



Hungarian Helsinki Committee

## BUILDING A LEGAL FENCE –

### Changes to Hungarian asylum law jeopardise access to protection in Hungary

*Information note*

*7 August 2015*

*The amendments to the Hungarian asylum legislation that enter into force on 1 August 2015 have the potential to dismantle the Hungarian asylum system and prevent refugees from having access to international protection in the country. Some provisions and policies are in breach of EU law and/or go against the clear principles established by the European Court of Human Rights or UNHCR guidance.*

*In 2015, the Hungarian-Serbian border section has become one of the three main entry points for irregular migrants and asylum-seekers to the EU. By early August, Hungary has registered over 103 000 asylum claims, the majority of whom from Afghanistan, Syria and Iraq. At the same time, most of them have moved on towards Western Europe in a couple of days or weeks. What is happening in Hungary with regard to asylum is a crucial challenge to the Common European Asylum System, therefore has direct impact on the entire EU and all its Member States.*

*The Hungarian Helsinki Committee (HHC) is deeply concerned that the present amendments will prevent refugees from accessing protection in Hungary and may lead to the de facto self-exclusion of the country from the Common European Asylum System.*

This information note summarises the main problematic amendments to Hungarian asylum law.

#### 1. LEGAL REFORMS ROOTED IN A HATE CAMPAIGN

In July 2015, Hungary amended its asylum legislation in various aspects (including the Hungarian Asylum Act<sup>1</sup>, its implementing Asylum Government Decree<sup>2</sup>), and adopted a National List of Safe Countries<sup>3</sup>. These changes are an organic continuation of the **politically motivated xenophobic scapegoating campaign** launched by Prime Minister Viktor Orbán's government in February 2015. The campaign kicked off with a coordinated communication action aiming at demonising migration and refugees and suggested that this issue (then yet unknown to and considered as unimportant by most Hungarians) is the main challenge Hungary has to deal with. It then continued with a national consultation on immigration and terrorism, boosted by a government-financed nationwide xenophobic billboard campaign that cost a total of 4,5 million Euros. In June, the government announced that it will build a **175-km-long fence** along the Serbian-Hungarian border section; the fence should be completed by end of August 2015. These drastic measures have received wide scale **international criticism**, including by the European Parliament and the UN Refugee Agency (UNHCR). Hungary is the only EU Member State that rejected to resettle *any* refugee from the Middle East under the European Commission-proposed scheme.

#### 2. BLANKET AUTHORISATION TO REJECT 99% OF ASYLUM CLAIMS AT FIRST GLANCE

- The Hungarian government adopted a national **list of safe third countries**, which includes – among others – Serbia.<sup>4</sup> This decision **contradicts the UNHCR's currently valid position**, according to which **Serbia is not a safe third country** for asylum-seekers, and the guidelines of the Hungarian Supreme Court (*Kúria*) and the clear-cut evidence provided by the reports of the HHC and Amnesty International. Currently there is no other EU Member State that regards Serbia as a safe third country for asylum seekers.
- The amendment to the Asylum Act obliges the Office of Immigration and Nationality (OIN) to **reject as inadmissible all asylum claims lodged by applicants who came through a safe third country**, since the

<sup>1</sup> Act LXXX of 2007 on asylum – Asylum Act

<sup>2</sup> Government Decree 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on asylum – Asylum Government Decree

<sup>3</sup> Government Decree 191/2015 (VII. 21.) on the national list of safe countries of origin and safe third countries – Safe Country Government Decree

<sup>4</sup> Safe Country Government Decree, Section 2

applicant “could have applied for effective protection there”.<sup>5</sup> As over 99% of asylum-seekers enter Hungary at the Serbian-Hungarian border section, this will mean the **quasi-automatic rejection at first glance of over 99% of asylum claims**, without any consideration of protection needs.

