



COMMUNICATION

In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements by ECRE, the AIRE Centre and DCR

CASE OF ILIAS AND AHMED v. HUNGARY (Application no. 47287/15) (Grand Chamber)

1. The case concerns two Bangladeshi nationals who arrived in the transit zone situated on the border between Hungary and Serbia and submitted applications for asylum. Their applications were rejected and they were escorted back to Serbia. The Grand Chamber of the European Court of Human Rights (ECtHR) found that there was an insufficient basis for the Hungarian Government's decision to establish a general presumption concerning Serbia as a safe third country; the expulsion decisions disregarded the authoritative findings of the UNHCR as to a real risk of denial of access to an effective asylum procedure in Serbia and summary removal from Serbia to North Macedonia and then to Greece. In addition, the Hungarian authorities exacerbated the risks facing the applicants by inducing them to enter Serbia irregularly instead of negotiating an orderly return. As a result, the Court found that the respondent State failed to discharge its procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision before removing the applicants from Hungary (para163).
2. The European Council on Refugees and Exiles (ECRE), the Dutch Council for Refugees (DCR) and the International Commission of Jurists (ICJ) were interveners in this case.
3. [ECRE](#), the [DCR](#) and the Advice on Individual Rights in Europe (the [AIRE Centre](#)), wish to bring to the attention of the Committee its ongoing concerns with regard to the duty of the State to discharge its procedural obligations under Article 3 when assessing the risks of ill-treatment before expelling asylum-seeking applicants to a "safe third country", particularly, in the context of the Committee's duty to satisfy itself that Hungary has taken the General Measures necessary for it to comply with this judgment.

EXECUTIVE SUMMARY

4. The AIRE Centre, the DCR and ECRE are of the opinion that the Hungarian authorities did not comply with the general measures indicated in *Ilias and Ahmed v Hungary*. Contrary to Hungary's Government submission in the Action Plan that "general measures concerning the regime at issue in the present case [are] obsolete", such measures are of the outmost relevance given the developments in Hungarian law and practice following the judgment, as will be demonstrated further in the present submission. Practices contrary to the obligations under Article 3 as found by the judgment in *Ilias and Ahmed* continue to be a matter of a grave concern in Hungary. Key areas of concern include:

- In June 2020, a new law (*Act LVIII of 2020*)¹ severely limited access to asylum resulting in removals to countries ‘considered safe’ without assessing the risks of treatment contrary to Article 3 ECHR. Transitional measures removed the possibility for asylum seekers to submit applications inside Hungary, instead requiring them to first submit a “declaration of intent” at selected embassies outside the country.² In October 2020, the European Commission launched an infringement procedure, arguing that these restrictions were unlawful.³
- Migrants entering irregularly, mostly from Serbia, are expelled, often collectively to countries where they risk being subjected to treatment in breach of serious human rights violations. By the end of 2020, forcible police expulsions across the border fence were reported to exceed 30,000 in breach of the obligation to individually assess the risk of *refoulement*.⁴ In December 2020, in the case C-808/18 the Court of Justice of the European Union (CJEU) ruled that such returns breached EU law.⁵ However, the Government refuses to implement the judgment and immediate removals continue to take place.⁶
- The new 2018 law on asylum has introduced new grounds for declaring an asylum application inadmissible, restricting the right to asylum only to people arriving in Hungary directly from a place where their life or freedoms are at risk. The CJEU judgment issued in the case LH (C-564/18)⁷ found this ground to be in breach of EU law. However, this provision has not been repealed so far, and is relevant when considering general measures in *Ilias and Ahmed v Hungary*.

GENERAL MEASURES

I. New legislation introduced in 2020 and Hungary's obligations under Article 3 ECHR

5. On 17 June 2020, *Act LVIII of 2020 on the transitional rules and epidemiological preparedness related to the cessation of the state of danger* (hereafter the “act”) was promulgated in the National Gazette and entered into force on 18 June 2020.⁸ Two decrees entered into force on the same day introducing detailed implementing rules.⁹
6. The act introduces a new procedure, currently extended until 30 June 2021, requiring individuals, as a general rule, to express their intent to seek asylum at Hungarian Embassies located in neighboring States outside the EU (Serbia and Ukraine) as specified by a

¹ Act LVIII of 2020 on the Transitional Provisions related to the Termination of the State of Danger and on Epidemiological Preparedness <https://net.jogtar.hu/jogszabaly?docid=a2000058.tv>

² See AIDA Country Report on Hungary, 2020 update, pag. 21-23 available at https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU_2020update.pdf.

