



Case Law Fact Sheet: Prevention of Dublin Transfers to Hungary

January 2016



Introduction

This fact sheet is devoted to jurisprudence¹ preventing transfers under Regulation 604/2013 (Dublin III Regulation)² to Hungary. Its scope is limited to case law from European Union Member States supported by policy and non-governmental material to illustrate the grounds on which the judiciary are suspending transfers to Hungary. In light of the substantial amount of case law on the topic, the note in no way purports to be a fully comprehensive review of Member State practice, nonetheless the jurisprudence included serves as a unique tool for practitioners to consult and use in their own respective litigation. It is to be seen against the backdrop of the Commission's infringement proceedings against Hungary³ and the new systematic monitoring process outlined in the European Agenda on Migration,⁴ as well as several cases pending before the European Court of Human Rights and an urgent preliminary reference to the Court of Justice of the European Union lodged by Debrecen Administrative and Labour Court in the context of asylum law.⁵ The note therefore provides a further layer of examination and analysis, one which is jurisprudential in nature and which should be borne in mind when evaluating the adherence of Hungary to European and international legal obligations.

Given the substantial amount of case law on the subject, the fact sheet is limited to cases from 2015. The temporal limit has been chosen in order to draw upon up to date argumentation used by Courts but is equally a long enough period to accurately track how reasoning has evolved during the year. The note only covers cases which have prevented transfers to Hungary on the basis that such a transfer would violate international or European law. The aim of the note is to map and raise awareness of developments in Hungary and their impact on legal scrutiny and argumentation elsewhere. As an extension of this it is clearly arguable that where one Court prevents transfer to another State on the basis of a real risk of an Article 3 [European Convention on Human Rights](#) or Article 4 [Charter of Fundamental Rights of the European Union](#) violation, it should raise alarm bells for other Courts and administrative authorities to follow suit when deciding on similar cases.⁶

¹ The majority of cases included are publicly accessible and can be found on domestic case law databases, links of which are available on the [EDAL country profile page](#). Where an English summary on EDAL has been completed, the link is cited in the foot notes.

² 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 stateless person (recast), OJ L180/31.

³ European Commission, 'Commission opens infringement procedure against Hungary concerning its asylum law' (10 December 2015), accessible at: <http://bit.ly/1XYJ79p>.

⁴ European Commission, European Agenda on Migration, COM(2015) 240, 12 see also European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)) raises serious concerns over recent legislative amendments in Hungary "rendering access to international protection extremely difficult" and urges the Commission to "initiate immediately an in-depth monitoring process concerning the situation of democracy, the rule of law and fundamental rights in Hungary."

⁵ European Court of Human Rights, Applications No. 44825/15 and No. 44944/15; CJEU, Case C-695/15 PPU, *Mirza*, lodged on the 23 December 2015. The questions are yet to be published on curia.

⁶ This conclusion is based on Article 4 of the Charter and Article 3 of the European Convention of Human Rights, as demonstrated in ECtHR (GC), *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 Jan. 2011, confirming that the practical implementation of protection standards must be verified and transfer prevented where there is a real risk of an Article 3 violation if the transfer were undertaken. See also NGO calls to suspend transfers to Hungary: Organisation Suisse d'aide aux réfugiés, 'Stopper les renvois Dublin vers la Hongrie' (25 September 2015); Amnesty International, *Fenced out: Hungary's violations of the rights of refugees and migrants*, October 2015, EUR 27/2614/2015; ECRE, *Crossing Boundaries: The new asylum procedure at the border and restrictions to accessing protection in Hungary*, October 2015.

Given the aim of the paper, cases where a transfer was ultimately allowed to Hungary will not be discussed. However, it is worth signalling that in 2015 administrative authorities did undertake transfers to the country, as is evidenced by recent statistics that out of 39,299 take charge and take back requests from Member States from January 2015 - November 2015, 1,338 successful transfers actually took place.⁷

The cases have been collated via various channels, including notification of cases by the [European Legal Network on Asylum \(ELENA\)](#) co-ordinators and lawyers, [Asylum Information Database \(AIDA\)](#) Country Updates, an information note on Dublin transfers post-Tarakhel, completed by the ELENA Network⁸, and ECRE's own desk research.

Mapping jurisprudence

An overwhelming amount of recent case law has cited the August and September legislative amendments to the Hungarian Asylum Act⁹ when preventing transfers to the country.¹⁰ Moreover, the Hungarian legislative revisions have impacted upon policy changes elsewhere as evidenced by the **Danish** Refugee Appeals Board decision in October 2015 to suspend all Dublin transfers to Hungary.¹¹ In conjunction with said decision a request to the Danish Immigration Service was made to launch a general consultation on whether Hungary presently accepts Dublin returnees from EU Member States, as well as whether Hungary observes its obligations under international law.¹²

Reference to specific provisions of the revised Asylum Act and the effects on those seeking international protection, as cited by courts, have been organised into the following sub-sections: I. Access to Protection; II Detention; III Reception conditions.

I. a. Access to protection

The entry into force in August and September 2015 of legislation¹³ creating a legal basis for the construction of a fence on the border between Hungary and Serbia in conjunction with further legislative amendments¹⁴ criminalising irregular entry and damage to the fence has resulted in an extremely hostile environment towards those seeking asylum, violating the right to asylum, the right to effective access to procedures and the non-criminalisation of refugees.¹⁵ Additionally such measures raise serious tension with Directive 2010/64/EU on the right to interpretation during criminal proceedings as well as the right to information codified in Directive 2012/13/EU.¹⁶ Effectively placing the country well outside any of the

⁷ Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36 of the European Convention on Human Rights Applications No. 44825/15 and No. 44944/15, December 2015, CommDH(2016)3, 9, accessible at: <http://bit.ly/1PbwsFF>

⁸ ELENA Information Note, Dublin transfers post Tarakhel: Update on European case law and practice, October 2015, 11, accessible at: <http://bit.ly/1Oi9Frv>.