- In individual cases, the presumption of having had an opportunity to ask for asylum in Serbia is – **in principle – rebuttable**. However, this possibility is likely to remain **theoretical** for a number of reasons:
  - First, the law requires the applicant to **prove** that she/he could not present an asylum claim in Serbia.<sup>6</sup> This represents an **unrealistically high standard of proof** (as compared to the lower standard of “to substantiate”, which is generally applied in Hungarian asylum law). An asylum-seeker typically smuggled through a country unknown to her/him is extremely unlikely to have any verifiable, “hard” evidence to prove such a statement.
  - Second, the law **does not provide the necessary due process safeguards** by stipulating that the asylum-seeker, “*after being informed [about the application of the safe third country concept in her/his case] can, without delay and in any case not later than within 3 days, make a declaration concerning why in her/his individual case the given country cannot be considered as safe*”.<sup>7</sup> The law does not specify in which format and language this information should be communicated to the applicant, if an interpreter should be made available, or if a written record should be prepared. Equally, the law does not specify the format or language, the availability of interpreters, and the preparation of a written record pertaining to applicants’ “declaration” either. No mandatory, free-of-charge legal assistance is foreseen for this process. Due to the lack of a functioning legal aid system accessible to asylum-seekers, the vast majority of them have **no access to professional legal aid** during the asylum procedure.
  - Third, the impossibility to have access to protection in Serbia does not stem from individual circumstances, but from the general lack of a functioning asylum system. Therefore, it is absurd and conceptually impossible to expect an asylum-seeker to prove that, for individual reasons, she/he had **no access to a functioning system in Serbia which in reality does not exist**.
- If the claim is considered inadmissible, the OIN has to deliver a decision in maximum 15 days.<sup>8</sup> This **extremely short deadline** adds to the presumption that no individualised assessment will be carried out.
- In addition, the National List of Safe Countries declares that all EU Member States are safe third countries. On the one hand, this absurd provision (under EU law, third countries are those which are *not* members of the Union) confirms the **questionable professional quality** of the entire legislative process.<sup>9</sup> On the other hand, it may confirm the government’s intention – frequently repeated in the press in recent months – to again **start considering Greece as a safe country** for asylum-seekers and resume applying the Dublin III Regulation towards that EU Member State. Such a measure would disregard the systemic and unresolved deficiencies of the Greek asylum system (which led to the general halt on Dublin returns from other EU Member States since 2011) and the worsening complex crisis of the country, and also goes against the policy of all other EU members.
- These amendments not only **breach the definition of ‘safe third country’ under EU and Hungarian law**,<sup>10</sup> but they are also likely to lead, in practice, to the **massive violation of Hungary’s non-refoulement and protection obligations** enshrined in the 1951 Refugee Convention, Article 3 of the European Convention on Human Rights, and Articles 18 and 19 of the EU Charter of Fundamental Rights. Since early 2015, the vast majority of asylum-seekers have come to Hungary from the **worst crises of the world** (Afghanistan, Syria and Iraq). It is expected that most of them will no longer have an opportunity to explain why they had to flee. Instead, they will be exposed to the risk of an immediate removal to Serbia, a country where protection is currently not available. This means that they will be **deprived of the mere possibility to find protection** and at the real risk of **chain refoulement**.

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<sup>5</sup> Asylum Act, Section 51 (2) (e) and Section 51 (4) (a)-(b)

<sup>6</sup> Asylum Act, Section 51 (5)

<sup>7</sup> Asylum Act, Section 51 (11)

<sup>8</sup> Asylum Act, Section 47 (2)

<sup>9</sup> Another equally absurd provision declares as safe third (!) countries those states of the United States of America which do not apply death penalty (cf. asylum is under the scope of federal law in the US).

<sup>10</sup> Recast Asylum Procedures Directive, Recital (46) and Article 38; Asylum Act, Section 2 (i)

