



Hungarian Helsinki Committee

PLACEMENT IN TRANSIT ZONES IS A FORM OF DEPRIVATION OF LIBERTY

Development of a broad consensus by international organisations that qualifies placement in the transit zones of Hungary as deprivation of liberty, after the legal amendments of March 2017

Information Update by the Hungarian Helsinki Committee (HHC), 6 August 2020

On 28 March 2017, a set of amendments to the Hungarian Asylum Act entered into force.¹ The amendments fundamentally altered the legal framework regulating the transit zones and its basic function, originally set up in September 2015 following the building of the fence at the Hungarian-Serbian and Hungarian-Croatian border sections. The case of *Ilias and Ahmed v. Hungary* brought by the HHC to the European Court of Human Rights (ECtHR) concerned placement of two asylum seekers in inadmissibility border procedures in the Rösztke transit zone at the end of September, beginning of October 2015, thus prior to these changes having entered into force.²

The key differences between the 2015-2017 and the post-2017 legal framework can be summarised as follows:

	15 SEPTEMBER 2015 – 28 MARCH 2017	28 MARCH 2017 – 1 MARCH 2020 ³
WHO CAN BE KEPT IN THE TRANSIT ZONES	Asylum seekers (see exceptions below).	Asylum seekers and foreigners in alien policing (removal) procedure.
WHERE ASYLUM APPLICATIONS CAN BE LODGED	Anywhere in Hungary.	People without otherwise having a right to stay in Hungary can only apply for asylum in the transit zones, except if the applicant is in detention. ⁴
MAXIMUM TIME LIMIT ON PLACEMENT IN THE TRANSIT ZONE	28 days. ⁵	Practically unlimited. Applicants must stay in the transit zone until a decision in their asylum procedure becomes final ⁶ and if rejected can further stay there during the alien policing (removal) procedure. ⁷

¹ Act LXXX of 2007 on Asylum (hereafter: Asylum Act), modified by Act XX of 2017 on the Amendments of certain acts on severing the procedures conducted at the border. See HHC's detailed analysis of Act XX here: <https://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-New-Asylum-Bill-15.02.2017.pdf>.

² *Ilias and Ahmed v. Hungary*, Application no. 47287/15, Chamber judgment of 14 March 2017: <http://hudoc.echr.coe.int/eng?i=001-172091> and Grand Chamber judgment of 21 November 2019: <http://hudoc.echr.coe.int/eng?i=001-198760>

³ Hungary announced the cessation of admittance to the transit zones indefinitely due to the COVID-19 pandemic on 1 March 2020: <https://www.kormany.hu/en/cabinet-office-of-the-prime-minister/news/coronavirus-hungary-to-suspend-admission-of-illegal-migrants-to-transit-zone-indefinitely>.

⁴ Sections 80/J (1) and (1a) of the Asylum Act.

⁵ Section 80/I of the Asylum Act.

⁶ Section 80/J (5) of the Asylum Act.

⁷ Section 62 (3a) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals.

EXEMPTION FROM PLACEMENT IN THE TRANSIT ZONE	Vulnerable applicants cannot be placed in the transit zone, upon registration such applicants are immediately transferred to adequate reception facilities. ⁸	Unaccompanied children under the age of 14. ⁹
TYPE OF PROCEDURES CONDUCTED IN THE TRANSIT ZONE	Border procedure as defined by the Asylum Procedures Directive with the aim to decide on the admissibility of the application. ¹⁰	Regular asylum procedure ¹¹ and alien policing (removal) procedure. ¹²
REMEDY AGAINST THE PLACEMENT	Not available. No decision issued on the transit zone placement.	In asylum procedure: No effective remedy, as the ruling issued by the asylum authority on the transit zone placement can only be challenged at court as part of the judicial remedy against the final decision issued in the asylum procedure. In alien policing (removal) procedure: No effective remedy.

A **broad consensus** has emerged by May 2020 that **placement in the transit zones** following the March 2017 changes led to a situation where it can be only **qualified as deprivation of liberty**.