⁹ Act LXXX of 2007 on Asylum, accessible at: <http://bit.ly/1IFdMk2>.

¹⁰ Act CXXVII of 2015 on the temporary closure of borders and amendment of migration related acts, accessible at: <http://bit.ly/1CWxANR> and Act CXL of 2015 on the amendment of certain Acts related to the management of mass migration, accessible at: <http://bit.ly/1HWXFct>.

¹¹ Flygtningenævnet stopper tilbagesendelser af flygtninge til Ungarn, accessible at: <http://bit.ly/1nxA7YG>.

¹² ELENA Legal Update, 6 November 2015, accessible at: <http://bit.ly/1nxAcvC>.

¹³ Act CXXVII of 2015.

¹⁴ Act CXL of 2015.

¹⁵ Article 18 of the Charter of Fundamental Rights, Recital 25, 26 and 29 recast Asylum Procedures Directive and Article 31 of the 1951 Refugee Convention.

¹⁶ See European Commission letter, Ref. Ares(2015)4109816 - 06/10/2015, accessible at: <http://bit.ly/1SxlzUn>.

international and European instruments which it is obliged to follow, the Hungarian legislative and political framework for asylum seekers has been labelled as a “draconian regime” by the **Luxemburg** Administrative Tribunal¹⁷ and the “xenophobic” political rhetoric in the country has been lamented by **Austrian** Courts.¹⁸

Moreover, in a recent third party intervention in two European Court of Human Rights cases brought against Austria for the transfer of asylum applicants to Hungary, the Council of Europe Commissioner for Human Rights has submitted that the “current asylum law and practice in Hungary are not in compliance with international and European human rights standards. At the moment, virtually nobody can access international protection in Hungary.”¹⁹

In particular, detailed judgments from the Council of Alien Law Litigation in **Belgium**, who provide cogent reasoning based on the contextual legislative environment, have suspended Dublin transfers on grounds of a risk of an Article 3 ECHR violation upon return to the country and an erroneous reading by the administrative authority of country of origin information. In these rulings the Council finds that the legislative amendments have had a considerable impact on the treatment of asylum requests and reception conditions as well as access to the territory and the introduction of an asylum claim.²⁰ Notably, the Council makes reference to a purposeful and long term dissuasive policy towards refugees which sees the use of no man’s land, a legal fiction, in the establishment of the transit zones at the border as well as the introduction of an admissibility procedure characterised by highly compacted time tables for judicial review, a process which in itself places question marks over the quality and independence of decision making.²¹

It is the imposition of an admissibility procedure at the transit zones, and in particular the inadmissibility ground relating to the Safe Third Country concept, which has been at the forefront of most jurisprudence. Government Decree 191/2015 designates countries such as Serbia as safe, leading Hungarian authorities to declare all applications of asylum seekers coming through Serbia as inadmissible.²² Given the location of the transit zones at the Hungarian-Serbian border over 99% of asylum applications, without an in-merit consideration of the protection claims, have been rejected on this basis by the Office of

¹⁷ Luxemburg Administrative Tribunal, Decision of 19 September 2015, 36966, as reported in the ELENA Legal update, 6 November 2015, accessible at: <http://bit.ly/1QFLfig>.

¹⁸ Federal Administrative Court, Decision of 24 September 2015 W185 2114721-1; Decision of 28 September 2015 W185 2114671-1 W105 2112758-1; W168 2110928-1 29.09.2015; Decision of 30 September 2015, W168 2109023-1. AIDA Country Report Austria: Fourth Update, accessible at: <http://bit.ly/1KGTarL>, 32. For more information on the anti-immigration rhetoric and physical as well as legal barriers to accessing protection in Hungary please see ECRE, Crossing Boundaries: The new asylum procedure at the border and restrictions to accessing protection in Hungary, October 2015.

¹⁹ Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36 of the European Convention on Human Rights Applications No. 44825/15 and No. 44944/15, December 2015, CommDH(2016)3, accessible at: <http://bit.ly/1PbwsFF>.

²⁰ S.O. v. Austria and A.A. v. Austria

²¹ Council of Alien Law Litigation, Decision of 15 December 2015, 158.631, 158.621 and 181 584, and Decision of 13 December 2015, 158 281 accessible at: <http://bit.ly/1OG5wxw>.

²² Ibid see Act CXL of 2015. Decisions on the appeal against a decision taken in the transit zone can be provided by a court clerk, ECRE, Crossing Boundaries, 20. It is worth noting that in an admissibility procedure which is not conducted at the transit zones a hearing is not mandatory during the judicial review proceedings. Applicants must specifically request a hearing, information which is not provided to them prior to the judicial review. Moreover, judicial review against inadmissibility decisions which are not based on the Safe Third Country concept do not have suspensive effect on the removal order. AIDA Country Report Hungary: Fourth Update, 29

²² AIDA Country Report Hungary: Fourth Update, 24

Immigration and Nationality (OIN).²³ Moreover, the clear EU procedural violations that this process gives rise to have been documented by the Hungarian Helsinki Committee as well as ECRE.²⁴ From the latest statistics this process is still in full swing with the Commissioner for Human Rights submitting that between mid-September and the end of November 2015, 311 out of the 372 inadmissible decisions taken at both the border and in accelerated procedures were found as such on the safe third country concept ground.²⁵ With a clear lack of an effective remedy against such a decision available and an immediate accompanying entry ban for 1 or 2 years, various actors as well as the judiciary have argued that Hungary is in breach of its *non-refoulement* obligations.²⁶

Whilst Articles 51(2)(e) and 51(4)(a)-(b) of Act CVI of 2015 alongside the Government Decree 191-2015 sees Serbia as a country whereby the applicant could apply for effective protection, the same finding has not been voiced by the UNHCR²⁷, the UN Committee against Torture²⁸ and the Supreme Court of Hungary, which followed arguments presented by the Hungarian Helsinki Committee finding that it was in breach of the ECHR to consider Serbia as a safe third country.²⁹

The lack of access to effective procedures, an effective remedy, legal aid and information in Serbia has been well documented³⁰ and it is this real risk of indirect or chain *refoulement* from Hungary to Serbia and then beyond that has been raised by many national Courts in their suspension of transfers to Hungary. In **Germany**³¹ a recent case has confirmed that

²³ Hungarian Helsinki Committee, No Country for Refugees, September 2015, accessible at: <http://bit.ly/1N95k92>, 2.