### 3. MOST ADMISSIBLE CASES CAN BE DEALT WITH IN AN ACCELERATED PROCEDURE

- The amended legislation introduces an accelerated procedure, where the OIN is expected to pass a decision within an **unreasonably short timeframe** of 15 days.<sup>11</sup>
- The law stipulates **10 different grounds** for referring an admissible asylum claim into an accelerated procedure.<sup>12</sup> These ten grounds cover a wide range of situations, some of which are applicable in many (or even most) asylum cases:
  - For instance, it will be enough to refer a case to an accelerated procedure “*if the applicant has misled the authorities by presenting **false documents** or has, supposedly in bad faith, **destroyed or disposed of an identity or travel document** that would have helped establish her/his identity or nationality*”. **Illegal entry** will also serve as an additional ground for ordering an accelerated procedure (which can only be applied together with another ground). For years, most asylum-seekers (including those later recognised as refugees) have been arriving in Hungary without valid documents and in an irregular manner. Many have no choice but to rely on human smugglers, who often take away and destroy their travel documents (if the applicant had any) and sometimes provide fake ones. Also, the term “supposedly in bad faith” leaves an unduly large room for speculation, especially as refugees, just upon arrival after a painful journey of several months, are often unable to give a full and properly informed explanation about the reasons why they did not have valid documents. Such provisions allow the accelerated procedure to be automatically applied in the majority of claims.
  - Another reason for launching an accelerated procedure is when the asylum-seeker makes “*clearly **inconsistent and contradictory**, clearly false or obviously improbable representations which contradict sufficiently verified country of origin information*”. According to current scientific knowledge (supported by a solid body of research and literature, as well as the jurisprudence of the European Court of Human Rights and the UN Committee against Torture), torture victims and traumatised persons are likely to make inconsistent and contradictory statements at an asylum interview, especially if they are interviewed upon arrival and without prior psychotherapy and preparation. The internal consistency of an asylum claim and eventual contradictions with country information are relevant factors for asylum decision-making. However, these are complex issues that cannot be properly assessed in such a short time-frame and merely on the basis of an initial interview, especially in light of the fact that memory can be distorted during recalling<sup>13</sup> and that a high proportion of asylum-seekers arriving in Hungary are seriously traumatised, vulnerable war refugees.

Consequently, there is a high risk that the use of accelerated procedures is not going to be limited to obviously unfounded or in some way “abusive” asylum claims, but may even be **used as the general rule and not as an exception**.

- 15 days for processing a first-time asylum application is – as a general rule – **insufficient time for ensuring the indispensable requirements** of such a procedure, including finding the right interpreter, conducting a proper asylum interview, obtaining individualised and high-quality country information, obtaining – if necessary – medical or other specific evidence, and an eventual follow-up interview allowing the asylum-seeker to react on adverse credibility findings or legal conclusions.<sup>14</sup> This extremely short deadline is therefore in **breach of EU law**, which requires **reasonable time limits** for accelerated procedures, “*without prejudice to an adequate and complete examination being carried out*” and to the applicant’s effective access to basic guarantees provided for in the EU asylum legislation.<sup>15</sup> Also in contradiction with the relevant EU rule, the amended Hungarian legislation does not set forth any specific safeguard that would prevent the undue application of accelerated procedures to **asylum-seekers in need of special procedural guarantees**.<sup>16</sup>

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<sup>11</sup> Asylum Act, Section 47 (2)

<sup>12</sup> Asylum Act, Section 51 (7)

<sup>13</sup> See for example Gábor Gyulai (ed.) et al., *Credibility Assessment in Asylum Procedures – A Multidisciplinary Training Manual*, Hungarian Helsinki Committee, [Volume 1](#) (2013) and [Volume 2](#) (2015)

<sup>14</sup> The latter being mandatory under EU law as interpreted by the EU Court of Justice (see judgments *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, 22 November 2012 and *Sopropé – Organizações de Calçado Lda v Fazenda Pública*, C-349/07, 18 December 2008)

<sup>15</sup> Recast Asylum Procedures Directive, Recital 20, Article 31 (2) and (9)

<sup>16</sup> Recast Asylum Procedures Directive, Recital 30

#### 4. NO EFFECTIVE REMEDY AGAINST UNLAWFUL FIRST-INSTANCE DECISIONS

- Effective judicial review has so far played a key role in ensuring quality decision-making and the rectification of unlawful practices. In 2014, in 30% of their in-merit decisions, Hungarian courts ruled that the OIN had taken a legally unfounded decision in asylum cases. Crucial safeguards included the mandatory personal hearing of the applicant and the automatic suspensive effect on removal measures.<sup>17</sup> At the same time, the Hungarian judicial review procedure in asylum cases was already probably the fastest such process in the EU, with a 60-day deadline and with only one judicial instance involved, whose decision was not subject to appeal.
- The amended Asylum Act introduces new rules for the judicial review of asylum decisions:

	Inadmissibility decisions	Rejection in an accelerated procedure	Rejection in a standard procedure
Deadline to appeal the OIN's decision	3 calendar days after receiving the rejection	3 calendar days after receiving the rejection	8 calendar days after receiving the rejection
Deadline for the court to decide	8 calendar days	8 calendar days	60 calendar days
Personal hearing at the court	Optional	Optional	Optional (mandatory only if applicant is detained)
Suspensive effect on removal measures	No automatic suspensive effect, can be requested under general rules	No automatic suspensive effect, can be requested under general rules	No automatic suspensive effect, can be requested under general rules
	Exception: automatic suspensive effect if the inadmissibility decision is based on applying the safe third country concept	Exception: automatic suspensive effect if the accelerated procedure has been initiated on grounds of an illegal entry or stay	

These provisions **are likely to render the judicial review of first-instance asylum decisions ineffective**, for a number of reasons:

- In the case of inadmissibility decisions and accelerated procedures (which are likely to cover up to 99% of asylum cases – see earlier), the **3-day time limit to submit a judicial review request is insufficient**. Without a functioning and professional legal aid system available for asylum-seekers, the vast majority of them **have no access to legal assistance** when they receive a negative decision. Many asylum-seekers may fail to understand the reasons for the rejection (especially in case of complicated legal arguments, such as the safe third country concept), and their right to turn to court. The gravity of these challenges would be significantly reduced if more time would be available – for example the applicant could consult with HHC lawyers, most of whom visit detention and reception facilities on a weekly basis. The **excessively** short deadline makes it **difficult for the asylum-seeker to exercise her/his right to an effective remedy** and thus it is in breach of both EU law<sup>18</sup> and the principles established by the jurisprudence of the European Court of Human Rights.<sup>19</sup>
- In these two scenarios, the **8-day deadline for the judge to deliver a judgment is insufficient** for *"a full and ex nunc examination of both facts and points of law"* as prescribed by EU law.<sup>20</sup> 5 or 6 working days are not enough for a judge to obtain crucial evidence (such as digested and translated country information or a medical/psychological expert opinion) or to arrange a personal hearing with a suitable interpreter (see also below).
- The personal hearing of the applicant is a crucial safeguard in the judicial review of asylum decisions, especially in a single-instance procedure (such as in Hungary), where the first-instance judge delivers a final, non-appealable decision. Under the new law **a personal hearing is no longer mandatory in court procedures**. It is very unlikely, though, that judges will hold a personal hearing, given the extremely short time limit in which it may easily prove to be **impossible to make the necessary arrangements**, including arranging a suitable

<sup>17</sup> In the judicial review of in-merit decisions on asylum

<sup>18</sup> Recast Asylum Procedures Directive, Article 46 (4) – Note that the Directive only sets a clear minimum time limit for submitting an appeal in case of border procedures (Article 46 (7) (a)), namely **one week**. By analogy, if one week is the minimum for the most exceptionally accelerated procedure conducted on the border, then 3 days will clearly be insufficient for the "less accelerated" procedures in question.

<sup>19</sup> In the I.M. v. France judgment the Court found that 2 days for the submission of an appeal was insufficient (AFFAIRE I.M. c. FRANCE, requête no 9152/09, 2 février 2012). Also, in Austria and the Czech Republic, the Constitutional Court found insufficient the 2 and 7-day deadline (respectively) for the submission of an appeal in asylum cases.

<sup>20</sup> Recast Asylum Procedures Directive, Article 46 (3)

interpreter, for example. The unreasonably short time limit and the lack of a personal hearing **may reduce the judicial review to a mere formality**, in which the judge has no other information than the one provided by the first-instance authority.

