



# The End of the Right to Asylum in Hungary?

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## 1. Introduction

On 28th March 2017, the Hungarian Act “On the amendment of certain acts related to increasing the strictness of procedures carried out in the areas of border management” entered into force, amending five pieces of domestic legislation: the Act on Asylum, the Act on the Admission and Right of Residence of Third-Country Nationals, the Act on State Border, the Act on Minor Offences and the Act on Child Protection and Guardianship Management. The newly past law requires that all asylum-seekers must submit their application in the transit zones established at the border, where they will remain in detention for the entire asylum procedure without a detention order and therefore without the right to judicial remedies. Asylum applicants whose asylum procedure is already ongoing are also to be moved to the detention facilities in the transit zones. The Act also requires that unlawfully present non-nationals be removed from anywhere in the country “through the gate of the facility” at the border, from where they can apply for asylum in the transit zones. No legal procedure is established for this “removal”, including an effective mechanism to challenge this measure. The analysis in this blog is based on the [unofficial translation of the Hungarian legislation](#) provided by the [Hungarian Helsinki Committee](#). Likewise, the facts and figures underpinning this analysis are also those provided by the Hungarian Helsinki Committee.

The changes in Hungarian legislation give rise to a number of issues, as [criticised](#) by human rights organisations, namely: denial of access to asylum procedures and no effective remedy against it, and deprivation of liberty. They must also be read in the context of other recent changes in the Hungarian asylum system, notably the declaration of Serbia as a “safe third country”. We will take each one in turn but before, some observations need to be made in relation to the EU framework for the protection of fundamental rights and EU asylum law, in their applicability to the case in question.

The term “refugee” will be used broadly to refer to the two categories that the CEAS recognises as “persons in need of international protection”, which are refugees within the meaning of Article 1A of the [UN Refugee Convention](#), as well as persons whose protection grounds derive from international human rights law (beneficiaries of subsidiary protection). While the term “persons in need of international protection” has found its way into the discourse of the EU (and even within UNHCR), and eventually into legislation itself, its use to refer to persons forcibly displaced who receive protection *by States* (as opposed to international organisations) is far from being peaceful (in this regard, see A Fortin, ‘[The Meaning of ‘Protection’ in the Refugee Definition](#)’ (2000) 12(4) *International Journal of Refugee Law* 548-

576; but a different view is offered by J Hathaway and H Storey, 'What is the Meaning of State Protection in Refugee Law? A Debate' (2016) 28(3) *International Journal of Refugee Law* 480–492).

The assessment of the lawfulness and validity of any measure of EU law, including its implementation by EU Member States, must be made (as a matter of EU law itself), by assessing its compliance with the [Charter of Fundamental Rights of the EU](#), including the right to liberty (Article 6), the right to asylum (Article 18), the prohibition of *refoulement* (Article 19), and the right to an effective remedy (Article 47). In particular, these rights are further developed –insofar as they apply to refugees– in EU secondary legislation on asylum within the Common European Asylum System (CEAS). Therefore, the assessment of the lawfulness of Hungarian legislation must be made in relation to the Hungarian constitution, the international obligations of Hungary as a person of international law (notably the UN Refugee Convention and the [European Convention on Human Rights](#), ECHR), as well as EU law itself.

## 2. Denial of Access to Asylum Procedures

Two different scenarios arise in this regard: denial of access to refugees *unlawfully present* in Hungarian territory and denial of access to refugees seeking *lawful* admission into Hungarian territory. In relation to the former, the legislative amendments introduced by section 7 of the Act establish that: 'In the event of a crisis situation caused by mass immigration [...] A police officer leads the person illegally staying in the territory of Hungary and declaring their intention to submit an application for asylum through *the gate of the facility* established for protecting the order of the state border [...]' (emphasis added). Given that Hungary only has external borders with Ukraine and Serbia, and that the only existing facilities are located at the border with the latter, in practice, this measure means that every unlawfully present non-national (regardless of the actual point of entry) will be sent across the fence built along the Hungarian-Serbian border.