²⁴ See AIDA Country Report Hungary: Fourth Update, 71 onwards providing a table of the discrepancies in the transposition of EU law by Hungary. The automatic rejection of these cases violates the requirement codified in Article 10(3)(a) of the recast asylum procedures Directive, requiring an individual, objective and impartial decision to be taken on an asylum claim. For further details please see Crossing Boundaries documenting the issuance of decisions at the transit border in sometimes less than an hour, eradicating any possibility of a complete examination of the application as prescribed in Article 10 of the recast Asylum Procedures Directive. It also renders redundant Article 38(2)(a) of the recast Asylum Procedures Directive, obliging the Member State to assess whether it would be reasonable for an applicant to go there in his or her individual circumstances. Any possibility for the applicant to exercise his or her right to be heard under the Charter is also nullified to the extent that the three day time limit to contest the OIN's decision is often not communicated to the applicant, there is no access to legal assistance and the burden of proof on the applicant requires proof that he or she could not present an asylum claim in Serbia, a far higher standard than "substantiate" required in the recast Asylum Procedures Directive.

²⁵ Third Party Intervention by the Council of Europe Commissioner for Human Rights, 4.

²⁶ *Ibid*, 8-9.

²⁷ UNHCR, UNHCR urges Europe to change course on refugee crisis, 16 September 2015.

²⁸ UN Committee against Torture, Concluding Observations on Serbia, CAT/C/SRB/CO/2, 15.

²⁹ Opinion No. 2/2012 (xii.10) KMK of the Supreme Court of Hungary (Kúria) on certain questions related to the application of the safe third country concept. A policy which was followed by the OIN up until August 2015. See Celebrating 30 years of the ELENA Network: 1985-2015, accessible at: <http://bit.ly/1PcXz3i>.

³⁰ ELENA /EDAL desk research on the procedural and reception system for asylum seekers in Serbia, October 2015, accessible at: <http://bit.ly/1GpK5U6>.

³¹ See also Dusseldorf Administrative Court, Decision of 21 October 2015, 13 L 3465.15.A; Minden Administrative Court, Decision of 10 September 2015, 3 L 806.15.A; Kassel Administrative Court, 24 July 2015, 6 L 1147-15.KS.A; Augsburg Administrative Court, Decision of 18 August 2015, Au 6 K 15.50155; Würzburg Administrative Court, Decision of 13 August 2015, W 7 S 15.50248; Potsdam Administrative Court, 4 September 2015, 4 L 810/15.A, accessible at: <http://bit.ly/1O9bawv>; Administrative Court Münster, Decision of 7 July 2015, 2 L 858/15.A; Administrative Court Augsburg, Decision of 3 August 2015, Au 5 K 15.50347; Frankfurt/Oder Administrative Court, Decision of 7 August 2015, VG 3 L 169/15.A; Potsdam Administrative Court, 20 July 2015, VG 6 L 356/15.A; Düsseldorf Administrative Court, 17 July 2015, 8 L 1895/15.A; München Administrative Court, 17 July 2015, M 24 S 15.50508; Cologne Administrative Court, 8 September 2015, 18 K 4584/15.A; Arnsberg Administrative Court, 4 November 2015, 6 L 1171.15.A; Kassel Administrative Court, 7. August 2015, 3 L 1303/15.KS.A; Minden Administrative Court, 5 October 2015, 1 L 756.15.A; Düsseldorf Administrative Court, Decision of 11 September 2015, 8 L 2442.15.A; München Administrative Court, 11 September 2015,

Hungary is manifestly unwilling to meet its obligations under European law. In this specific case the German Administrative Court stated that in the third quarter of 2015 Hungary accepted 2,570 of the 4,303 take back requests from Germany, however only 40 took place during this period, corresponding to a 1.56% transfer rate.³² In **Belgium**,³³ transfers have been prevented on grounds that Hungary violates the *non-refoulement* principle, in **Austria** on the basis that the safe third country concept impedes effective access to the procedure, in violation of EU and international law,³⁴ in **Switzerland**³⁵ and **Belgium**³⁶ on grounds that specific attention needed to be paid to the legislative changes, which the first instance authorities had failed to do, in **Norway** on the risk of chain *refoulement* to Serbia³⁷ and in **Luxembourg** on grounds that Hungary proceeds in an automatic rejection of asylum applications on the basis of the safe third country concept.³⁸

I. b. Access to protection – Dublin returnees

The situation of Dublin returnees to Hungary has, of course, been cited consistently in jurisprudence. Notwithstanding that the safe third country list entered into force on the 1st August 2015, the OIN has confirmed that it has retroactive application and would therefore apply to persons returning to Hungary under Dublin.³⁹ Dublin returnees will, therefore, find themselves at the brunt end of an inadmissibility or subsequent application procedure more than likely leading to an inadmissibility finding.