- **The lack of an automatic suspensive effect** on removal measures is in violation of the principle established in the consequent jurisprudence of the European Court of Human Rights, according to which this is an indispensable condition of an effective remedy in such cases. While EU asylum rules are more permissive in this respect and allow for the lack of an automatic suspensive effect case of inadmissibility decisions and accelerated procedures), the lack of an automatic suspensive effect may still raise compatibility issues with the EU Charter of Fundamental Rights. **The lack of an automatic suspensive effect is in clear violation of EU law with regard to standard procedures**, as the Asylum Procedures Directive allows for this option only in certain specific (for example accelerated) procedures.<sup>21</sup> In all cases where the suspensive effect is not automatic, it is difficult to imagine how an asylum-seeker will be able to submit a request for the suspension of her/his removal as she/he is typically without professional legal assistance and subject to an unreasonably short deadline. To make it even worse for asylum-seekers, the rules allowing for such a request to be submitted are not found in the Asylum Act, but they emanate from general rules concerning civil court procedures.<sup>22</sup>
- The amended legislation **lacks any additional safeguards for applicants in need of special procedural guarantees** with regard to the automatic suspensive effect, although this is required by EU law.<sup>23</sup>

## 5. MORE DETENTION IN POTENTIALLY WORSE CONDITIONS

- Foreigners apprehended at the border without documents can be detained **for 24 hours** instead of 12 hours under the previous legislation. If the foreigner decides to ask for asylum during this period, this initial detention **can be extended** for an additional 12 hours, **up to a total of 36 hours**. This amendment aims to adjust the rules to reality, since asylum-seekers have already often been held by the police for 24 or even 48 hours. This initial deprivation of liberty is carried out in police premises near the border in seriously inadequate conditions that may amount to inhuman treatment. (The HHC's regular monitoring visits found men and women, adults and children held together in overcrowded cages at the Szeged police headquarters, with often only 1 square metre (!) per person and no immediate access to toilet and drinking water.)
- A specific regime for the detention of asylum-seekers – **"asylum detention"** – was introduced in Hungary in July 2013. Since then, as a rather unique policy in Europe, over 8,000 first-time asylum-seekers have been detained in asylum jails for several weeks or months. The maximum time limit for asylum detention is 6 months. Asylum-seekers at these facilities often face inadequate detention conditions, including the lack of access to proper psycho-social assistance or meaningful daily activities (as documented also in the Hungarian Ombudsman's very critical report from January 2015). In most cases in recent months, asylum detention was limited to the duration of the first-instance asylum procedure, and it was usually discontinued after the OIN had made a decision. The amended legislation explicitly refers to the possibility of **keeping asylum-seekers in asylum detention even during the judicial review procedure**.<sup>24</sup>
- **It will be easier for the OIN to order detention in Dublin procedures.** Instead of the ground laid out in the previous law, "not having fulfilled her/his obligation to appear before the authorities", which refers to a past behaviour, it will suffice under the amended law if "there is a serious danger of absconding", i.e. a speculation about future behaviour.
- The law required at least 5 sq. metres moving space and 15 cubic metres space per person in the cells of asylum jails. The amended Asylum Government Decree turned this mandatory rule into a non-binding recommendation, inserting the expression "if possible" into the relevant rule.<sup>25</sup> In light of the aforementioned amendments aiming at a further extended use of detention, it is particularly worrisome that **the OIN now becomes officially authorised to tolerate even serious overcrowding in asylum jails**. A similar provision was introduced into parallel rules concerning pre-trial detention in 2010, which the Constitutional Court later quashed on the ground that, among others, it violated the prohibition of torture, inhuman and degrading treatment.<sup>26</sup> The amended rule may authorise detention conditions that amount to inhuman treatment, and thus is a serious violation of both the EU Charter of Fundamental Rights and the European Convention on Human Rights.

<sup>21</sup> Recast Asylum Procedures Directive, Article 46 (5)-(6)

<sup>22</sup> Act III of 1952 on the rules of civil court procedures, Section 332 (2a)

<sup>23</sup> Recast Asylum Procedures Directive, Recital 30

<sup>24</sup> Asylum Act, Section 68 (4)

<sup>25</sup> Asylum Government Decree, Section 36/D (1) (a)