³ Infringement number INFR(2020)2310, 30 October 2020, Formal notice based on Art. 258 TFEU, on the “Compatibility with Union Acquis on Asylum of certain aspects of Hungarian Act LVIII of 2020 and government decree 233/2020 (V.26.)”, available at https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?r_dossier=&noncom=0&decision_date_from=&decision_date_to=&active_only=0&EM=HU&title=&submit=Search&lang_code=en

⁴ Amnesty International Report 2020/2021: The State of the World's Human Rights <https://www.amnesty.org/download/Documents/POL1032022021ENGLISH.PDF>, pp. 180-182

⁵ CJEU C-808/18, (Grand Chamber), European Commission v. Hungary, 17 December 2020, ECLI:EU:C:2020:1029.

⁶ AIDA Country Report on Hungary, 2020 update, pag. 11.

⁷ CJEU Case C-564/18, *LH v. Bevándorlási és Menekültügyi Hivatal*, 19 March 2020, ECLI:EU:C:2020:218.

⁸ See Issue 144 of 17 June, 2020 of the National Gazette in Hungarian language at: <https://magyarkozlony.hu/dokumentumok/b18d1fb3c742aa2bd183b15a32fe4425e603f2c2/megtekintes>

⁹ See Government Decree No. 292/2020 (VI. 17.) on the designation of embassies in connection with the statement of intent to lodge an application for asylum and Minister of Interior Decree No. 16/2020. (VI. 17.) on the procedure related to the statement of intent to lodge an application for asylum.

Governmental decree.¹⁰ The act only exempts three specific categories of persons from this procedure.¹¹ Further, the act provides for the immediate removal from the territory of any person who crosses the border unlawfully and indicates intent to seek asylum¹² without assessing the risks of ill-treatment under Article 3 ECHR before expelling asylum-seeking applicants.

7. UNHCR has noted that this legislation is not in line with international and EU law as the primary responsibility to provide protection and reception conditions rests with the State where asylum is sought.¹³ In this regard, the CJEU has stated that EU Member States are obliged to assess the asylum claim before any removal can take place, regardless of the form in which it was communicated.¹⁴
8. Moreover, the law does not clarify the criteria to be considered by the Embassy in deciding on such applications. This may deny asylum seekers access to a fair and efficient asylum procedure as it raises fundamental concerns over the possibility of a substantive assessment due to the lack of appropriate, efficient and accessible procedural guarantees as required by international and EU law.
9. UNHCR has raised serious concerns about the closure of the border for asylum seekers and the introduction of a preliminary asylum procedure “*States may not use border management as a means to deter refugees from seeking asylum or to deny protection to asylum-seekers without any individual consideration of their claims, as many individuals will have valid claims to protection as refugees under the 1951 Convention and 1967 Protocol*”.¹⁵
10. Furthermore, the procedure raises questions regarding readmission to and the lawfulness of stay in that third country; the responsibility of the transferring State for ensuring protection from persecution and other threats to physical safety and freedom in the third country; and access to adequate reception conditions.¹⁶

¹⁰ See Sections 267 and 268 of the act; see also Section 1 of Government Decree No. 292/2020 (VI. 17.) according to which ‘the statement of intent to lodge an asylum application may be submitted within the territory of diplomatic representations of Hungary, as defined under point a) of Section 3 (1) of Act LXXIII of 2016 on Foreign Representations and Permanent Foreign Service, operating on the territory of non-EU Member States having borders with Hungary’.

¹¹ Pursuant to Sub-section 271 (1) of the act, the following three categories of persons are exempted from the new procedure: ‘a) Recognized beneficiaries of subsidiary protection staying in Hungary; b) Family members – within the meaning of the Asylum Act – of recognized refugees or beneficiaries of subsidiary protection who are staying in Hungary at the time of submission of the asylum application; and c) Any person who is subject to a coercive measure, measure or penalty affecting his or her personal liberty, except for those who have crossed the state border of Hungary in an illegal manner.’

¹² See Sub-section 271 (2) of the act: ‘The police shall direct the foreigner who had crossed the state border of Hungary in an illegal manner to the Hungarian Embassy located in the neighbouring country from which they had crossed the border, if he/she indicated the intent to submit an asylum application before the police.’ The interception and summary removal of individuals who enter Hungary irregularly is based on regulations issued under the “crisis situation due to mass immigration”, in effect until 7 September 2020 with the possibility of further extensions. See Section 5 (1b) of Act LXXXIX of 2007 on the State Border, which sets out the following: ‘At the time of a crisis situation caused by mass immigration, the Police can halt foreigners illegally staying in the territory of Hungary and escort them to the nearest gate of the facility specified in paragraph (1), unless the suspicion of a crime arises.’ See also Government Decree No. 41/2016 (III. 9.) on ordering of a crisis situation caused by mass immigration covering the entire territory of Hungary and on the rules related to the ordering, existence and elimination of a crisis situation.

¹³ UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, available at: www.refworld.org/docid/51af82794.html

¹⁴ CJEU C-36/20 PPU *Ministerio Fiscal v. VL*, 25 June 2020, ECLI:EU:C:2020:495, para 94.

¹⁵ UN High Commissioner for Refugees (UNHCR), *UNHCR Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020, available at: <https://www.refworld.org/docid/5ef5c0614.html>

¹⁶ UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018, para. 4, available at: <https://www.refworld.org/docid/5acb33ad4.html>; UNHCR, Brief of the United Nations High Commissioner for Refugees



11. In October 2020, the European Commission opened infringement procedures by sending a letter of formal notice to Hungary on the incorrect application of EU asylum legislation. The Commission considers that the Hungarian Act LVIII of 2020 imposes an unlawful restriction to access to the asylum procedure that is contrary to the Asylum Procedures Directive, read in light of the Charter of Fundamental Rights, as it precludes persons who are on Hungarian territory, including at the border, from applying for international protection.¹⁷
12. **The AIRE Centre, DCR and ECRE submit that the requirement that persons irregularly arriving and wishing to seek international protection at the Hungarian border or inside Hungary first must declare their intent to seek asylum at a diplomatic representation outside the country (“Embassy”) as a precondition of being admitted to the territory and the asylum procedure is in violation of Hungary’s obligations under Article 3 as highlighted in the *Ilias and Ahmed* judgment.**

II. Procedural duty under Article 3 ECHR and reports of immediate removals by authoritative sources

13. Legal amendments that entered into force on 5 July 2016 allowed the Hungarian police to automatically return asylum seekers who were apprehended within 8 km of the Serbian-Hungarian or Croatian-Hungarian border to the external side of the border fence.¹⁸ Act XX of March 2017 extended the ‘8-km Rule’ to the entire territory of Hungary,¹⁹ allowing for the immediate removal of migrants to the external side of the border fence, without registering their data or allowing them to submit an application for international protection, in a summary procedure lacking the most basic procedural safeguards.²⁰ Migrants arriving at the airport and requesting asylum there are automatically expelled to Serbia, although they have never been or transited through Serbia, since they arrived by plane from another country.²¹
14. Similarly, as stated above, the Hungarian Act LVIII of 2020, provides for the immediate removal from the territory of any person who crosses the border unlawfully and indicates an intent to seek asylum. This implies that Hungary is actively ‘escorting’ apprehended migrants in an irregular situation to the outer side of the border fence, into a third country, without considering the legality of their stay, accommodation and treatment in that third country.²²
15. Amnesty International reported that “[migrants] entering irregularly, mostly from Serbia, were expelled, often collectively” and by the end of 2020 “police pushbacks across the border fence

before the United States Court of Appeals for the Ninth Circuit in the case *INNOVATION LAW LAB, et al., Plaintiffs-Appellees, v. KEVIN M. MCALEENAN, Secretary of Homeland Security, et al. Defendant-Appellant*, 26 June 2019, pp. 17 and 18, available at: www.refworld.org/docid/5d82275b4.html UNHCR, Brief of the Office of the United Nations High Commissioner for Refugees before the United States Court of Appeals for the Ninth Circuit in the case *East Bay Sanctuary Covenant, et al., v. William P. Barr (“East Bay Sanctuary (II)”)*, 15 October 2019, Case No. 3:19-CV-04073, pp. 26 and 27, available at: www.refworld.org/docid/5dcc03354.html.

¹⁷ Infringement number INFR(2020)2310, 30 October 2020, Formal notice based on Art. 258 TFEU, on the “Compatibility with Union Acquis on Asylum of certain aspects of Hungarian Act LVIII of 2020 and government decree 233/2020 (V.26.)”.

