



Hungarian Helsinki Committee

## Minimum standards required in the transit zones on the Hungarian land borders

*Background note by the Hungarian Helsinki Committee (HHC)*

**30 August 2017**

This background note provides the list of the most urgent changes that would ensure that confinement in the transit zones in Hungary is in line with relevant international, EU and domestic standards of detention.

### *Summary*

**Placement in the transit zone, despite the Hungarian government's continuous claims to the contrary, is a form of unlawful detention**, as it is clearly stated in the European Court of Human Rights' judgement in the case of *Ilias and Ahmed v. Hungary*<sup>1</sup> of 14 March 2017. The current legal and operational context of the Hungarian transit zones is thus untenable. From a legal perspective, **the lack of issuance of (individualised) detention orders violates the Hungarian Fundamental Law<sup>2</sup> as well as the European Convention on Human Rights.<sup>3</sup>** As of 28 March 2017, all applicants with the sole exception of unaccompanied asylum-seeking children under 14, are, by virtue of lodging an asylum application, confined to their respective closed sector within the closed transit zone.<sup>4</sup> From an operational perspective, the transit zones in their current state are **unfit for accommodating people for a longer period of time,<sup>5</sup> and are unfit for accommodating people belonging to vulnerable groups for even a shorter period of time.** This is partly due to the physical infrastructure (small metal containers without the possibility of proper natural ventilation and without air conditioning), the lack of shelter against inclement weather outside of the metal containers, the lack of access to reliable telecommunications networks, the lack of access to shopping opportunities, the lack of space and equipment for varied and purposeful activities. Neither educational, nor psycho-therapeutic services are available. There is a systemic inadequacy of interpreters and they are only available for the purposes of the asylum procedure (e.g. not during medical examinations).

That conditions are inadequate is not only **exemplified by the interim measures granted by the European Court of Human Rights** in the case of dozens of applicants indicating to the Hungarian Government to place the applicants in an environment that meets the requirement of Article 3 of the Convention<sup>6</sup>, but also by the accounts of asylum-seekers held there for months. According to the statements of the asylum-seekers themselves, and the psychiatrists and psychotherapists of the Cordelia Foundation who meet some of these asylum-seekers in an open reception centre once they had been released, **the physical, and particularly the mental state of many of them – including children – are worryingly deteriorating.** The fundamental, systemic shortcomings of the current conditions in the transit zones is further demonstrated by the experience of civil society organisations working with beneficiaries of international protection, according to which **almost all refugees and beneficiaries of subsidiary protection leave Hungary upon their recognition and release from the transit zones** – in great part as a result of their traumatising experience at these inadequate detention facilities.

In order to ensure that the placement in the transit zones meet the minimum standards, both the current legal and operational framework **must be fundamentally altered.**

<sup>1</sup> *Ilias and Ahmed v. Hungary*, Application no. 47287/15, especially paragraphs 64, 69, and 75-77.

[http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-172091%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-172091%22]})

<sup>2</sup> Article IV of the Fundamental Law of Hungary

<sup>3</sup> Articles 5 (1) and 5 (4) of the European Convention of Human Rights

<sup>4</sup> For an English summary of the legal changes entered into force on 28 March 2017, see: <http://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-New-Asylum-Bill-15.02.2017.pdf>

<sup>5</sup> Short-term stay is understood as less than 24 hours as per the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment's (hereinafter CPT) Factsheet on Immigration Detention, March 2017, pp. 3-4. <https://rm.coe.int/16806fbf12>

<sup>6</sup> For a summary of these interim measures until 30 May 2017, see <http://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-interim-measures-granted.pdf>

### *Required legal changes to ensure compliance with minimum standards*

In line with relevant international and EU legislation,<sup>7</sup> the Hungarian Helsinki Committee (HHC) firmly **opposes the automatic, indiscriminate detention of asylum-seekers**. The detention of asylum-seekers, regardless of the actual place of detention and/or how this facility is officially “labelled”, should **be in line with relevant international, EU and domestic law**, meaning especially:

