/5788aae94/hungary-unhcr-concerned-new-restrictive-law-increased-reports-violence.html?query=hungary>, accessed 29.09.2016.

11 Human Rights Watch (13 July 2016), "Hungary: Migrants Abused at the Border", <https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border>, accessed 03.10.2016.

12 Ibid.

13 'Hungarian Government (30 August 2016), "Migration and Terrorism go hand in hand", <http://www.kormany.hu/en/news/migration-and-terrorism-go-hand-in-hand>, accessed 27.09.2016.

14 Hungarian Government, Ministry of Interior, "Recruitment of border hunters ongoing", <http://www.kormany.hu/en/ministry-of-interior/news/recruitment-of-border-hunters-ongoing>

[REDACTED]

[REDACTED]

L

Case 1: 1 Feb 2016, [REDACTED]

Case 2: 3 Jun 2016 [REDACTED]

Case 3: [REDACTED]

IV. Possible impact on fundamental rights

The European Court of Human Rights (ECtHR) has stated in several cases that the lack of specific examination of each individual situation in case of removal of aliens **might amount to a collective expulsion**.¹⁷ The ECtHR has reiterated that collective expulsion is “any measure compelling aliens, as a group, to leave a country, except where such a measure was taken on the basis of a reasonable and objective examination of the particular case of each individual in the group”. Furthermore, the Article 19 of the Charter of Fundamental Rights of the European Union explicitly prohibits collective expulsions.

The Hungarian authorities included non-individualised measure under the state of emergency, [REDACTED] As a concept, emergency measures seem to mandatorily be of temporary nature. Furthermore, it is clearly established during border procedures in EU law that basic procedural safeguards and effective redress mechanisms should also apply in border procedures such as the ones in force in Hungary, as indicated in Article 43 of the Asylum Procedure Directive (recast).¹⁸ Hence, Art 36. 2 foresees that “The application of the safe third country concept shall be subject to rules laid down in national law, including:

(a) rules requiring **a connection** between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

¹⁷ ECtHR, *Hirsi Jamaa and Others v. Italy*, 2012; *Conka v. Belgium*, 2002; and *Sultani v. France*, 2007.

¹⁸ 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 (recast)

(b) 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;

c) 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. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a)."

In line with this argumentation, the ECtHR has rejected in the case *Amuur v. France* the logic of extraterritoriality as a justification for the lack of entry in a state of concern. The ECtHR reiterates that despite its name, an international or transit zone does not have extraterritorial status (para. 52) and is to be considered national territory. Hence, the fact that Hungarian law enforcement officers are applying measures in transit zones, under their national legislation, calls for the obligation to provide necessary safeguards for those seeking international protection in line with EU *acquis*. Otherwise, such conduct could be deemed as a violation not only of the provisions related to the access to asylum, but also the right to an effective remedy and to a fair trial as set by Article 47 of the Charter.

The law enforcement officers are allegedly using excessive force when implementing measures under the new legislation and several videos and pictures showing injuries are publically available. The number of reported cases involving alleged violent conduct raises concern. Article 4 of the Charter explicitly prohibits, cruel, inhuman or degrading treatment, in a similar fashion that Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),¹⁹ Article 5 of the Universal Declaration of Human Rights (UDHR),²⁰ and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).²¹ These rights are absolute and cannot be derogated at any time or under any circumstances including the state of emergency. The use of force and episodes of violence reported also raise concerns on the right to integrity of the persons (Art 3), and even on the right to life (Article 2).

The lack of individual examination of personal circumstances is clearly at odds with the prohibition of non refoulement established in Article 19 of the EU Charter, which requires to make an examination of personal circumstances to exclude the risk of persecution for the particular applicant, also during procedures as per Article 36 of the Asylum Procedure Directive. In this context, it is worth noting that the recognition rate for asylum is indicatively lower in Hungary comparing to other EU member states. In two first quarters of 2016,

19 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>, accessed 28.09.2016.