CJEU judgement

On 14 May 2020, the Court of Justice of the European Union (CJEU) delivered its judgment in joint cases [C-924/19 PPU and C-925/19 PPU](#), where the applicants were held in the transit zones. The CJEU held that the *“Return Directive and Reception Conditions Directive must be interpreted as meaning that the obligation imposed on a third-country national to remain permanently in a transit zone the perimeter of which is restricted and closed, within which that national’s movements are limited and monitored, and which he or she cannot legally leave voluntarily, in any direction whatsoever, appears to be a deprivation of liberty, characterised by ‘detention’ within the meaning of those directives.”*¹³

UNWGAD opinion

On 22 May 2020, the UN Working Group on Arbitrary Detention (UNWGAD), delivered its [Opinion No. 22/2020 concerning Saman Ahmed Haman \(Hungary\)](#) based on an individual complaint. The Working Group concluded that *“the detention of Mr. Hamad was arbitrary and falls within category IV (when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy).”*

The above CJEU judgment and the UNWGAD opinion were preceded by a long list of reports, statements, concluding observations, and recommendations of various bodies, institutions, organisations and special procedures of both the Council of Europe and of the United Nations, all declaring that placement in the transit zones in Hungary constitutes deprivation of liberty.¹⁴

⁸ Section 71/A (7) of the Asylum Act.

⁹ Section 81/J (6) of the Asylum Act.

¹⁰ Sections 71/A (1) and (5) of the Asylum Act.

¹¹ Section 80/I (i) of the Asylum Act.

¹² Section 62 (3a) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals.

¹³ Section 4 of para. 302 of the judgment. See also the Advocate General’s Opinion in Case C-808/18, Commission v. Hungary.

¹⁴ The list below only includes materials pertaining to the situation after the changes of March 2017 entered into force.

Council of Europe

Reports of official visits:

- June 12-16 2017: [Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on Migration and refugees to Serbia and two transit zones in Hungary.](#)
- 30 January 2018: [Council of Europe Lanzarote Committee, Special report further to a visit to transit zones at the Serbian/Hungarian border \(5-7 July 2017\), T-ES\(2017\)11.](#)
- 27 April 2018: [GRETA Report on Hungary under rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings.](#)
- 18 September 2018: [Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment \(CPT\) from 20 to 26 October 2017, CPT/Inf \(2018\) 42.](#)
- 21 May 2019: [Report following the visit of the Commissioner on Human Rights of the Council of Europe, Dunja Mijatović, from 4 to 8 February 2019, CommDH\(2019\)13.](#)
- 27 September 2019: [GRETA Report concerning the implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by Hungary. Second evaluation round, adopted on 10 July 2019.](#)

Selected statements:

- 8 March 2017: [Statement by the former Council of Europe Commissioner for Human Rights, Nils Muižnieks, 'Commissioner concerned about Hungary's new law allowing automatic detention of asylum seekers'.](#)
- 19 October 2017: [Press release following the fact-finding mission by the Secretary General's Special Representative on migration and refugees Ambassador Tomáš Boček to Hungary. 'Report: The situation of migrants and refugees in Serbia and transit zones in Hungary'.](#)
- 18 September 2018: [Statement following the visit of the CPT to Hungary from 20 to 26 October 2017. 'Hungary: anti-torture Committee observed decent conditions in transit zones but criticises treatment of irregular migrants when 'pushed back' to Serbia'.](#)
- 11 February 2019: [Statement by the Council of Europe Commissioner for Human Rights, Dunja Mijatović, 'Hungary should address many interconnected human rights protection challenges including civil society space, gender equality, refugee protection and independence of the judiciary'.](#)

United Nations

UN Treaty Bodies:

- 8 December 2017: UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), [Report of the Subcommittee on the Visit to Hungary undertaken from 21 to 30 March 2017.](#)
- 9 May 2018: Human Rights Committee (CCPR), [Concluding observations on the sixth periodic report of Hungary.](#)
- 6 June 2019: UN Committee on the Elimination of Racial Discrimination (CERD), [Concluding observations on the combined eighteenth to twenty-fifth periodic reports of Hungary.](#)

UN Special Procedures:

- 15 November 2018: UN Working Group on Arbitrary Detention (UNWGAD), [UN human rights experts suspend Hungary visit after access denied](#).
- 11 September 2018: Joint statement of 6 Special Rapporteurs on Hungary, [UN experts decry Hungary's tough new measures against migrants and civil society](#). 11 September 2018.
- 17 July 2019: UN Special Rapporteur on the human rights of migrants, [End of Visit Statement of the Special Rapporteur](#).
- 11 May 2020: UN Special Rapporteur on the human rights of migrants, [Visit to Hungary Report of the Special Rapporteur](#).
- 29 May 2020: UN Special Rapporteur on the human rights of migrants, [Statement on the closure of the "transit zones"](#).