- Detention is a **last resort**<sup>8</sup> and can only be applied<sup>9</sup> **after a careful individual assessment** of each case<sup>10</sup> and with **effective judicial remedy** available<sup>11</sup> if at least one of the **following conditions** are met:
  - in order to determine or verify the applicant’s identity or nationality<sup>12</sup>;
  - in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant<sup>13</sup>;
  - in order to decide, in the context of a procedure, on the applicant’s right to enter the territory<sup>14</sup>;
  - when the applicant is detained subject to a return procedure under the Return Directive<sup>15</sup> in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision<sup>16</sup>;
  - when protection of national security or public order so requires<sup>17</sup>;
  - when the applicant’s transfer under the Dublin regulation is imminent and there is a significant risk of absconding<sup>18</sup>.
- The HHC strongly **urges the introduction of a blanket prohibition on the detention of children for administrative purposes** (such as migration control or the detention of asylum-seekers).<sup>19</sup> Until such a prohibition is introduced in Hungary, **at least the current legislation applicable to the standard detention regime for asylum-seekers (the so-called asylum detention) must be fully**

<sup>7</sup> Article 8 of the recast Directive 2013/33/EU of the European Union and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (hereinafter recast Reception Directive)

<sup>8</sup> Section 31/A (2) of the Act LXXX of 2007 on Asylum (hereinafter Asylum Act)

<sup>9</sup> Article 8 of the recast Reception Directive, and Section 31/A (1) of the Asylum Act, and Article 26 of the recast 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 (hereinafter recast Procedures Directive)

<sup>10</sup> Article 8 (2) of the recast Reception Directive and Section 31/A (2) of the Asylum Act

<sup>11</sup> Article 9 (2)-(3) of the recast Reception Directive and Section 31/A (6) of the Asylum Act. Cf. *Ilias and Ahmed v Hungary*, Application no. 47284/15, especially paragraphs 75-76. Available at: <http://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-172091%22%5D%7D>

<sup>12</sup> Article 8 (1)(a) of the recast Reception Directive and Section 31/A (1) a) of the Asylum Act

<sup>13</sup> Article 8 (1)(b) of the recast Reception Directive and Section 31/A (1) c) of the Asylum Act

<sup>14</sup> Article 8 (1)(c) of the recast Reception Directive

<sup>15</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

<sup>16</sup> Article 8 (1)(d) of the recast Reception Directive and Section 31/A (1) b) of the Asylum Act

<sup>17</sup> Article 8 (1)(e) of the recast Reception Directive and Section 31/A (1) d) of the Asylum Act

<sup>18</sup> Article 8 (1)(f) of the recast Reception Directive and Section 31/A (1) f) of the Asylum Act. See also Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

<sup>19</sup> See for example the Irish regulations: Section 5 (4)(a) of the Immigration Act (available at <http://www.irishstatutebook.ie/eli/1999/act/22/section/5/enacted/en/html#sec5>) and Section 20 (6) of Part III. of the International Protection Act (available at <http://www.irishstatutebook.ie/eli/2015/act/66/section/20/enacted/en/html#sec20>)

**observed** even in the transit zones,<sup>20</sup> namely that unaccompanied children<sup>21</sup> cannot be detained<sup>22</sup> and that children travelling with their families can only be detained after a careful assessment of their best interest<sup>23</sup> and only for a maximum of 30 days.<sup>24</sup>

- The assessment and **identification of vulnerable persons**<sup>25</sup> must take place **during or immediately after the registration** of the asylum application in the transit zone in line with EU requirements.<sup>26</sup>
- Those identified belonging to a **vulnerable group must be exempted from the accelerated/border procedure** until adequate support is continuously provided on site, as prescribed by EU law.<sup>27</sup>
- People in detention under all circumstances must be provided with **regular meals**.<sup>28</sup>

#### *Required material conditions to ensure compliance with minimum standards*

- Physical standards set out by relevant international bodies<sup>29</sup>, including the European Court of Human Rights<sup>30</sup> must be adhered to, in particular:
  - **At least 4 square metres of living space per person** in a multiple-occupancy cell excluding furniture, at least 2.5 metres between the floor and the ceiling of the cell;
  - Living quarters must **ensure the right to a private life** of the detainees in all weather conditions;
  - Taking into consideration that no natural shades exist in the transit zones and their immediate environs, in line with the standards set out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), spaces assigned for accommodation must have **adequate ventilation**;<sup>31</sup>
  - The **outdoor space** available to detainees must be made **suitable for stay** in most weather conditions. This means in particular that proper drainage and cover from rain must be constructed and shades must be provided at least over significant parts of the courtyard.
- **Adequate services** must be provided on site at least on working days, in particular:
  - **Adequate number of interpreters** to ensure that detainees are able to effectively communicate with the providers of mandatory services (e.g. medical personnel);

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<sup>20</sup> Cf. with the Hungarian government's position according to which transit zones do not constitute a form of detention, despite all relevant international actors' contrary position (see for example *Ilias and Ahmed v Hungary*, Application no. 47284/15)

<sup>21</sup> Child is defined as "every human being below the age of eighteen years" according to Article 1 of the Convention on the Rights of the Child.

