



Hungarian Helsinki Committee

ONE YEAR AFTER

How legal changes resulted in blanket rejections, refoulement and systemic starvation in detention

Information update by the Hungarian Helsinki Committee (HHC)

1 July 2019

Exactly one year ago, amendments to the Hungarian asylum system came into force that drastically reduced the chances of genuine asylum-seekers to receive protection by fundamentally altering the asylum procedure. This past year saw threats of imprisonment up to one year for those who assist asylum-seekers; the automatic rejection of almost all asylum claims; deliberate starvation of detainees in the transit zones; attempted deportations to the country of origin of applicants whose claims were never examined on their substance; and finally, the re-integration of the asylum authority into the Police and the dissolution, after two decades, of the Immigration and Asylum Office.

THE LEGAL CHANGES

Amendments to the Fundamental Law and the Asylum Act

The Hungarian Parliament adopted amendments to the Asylum Act¹ and the Fundamental Law² that entered into force on 1 July 2018. The amendment to the Fundamental Law was instrumental in emptying the right to seek asylum in Hungary and also provided a wide basis for potential criminal investigations against those assisting asylum-seekers.

The newly added Section 4 to Article XIV of the Fundamental Law that supposedly ensures the right to seek asylum reads as follows (emphasis added):

*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. **Any non-Hungarian citizen arriving at the territory of Hungary through a country where he or she was not exposed to persecution or a direct risk of persecution shall not be entitled to asylum.***

The amendment to the Asylum Act introduced a new inadmissibility ground, a hybrid of the concepts of the first country of asylum³ and the safe third country⁴. The new inadmissibility ground, not provided for by EU law, reads as follows:

The applicant arrived through a country where he/she is not exposed to persecution as provided for in Subsection (1) of Section 6⁵ or to serious harm under Subsection (1) of Section 12⁶, or in the country through which the applicant arrived to Hungary adequate level of protection is available.⁷

Such a hybrid ground is **not compatible with current EU law** as it arbitrarily mixes the concept of the first country of asylum⁸ with that of a safe third country⁹, but without the procedural guarantees attached to those. The recast Asylum Procedures Directive provides an exhaustive list of inadmissibility grounds¹⁰ which does not include such a hybrid form. That the new inadmissibility ground is in breach of EU law is further attested by the European Commission's decision of 19 July 2018 to launch an **infringement procedure** concerning the recent amendments. According to the Commission, "the introduction of a new non-admissibility ground for asylum applications, not provided for by EU law, is a violation of the EU Asylum Procedures Directive. In addition, while EU law provides for the possibility to introduce non-admissibility grounds under the safe third country and the first country of asylum concepts, the new law and the

¹ Newly introduced Section 51 (2) (f), and newly introduced 51 (12) of Act LXXX of 2007 on Asylum (hereinafter: Asylum Act), English translation available <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf> p4.

² Amended Article XIV of the Fundamental Law, English translation available at <https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf> p3.

³ Section 51 (2) (c) of the Asylum Act, transposing Article 35 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 (recast) (hereinafter: Asylum Procedures Directive).

⁴ Section 51 (2) (d) of the Asylum Act, transposing Article 38 of the Asylum Procedures Directive.

⁵ Section 6 (1) of the Asylum Act reads: "Hungary shall grant refugee status to any foreign national to whom the conditions set out in the first sentence of Article XIV(4) of the Fundamental Law apply."

⁶ Section 12 (1) of the Asylum Act reads: "Hungary shall grant subsidiary protection status to an alien who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin would face a real risk of suffering serious harm, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

⁷ Section 51 (2) (f) of the Asylum Act

⁸ Section 51 (2) (c) of the Asylum Act, transposing Article 35 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 (recast) (hereinafter: Asylum Procedures Directive).

⁹ Section 51 (2) (d) of the Asylum Act, transposing Article 38 of the Asylum Procedures Directive.

¹⁰ Article 33(2) of the Asylum Procedures Directive

constitutional amendment on asylum curtail the right to asylum in a way which is incompatible with the Asylum Qualifications Directive and the EU Charter of Fundamental Rights.”¹¹ The European Commission stepped up this procedure on 24 January 2019 by sending a reasoned opinion to Hungary. The Hungarian government had until 24 March to respond to the Commission; the decision on whether to refer Hungary to the Court of Justice of the European Union is pending.¹²

As of 28 March 2017, persons without the right to stay in Hungary can only lodge an asylum application in either of the two transit zones located at the Hungarian-Serbian border.¹³ This means that anyone who would like submit an asylum claim in Hungary can only do so by entering Hungary (the transit zones) from Serbia. Since Hungary regards Serbia as a safe third country,¹⁴ the above-cited new inadmissibility provision abolished any remaining access to a fair asylum procedure in practice.



Criminalisation of assistance to asylum-seekers – the Stop Soros package

Amendments to the Criminal Code and the Police Act **threaten with criminal sanctions those who provide assistance to asylum-seekers** whose claims are found, at a later stage, inadmissible based on this new ground. The relevant subsection of the Criminal Code sets out that “*Anyone who conducts organisational activities in order to allow the initiating of an asylum procedure in Hungary by a person who in their country of origin or in the country of their habitual residence or another country via which they had arrived, was not subjected to persecution for reasons of race, nationality, membership of a particular social group, religion or political opinion, or their fear of indirect persecution is not well-founded*”¹⁵ commits the crime of “facilitating illegal immigration” and shall be punishable by confinement. However, if the “crime” is committed by providing assistance to more than one person, or is committed within an 8-kilometre area from the external Schengen borders, punishment shall be **imprisonment up to one year**.¹⁶

The parallel amendments of the Police Act¹⁷ and the State Border Act¹⁸ introduced a possibility for the police to ban from the 8-kilometre zone of Hungary’s extra-Schengen borders any Hungarian or foreign citizen who is under criminal proceedings for the *suspicion* of committing the newly introduced crime of facilitating illegal immigration. The provision does not even require formal accusation by a public prosecutor, a mere criminal proceeding initiated by the police suffices to order the ban. Both transit zones of Hungary are in this 8-kilometre area of the Hungarian-Serbian (extra-Schengen) border.

That the target of these provisions was the HHC and its staff is exemplified by the statement of the spokesperson of the ruling Fidesz’s parliamentary group, speaking about the HHC: “*it is precisely because of such, migrant-friendly organisations threatening national security, that the Stop Soros legislative proposals must be put on Parliament’s agenda*”.¹⁹

THE IMPLEMENTATION

Automatic rejection of asylum claims

Although the amendments were introduced to Parliament already in May 2018, the changes seemingly caught the Immigration and Asylum Office (IAO) by surprise. Between 1 and 10 July, no asylum-seeker was allowed to enter either of the transit zones and apply for asylum. The first applicants in whose claim the IAO used the new inadmissibility ground to reject them entered the transit zone on 10 July 2018 and were served with a rejection on 8 August. Since then, the HHC is **only aware of 3 positive decisions concerning asylum applications that were lodged after 1 July 2018** by asylum-seekers passing through Serbia: the infamous case of Nikola Gruevski²⁰ who received refugee status from Hungary and two Iranians who were granted subsidiary protection. All other applications lodged after 1 July 2018 known to the HHC were declared inadmissible.

¹¹ European Commission Press Release: Migration and Asylum: Commission takes further steps in infringement procedures against Hungary, 19 July 2018. Available at: http://europa.eu/rapid/press-release_IP-18-4522_en.htm

¹² European Commission Press Release: Asylum: Commission takes next step in infringement procedure against Hungary for criminalising activities in support of asylum applicants, 24 January 2019. Available at: http://europa.eu/rapid/press-release_IP-19-469_en.htm

¹³ Section 80/J (1) of Asylum Act

¹⁴ Section 2 of Government Decree no. 191/2015 (VII. 21.)

¹⁵ Section 353/A (1) (a) of Act C of 2012 on the Criminal Code (hereinafter: Criminal Code)

¹⁶ Sections 353/A (2) and (3) of the Criminal Code

¹⁷ Section 46/F of Act XXXIV of 1994 on the Police, “Border security restraining measure”

¹⁸ Section 5 (1c) of Act LXXXIX of 2007 on State Border

¹⁹ https://fidesz.hu/hirek/a-helsinki-bizottsag-migraciot-segito-soros-szervezet_227607

²⁰ <https://www.bbc.com/news/world-europe-46223909>

Request for a preliminary ruling by the EU Court of Justice

On 7 September 2018, the Budapest Administrative and Labour Court, in a case where the HHC provides legal representation to the applicant, requested a preliminary ruling of the Court of Justice of the EU to decide **whether the new inadmissibility ground is in line with EU law**.²¹ In a number of cases, judges decided to suspend the appeal procedure pending the outcome of the preliminary ruling request.

Starvation in detention

Those asylum-seekers rejected in the transit zones are placed under an alien policing procedure pending their deportation. Since 28 March 2017, the transit zones can be designated as the compulsory place of stay in alien policing procedures as well. Since 1 July 2018, **the IAO has "placed" all rejected applicants in the transit zone after delivering the inadmissibility decision** in their asylum case. In practice, this is merely an administrative step, as the applicants are anyway "placed" in the same transit zone, where they have been *de facto* detained since they lodged an asylum application.

However, the corresponding government decree that sets out, among others, the details of services to be provided at various types of facilities for persons under an alien policing procedure simply **does not include provisions for the transit zone apart from basic health care**.²² According to the IAO, this omission is the legal ground for the starvation of rejected applicants. The only exception are children under 18 and pregnant or nursing mothers.

Hungary started to deprive of food some third-country nationals detained in the transit zones in August 2018.²³ After 5 such cases successfully challenged by the HHC by obtaining interim measures from the European Court of Human Rights (ECtHR), the IAO promised in August 2018 to discontinue this practice and provide food to all asylum-seekers in the transit zone. While welcoming the announcement to end starvation, the HHC also warned already in August 2018 that unless the legal framework is amended to clearly stipulate the requirement to provide food to all those detained in the transit zone, similar cases will occur in the future.²⁴ Less than 6 months later, on 8 February 2019, an Iraqi family of five was informed that the parents would not be given food while detained in the transit zone.²⁵ The IAO actually refused to provide the parents with food for 5 days, until the HHC secured an interim measure from the ECtHR that ordered the Hungarian authorities to immediately stop this practice. Since August 2018, **the IAO denied food to 23 individuals detained in the transit zones**. In all of these cases, the HHC successfully requested interim measures from the ECtHR.

Although amending the government decree would be very simple, the government has not done so. To avoid starving detainees, an independent Member of Parliament submitted a bill based on the HHC's proposal that is pending approval in the relevant committee.²⁶ The authorities nonetheless already have the ability to avoid starvation in the transit zones: it is at the discretion of the IAO to decide on the designated compulsory place of stay for foreigners under alien policing procedure. As opposed to asylum-seekers, who can be placed only in the transit zones since 28 March 2017, those under alien policing procedure can be placed in other facilities as well.

Deportation shopping and streamlined *refoulement*

The very essence of the (in)admissibility procedure in asylum cases is to identify applications which should not be examined in substance: either because the person already applied for asylum and there are no new findings or elements in his/her case, or because there is another country expected to provide protection to the applicant if he/she is eligible to it. It logically follows from this that if the country which formed the basis for the inadmissibility decision refuses to receive the applicant, it can no longer be considered a state that meets the requirements on which the inadmissibility decision rests (as also reflected in the recast Asylum Procedures Directive). A country can be considered to be a first country of asylum if

(a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or

(b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement,

provided that he or she will be readmitted to that country.²⁷

²¹ LH v Bevándorlási és Menekültügyi Hivatal, C-564/18,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=208325&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7434350>

²² Government Decree No. 114/2007 (V. 24) on the implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals

²³ See more on this here: <https://www.helsinki.hu/en/denial-of-food-inadmissible-claims/>

²⁴ See our statement here: <https://www.helsinki.hu/en/all-asylum-seekers-finally-get-food-in-the-transit-zones-at-the-border/>

²⁵ See more on the individual cases until 23 April 2019 here: <https://www.helsinki.hu/en/hungary-continues-to-starve-detainees-in-the-transit-zones/>

²⁶ Bill on the modification of certain acts in order to free the most vulnerable asylum-seekers from detention and to stop the starvation of detainees, T/6493, available at: <https://www.parlament.hu/irom41/06493/06493.pdf>

²⁷ Article 35 of the Asylum Procedures Directive, emphasis added

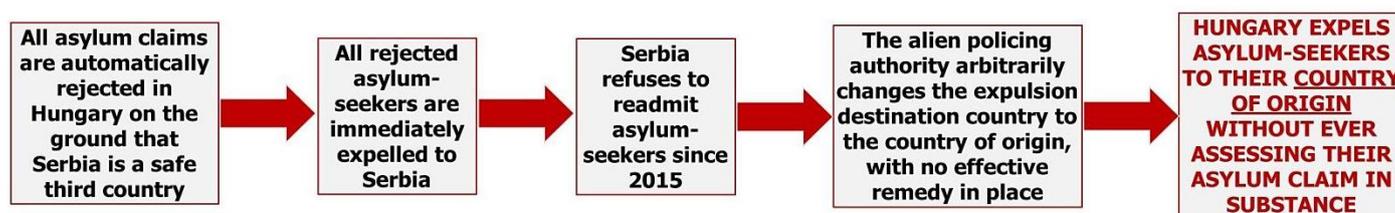
Similarly, the concept of the safe third country can only be applied in inadmissibility cases if the third country meets certain criteria. However,

Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.²⁸

In short, these provisions clarify that in case the country which formed the basis for the inadmissibility decision does not admit the applicant and provide access to its asylum system to him/her, the applicant's asylum claim must be examined on its substance. **The new inadmissibility ground is missing this guarantee** that at least once an application is properly examined.

In all cases since 1 July 2018, **the decision on inadmissibility is joined together with a ruling on the expulsion** of the applicant. Since the inadmissibility decision is based on the argument that the applicant should have lodged an asylum application in Serbia prior to arriving in Hungary, **the expulsion destination country is always Serbia**. However, since September 2015, Serbia refuses to readmit (failed) asylum-seekers from Hungary. In accordance with both the wording and the logic of the recast Asylum Procedures Directive, at this point, the applicant should enter a normal asylum procedure in Hungary, where the IAO examines his/her application in its substance. Instead, the IAO's alien policing department began an arbitrary practice of modifying internally the expulsion order issued by the IAO's asylum department by **changing the destination country from Serbia to the country of origin of the applicants**. Against such internal modification **no effective legal remedy is available** under domestic legislation.

This means that Hungary not just automatically rejects all asylum claims, but it also now **expels asylum-seekers to their countries of origin (such as Afghanistan) without ever assessing their protection claim in substance**. The UNHCR itself also regards this practice to be in breach of the principle of *non-refoulement* and consequently *"advised the European Border and Coast Guard Agency, Frontex, to refrain from supporting Hungary in the enforcement of return decisions which are not in line with international and EU law."*²⁹



Push-backs and arbitrary limit of admittance to the transit zones

Since the end of January 2018, on average, the IAO only **allows 1 person per working day per transit zone to enter the facility and apply for asylum**. At the same time, the number of push-backs through the border fence to Serbia and so-called blocked entries at the fence remain high. In 2018, the number of those denied access to the asylum procedure was more than 8 times those allowed to apply for asylum.

	Asylum applications	Push-backs	Blocked entries	Total denied access (% compared to asylum applications)
2016	29 432	8 466	10 591	19 057 (65%)
2017	3 397	9 136	10 964	20 100 (592%)
2018	671	4 151	1 668	5 819 (867%)

Asylum Office dissolved as of 1 July 2019

In what might seem a logical step in the destruction of international protection in Hungary, the Immigration and Asylum Office ceased to exist on 1 July 2019, after two decades of existence. The new organisation, in charge of examining asylum applications, is the National General Directorate for Alien Policing.³⁰ Current employees, including case workers, **will have to become law enforcement officers** subject to the regulations set out in the Police Act.³¹

²⁸ Article 38 (4) of the Asylum Procedures Directive, emphasis added

²⁹ Filippo Grandi, UN High Commissioner for Refugees: Hungary's coerced removal of Afghan families deeply shocking, 8 May 2019, available at <https://www.unhcr.org/ceu/10940-hungarys-coerced-removal-of-afghan-families-deeply-shocking-unhcr.html>

³⁰ Articles 1 and 7 of Act XXXV of 2019 on the Amendment of Certain Acts related to the Alien Policing Authority and Government decree 126/2019 (V. 30.) on the Alien Policing Authority

³¹ Article 6 of Government decree 126/2019 (V.30.)