¹⁸ Art 5(1a) of Act LXXXIX of 2007, as amended by Act XCIV of 2016.

¹⁹ Art 5(1b) of Act LXXXIX of 2007, as amended by Act XX of 2017.

²⁰ AIDA Country Report on Hungary, 2020 update, pag. 24 and Horizon 2020 project ‘RESPOND’, Hungary Country report, Daniel Gyollai, pag. 26-28.

²¹ AIDA Country Report on Hungary, 2020 update, pag 24.

²² See AIDA Country Report on Hungary, 2020 update, pag. 22 available at https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU_2020update.pdf, and UNHCR *Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020.

exceeded 30,000, in breach of the obligation to individually assess the risk of *refoulement*, the forcible return of individuals to countries where they risk serious human rights violations".²³

16. According to FRA, between October and December 2020, the police prevented 8,291 people from crossing Hungary's southern fenced border (three times as many as in the previous reporting period, July to October 2020). Additionally, the police apprehended 12,199 migrants in an irregular situation during the reporting period – twice as many as in the preceding period. The police escorted the migrants back to the outer side of the border fence. Authorities do not fingerprint or register these individuals, nor do they record them as new arrivals or asylum applicants in the statistics.²⁴
17. Human Rights Watch highlighted that Hungary saw a significant decline in asylum applications in 2020 due to border closures and other restrictions. By July 2020, 95 people had filed for asylum, down from 266 people in the first 7 months of 2019. Immediate removals from Hungary to Serbia, sometimes violent, continue.²⁵
18. On 17 December 2020 the CJEU issued a judgment in the case C-808/18 and ruled that moving irregularly staying third-country nationals to a border area, without observing the guarantees surrounding a return procedure constitute infringements of EU law.²⁶ However, no legislative amendments followed the judgment and the practice still remains the same. Hungary had summarily returned over 4,400 people since the CJEU's ruling.²⁷ The Hungarian Minister of Justice decided to challenge the CJEU judgment at the Constitutional Court.²⁸
19. Furthermore, according to the official statistics published by the Hungarian police, 2,824 refugees were apprehended near the border fence and forced to return to Serbia in January 2021 alone.²⁹
- 20. In view of the above, the AIRE Centre, the DCR and ECRE consider that the denial of entry and the immediate removal from its territory of asylum seekers who cross the borders or who are present on the territory irregularly as provided for by the law, fail to provide the necessary safeguards in breach of Hungary's obligations under Article 3 ECHR and exposes asylum seekers to a risk of *refoulement*, contrary to the obligations incumbent upon the Contracting Party as specified in the *Ilias and Ahmed* judgment.**

III. The safe third country concept and the new inadmissibility ground introduced in 2018

21. On 28 June 2018, Act VI of 2018 on amending certain acts relating to measures to combat unlawful migration and the Seventh amendment to the Fundamental Act were promulgated in the National Gazette. Under this legislation, the asylum claim of an individual is inadmissible if he/she has transited through a country where he/she was not exposed to persecution or serious harm or if the country through which he/she entered to Hungary affords adequate level

²³ Amnesty International Report 2020/2021: The State of the World's Human Rights <https://www.amnesty.org/download/Documents/POL1032022021ENGLISH.PDF>, pp. 180-182

²⁴ EU FRA, Migration: Key Fundamental Rights Concerns Quarterly Bulletin October-December 2020, pag 10, 12. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-migration-bulletin_en.pdf

²⁵ Human Rights Watch, *World Report 2021, Events of 2020*, pag 312.

²⁶ CJEU C-808/18, (Grand Chamber), European Commission v. Hungary, 17 December 2020, ECLI:EU:C:2020:1029, paras 227-266.

²⁷ See map indicating summary returns, updated regularly by HHC, available at: <https://bit.ly/39nsxud>; also Infomigrants, "How Hungary is violating EU law on refugees", 9 February 2021, at <https://www.infomigrants.net/en/post/30148/how-hungary-is-violating-eu-law-on-refugees>.