<sup>22</sup> Section 31/A (6)(c) of the Asylum Act.

<sup>23</sup> See Articles 11 and 23 of the recast Reception Directive

<sup>24</sup> Section 31/A (7) of the Asylum Act.

<sup>25</sup> Vulnerable persons as defined by Article 21 of the recast Reception Directive. See also Section 2 (k) of the Asylum Act.

<sup>26</sup> Article 22 (1) of the recast Reception Directive.

<sup>27</sup> Paragraph (30) of the recast Procedures Directive.

<sup>28</sup> Under the current legislation, those in their subsequent asylum procedure are not provided with food. The food deprivation resulting from this provision, especially when applies to people in confinement, leads to inhuman treatment, or even torture. See the practical implication of this here: <http://www.politico.eu/article/hungary-refugee-camp-conditions-food-shelter-human-rights-court-orders-ignored/>

<sup>29</sup> CPT, *Living space per prisoner in prison establishments: CPT standards*, 15 December 2015. Available at: <https://rm.coe.int/16806cc449>

<sup>30</sup> See for example the Judgment in the case of *Varga and Others v. Hungary* (Application nos. [14097/12](#), [45135/12](#), [73712/12](#), [34001/13](#), [44055/13](#), and [64586/13](#)), 10 March 2015. These standards are also set out in Sections 121 (1) and (2) of Decree no. 16/2014 (XII. 19.) of the Minister of Justice on the Detailed Rules of Confinement Replacing Prison Sentencing, Confinement, Pretrial Detention and Disciplinary Fines

<sup>31</sup> CPT, *Immigration Detention Standards*, March 2017, p.4. Available at: <https://rm.coe.int/16806fbf12>

- **Psychological care, as required by relevant EU law**,<sup>32</sup> must be available as asylum-seekers are more prone to have pre-existing conditions that, if coupled with long-term detention, will likely deteriorate without having access to therapeutic services;
  - Until a blanket prohibition on the asylum detention of children is introduced in Hungary, **meaningful and child-specific activities** must be organised by properly trained staff, including basic **educational services** for children deprived of their liberty in the transit zones<sup>33</sup>;
  - Individual **legal assistance** and regular general **legal counselling** must be provided<sup>34</sup> free of charge and without hindrance from the moment of registering an asylum application. **Unrestricted access of attorneys, lawyers and legal officers** of civil society organisations with expertise in the provision of free legal assistance to asylum-seekers and refugees must be ensured and applicants must be duly informed of their right to obtain free legal assistance during the registration of their asylum application. In order to avoid possible conflict of interest, those providing free legal assistance and/or general legal counselling must be allowed to enter the transit zones with **interpreters of their own choice** and not be restricted to use the services of those employed by the Immigration and Asylum Office;
  - **Meaningful activities** must be provided to all detainees taking into account their age and gender and medical or mental conditions. These activities can include for example language classes, sports activities, arts and crafts, or cultural programmes;<sup>35</sup>
  - The current practices of severe and arbitrary restrictions on access to the transit zones must be fundamentally altered. **Access to the transit zones, a requirement set out in EU law**,<sup>36</sup> must be **ensured for civil society organisations with relevant experience** after the publication of a clear set of rules that guides the granting of permissions of access to these detention sites.
- The regime applied to detention in the transit zones must be in line with the basic principle that **the detention of asylum-seekers, even when applied as a last resort, is not a punitive form of detention and it only serves administrative purposes**. In light of this:
- The **excessive, unnecessary and frightening show of weapons** on the police, military and armed guards currently present in, and in the immediate environ of the transit zones must cease;<sup>37</sup>
  - Detainees must have **effective and meaningful contact with the outside world**, in particular access to wireless internet, computers for those without mobile equipment with applications able to transfer voice over internet (such as Skype) and regular access to visitors.<sup>38</sup>

<sup>32</sup> Article 25 (1) of the recast Reception Directive

<sup>33</sup> Article 11 of the recast Reception Directive

<sup>34</sup> Article 9 of the recast Reception Directive

<sup>35</sup> See paragraph 45. of the CPT's visit to Menoyia Detention Centre for Illegal Immigrants, Cyprus, 2013:

<sup>36</sup> Article 8 recast Procedures Directive

<sup>37</sup> CPT, *Immigration Detention Standards*, March 2017, p.6. Available at: <https://rm.coe.int/16806fbf12>

<sup>38</sup> *Ibid*, pp. 3. and 7.