<sup>26</sup> Constitutional Court resolution No. 32/2014 of 3 November 2014



## 6. FROM OVERCROWDED, UNHYGIENIC RECEPTION CENTRES TO TENT CAMPS AND REFUGEE HOMELESSNESS

- Notwithstanding an ever-increasing influx of asylum-seekers since 2013 and significant amounts of EU-funding,<sup>27</sup> the Hungarian government has **failed to properly extend the country's reception capacities**. The open reception centres for asylum-seekers have become **extremely overcrowded** in Hungary by mid-2015. The facility in Debrecen (the largest in the country), with a capacity of 800, is now hosting over 1 800, on occasions even 2 000 asylum-seekers. The reception centre in Bicske is constantly home to up to 1 200 asylum-seekers, while its maximum capacity is only 450 places. At all reception facilities, asylum-seekers have to sleep on the corridors, in community areas or, especially during heat waves, outside in tents or often on plain mattresses. Hygienic conditions are frequently very problematic, there are not enough showers and lavatories, and crucial services – such as individual social assistance or psycho-social care – are not available.
- Against this background, it is particularly worrying that the amendment cancels the OIN's obligation to accommodate in reception centres asylum-seekers without means to pay for their private accommodation. The amended Asylum Act now **enables the OIN to specify merely the territory of a county as the designated place of stay of the asylum-seeker**, instead of a reception or detention centre.<sup>28</sup> Previously, this option was only allowed in case of a subsequent application. This amendment is in breach of EU law<sup>29</sup> and **may increase the danger of homelessness** among asylum-seekers in Hungary.

## 7. ASYLUM-SEEKERS OBLIGED TO CONTACT THEIR COUNTRY OF ORIGIN

- The majority of asylum-seekers arrive in Hungary with no valid identification documents. The reasons for this are manifold: for example, European-style identification documents do not even exist in some of the main countries of origin (like Afghanistan or Somalia). It is also common that a refugee is unable to carry her/his documents when she/he has to flee from home. Many asylum-seekers lose their passport on the way, or have to hand it over to the smuggler. Under the amended Asylum Act, **the OIN can oblige asylum-seekers to contact their country of origin during the asylum procedure** in order to establish their identity or to obtain documentary evidence thereof.<sup>30</sup> If the asylum-seekers refers to persecution by a non-state agent, she/he may even be obliged to establish contact with the authorities of the country of origin (in other cases she/he will be required to contact family members or friends left behind). This unprecedented provision **goes against the most basic prohibition in asylum law**. If it is applied in practice, it may expose asylum-seekers and their families and friends to inhuman treatment, or even torture or death.
- At the same time, **this absurd amendment lacks common sense**: it is unrealistic to obtain genuine documents or other relevant proof within a few days (cf. extremely short deadlines under the amended rules) from a war-torn country like Syria or Iraq, or from countries like Afghanistan or Somalia, which lack any modern communication infrastructure as well as a functioning public administration.

**The Hungarian Helsinki Committee is deeply concerned that these amendments will prevent refugees from having access to protection in Hungary and may lead to the *de facto* self-exclusion of the country from the Common European Asylum System.** The HHC calls on the international community and the international press to closely monitor the application of the amended asylum rules in the forthcoming months.

*The HHC is a leading human rights organisation in Hungary focusing on various areas such as detention, access to justice, the rule of law, anti-discrimination, asylum, statelessness and nationality. As an implementing partner of the UNHCR, the HHC has been the only non-governmental organisation to provide free-of-charge professional legal assistance to asylum-seekers in Hungary since 1998. We are present at all places in Hungary where asylum-seekers are detained or accommodated and we have assisted several thousands of foreigners in need of international protection in recent years. The HHC has also gained outstanding international reputation as an expert organisation in various fields of law. We have led some of the most powerful research and training initiatives in the European asylum field in recent years, working closely together with state authorities, the UNHCR or the judiciary. Our experts trained over a thousand lawyers, state officers, judges and other professionals on asylum and statelessness all around Europe and even beyond. More information: [www.helsinki.hu/en](http://www.helsinki.hu/en)*

<sup>27</sup> Just in 2014, the Hungarian government received approximately **1,5 million Euros** from the European Refugee Fund, the majority of which was made available as emergency support.

<sup>28</sup> Asylum Act, Section 48

<sup>29</sup> Recast Reception Conditions Directive, Article 17 (1)-(2)

<sup>30</sup> Asylum Act, Section 5 (3)