

Submission by the Council of Europe Commissioner for Human Rights

under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements
in the case of

Ilias and Ahmed v. Hungary

(application no. 47287/15, Grand Chamber judgment of 21 November 2019)

grouped with

Shahzad v. Hungary

(application no. 12625/17, judgment of 8 July 2021)

Introduction

1. This submission by the Council of Europe Commissioner for Human Rights (hereinafter: “the Commissioner”) is addressed to the Committee of Ministers of the Council of Europe, in accordance with Rule 9.4 of the Rules of the Committee of Ministers,¹ in the context of the supervision of the execution of the judgment of the European Court of Human Rights (hereinafter: ‘the Court’) in the case of *Ilias and Ahmed v. Hungary* (application no. 47287/15). This judgment relates to the failure by the Hungarian authorities to discharge their procedural obligations to assess the risk of ill-treatment before expelling the applicants to Serbia as a presumed “safe third country”, in violation of Article 3 of the European Convention on Human Rights (hereinafter: “the Convention”).
2. This case has been grouped with the case of *Shahzad v. Hungary* (application no. 12625/17), in which the Court found a violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) and a violation of Article 13 of the European Convention (right to an effective remedy) taken in conjunction with Article 4 of Protocol No. 4 in the removal of the applicant to Serbia as part of a group.
3. According to her mandate, the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region.²
4. The present submission aims to assist the Committee of Ministers in its examination of the execution of the above two cases. It is based on the Commissioner’s and her predecessor’s monitoring of Hungary’s refugee protection system and her ongoing thematic work pertaining to the widespread human rights violations committed against refugees, asylum seekers and migrants at the borders of Council of Europe member states, including through the practice of pushbacks.³
5. Section I of this submission contains the Commissioner’s observations regarding the availability of access to an effective asylum procedure and individual risk assessment in Hungary, given the legislative and policy framework in place. Section II provides an overview of the practice of arbitrary removals from Hungary to Serbia, including through resorting to collective expulsions. Section III contains the Commissioner’s views on the measures that are necessary to prevent the occurrence of similar human rights violations in the future. These sections are followed by the Commissioner’s conclusions.

1. Overview of asylum-related laws, policies, and practices in place

6. The Commissioner notes that access to the asylum procedure in Hungary, and to any thorough, individual examination of the need for international protection, has become continuously more difficult since 2015. As observed in the country report following her visit to Hungary from 4 to 8 February 2019,⁴ legislation entered into force in August and September 2015 creating the legal basis for the construction of a fence on the Hungarian-Serbian border and criminalising irregular entry and damage to the fence.⁵
7. A “crisis situation due to mass immigration”, originally declared in the border adjacent regions in September 2015, was extended to the entire territory of Hungary in March 2016 and has been

¹ [Rules of the Committee of Ministers](#) for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 and [amended on 18 January 2017](#)).

² [Resolution](#) (99)50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

³ [Recommendation](#) by Dunja Mijatović, Commissioner for Human Rights, *Pushed beyond the limits: Four areas for urgent action to end human rights violations at Europe’s borders*, April 2022.

⁴ [Report](#) by Dunja Mijatović, Commissioner for Human Rights, on her visit to Hungary from 4 to 8 February 2019, CommDH(2019)13, published 21 May 2019, hereinafter “2019 Report”.

⁵ Act CXXVII of 2015 and Act CXL of 2015.

prolonged twelve times since, remaining presently in force until 7 September 2022.⁶ Regular provisions of the Asylum Act of 2007 were suspended and the possibility of submitting an asylum application was limited to two border transit zones.⁷ As confirmed by the Court in *Shahzad v. Hungary*, however, physical access for asylum seekers to those two transit zones was firmly restricted as Hungary had failed to secure the applicant effective means of legal entry.⁸

8. In addition, Parliament adopted on 20 June 2018 the so-called “Stop Soros” package and the Seventh Amendment to the Fundamental Law, creating a new inadmissibility ground, in the form of a hybrid of the concepts of safe third country and first country of asylum.⁹ The newly introduced inadmissibility ground has led to the systematic rejection of practically all asylum applications, as it outright excludes as possible beneficiaries all persons who arrive in Hungary via a country in which they were not exposed to persecution or a direct risk thereof. Extremely accelerated review procedures, granting asylum seekers only three days to refute the presumption of inadmissibility by the asylum authorities and three days to submit a court appeal against the rejection decision, without automatic suspensive effect, do not provide an effective opportunity to challenge that decision.¹⁰
9. The “Embassy procedure”, introduced on 26 May 2020 as a transitional epidemiological measure,¹¹ prevents most access to asylum on the territory of Hungary. With few exceptions, for instance for beneficiaries of subsidiary protection and family members of refugees and beneficiaries of subsidiary protection residing in Hungary, all asylum seekers must first and in person submit a form at the Hungarian embassy in Belgrade (Serbia) or Kyiv (Ukraine) to declare their intent to apply for asylum. The form, which must be filled in Hungarian or English language, is comprised of 21 questions pertaining, among others, to the asylum seeker’s education and health status and to their average income.¹² Securing an appointment to submit the form can involve waiting times of over six months. Based on the information provided in the form, a decision is taken whether to allow the applicant’s entry to Hungary to proceed to the substantive assessment of the application by the National Asylum Office.¹³ UNHCR considers that this procedure is not consistent with the right to seek asylum in Hungary, including at its borders, and exposes asylum seekers to a risk of refoulement, contrary to international refugee, human rights, and EU law.¹⁴
10. In the opinion of the Commissioner, it is difficult to consider this procedure transitional. It has been in place since May 2020 and the Commissioner is not aware that a review is imminent, even though the war in Ukraine would presumably call into question the sustained presumption that asylum seekers can safely travel to Kyiv to submit their declaration of intent. It is further unclear to what extent the Embassy procedure would serve the aim of epidemiological protection as it requires additional travel by the asylum seekers and their family members.
11. The Commissioner considers that access to the asylum procedure and to a substantive and individual risk assessment has become virtually impossible in Hungary owing to the above

⁶ See [41/2016. \(III. 9.\) Korm. rendelet - Nemzeti Jogszabálytár \(njt.hu\)](#), last accessed on 12 August 2022.

⁷ The transit zones were closed on 21 May 2020, following the Grand Chamber Judgement [C-924/19](#) of the Court of Justice of the European Union of 14 May 2020, which ruled that placement in the transit zone constituted unlawful detention.

⁸ See [Shahzad v. Hungary](#), para. 65.

⁹ Bill No. No. T/333, adopted as Act VI of 2018 on 20 June 2018. See “Commissioner concerned at further planned barriers to the work of NGOs assisting migrants”, [Statement](#) of 1 June 2018. The Court of Justice of the European Union ruled on 16 November 2021 that the package was incompatible with EU Law. CJEU [C-821-19](#).

¹⁰ See 2019 [Report](#), para. 40.

¹¹ Act LVIII of 2020 on the transitional rules and epidemiological preparedness related to the cessation of the state of danger. The Act has been extended two times and is currently in force until 31 December 2022.

¹² [Form](#) for a declaration of intent for lodging an application for asylum to be submitted to the National Directorate-General for Aliens Policing.

¹³ According to information received by the Hungarian Helsinki Committee through a Freedom of Information request, a total of twelve persons had been allowed to enter Hungary by the end of March 2022 based on a positive decision issued in an Embassy procedure.

¹⁴ UNHCR [Position](#) on the Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger, June 2020.

described consecutive and overlapping measures taken by the Government since 2015. Potential asylum seekers are either refused legal entry to the territory or, with few exceptions, obliged to leave Hungary and undergo a pre-screening through the Embassy procedure before being able to submit a claim for international protection. The Commissioner regrets that this gradual dismantling of the asylum system has been consistently accompanied and fuelled by a harsh anti-migrant discourse adopted by the Hungarian Government, further undermining the reception and protection of refugees and asylum seekers in the country.¹⁵

12. Indeed, the lack of a functioning system has become even more evident in the current situation when people are fleeing the war in neighbouring Ukraine. While Hungary's decision to maintain an open border with Ukraine is welcome, those fleeing depend on temporary and short-term humanitarian solutions without a durable protection perspective. This situation is problematic not only for third country nationals and stateless persons fleeing Ukraine who are excluded from temporary protection schemes, but also for Ukrainian nationals who were in Hungary already before 24 February 2022. In a letter to the Hungarian Minister of the Interior on 10 June 2022, the Commissioner expressed her view that the legislative framework related to asylum is inadequate and unsustainable, and urged the authorities to pursue the establishment of an asylum system in line with the country's international protection obligations.¹⁶

II. Arbitrary removals from Hungary to Serbia

13. Since the entry into force of the Hungarian Act "On the amendment of certain acts related to increasing the strictness of procedures carried out in the areas of border management" in March 2017,¹⁷ police have the duty to escort any third country national apprehended anywhere in Hungary in an irregular situation, including those who express a wish to apply for asylum, to the external side of the border fence with Serbia. The number of forced removals to Serbia from Hungary resulting from this duty and carried out without an orderly return procedure is alarming and continues to rise. According to information published by the Hungarian border police, 72,787 removals to Serbia took place in 2021, a considerable increase from 13,100 in 2019 and some 29,500 in 2020, while by the end of July 2022, the figure for this year already stood at some 75,000.¹⁸
14. The Commissioner observed already in 2019 that these forced removals expose refugees, asylum seekers and migrants to the risk of refoulement and chain refoulement prohibited by Article 3 of the Convention and Article 33(1) of the 1951 Geneva Convention.¹⁹ Foreign nationals subject to removal should have access to a procedure which involves an individual assessment of the risk of ill-treatment following expulsion, on the basis of an objective analysis of the human rights situation in the countries concerned. The Court has further made clear that any remedies against refoulement must be accessible in practice and not hindered by the acts or omissions of state authorities.²⁰
15. As stressed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) in March 2020, there is no procedure in place for the identification and registration of individuals who are being removed and no steps had been taken by the authorities to put in place effective safeguards that would offer persons apprehended by the Hungarian border police "protection against forced removal and/or refoulement, including chain refoulement."²¹

¹⁵ A recent example of this rhetoric is the speech by the Hungarian Prime Minister on 23 July 2022 in Băile Tuşnad, Romania, in which he named demographic issues as the most crucial challenge for Hungary, referred to migration as "population exchange" or "flooding", and argued that Europeans should not become a "people of mixed race".

¹⁶ [Letter](#) by the Commissioner for Human Rights to the Hungarian Minister of the Interior, published on 21 June 2022.

¹⁷ Bill No. T/13976, adopted as Act XX of 2017 on 7 March 2017 and in force as of 28 March 2017.

¹⁸ [Statistics](#) by the Hungarian border police.

¹⁹ 2019 [Report](#). *op.cit.*, para. 18.

²⁰ *M.S.S. v. Belgium and Greece*, [GC], (no. 30696/09), 21 January 2011, para 290.

²¹ CPT [Report](#) on the visit to Hungary from 20 – 29 November 2018, CPT/Inf(2020)8, published on 17 March 2020, reviewing steps taken by the authorities since the Committee's 2017 ad hoc visit.