20 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>, accessed 30.09.2016.c

21 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>, accessed 03.10.2016.

recognition rate was 15 and 10 per cent in the first instance decisions.²² In the same period, the EU-28 recognition rate was 60 and 59 per cent.²³

V. Conclusions

Summarily, FRO raises several concerns on the situation and allegations at the Hungarian- Serbian border:

- The **8-km rule**, which allows Hungarian border guards to send migrants stopped within 8 km of the Serbian border directly back to Serbia without any registration or opportunity to apply for international protection, poses **serious risks to the right to asylum** (Art. 18); **the prohibition of non-refoulement** (Art. 19) as Serbia is not a safe country of asylum according to UNHCR; **and the prohibition against collective expulsions** (Art. 19).
- The **coercive tactics** (e.g., beatings, dog bites, pepper spraying) used to enforce the 8-km rule have led to incidents that **jeopardize the right to human dignity** (Art. 1); **the right to life** (Art. 2); **the right to the integrity of the person** (Art. 3); and **the prohibition of inhuman or degrading treatment** (Art. 4).
- Hungary's **entry limit of 30 asylum-seekers per day** impedes **the right to asylum** (Art. 19) of those forced to wait in Serbia, in particular for **vulnerable groups** for whom no prioritization system exists. Moreover, the dire **humanitarian situation** on the Serbian side can negatively impact the **right to human dignity** (Art. 1) and **the rights of the child** (Art. 24).
- The **transit zone's fast-track asylum procedures** may be placing **the right to asylum** (Art. 19) and **the right to effective remedy** (Art. 47) at risk.
- Hungary's **legislation criminalizing irregular border crossings**, even if legal, might be de facto jeopardizing **the right to access asylum** (Art. 19) due to its weak due process safeguards for those in need of international protection, and **the rights of the child** (Art. 24) since no provisions are included for unaccompanied children nor on the appointment of a legal guardian to act in the best interests of the child.

*Articles refer to EU Charter on Fundamental Rights

② [REDACTED] cites the Article 3b(4) of Frontex Regulation: *"Members of the European Border Guard Teams shall, in the performance of their tasks and in the exercise of their powers, fully respect fundamental rights, including access to asylum procedures, and human dignity. Any measures taken in the performance of their tasks and in the exercise of their powers shall be proportionate to the objectives pursued by such measures..."*

However, the Hungarian officials refer to the officers deployed by the Agency, as support to the efforts of Hungarian authorities in managing pressure from migration.²⁴ As a consequence, there is a serious concern that this support may be understood that the manner in which the provisions of the new law are

²² Eurostat, "Statistics explained", http://ec.europa.eu/eurostat/statistics-explained/images/5/53/First_instance_decisions_by_outcome_and_recognition_rates%2C_1st_quarter_2016.png and http://ec.europa.eu/eurostat/statistics-explained/images/e/e3/First_instance_decisions_by_outcome_and_recognition_rates%2C_2nd_quarter_2016.png, accessed 29.09.2016.

²³ Ibid.

²⁴ Statement by the National Police Headquarters, 5 August 2016, <http://www.kormany.hu/en/news/currently-42-international-police-officers-support-hungarian-efforts>, accessed 30.09.2016.

implemented and its impact on the fundamental rights are done with the consent and even the support of the Agency. Noteworthy, the UN Resolution "*Responsibility of States for internationally wrongful acts*" defines responsibilities of the States or entities related to such acts committed by another state. *Omission to act may be understood as giving consent, aiding and assisting another State in committing the internationally wrongful acts especially if knowing the circumstances of such an act.*²⁵ Similar provision in relation to international organisations apply to the responsibility in aiding and assisting the internationally wrongful acts of States,²⁶ which has been referred to as "indirect responsibility" and could be tested upon the concept of "shared responsibility" foreseen in Article 5 of the Regulation 2016/1624.

The Agency may wish to revise its support in the operational areas where there are several and repeated allegations of disrespect to the obligations and the values enshrined in the EU Treaty and legislation, as well as in regional and international laws. Otherwise, the Agency is at risk by omission in respecting, protecting and fulfilling the aforementioned EU Charter of Fundamental Rights' obligations.

Enclosure: Annex 1 illustrates the compilation of available information from public sources that impact the fundamental rights of persons before, during and after the crossing of the Hungarian-Serbian border.

25 UN General Assembly, Responsibility of States for internationally wrongful acts, Resolution adopted by the General Assembly, 8 January 2008, A/RES/62/61, Article 6, 16, 20, <http://www.refworld.org/docid/478f60c52.html>, accessed 03.10. 2016.

26 http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf

