



## HUNGARY DE FACTO REMOVES ITSELF FROM THE COMMON EUROPEAN ASYLUM SYSTEM (CEAS)

Information Update by the Hungarian Helsinki Committee (HHC)

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**The Court of Justice of the European Union (CJEU) ruled on 14 May 2020 that Hungary's practice of automatically placing the quasi-totality of asylum-seekers in closed land-border transit zones during the entire asylum procedure constitutes unlawful detention. As a reaction, the Hungarian government announced the introduction of a new asylum system. At the core of the new system is a compulsory precondition for those seeking asylum in Hungary to first submit a "statement of intent" at the Hungarian embassy in Belgrade or Kyiv. Depending on the approval of the "statement of intent", the would-be asylum-seeker is issued with a special travel permit allowing him or her to travel to Hungary and submit an asylum application there. This system is in breach of the Hungarian Fundamental Law,<sup>1</sup> the EU asylum *acquis*,<sup>2</sup> the 1951 Refugee Convention,<sup>3</sup> as well as the European Convention on Human Rights and its Fourth Protocol.<sup>4</sup> By restricting access to territory and the asylum procedure in a way that is incompatible with EU law, and by exclusively designating specific places for lodging a "statement of intent" as a compulsory precondition for submitting an asylum application, Hungary de facto removes itself from the Common European Asylum System (CEAS).**

### How did this new system come about?

The Hungarian government declared a state of danger on 11 March 2020 in response to the COVID-19 epidemic. During the state of danger, a special legal order defined by the Fundamental Law,<sup>5</sup> the government is authorised to issue decrees that derogate from acts adopted by the Parliament in order to manage the danger that gave rise to the special legal order. These decrees could have remained in force only for 15 days, after which the Parliament must have given consent to the extension of the validity of a decree. On 20 March the government submitted a bill to the Parliament seeking authorisation to issue decrees with an extended scope (not strictly related to the management of the epidemic) and without a sunset clause (decrees would remain in place automatically not for 15 days but for the entire period of the state of danger which can only be revoked by the government itself). The Parliament approved this bill that would become known as the Authorisation Act on 30 March 2020.<sup>6</sup>

On 14 May 2020, the CJEU delivered its judgment in the joint cases of C-924/19 PPU and C-925/19 PPU,<sup>7</sup> ruling among others that the automatic and indefinite placement of asylum-seekers in the transit zones at the Hungarian-Serbian border qualifies as unlawful detention. The government first stated that

<sup>1</sup> Article XIV (2) of the Fundamental Law prohibits collective expulsion of third-country nationals, Article XIV (4) protects the right to seek asylum.

<sup>2</sup> Article 67(2) of the Treaty on the Functioning of the European Union, Article 3(1) and 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 (recast) (hereafter: rAPD), and Article 3(1) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on laying down standards for the reception of applicants for international protection (recast) (hereafter: rRCD).

<sup>3</sup> See UNHCR Position on the new system: <https://www.refworld.org/docid/5ef5c0614.html>.

<sup>4</sup> Article 3 and Article 13 of the European Convention on Human Rights (hereafter: ECHR), Article 4 of Protocol 4 to the ECHR.

<sup>5</sup> Article 53 of the Fundamental Law.

<sup>6</sup> Act XII of 2020 on the Containment of the Coronavirus, see our analysis: [https://www.helsinki.hu/wp-content/uploads/HHC\\_background\\_note\\_Authorization\\_Act\\_31032020.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_background_note_Authorization_Act_31032020.pdf).

<sup>7</sup> FMS and Others v. Országos Idegenrendészeti Főigazgatóság, request for a preliminary ruling from the Szeged Közigazgatási és Munkaügyi Bíróság C-924/19 PPU and SA and SA junior v Országos Idegenrendészeti Főigazgatóság, request for a preliminary ruling from Szeged Közigazgatási és Munkaügyi Bíróság C-925/19 PPU, see the case file: <https://bit.ly/3grH9tz>, see the summary: <https://www.helsinki.hu/en/hungary-unlawfully-detains-people-in-the-transit-zone/>.

it was exploring avenues to request the Constitutional Court to overrule the CJEU's judgment.<sup>8</sup> A week after the judgment was delivered, the government announced that instead of turning to the Constitutional Court it will shut down the transit zones and introduce a new asylum system.<sup>9</sup>

Using the *carte blanche* authorisation it received through the Authorisation Act, the government issued a government decree on 26 May 2020 that introduced a precondition for lodging an asylum application in Hungary.<sup>10</sup> The Decree remained in force until the government terminated the state of danger on 17 June 2020.<sup>11</sup> Before the government decided to terminate the state of danger, it submitted a bill to the Parliament on transitional provisions related to the termination of the special legal order. The stated aim of the bill was to "facilitate the regulatory transition in connection with the emergency measures taken by the Government during the state of danger for the prevention of the human epidemic."<sup>12</sup> Among its more than four hundred provisions, the bill also included a copy of the Government Decree on the new asylum system. Through a significant change, the provisions of the bill further diminished the already illusory chances of applying for asylum in Hungary by authorising the government to designate particular embassies where "statements of intent" could be lodged.<sup>13</sup> Although the bill stipulated that the new asylum system be in place until 31 December 2020,<sup>14</sup> this can be prolonged in practice indefinitely. The Parliament approved the bill and it entered into force the day following the end of the state of danger, on 18 June 2020.

### How does the new system look like?

According to the new 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 register their asylum application:

1. She/he 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.<sup>15</sup>
2. The embassy must then forward the "statement of intent" to the asylum authority, the National Directorate-General for Alien Policing (hereafter: NDGAP) in Budapest, which shall examine the "statement of intent" within 60 days.<sup>16</sup>
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.<sup>17</sup>
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.<sup>18</sup>

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<sup>8</sup> „This is unacceptable and contrary to Hungary's Fundamental Law. Therefore, the government will also scrutinise this legal situation and its consequences from a constitutional point of view, the Justice Minister said." See the full statement of 15 May 2020 on the government's official website: <https://www.kormany.hu/en/ministry-of-justice/news/hungarian-government-s-position-remains-unchanged-hungarian-legislation-and-practice-are-compatible-with-eu-law>.

<sup>9</sup> „[the government has] decided to abolish the transit zone in a physical sense as well. In the future, those seeking to enter Hungary will have to apply at consulates in neighbouring, secure countries." See the statement of 21 May 2020 of the Minister of the Prime Minister's Office on the government's spokesperson's website: <http://abouthungary.hu/blog/gergely-gulyas-on-the-european-court-of-justices-new-ruling-on-immigration-its-dangerous-for-all-of-europe/>.

<sup>10</sup> Government Decree 233/2020. (V. 26.) on the rules of the asylum procedure during the state of danger declared for the in Hungarian: [http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=219700.383485](http://njt.hu/cgi_bin/njt_doc.cgi?docid=219700.383485). An unofficial English translation: [https://www.helsinki.hu/wp-content/uploads/Government-Decree-no.-233\\_2020-on-the-rules-of-the-asylum-procedure-during-the-state-of-danger.pdf](https://www.helsinki.hu/wp-content/uploads/Government-Decree-no.-233_2020-on-the-rules-of-the-asylum-procedure-during-the-state-of-danger.pdf).

<sup>11</sup> Government Decree 282/2020. (VI. 17.), entered into force on 18 June 2020.

<sup>12</sup> Promulgated as Act LVIII on the Transitional Provisions related to the Termination of the State of Danger and on Epidemiological Preparedness (Transitional Act). See the adopted version here:

<https://www.parlament.hu/irom41/10748/10748-0019.pdf> Unofficial English translation of selected provisions here: [https://www.helsinki.hu/wp-content/uploads/T-10748\\_excerpts\\_unofficial\\_translation\\_EN.pdf](https://www.helsinki.hu/wp-content/uploads/T-10748_excerpts_unofficial_translation_EN.pdf). The asylum-related sections are under chapter 84, Sections 267 through 275.

<sup>13</sup> Section 268 (2) of the Transitional Act and Section 1 of Government Decree 292/2020. (VI. 17.). During the state of danger, Sections 2 (1)-(2) of Government Decree 233/2020. (V. 26.) prescribed that a statement of intent can be lodged in person at any Hungarian Embassy located outside of the Schengen Zone. The potential embassies where statements of intent can be lodged was severely restricted by Government Decree 292/2020 (VI. 17.), issued on the basis of Section 275(2) of the Transitional Act that authorizes the government to define the exact embassies where statement of intents can be lodged.

<sup>14</sup> Section 267 of the Transitional Act.

<sup>15</sup> Section 1 of Government Decree 292/2020 (VI. 17.).

<sup>16</sup> Section 2 (3)-(4) of Government Decree 233/2020. (V. 26.) and Section 268 (3)-(4) of the Transitional Act.

<sup>17</sup> Section 2 (4)-(5) of Government Decree 233/2020. (V. 26.) and Section 268 (4)-(5) of the Transitional Act.

<sup>18</sup> Sections 3 and 4(2) of Government Decree 233/2020. (V. 26.) and Sections 269 and 270 (2) of the Transitional Act.

5. The border guards must then present the would-be asylum-seeker to the asylum authority within 24 hours.<sup>19</sup>
6. The would-be asylum-seeker can then formally register her/his asylum application with the Hungarian asylum authority.

The provisions also prescribe the automatic “placement of the applicant in a closed facility” for 4 weeks following the registration of their asylum application, without any available legal remedy to challenge the placement.<sup>20</sup>

Only people belonging to the following categories are not required to go through this process:<sup>21</sup>

- Beneficiaries of subsidiary protection who are staying in Hungary;
- Family members 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.

Those who neither fall under the exempted categories nor are granted the special one-time entry permit at one of the embassies cannot request asylum in Hungary.<sup>22</sup> In practice this results in absurd cases where, for example, a person with a valid student visa who cannot return to her/his country of origin due to the risk of persecution or serious harm cannot apply for asylum in Hungary despite residing in the country legally. Instead, they are made to travel to Belgrade or Kyiv (to which countries they might have to obtain a visa to do so) to lodge a “statement of intent”. As the NDGAP has 60 days to decide on the “statement of intent” during which period it might remotely interview the foreigner, this also means that persons under such circumstances would have to wait in Belgrade or Kyiv for two months.

The government aims to justify severe restrictions to access to protection incompatible with domestic, EU, and international law with the pretext of minimising exposure to COVID-19. Nevertheless, this system, besides all its human rights concerns, actually increases the risk of infection, by generating unnecessary cross-border movements:

- Those having the right to stay in Hungary but not falling under the extremely limited scope of exemptions are obliged to travel and stay outside of Hungary for 60 days to then return to lodge an asylum application in Hungary.
- Those crossing the borders of Hungary unlawfully, including at the international airport in Budapest or Debrecen, as well as those staying unlawfully in Hungary, wishing to seek international protection, are collectively expelled to the country from which they presumably entered Hungary and instructed to then travel to Serbia or Ukraine to submit a “statement of intent” for the purpose of lodging an asylum application in Hungary.

These provisions are clearly at variance with the stated aim of the legislation and expose the true aim of the new system: excluding as many people as possible from accessing the asylum system, regardless of the evident protection needs many of them may have.

### **What does the “statement of intent” include?**

According to the law, the NDGAP must provide a format for these statements to be filled out by would-be asylum-seekers.<sup>23</sup> The NDGAP published the form<sup>24</sup> on its website on 3 June, which only raises further concerns regarding the new system. The 10-page-long document includes questions such as

- “What do you do and how much money do you earn for a living?”
- “What property, cash and cash equivalents do you possess?”
- “Do you have any kind of health problem or/and addiction?”
- “What do you know about Hungary?”
- “If your application for asylum was approved by Hungary what would be your plan?”

<sup>19</sup> Section 4 (3) of Government Decree 233/2020. (V. 26.) and Section 270 (3) of the Transitional Act.

<sup>20</sup> Section 4 (5) of Government Decree 233/2020. (V. 26.) and Section 270 (5) of the Transitional Act. Please note that although the provisions state that this is optional („may issue a decision”), the reasoning provided to the relevant section of the Transitional Act, which is equally binding, clarifies that this is in fact compulsory thus an automatism.

<sup>21</sup> Section 5 (1) of Government Decree 233/2020. (V. 26.) and Section 271 (1) of the Transitional Act.

<sup>22</sup> Section 5 (2) of Government Decree 233/2020. (V. 26.) and Section 271 (2) of the Transitional Act.

<sup>23</sup> Section 2 (1) of Government Decree 233/2020. (V. 26.) and Section 268 (1) of the Transitional Act.

<sup>24</sup> The form available on NDGAP’s website: [http://oif.gov.hu/images/sz%C3%A1nd%C3%A9knyilatkozat\\_angol\\_4.pdf](http://oif.gov.hu/images/sz%C3%A1nd%C3%A9knyilatkozat_angol_4.pdf).

As many of the compulsory questions have little or nothing to do with protection needs, and as the law remains completely silent on what grounds the NDGAP would approve or reject a “statement of intent”, the purpose of this questionnaire remains unclear. It is also unclear whether any remedy is available against the decision of the asylum authority on the “statement of intent”. That the legislation authorises the NDGAP to keep all personal data related to the “statement of intent” for 10 years<sup>25</sup> raises further doubts on the actual aim of this form.

### **Why is this system in breach of Hungary’s international obligations?**

#### *Denying access to territory and asylum*

With the introduction of the precondition of lodging a “statement of intent” to even initiate an asylum procedure, Hungary further restricts its already extremely limited access to asylum. In July 2016, amendments entered into force that legalised extrajudicial collective expulsions of third-country nationals without the right to stay in Hungary who were found within an 8 km zone from the border fence built at the Hungarian-Serbian and Hungarian-Croatian border sections.<sup>26</sup> Those against whom this measure is applied do not have the right to seek asylum; they are neither identified, nor registered by the authorities. This so-called 8 km-rule was extended to the entire territory of Hungary through further legal changes that entered into force 28 March 2017. The amendments resulted in that third-country nationals found anywhere in Hungary without already having a right to stay (e.g. a valid visa, a valid residence permit) are to be “escorted” to the external side of the border fence without having the right to seek asylum.<sup>27</sup>

Since the same amendments also limited the registration of asylum applications to the two land-border transit zones,<sup>28</sup> the number of asylum applications continuously decreased while the number of third-country nationals attempting to reach safety remained high.

Admittance to the two transit zones was continuously reduced in an unofficial and arbitrary manner. From the end of January 2018, the average admittance was further reduced to 1 person per transit zone per working day. Not even this average was met in 2019: for a total of 250 working days, the asylum authority only allowed 394 individuals to lodge their application. In December 2019, admittance to the Rösztke transit zone was unofficially suspended; in the second half of January 2020, admittance to the Tompa transit zone became sporadic. On 1 March 2020, admittance to the transit zones were officially “suspended indefinitely” per the statement of the Chief Security Advisor to the Prime Minister.<sup>29</sup>

	Asylum applications <sup>30</sup>	Push-backs <sup>31</sup>	Blocked entries <sup>32</sup>	Total denied access (and % 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%)
2019	500	11 101	2 585	13 686 (2737%)
2020 (Jan-April)	84	5 436	1727	7 163 (8527%)

#### *Exposing asylum-seekers to refoulement*

The new system requires that those lodging a “statement of intent” remain available to the Hungarian authorities during the 60-day period the asylum authority issues a “suggestion” to the embassy whether to grant the third-country national a one-time entry permit.<sup>33</sup> Third-country nationals are not entitled to

<sup>25</sup> Section 6 of Government Decree 233/2020. (V. 26.) and Section 272 of the Transitional Act.