Since subsequent applicants are subject to the requirements of presenting new facts or circumstances; a possible denial of a personal hearing and in some cases a lack of suspensive effect and entitlement to reception pending judicial review proceedings and inadmissible applications are conducted under truncated time tables without a right to be heard, either one or both of these procedures leads to a heightened risk of *refoulement* to Serbia and beyond.⁴⁰ In this regard it is worth pointing out that applicants – including those

M_23_K_15_50045; Augsburg Administrative Court, Decision of 18 August 2015, Au 6 K 15.50155; Düsseldorf Administrative Court, Decision of 20 August 2015, 15 L 2556/15.A; Saarland Administrative Court, Decision of 12 August 2015, 3 L 816.15; Düsseldorf Administrative Court, Decision of 3 September 2015, 22 L 2944.15.A, accessible at: <http://bit.ly/1QHKJoX>; Düsseldorf Administrative Court, Decision of 11 August 2015, 22 L 2559.15.A; Minden Administrative Court, Decision of 2 October 2015, 19 L 923/15.A, accessible at: <http://bit.ly/1O9biMc>;

³² Cologne Administrative Court, Decision of 22 December 2015, 2 K 3464/15.A.

³³ Council of Alien Law Litigation, Decision of 15 December 2015, 158.631, accessible at: <http://bit.ly/1OG5wxw>.

³⁴ Federal Administrative Court decision of 10 December 2015, W185 2111200-1 and W185 2109594-1, decision of 7 December 2015 W185 2113261-1 07, Decision of 3 December 2015, W185 2116831-1 and W185 2110375-1.

³⁵ Federal Administrative Court, Decision E-5961/2015 of 29 September 2015; Federal Administrative Court, Decision D-6089/2014 of 10 November 2014; Federal Administrative Court, Decision E-6571/2015 of 27 October 2015, Federal Administrative Court, Decision D-6576/2015 of 29 October 2015, Federal Administrative Court, Decision E-6626/2015 of 22. October 2015, Federal Administrative Court, Decision E-6106/2015 of 1. October 2015, Federal Administrative Court, Decision E-5961/2015 of 29 September 2015. In all of these decisions, the case was remitted to the first instance authority to provide further clarifications on the current situation in Hungary, they are therefore not final.

³⁶ Council of Aliens Law Litigation, Decision of 15 December 2015, 158 621 and Council of Aliens Law Litigation, Decision of 13 December 2015, 158 281.

³⁷ Information received from the Norwegian ELENA co-ordinator, 11 January 2016. In the unanimous Immigration Appeals Board (UNE) decision, UNE also refers to domestic jurisprudence elsewhere in order to prevent return to Hungary on the basis it would breach the principle of *non-refoulement*.

³⁸ Luxemburg Administrative Tribunal, Decision of 19 September 2015, 36966, as reported in the ELENA Legal update, 6 November 2015, accessible at: <http://bit.ly/1QFLfig>.

³⁹ AIDA Country Report Hungary: Fourth Update, 24.

⁴⁰ Berlin Administrative Court, Decision of 15 January 2015, VG 23 L 899/14. A; Düsseldorf Administrative Court, Decision of 12 January 2015, 13 L 3109/14.A as referenced in ELENA Information Note, Dublin

subject to the Dublin Regulation – have 9 months from the tacit withdrawal of an application to request the continuation of the asylum procedure.⁴¹ Failure to do so means that the application is viewed as a subsequent one, in direct violation of Article 18(2) of the Dublin Regulation and Article 28(3) of the recast Asylum Procedures Directive. Subsequent applications are also imposed where the applicant has withdrawn their application in writing (often done where an applicant is in detention and release is contingent on such a withdrawal) and where the applicant has received a negative decision and had not sought judicial review.⁴²

It is this quasi-denial of access to the asylum procedure and the consequent risk of a violation of Article 33 of the 1951 Refugee Convention and Article 18 and 19 of the Charter that decisions from Courts have picked up upon. Findings from the Council of Alien Law Litigation in **Belgium** as well as the Federal Administrative Courts in **Austria**⁴³ have resulted in the suspension of transfers on the grounds that there is no guaranteed access to the asylum procedure, sufficient procedural safeguards or reception conditions for most Dublin returnees to Hungary.⁴⁴ In Belgium the latest decision to suspend a transfer was accompanied by a severe condemnation of the administrative authority's flawed reading of legislative amendments, which provided no rebuttal to the argumentation that the applicant's claim would inevitably be viewed as an inadmissible one. The Council found the examination of admissibility to be highly superficial in Hungary with a real risk of the applicant being 'refouled' to Serbia.⁴⁵ As a concrete example of this occurring, which has been quoted by German and Belgian Courts, ECRE has reported a young Afghan asylum seeker who, upon return to Hungary under Dublin, was issued with an inadmissibility decision on the basis of the safe third country concept and given an order of expulsion along with a re-entry ban.⁴⁶ According to the Hungarian Helsinki Committee this practice happens on a regular basis.⁴⁷

In the most recent decision from the **Austrian** Federal Administrative Court, the judiciary also finds that there is no guarantee that a Dublin returnee to Hungary would not be subjected to chain *refoulement*.⁴⁸ Similarly, the Council of State in the **Netherlands** has prevented return on the basis that there are severe doubts as to whether transfer to Hungary would breach Article 3 of the Convention and, thus, whether mutual trust could be upheld.⁴⁹

transfers post Tarakhel: Update on European case law and practice, October 2015, 11, accessible at: <http://bit.ly/1Oi9Frv>.

⁴¹ Section 66(6) Asylum Act.

⁴² AIDA Country Report Hungary: Fourth Update, 24. ECRE, Crossing boundaries, The new asylum procedure at the border and restrictions to accessing protection in Hungary, 34.

⁴³ For a comprehensive analysis see Federal Administrative Court, Decision of 24 September 2015, W 1442114716-1 / 3 E.

⁴⁴ Council of Alien Law Litigation, Decision of 11 September 2015, No 152 333, further reiterated in Council of Alien Law Litigation, Decision of 25 June 2015, No 148492 and Council of Alien Law Litigation, Decision of 23 June 2015, No 148 270. See AIDA Country Report Belgium: Fourth Update, 33 for further information.

⁴⁵ Council of Alien Law Litigation, Decision of 15 September 2015, 158.621.

⁴⁶ AIDA Crossing boundaries, The new asylum procedure at the border and restrictions to accessing protection in Hungary, October 2015, accessible at <http://bit.ly/1PDYU7e>, 35.

⁴⁷ Information received by the Hungarian Helsinki Committee on the 21 January 2016.

⁴⁸ Federal Administrative Court, Decision of 30 December 2015, W185 2110998-1.

⁴⁹ Council of State, Judgment of 26 November 2015, 201507248/1; Council of State, Judgment of 26 November 2015, 201507322/1/V3, accessible at: <http://bit.ly/22ZUHB6>; Statements by the president of the Administrative Jurisdiction Division of the Council of State (Department) on September 22 2015 (201506653/2 / V3) and September 23, 2015 (201507322/2 / V3).

This has been confirmed by the Secretary of State for Security and Justice in the Netherlands who issued a letter on the figures of Dublin requests and actual transfers to other EU Member States. Explaining the large gap between the number of take charge or take back requests and number of transfers actually carried out, the Secretary referred to the example of Hungary whereby transfers could not be undertaken without the ensuing risk of a violation of Article 3 ECHR.⁵⁰

Finally, in an October decision from the Minden Administrative Court, which extensively assesses country of origin information on Serbia, the Court finds that current evidence shows no significant change from the UNHCR position of 2012. Indeed, the Court finds that due to the inadequate asylum system in Serbia there is a risk that the applicant will be deported without a substantive examination of their application to Macedonia and then subsequently to Greece. According to the Court, which refers to the systemic flaws in Greece's asylum system, there is a risk of chain deportation violating the principle of *non-refoulement* and thus Article 18 of the Charter of Fundamental Rights if the applicant were sent to Hungary.⁵¹

II. a. Detention

The scale, frequency and conditions of detention for asylum seekers has been a consistent concern to both NGOs and international institutions, with the ECtHR ruling in September 2015 that there had been a lack of assessment on the part of the Hungarian Courts justifying the prolongation of a detention order.⁵² Similarly domestic Courts have prevented transfers, *inter alia*, on the grounds of systematic detention, the ineffectiveness of appealing against a detention order and the risk that particularly vulnerable applicants would be detained. The argumentation advanced by the Courts still ring true, with conditions arguably deteriorating further in light of legislative amendments.

As an illustration, **German** Administrative Courts have found that transfers could not be effectuated towards Hungary on grounds of a risk of ensuing Article 6 and 52(1) of the Charter as well as Article 5(1) of the ECHR violations.⁵³ In particular the Courts have argued that detention orders under the asylum detention regime lack individual reasoning and examination as well as any assessment by the OIN on the necessity and proportionality of a decision to detain, ignoring any evaluation of alternatives to detention. **Austrian**⁵⁴ Courts have corroborated the argumentation that the imposition of detention by the administrative authority is arbitrary, disproportionate and excessive, thereby violating the principles of necessity and proportionality as required by EU law. Indeed, statistics provided to the Hungarian Helsinki Committee highlighted that as of 2 November 2015, 52% of asylum seekers applying in Hungary were detained, moreover on 2 November 2015, the number of

⁵⁰ Council of State, Judgment of 26 November 2015, 201507248/1; Council of State, Judgment of 26 November 2015, 201507322/1/V3, a summary in English is accessible at: <http://bit.ly/22ZUHB6> and Letter of the State Secretary for Security and Justice to the President of the House of Representatives, The Hague, January 4 2016, Nr. 2114, accessible at: <http://bit.ly/1PbTNR1>.

⁵¹ Administrative Court of Minden, Decision of 2 October 2015, case no. 10 L 923/15.A, accessible at: <http://bit.ly/1O9biMc>.

⁵² ECtHR, Nabil and Others v Hungary, Application No 62116/12, Judgment of 22 September 2015, para 42 where there was an apparent lack of assessment on the part of the Hungarian Courts justifying the prolongation of detention.

⁵³ Berlin Administrative Court, Decision of January 23, 2015, Az. 23 L 717.14 A; Munich Administrative Court, Decision of 20 February 2015, Az. M 24 S 15.50091; Cologne Administrative Court, Decision of July 15, 2015, Az. 3 K 2005 / 15.A.

⁵⁴ Austria Federal Administrative Court, Decision of 24 September 2015, W 1442114716-1 / 3 E.

asylum seekers in detention exceeded those accommodated in open reception centre.⁵⁵ No doubt the scale of detention has been spurred on by the arbitrary interpretation attributed to the risk of absconding as well as the threat to public safety, squarely hinging upon legislative amendments allowing for the criminalisation of irregular entry.⁵⁶

Legislative amendments in the detention regime call into question compliance with EU secondary law, namely a lack of detailed regulation on the application of alternative measures to detention,⁵⁷ a period of detention envisaged throughout the asylum procedure, including during judicial review⁵⁸ and the ineffectiveness of a remedy against detention.⁵⁹ The latter has been most notably focused upon by **German** Courts who have assessed the judicial review of a detention order as inadequate, done so as to ensure that the maximum period of detention can be fully exploited⁶⁰ and, thus, symptomatic of a formality rather than any real assessment of the legality of detention.⁶¹

Hindering the exercise of an effective remedy,⁶² then, the Courts have confirmed that a person held within administrative detention in Hungary becomes little more than an object of the detention order and its prolongation.⁶³ This is in line with the latest country reports by NGOs which highlight a failure in Hungary “to carry out an individualised assessment as to the necessity and the proportionality of detention,”⁶⁴ the Commissioner for Human Rights who notes the insufficient use and lack of clear rules of alternatives to detention⁶⁵, as well as

⁵⁵ AIDA Country Report Hungary: Fourth Update, 59. This information was provided to the HHC and UNHCR by the OIN.

⁵⁶ AIDA Country Report Hungary: Fourth Update, 60-61.

⁵⁷ Provided for by Article 8(4) of the recast Reception Conditions Directive but incorrectly transposed by Article 31/A(1)(F) Asylum Act, see AIDA Country Report Hungary: Fourth Update, November 2015, 71 onwards.

⁵⁸ In contradiction to Article 9(1) recast Reception Conditions Directive. AIDA Country Report Hungary: Fourth Update, November 2015, available at: <http://bit.ly/1NCzPqm>, 63, a change which has come into force as of 15 September 2015 following on from the adoption of Act CXL of 2015 on the amendment of certain Acts related to the management of mass migration amending Act LXXX of 2007 on Asylum. The Section foresees that the court hearing is only obligatory in case the applicant is in asylum detention. As the Hungarian Helsinki Committee highlights, this “indicates that the legislator sees detention possible throughout the entire asylum procedure including the judicial review phase.”

⁵⁹ n automatic judicial review foreseen in Article 31/A(6) takes place at intervals of 60 days. A timing which cannot be viewed as reasonable along the lines of Article 9(5) of the recast Reception Conditions Directive.

⁶⁰ Cologne Administrative Court, Decision of July 15, 2015, Az. 3 K 2005 / 15.A, para 47, where the court finds the process to be reduced to that which is administratively convenient, i.e. bringing groups of detainees before the courts restricting an individual hearing to less than three minutes per case (para 45).

⁶¹ Düsseldorf Administrative Court, Decision 12 January 2015, 13 L 3109/14.A Note ECtHR, Nabil and Others v Hungary, Application No 62116/12, Judgment of 22 September 2015, para 42 where there was an apparent lack of assessment on the part of the Hungarian Courts justifying the prolongation of detention.

⁶² See ECtHR, Hilal v UK, Application No 45276/99, Judgment of 6 March 2001, para 75 and ECtHR, Conka v Belgium, Application No 51564/99, Judgment of 5 February 2002, para 46 which requires the circumstances created by the authorities to afford applicants a realistic possibility of using a remedy.

⁶³ Cologne Administrative Court, Decision of July 15, 2015, Az. 3 K 2005 / 15.A. For further detail please see AIDA Country Report Hungary: Fourth Update, November 2015, 70 which states that no legal assistance is provided in the first 72 hours of detention, the time allotted to lodge an objection against the OIN's decision to detain. Furthermore, officially appointed lawyers appointed for the prolongation of detention, made by the Court, often fail to provide effective legal advice.

⁶⁴ AIDA Country Report Hungary: Fourth Update, November 2015, available at: <http://bit.ly/1NCzPqm>, 68. ECRE, *Crossing Boundaries*, The new asylum procedure at the border and restrictions to accessing protection in Hungary, October 2015, accessible at <http://bit.ly/1PDYU7e>, 28.

⁶⁵ Third Party Intervention by the Council of Europe Commissioner for Human Rights, 5.

the Hungarian Supreme Court who have confirmed the ineffectiveness of “the judicial review of asylum detention, calling for improvements including at the legislative level.”⁶⁶

In addition to these arguments actors should further be aware of the contextual environment in Hungary with regards to detention, epitomised by the procedural laxity with which the newly established transit zones and specific admissibility procedure operate in (described above). As highlighted by NGOs and the European Commission itself, the transit zones give rise to conditions which amount to a deprivation of liberty⁶⁷, but yet the legislation establishing such zones ignore obligations under the recast Reception Conditions Directive with regards to a reasoned detention order in writing, the procedures for challenging an order and the possibility to request free legal assistance and representation.⁶⁸

II. b. Detention – Dublin returnees

The case law also raises additional elements which are specific to Dublin returnees and confirmed by other States. For example the Cologne Administrative Court Decision, 20 L 98/15.A, recently confirmed by an Oldenburg decision, concludes that Dublin returnees are systematically and thus arbitrarily detained upon return.⁶⁹ Based on the findings of the reports of the UNHCR and PRO ASYL, the Oldenburg Court found that systematic flaws are present in the Hungarian detention process, whereby Dublin returnees are regularly and indiscriminately detained, which is exacerbated by the fact that Hungarian Asylum law enables the detention of asylum seekers of up to 6 months. The Court further found that grounds for possible detention are broadly and vaguely formulated and the order for imprisonment from the administrative authorities does not even cite grounds. This leads to a practice whereby Dublin returnees are generally assumed to be at a risk of absconding and immediately imprisoned upon return. Such a blanket approach in the absence of a case by case examination and where an alternative to prison is rarely considered violates the proportionality principle. The Court notes that Hungarian Courts generally impose the maximum 60 day detention and an asylum detainee’s hearing generally lasts less than 3 minutes.⁷⁰ This finding has been further reiterated by a recent ruling from the **Austrian** Constitutional Court confirming that Dublin returnees are regularly detained.⁷¹

II. c. Detention – Conditions

The conditions within detention are also referred to in jurisprudence. In particular specific analysis is undertaken by the **Austrian** Federal Administrative Court who has consistently concluded on the basis of NGO country reports that the conditions of Debrecen detention centre to be inadequate for the purposes of detaining children.⁷² Whilst the centre has since

⁶⁶ Third Party Intervention by the Council of Europe Commissioner for Human Rights, 6.

⁶⁷ Section 71/A (4) of Act LXXX of 2007 on Asylum, AIDA Country Report Hungary: Fourth Update, 11. European Commission, Directorate General: Migration and Home Affairs, Ref. Ares (2015)4109816, 6 October 2015, accessible at: <http://bit.ly/1SxlzUn>, 4

⁶⁸ Article 9 (2) and (4) of the recast Reception Conditions Directive, see European Commission, Directorate General: Migration and Home Affairs, Ref. Ares (2015)4109816, 6 October 2015, accessible at: <http://bit.ly/1SxlzUn> for further details.

⁶⁹ Cologne Administrative Court, Decision of 18 February 2015, 20 L 98/15.A.

⁷⁰ Oldenburg Administrative Court, Decision of 2 November 2015, 12 A 2572.15, accessible at: <http://bit.ly/1RH9wVN>.

⁷¹ Austrian Constitutional Court, Decision of 24 November 2015, E1363/2015.

⁷² Federal Administrative Court, Decision of 24 September 2015, W144 2114716-1; decision of 10 December 2015, W185 2111200-1 and W185 2109594-1, decision of 7 December 2015 W185 2113261-1 07, decision of 3 December 2015, W185 2116831-1 and W185 2110375-1.

closed down the judgments explicitly state that the occupancy rates as well as conditions are constantly in flux in Békéscsaba and in Nyírbátor, as demonstrated in a report from December 2015 that the facilities in Nyírbátor were infested with bedbugs and that many people were without sweaters and were wrapped in bed sheets despite temperatures of 5 degrees centigrade.⁷³ Moreover, common to both of these detention centres and cited by German Courts is a lack of adequate medical and psychological care and reports of the use of handcuffs and leashes when moving persons from closed centres to external appointments.⁷⁴ Widely criticised by many actors this practice has been documented for several years without any sign of improvement.⁷⁵

Constituting a strong ground for the suspension of transfers to Hungary is the lack of a vulnerability screening mechanism, leading to the risk of vulnerable persons being detained,⁷⁶ exacerbated by the limited and non-exhaustive definition given to applicants with special needs and the long intervals of automatic judicial review of a detention order.⁷⁷ These judgments align themselves with reports by the Hungarian Helsinki Committee, confirming that “vulnerable persons with special needs such as the elderly, persons with mental or physical disability are detained and do not get adequate support..... a mechanism to identify persons with special needs does not exist”⁷⁸ as well as documentation from the Commissioner for Human Rights who during November 2015 was alerted to a continued detention of children with families as well as the systematic detention of unaccompanied minors, following dubious age assessment tests.⁷⁹

III. Reception

Reception conditions have also been the subject of jurisprudence with several Courts concluding, usually on the basis of specific vulnerabilities, that an applicant cannot be returned given the lack of assurances of appropriate care, whether it be medical facilities, age appropriate-housing or family unity.⁸⁰ This has featured in a September judgment from the High Administrative Court in **Austria**, which relying on the judgment by the European

⁷³ Human Rights Watch, Hungary: Locked up for Seeking Asylum, 1 December 2015.

⁷⁴ Cologne Administrative Court, Decision of July 15 2015, Az. 3 K 2005 / 15.A; Berlin Administrative Court, Decision of January 23 2015, Az. 23 L 717.14 A; Munich Administrative Court, Decision of February 20 2015, Az. M 24 S 15.50091.

⁷⁵ Nils Muižnieks, Council of Europe Commissioner for Human Rights, “Hungary’s response to refugee challenge falls short on human rights”, 27 November 2015; Hungarian Helsinki Committee, Information note on asylum-seekers in detention and in Dublin procedures in Hungary, May 2014, 17; Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 March to 2 April 2009, June 2010.

⁷⁶ See for example Minden Administrative Court, Decision of 16 July 2015, 3 K 3120.14.A; The Hague Regional Court, Decision of 16 October 2015, 11942.

⁷⁷ AIDA Country Report Hungary: Fourth Update, 62.

⁷⁸ AIDA Country Report Hungary: Fourth Update, 67.

⁷⁹ Third Party Intervention by the Council of Europe Commissioner for Human Rights, 7.

⁸⁰ Potsdam Administrative Court, Decision of 3 July 2015, 4 L 757.15.A; Gelsenkirchen Administrative Court, Decision of 22 June 2015, 18 a L 1261.15.A; Karlsruhe Administrative Court, Decision of 22 May 2015, 2 K 676.15; Munich Administrative Court, Decision of 18 May 2015, M 11 K 14.50681; Ansbach Administrative Court, Decision of 16 April 2015, AN 4 K 14.30119; Munich Administrative Court, Decision of 29 January 2015, M 10 K 14.550128; Minden Administrative Court, Decision of 21 January 2015, 3 L 1038/14.A; Munich Administrative Court, Decision of 7 January 2015, M11 S 14.50682 07.01.2015, accessible at: <http://bit.ly/1YxZUei>.

Court of Human Rights in *Tarakhel v Switzerland*, cast doubt on the appropriateness of accommodation in Hungary for families with children.⁸¹

Judgments over the summer placed a heightened attention on reception capacity in the country for all applicants, regardless of their specific vulnerabilities. Indeed, the Hungarian Helsinki Committee confirmed that on some weeks during the summer the occupancy rate of the reception centres fluctuated between 150%-250%.⁸² On account of these severe capacity problems and the ensuing risk of homelessness and treatment contrary to Article 3 of the ECHR, transfers were suspended from **Germany**,⁸³ **Luxembourg**⁸⁴ and **Austria**.⁸⁵ Evidence of a severe shortage of accommodation fed through to jurisprudence from the **Netherlands**, which found the inability of the Hungarian asylum system to deal with vulnerability, namely a screening mechanism to identify those with special needs, exacerbated by a severe lack of provisions within the already overcrowded and unhygienic reception centres.⁸⁶

It is worth noting that since the entry into force of Act CXL of 2015 and the construction of fences at both the Hungarian-Serbian and Hungarian-Croatian border, effectively blockading any access to Hungary, the number of persons compared to arrivals in the summer has fallen significantly. Nonetheless, the Hungarian authorities closed Debrecen reception centre, the largest in Hungary, in October 2015 with some of the remaining centres' conditions giving cause for concern, notably Balassagyarmat, a community shelter and Nagyfa, initially foreseen as a temporary instalment, comprised of heated containers and located inside the territory of a penitentiary.⁸⁷ These reception facilities are currently problematic⁸⁸ and it is easily foreseeable that they will deteriorate sharply in the event of an increase in numbers.