This situation raises a number of issues. Given that the fence is built on Hungarian territory itself (about 1.5 – 2 metres inland), the "removal" across the fence would not be (in itself) an expulsion to a foreign State in the technical legal sense, but rather some form of "internal relocation" within Hungarian territory and outside any procedural framework. In this regard, one could argue that issues about expulsion (collective and otherwise), procedural safeguards applying in removal proceedings, as well as *non-refoulement* issues would not arise, precisely because the refugee thus "removed" remains in Hungarian territory and subject to its jurisdiction. Yet, measures whereby a State attempts to excise part of its territory (if only as a matter of legal fiction) for the purpose of restricting the full application of human rights protection, must still comply with the obligations of that State under international and EU law. Hungary is not the first State to try and develop a legal framework for immigration control which attempts to create an exceptional state of law where the human rights framework would not apply or would apply so restrictively that it would not meet international law obligations. More than 20 years ago, the European Court of Human Rights already set the standards in the [Amuur v. France](#) case. In that case, the Court rejected arguments aimed at construing the extraterritorial nature of the areas in question, noting that the applicants (four Somali asylum-seekers) remained subject to French jurisdiction (para. 52). Furthermore, international human rights law not only prohibits direct *refoulement*, but also indirect *refoulement*, and therefore, any measures undertaken by Hungary which expose refugees to the risk of *refoulement* may constitute a violation of the ECHR and other international obligations. The body of case-law in Strasbourg as well as in the UN human rights monitoring bodies about the applicability of international human rights law obligations when a State exercises jurisdiction, or even *de facto* control, is well established (see the

work of Ralph Wilde, for instance R Wilde. 'Legal "Black Hole"?: Extraterritorial state action and international treaty law on civil and political rights' (2005) 26(3) *Michigan Journal of International Law* 739 – 806). Thus, Hungary's obligations under the ECHR and under other international human rights treaties remained applicable in cases of transfer of unlawfully present refugees through the gate of the border facility.

When it comes to EU law, Article 3(1) of the [Procedures Directive](#) establishes that: 'This Directive shall apply to all applications for international protection made in the territory, including *at the border*, in the territorial waters or in the transit zones of the Member States [...]' (emphasis added). Thus, there is no denial that the right to seek asylum and the procedural safeguards established in the Directive do apply to instances of unlawfully present refugees who wish to apply for asylum as a matter of EU law. Likewise, the standards of reception, including on detention, in the [Receptions Directive](#) also apply. The "relocation" of unlawfully present refugees through the gate of the facility, which effectively denies them of any of the rights they are entitled to under EU law by leaving them in no man's land, constitutes a violation of EU law.

The newly enacted Hungarian legislation, however, would still allow these refugees to apply for asylum at the established transit zone: 'An application for asylum can only be submitted in person to the refugee authority, *exclusively in the transit zone*' (section 7 of the Act, emphasis added). At this point, the first scenario would overlap with the second, namely, the denial of access to asylum for refugees seeking *lawful* admission into Hungarian territory. Both groups of refugees would be located within Hungarian territory and at its border but, crucially, "outside" the border fence and thus prevented from advancing further. For their status as asylum-seekers to be recognised, they must apply for asylum at the transit zone. The difficulty with this approach is that in practice, there are only two operational transit zones, both along the Serbian border, and access to them is only given to about five persons a day Monday-Friday for each of the two transit zones (therefore, a total of 10 persons a day would have access to lodging an asylum application). In these circumstances, it is self-evident that the effective exercise of the right to seek asylum, as well as the entitlements that go with it under EU law, is not guaranteed for all refugees who wish to seek asylum. And indeed, the combined effect of these measures ("relocation" outside the border fence and limited access to the transit zones) has resulted in [very low figures](#) of officially recognised asylum-seekers.

A further element arises in this context, namely the collective nature of such removals. Insofar the denial of standards which may result in *refoulement* are undertaken without an individual examination of the case, the well-established case-law of the European Court of Human Rights suggests that they may amount to collective expulsions, prohibited by Article 4 of Protocol 4 ECHR (See, [Hirsi Jamaa and Others v. Italy](#); [Khlaifia and Others v. Italy](#)).

The Hungarian government argues that the newly implemented restrictions on asylum are allowed under the framework of the state of emergency, which has been in place since September 2015 and now prolonged until September 2017, giving a sense of the durable nature of what should be an exceptional state of affairs. However, Article 15 ECHR explicitly excludes derogations to Article 3 ECHR and the Charter of Fundamental Rights of the EU does not include any provision on states of emergency. Furthermore, derogations to rights under Article 15 ECHR can only be invoked in time of war or other public emergency *threatening the life of the nation* and only to the extent *strictly required* by the situation (principle of proportionality). The threshold for such derogations is very high, as evidenced by the failure

of the United Kingdom to meet the strict requirements of the ECHR in the case of foreign terrorist suspects following the September 11<sup>th</sup> attacks ([A. and Others v. the United Kingdom](#)).

### 3. Deprivation of Liberty

Once refugees manage to apply for asylum in one of the two transit zones and they are admitted into the procedure, they become officially recognised asylum-seekers. The newly enacted legislation provides that they be accommodated in closed transit facilities. This measure also applies to asylum-seekers currently waiting for a decision on their case, as the law establishes that they be removed to those facilities at the border. This measure applies to all asylum-seekers, including all vulnerable persons and unaccompanied children over 14 years of age. However, no detention order will be issued and therefore, no remedy is available to challenge both its lawfulness as well as its conditions. This scheme has already been found to be in violation of the ECHR by the European Court of Human Rights in the case of [Ilias and Ahmed v. Hungary](#). The Court found that the *de facto* deprivation of liberty of the applicants (two Bangladeshi asylum-seekers) constituted a violation of Articles 3, 5 and 13 ECHR. The government however, disagrees with these findings and has already announced that it will seek a judgment of the Grand Chamber on the case.

This system is also in violation of EU law. In [Kadzoev](#), the Court of Justice of the EU ruled on the interpretation of the detention provisions in the Reception Conditions Directive, as they apply to asylum-seekers. The Court has recently pronounced itself in [Al Chodor](#) on the specific safeguards that apply to detention, whose lawfulness requires that it be 'subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness' (para. 40). For a full analysis of detention standards under EU Law and the ECHR, see the European Law Institute Statement on "[Detention of Asylum Seekers and Irregular Migrants and the Rule of Law](#)" (forthcoming).

### 4. Serbia as a "Safe Third Country"

The new legislation establishes that '[a]fter the communication of a decision that cannot be challenged by further requests for remedy, the person seeking recognition shall leave the transit zone' (Section 7 of the Act). In practice, given that -as already indicated before- the transit zones are located in the Hungarian-Serbian border, this would amount to removals of any rejected asylum-seeker to Serbia (regardless of whether this was the entry point into Hungary or not), which further to legislative changes in 2015, is now considered by Hungarian law as a "safe third country" (Government Decree no. 191/2015. (VII.21.) on safe countries of origin and safe third countries). While the European Court of Human Rights has not entered into the merits of this decision, it notes that such classification is 'of particular concern to the Court' ([Ilias and Ahmed v. Hungary](#), para. 121) given that

'the 2015 legislative change produced an abrupt change in the Hungarian stance on Serbia from the perspective of asylum proceedings [...]. The altered position of the Hungarian authorities in this matter begs the question whether it reflects a substantive improvement of the guarantees afforded to asylum-seekers in Serbia. However, no convincing explanation or reasons have been adduced by the Government for this reversal of attitude, especially in light of the reservations of the UNHCR and respected international human rights organisations [...].' ([Ilias and Ahmed v. Hungary](#), para. 120)

Expected removals from Hungary to Serbia of asylum-seekers whose applications are rejected in a final decision (on any grounds, not just “safe third country” grounds) would take place within the legal framework established by the [EU-Serbia Readmission Agreement](#). However, this agreement was suspended by Serbia in September 2015, following the building of the fence. Nevertheless, reports indicate that despite the formal refusal from Serbia to take back any rejected asylum-seekers, in practice, removals take place regularly from Hungary to Serbia by means of physically removing failed applicants across the border fence.

While EU law allows for the designation of “safe third countries” and for accelerated/border procedures for asylum-seekers coming from such countries, such designation needs to meet certain criteria and refusals of asylum on “safe third country” grounds are subject to judicial scrutiny.

Furthermore, the concept of “safe country” itself is founded on the assumption that there is an international principle by virtue of which a refugee must apply for protection in the first safe country that they reach, but such an international principle does not exist (M-T Gil-Bazo, [‘The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited’](#) (2006) 18 (3-4) *International Journal of Refugee Law* 571-600). Therefore, the use of the concept poses particular challenges, whether among EU Member States (within the Dublin system) or between them and third countries, such as Hungary-Serbia. I have argued elsewhere that in practice a readmission regime based on the “safe country” concept is impossible to meet outside the establishment of a single jurisdiction on asylum matters, coupled with a mutual recognition of positive protection decisions (M-T Gil-Bazo, ‘The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice’ (2015) 33(1) *Netherlands Quarterly of Human Rights* 42-77).

## 5. Conclusion

The legislative changes recently enacted in Hungary raise a number of serious issues in relation to the effective protection of the rights of refugees in Hungary, and therefore in the European Union as a whole, insofar as their compatibility with EU asylum law is questionable. Some of those changes have already been ruled by the European Court of Human Rights as being against the ECHR. Other pending cases before the ECHR, such as [N.D. and N.T. v. Spain](#) will offer the Court further opportunities to apply its well-established body of case-law on asylum procedures and continue to shape standards of refugee protection in border situations. Likewise, the European Commission may need to consider, in accordance with its role as “guardian of the Treaties”, lodging infringement proceedings against Hungary for violations of EU law arising from these legislative changes and following on from its previous [infringement proceedings](#), lodged in December 2015 and which do not seem to have received much [follow-up](#) since then.

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(This journal entry is an expression of the author's own views, and not necessarily those of EDAL or ECRE)

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