<sup>26</sup> See more on the so-called „8 km rule” here: <https://www.helsinki.hu/wp-content/uploads/HHC-info-update-push-backs-brutality-14-July-2016.pdf> and here: <https://www.helsinki.hu/wp-content/uploads/HHC-info-update-push-backs-5-July-2016.pdf>.

<sup>27</sup> Section 80/J of Act LXXX of 2007 on Asylum (hereafter: Asylum Act) and Section 5 (1a)-(1b) of Act LXXXIX on State Borders.

<sup>28</sup> See more on the previous system here: <https://www.helsinki.hu/en/turbulent-50-days-an-update-on-the-hungarian-asylum-situation/> and here: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_hu\\_2019update.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_hu_2019update.pdf).

<sup>29</sup> See the official announcement on the government’s website: <https://www.kormany.hu/en/cabinet-office-of-the-prime-minister/news/coronavirus-hungary-to-suspend-admission-of-illegal-migrants-to-transit-zone-indefinitely>.

<sup>30</sup> Source: asylum authority. Refers to first-time as well as subsequent applications.

<sup>31</sup> Source: Police.

<sup>32</sup> Source: Police. Refers to averted attempts to cross the fence.

<sup>33</sup> Section 2(3) of Government Decree 233/2020. (V. 26.) and Section 268(3) of the Transitional Act.

accommodation or any support services (reception conditions, as prescribed by the EU asylum *acquis*) 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 relevant Hungarian embassy is located. This is also the case for those third-country nationals who cross the border of Hungary unlawfully and request asylum: the new system mandates the Hungarian authorities to “refer” the third-country national to the Hungarian embassy located in the country from which the person entered Hungary unlawfully.<sup>34</sup> This raises concerns especially in cases where the third-country national is “referred” to a country other than Serbia or Ukraine, the two countries where “statements of intent” can be lodged.<sup>35</sup> In such cases, the Hungarian legislation forces third-country nationals to cross at least two state borders unlawfully in order to lodge a “statement of intent” at the designated embassy in Belgrade or Kiev.

#### *De facto removing Hungary from the CEAS*

The key instruments of the CEAS clearly define that their scope do not include asylum applications lodged at representations, that is, embassies and consulates, of Member States.<sup>36</sup> On the one hand, although the nature of the “procedure” described above, between the lodging of the “statement of intent” and the registration of the asylum application, is unclear, neither from the perspective of EU law, nor from the perspective of the domestic legislation can it be regarded as an asylum procedure falling under the scope of EU law.<sup>37</sup>

On the other hand, the new system excludes the possibility to apply for international protection at the border, at border crossing points, or inside Hungary, except for the few belonging to the groups excluded from the embassy procedure, as described above.

This exclusion, coupled with the restriction that procedures can only be initiated at the Hungarian embassy in Belgrade and Kyiv, result in a situation where Hungary does not meet the requirement of providing access to the territory<sup>38</sup> and, at the same time, forces asylum-seekers to initiate a procedure that falls outside of the scope of EU law, including the Charter of Fundamental Rights.<sup>39</sup>

#### *Not executing a CJEU judgment*

As described above, the new system was introduced as a reaction to the CJEU’s judgment qualifying placement in the transit zone as unlawful detention. The new system clearly continues the practice of automatic and unlawful confinement of asylum applicants through the provision that foresees that upon registering the asylum application (following the arrival of the asylum-seeker to Hungary after having granted a special one-time entry document as a result of their “statement of intent”), the asylum authority issues a decision on the placement of the applicant “in a closed facility”.<sup>40</sup> Similarly to the placement decisions issued in relation to the transit zones, no judicial remedy is available against the particular type of decision defined by law (*végzés* in Hungarian) in relation to the automatic placement of applicants “in a closed facility”.<sup>41</sup> This automatic four-week detention does not even exclude unaccompanied minors under the age of fourteen, as was the case in the transit zones.