Selected OHCHR and UNHCR statements:

- 8 March 2017: [UN High Commissioner for Human Rights on the activities of his Office and recent human rights developments. Item 2: Annual Report and Oral Update to the 34th session of the Human Rights Council](#).
- 12 September 2017: [UNHCR Chief visits Hungary, calls for greater access to asylum, end to detention and more solidarity with refugees](#).
- 11 September 2017: [Address of the High Commissioner for Human Rights to the 36th session of the Human Rights Council](#).
- 3 May 2019: [OHCHR Press briefing notes on Iran and Hungary](#).

Importance of "broad consensus" and international law in ECtHR decision-making process

The Convention cannot be interpreted in a vacuum. It should as far as possible be interpreted in harmony with other rules of international law of which it forms part.¹⁵ Thus the ECtHR often refers to other human rights treaties, and relevant "soft law" instruments – both of the Council of Europe¹⁶ and of other international institutions¹⁷ – and decisions by international courts and other bodies applying them.¹⁸

The ECtHR has already acknowledged that the Reception Conditions Directive is an indicator of a "broad consensus" about the fact that asylum-seekers need special protection.¹⁹ Therefore the definition of detention under the Reception Conditions Directive and the Return Directive, as interpreted by the CJEU

¹⁵ See para. 55 of *Al-Adsani v. the UK* [GC], Appl. No. 35763/97, 21 November 2001: *The Court must next assess whether the restriction was proportionate to the aim pursued. It reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, mutatis mutandis, Loizidou v. Turkey (merits), judgment of 18 December 1996, Reports 1996-VI, p. 2231, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.*

¹⁶ *Al-Adsani v. the UK*; *Jersild v. Denmark*, 22 August 1994; *Siliadin v. France*, Appl. No. 73316/01, 26 July 2005; *Vilho Eskelinen and Others v. Finland*, Appl. no. 63235/00, 19 April 2007.

¹⁷ *Sorensen and Rasmussen v. Denmark*, Appl. nos. 52562/99 and 52620/99, 11 January 2006; *Dickson v. the UK*, Appl. No. 44362/04, 4 December 2007; *Oneryildiz v. Turkey*, Appl. No. 48939/99, 30 November 2004.

¹⁸ Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 4th edition, Oxford.

¹⁹ See para. 251 of *M.S.S. v. Greece and Belgium*, Appl. no. 30696/09, 21 January 2011: *The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, mutatis mutandis, Oršuš and Others v. Croatia [GC], no. 15766/03, § 147, ECHR 2010-...). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.*

in joint cases [C-924/19 PPU and C-925/19 PPU](#) is also an indicator of a “broad consensus” on what amounts to deprivation of liberty under the EU law.

The ECtHR should take into account the CJEU judgment in joint cases [C-924/19 PPU and C-925/19 PPU](#) and the UNWGAD [Opinion No. 22/2020 concerning Saman Ahmed Haman \(Hungary\)](#), together with the above-listed international sources, when interpreting whether placement in the transit zones constitutes deprivation of liberty under Article 5 of the Convention. The broad consensus on placement in the transit zone qualifying as deprivation of liberty could therefore warrant a new approach to the cases currently pending before the ECtHR.²⁰

²⁰ Out of dozens of pending cases on placement of asylum seekers in the transit zone, the following ones have already been communicated: A.S. and Others v. Hungary, Appl. No. 34883/17; R.R. and Others v. Hungary, Appl. No. 36037/17; N.A. and Others v. Hungary, Appl. No. 37325/17; A.A.A. and Others v. Hungary, Appl. No. 37327/17; I.A. v. Hungary, Appl. No. 38297/17; H.M. and Others v. Hungary, Appl. No. 38967/17; M.B.K. v. Hungary, Appl. No. 73860/17; W.O. and Others v. Hungary, Appl. No. 36896/18. There are also 19 pending, not yet communicated cases, regarding placement in the transit zone during alien policing (removal) procedure.