²⁸ AIDA report on Hungary, 2020 update, pag 27

²⁹ Infomigrants, *How Hungary is violating EU law on refugees*, 9 February 2021, at <https://www.infomigrants.net/en/post/30148/how-hungary-is-violating-eu-law-on-refugees>

- of protection. If the stay in that country was authorized on humanitarian grounds that will be interpreted as ‘adequate protection’.³⁰
22. However, under EU Law, Article 38(2) a) of the Asylum Procedures Directive³¹ specifically requires that the application of the safe third country (STC) concept shall be subject to rules laid down in national law, including rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country.
 23. Although this inadmissibility ground was found incompatible with EU law by the CJEU *inter alia* in the joined cases C-924/19 and 925/19 (FMS and SA)³², the legislation has not been amended.
 24. UNHCR has reiterated that the application of the safe third country concept requires an individualised assessment of whether the previous state will readmit the person; grant the person access to a fair and efficient procedure for determination of his or her protection needs; permit the person to remain; and accord the person standards of treatment commensurate with the 1951 Refugee Convention and international human rights standards, including protection from *refoulement*.³³ Where she or he is entitled to protection, a right of legal stay and a timely durable solution are also required.³⁴
 25. Moreover, UNHCR has highlighted that where the STC concept is applied an individual asylum seeker should be given an opportunity within the procedure to rebut the presumption that she or he will be protected and afforded the relevant standards of treatment, in a previous State based on his or her circumstances.³⁵
 26. The AIRE Centre, the DCR and ECRE recall that the Court noted in the judgment of the present case that Articles 33, 38 and 43 of the EU Asylum Procedures Directive³⁶ (APD) provided for a possibility to enact national legislation that allows, under certain conditions, to forego an examination of requests for international protection on the merits and to undertake instead an examination of admissibility, in the sense of the APD. In particular, on whether it can reasonably be assumed that another country would conduct the examination on the merits or provide protection. In that case, however, the expelling State had to make sure that the intermediary country’s asylum procedure afforded sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faced from the standpoint of Article 3 of the Convention (§§ 132-133). Any presumption that a particular country is “safe”, if it has been relied upon in decisions concerning an individual asylum seeker, must be sufficiently supported at the outset by an analysis of the relevant conditions in that country and, in particular, of its asylum system (§

³⁰ Amendment to Section 51 (2) f of the Act LXXX of 2007 on Asylum (Asylum Act).

³¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedures Directive), OJ L 180, 29.6.2013, p. 60–95.

³² CJEU Joined cases FMS, FNZ (C-924/19 PPU), SA, ifj. SA (C-925/19 PPU) v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, Judgment of the Court (Grand Chamber) of 14 May 2020, ECLI:EU:C:2020:294.

³³ 1951 Convention relating to the Status of Refugees, Article 33, op. cit.; UNHCR Executive Committee Conclusion No. 6(XXVIII) (1977); UNHCR Note on the Principle of Non-Refoulement, November 1997. Protection from *refoulement* also includes protection from torture and other cruel, inhuman or degrading treatment or punishment; risks to life, or to deprivation of liberty without due process as developed under international human rights law.

³⁴ UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, paras. 12 to 16.

³⁵ *Ibid*, para. 13

³⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180 p. 60) (‘the Procedures Directive’).



152). At the same time, falling short of each of the above listed international and regional standards, the Hungarian law referring to a “safe transit country” continues to be in effect.

27. In light of the above, the AIRE Centre, the DCR and ECRE submit that the 2018 Hungarian inadmissibility ground on the basis of a ‘safe transit country’ curtails the right to asylum in a way that is not compatible with the obligations of the State in light of the judgment in *Ilias and Ahmed* as well as under EU or international law. Therefore, the undersigned organisations respectfully urge the Committee of Ministers to ensure that such provisions are repealed by Hungary in order for the general measures to be duly implemented.
28. The AIRE Centre, DCR and ECRE call on the Committee of Ministers to urge the Hungarian authorities to provide evidence on the steps they have taken to eliminate law and practices leading to arbitrary removals of asylum seekers from the territory of Hungary contrary to their obligations as specified in the *Ilias and Ahmed* judgment and hindering the implementation of the general measures indicated therein. The Hungarian authorities must also clarify how effective access to asylum procedures is guaranteed and provide detailed information on the steps they have taken to prevent acts or omissions that may lead to further violations of Hungary’s obligations under Article 3 of the Convention. The Committee of Ministers is also urged to call on the Hungarian government to confirm (1) whether or not Serbia and Ukraine are considered STCs; (2) if so, what is the legal basis for that and whether a prior diligent assessment has been made to consider them STCs; (3) whether the safe third country inadmissibility ground as per Section 51(2)(e) of the Act no. LXXX of 2007 on Asylum has been relied upon since the Grand Chamber ruling.