**Thus, apart from restricting access to territory and the asylum procedure in a way that is incompatible with EU law and exclusively designating places to lodge a “statement of intent” that is a precondition for lodging an asylum application Hungary de facto removes itself from the CEAS and Hungary is also clearly at variance with a judgment of the CJEU.**

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<sup>34</sup> Section 5(2) of Government Decree 233/2020. (V. 26.) and Section 271(2) of the Transitional Act.

<sup>35</sup> Section 1 of Government Decree 292/2020. (VI. 17.).

<sup>36</sup> Article 3(2) of rAPD and Article 3(2) of rRCD.

<sup>37</sup> Section 4(4) of Government Decree 233/2020. (V. 26.) and Section 270 (4) of the Transitional Act state that „the foreigner who lodged his/her asylum application may enjoy the rights provided by the Asylum Act *from the moment of having lodged the asylum application before the asylum authority*” (emphasis added).

<sup>38</sup> Article 3 of rAPD.

<sup>39</sup> Article 51(1) of the Charter, see also X and X v Belgium, C-638/16 PPU.

<sup>40</sup> Section 4(5) of Government Decree 233/2020. (V. 26.) and Section 270(5) of the Transitional Act.

<sup>41</sup> Section 4 (5) of Government Decree 233/2020. (V. 26.) and Section 270 (5) of the Transitional Act.

## **Actions the European Commission should pursue**

There are already three separate ongoing infringement procedures against Hungary for various aspects of its asylum system.<sup>42</sup> In two cases, the European Commission has already decided to refer Hungary to the CJEU. One of these relate, among others, to the legalisation of collective expulsions which is a cornerstone of the new system as well. The Advocate General's Opinion in this case, delivered on 25 June 2020 argues that the "escort" of third-country nationals to the external side of the border fence, without having the right to seek asylum, "is comparable to removal within the meaning of Article 3(5) of the [Return Directive]."<sup>43</sup>

Similarly, the Advocate General sided with the Commission in the assessment that restricting the lodging of asylum applications to the two transit zones was in breach of EU law,<sup>44</sup> as it imposed a restriction on access to the asylum procedure incompatible with the relevant Directive.

- The judgment in this case is expected in the second half of 2020. Should the CJEU adopt the Advocate General's Opinion regarding these issues, the **European Commission should ensure that Hungary immediately complies with the judgment by safeguarding that third-country nationals have access to the asylum procedure at the border, at border crossing points and on the territory of Hungary, regardless of their legal status.**
- The Commission should also **ensure that Hungary complies with the CJEU's judgment in the joint cases of C-924/19 PPU and C-925/19 PPU** by not prescribing the automatic confinement of asylum-seekers in closed facilities for four weeks, without any available effective remedy.
- The Commission should immediately **initiate the suspension of Frontex's mission to Hungary**, in order to avoid being complicit in operating a system that is in breach of EU law and international human rights obligations.

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<sup>42</sup> See a brief summary of these: <https://www.helsinki.hu/wp-content/uploads/asylum-related-infringements-against-Hungary-2015-2020.pdf>.

<sup>43</sup> Opinion of Advocate General Pikamäe in case C-808/18 of 25 June 2020, paras. 152-173, esp. para. 172.

<sup>44</sup> Ibid., paras. 37-72, esp. para. 71.