Lastly, and of particular interest, are cases in which the applicant has received refugee or subsidiary protection status in Hungary but the Courts have nonetheless suspended transfers on grounds that the individual will be left homeless, thus giving rise to a risk of inhumane treatment. In several Administrative decisions from the Court in Freiburg, **Germany**, the Court signals that protection status holders are in a particularly vulnerable

⁸¹ Austria High Administrative Court, Decision of 8 September 2015, Out 2015/18/0113 The Court rules that the legal assumption that Hungary is safe for asylum seeker did not exist at the time being and that the administrative authority had not conducted a thorough examination of the conditions within Hungary for asylum seekers. See AIDA Country Report Austria: Fourth Update, 36. ECtHR, *Tarakhel v. Switzerland* [GC], Application No. 29217/12, Judgment of 4 November 2014.

⁸² AIDA Country Report Hungary: Fourth Update, 51.

⁸³ Cologne Administrative Court, Decision of 15 July 2015, 3 K 2378.15.A; Münster Administrative Court, Decision of 10 July 2015, 2 L 880.15.A.

⁸⁴ Luxemburg Administrative Tribunal, Decision of 19 September 2015, 36966, as reported in the ELENA Legal update, 6 November 2015, accessible at: <http://bit.ly/1QFLfig>.

⁸⁵ Federal Administrative High Court, Decision of 8 September 2015, 2015/18/0113; Federal Administrative Court Austria, Judgment of 27 August 2015, W125 2111611-1/7E; 268. Federal Administrative Court, Decision of 7 September 2015, W1172113666-1.AE; Federal Administrative Court, Decision of 27 August 2015 W125 2111611; Federal Administrative Court, Decision of 1 October 2015 W144 2115014-1 1; W144 2115019-1; W144 2115016-1.

⁸⁶ Regional Court The Hague, Decision of 16 October 2015, 11942; Regional Court The Hague Decision of 16 April, 2015, 2215, Regional Court Roermond, Decision of April 9 2015, 4075.

⁸⁷ AIDA Country Report Hungary: Fourth Update, 50.

⁸⁸ Notably access to medical and interpretation services in all centres, AIDA Country Report Hungary: Fourth Update, 52.

position in Hungary with insufficient financial and employment support, lack of places in homeless shelters and threat of criminalisation if found sleeping in public places.⁸⁹

The decision of A.5.K 1862-13 by the Freiburg Court on the 13 October 2015 is of particular value not least because the case makes reference to practice in other Member States such as Austria, which, according to the Court, implements the suspensive effect of return decisions to Hungary on a regular basis since September 2015.⁹⁰ The Freiburg Court also cites a response given by the Federal government following on from a request by the German Bundestag in August enquiring as to the percentage of Dublin take charge requests, acceptances by Hungary and actual completed transfers. The Court confirms that approximately 80% of the number of take back requests sent by Germany to Hungary were accepted by the latter, but only 2% of this number were actually transferred for the first and second quarters of 2015. Whilst the reasons for unsuccessful transfers are unknown the Court raises as an additional point of interest the low percentage of actual transfer rates undertaken by Switzerland during the same period (approximately 16% of accepted take back requests). This contextual analysis, which further takes into account the general climate in Hungary towards asylum seekers and refugees and an insufficient willingness to integrate refugees into society, bolsters the Court's assessment that any transfer would be unlawful from the perspective of Article 3 of the Convention.

Conclusion

The cases compiled in this fact sheet demonstrate that submissions by litigants arguing against a transfer to Hungary on the basis of violations of Article 3 and 5 of the ECHR, Article 4, 6, 18 and 19 of the Charter in conjunction with Article 3(2) and 17(2) of the Dublin III Regulation have struck a chord with domestic Courts. The judiciary have relied extensively on the legislative amendments as well as documentation by NGOs on country conditions relating to reception and detention to support their findings that Hungary is in dereliction of its European and international obligations.

⁸⁹ Freiburg Administrative Court, Decision of 13 October 2015, A_5_K_1862-13; A_5_K_1405-13; A_5_K_2328-13.

⁹⁰ For the most recent cases see Federal Administrative Court decision of 10 December 2015, W185 2111200-1 and W185 2109594-1, decision of 7 December 2015 W185 2113261-107, decision of 3 December 2015, W185 2116831-1 and W185 2110375-1, all accessible at: <http://bit.ly/1ZLDEQB/>. For more information see AIDA Country Report Austria: Fourth Update, accessible at: <http://bit.ly/1KGTarL>, 35-37.

For country information on Hungary, please see:

AIDA, Country Report Hungary: [Fourth Update](#), November 2015

AIDA, [Crossing Boundaries, The new asylum procedure at the border and restrictions to accessing protection in Hungary](#), October 2015

AIDA, [Annual report 2014/2015](#), 10 September 2015

Amnesty International, [Fenced out: Hungary's violations of the rights of refugees and migrants](#), October 2015

Amnesty International, [Europe's Borderlands: Violations against refugees and migrants in Macedonia, Serbia and Hungary](#), July 2015

Council of Europe, [Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36 of the European Convention on Human Rights Applications No. 44825/15 and No. 44944/15](#), December 2015

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[Report by Nils Muižnieks](#), Council of Europe Commissioner for Human Rights, following his visit to Hungary, from 1 to 4 July 2014

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