16. The Commissioner reiterates that the lack of proper identification of persons who are apprehended and escorted to the external side of the border fence with Serbia and their inability to challenge the expulsion contravene the prohibition of collective expulsion under Article 4 of Protocol No. 4 of the Convention,²² as the process clearly does not entail a reasonable and objective examination of each individual case within the group.²³ The situation is made worse by the fact that the forced removals take place without an opportunity for the affected individuals to obtain legal advice on their Convention rights, as the work of civil society organisations pursuing lawful activities in the field of human rights and refugee rights protection has been arbitrarily restricted since the entry into force of the so-called “Stop Soros” package, which criminalises the provision of assistance to migrants and levies a special tax on any immigration-supporting activity.²⁴
17. Moreover, the Commissioner remains deeply concerned by the consistent allegations of ill-treatment and disproportionate use of force applied in the course of these removals, including against children.²⁵ In March 2020, the CPT concluded that no action had been taken by the Hungarian authorities to “put in place effective safeguards to prevent ill-treatment of persons returned by Hungarian police officers through the border fence towards Serbia”.²⁶ According to recently published testimony, practices of violent beatings and assaults with riot control agents such as teargas in the context of removals appear to be increasing.²⁷ The Commissioner is especially alarmed by accounts of the placement of some 40 individuals for up to twelve hours in small and overcrowded shipping containers prior to their expulsion to Serbia.

III. Observations on measures to be taken by the Hungarian authorities

18. The Hungarian authorities have been invited by the Committee of Ministers to carry out a reassessment of the legislative presumption of a safe third country in respect of Serbia, and to demonstrate that the risk of denial of access to an effective asylum procedure in Serbia and of refoulement are now thoroughly examined. The Commissioner considers that no progress has been made in this regard. The Embassy procedure, rather than suspending the application of the safe third country concept in respect of Serbia,²⁸ constitutes a continuation of the same concept on other terms. It is still based on the legislative presumption of Serbia as a safe third country to which asylum seekers can travel for an appointment at the Hungarian Embassy. The underlying problem identified by the Court, which is the lack of an individual assessment of potential risks under Article 3 of the Convention with respect to Serbia, has not been addressed in substance.
19. Indeed, the Commissioner is not aware of any attention being paid by the Hungarian authorities or any individual assessment being carried out as to whether an asylum seeker is able to travel safely to Belgrade (or Kyiv) to lodge a declaration of intent in the respective Embassies without subjecting him or herself to the risk of refoulement.
20. As a result of the abovementioned measures taken by the authorities, the number of asylum applications lodged in Hungary has diminished from some 180,000 in 2015 to 38 in 2021,²⁹ rendering unnecessary any crisis measures “due to mass immigration”. The Commissioner is of the opinion that, with a view to preventing the occurrence of similar violations to the ones found in these cases in the future, the Hungarian authorities should, in the first place, repeal the decreed “crisis situation”, revoke the Embassy Procedure in its current form, and review the legislation applicable under regular circumstances to bring it in line with Hungary’s international human rights and refugee protection obligations.

²² 2019 [Report](#), *op.cit.*, para. 19.

²³ See [N.D. and N. T. v. Spain](#) [GC], (nos. 8675/15 and 8697/15), 13 February 2020, para. 193.

²⁴ See [Statement](#) of 1 June 2018, *op.cit.*

²⁵ *Ibid.*, para. 20.

²⁶ CPT [Report](#) of 17 March 2020, *op.cit.*

²⁷ Médecins Sans Frontières, [Press release](#), *Alarming violence occurring at Hungary-Serbia border*, 4 August 2022.

²⁸ See [DH-DD\(2021\)1107](#) Communication from Hungary of 21 October 2021.

²⁹ See [AIDA](#) Country Report on Hungary, 2021 Update, based on statistical information provided by the former Immigration and Asylum Office and the National Directorate General for Aliens Policing.

21. In view of the continued increase in forced removals from Hungary to Serbia and given the fact that these are carried out collectively, outside the scope of the readmission agreement with Serbia,³⁰ without the presence of Serbian border guards and without the Hungarian police or immigration authority paying any attention to whether the removal constitutes or may lead to refoulement, it appears clear to the Commissioner that the Hungarian authorities continue to disregard their procedural obligations under Article 3 of the Convention to conduct an individual risk assessment in the context of removal procedures.
22. The Commissioner is further dismayed by the sustained and disrespectful rhetoric by the Hungarian authorities against refugees, asylum seekers and migrants. The persistent differentiation between Ukrainians as “real refugees” and those fleeing war and atrocities elsewhere as illegal migrants and a threat to Hungary’s national security contradicts the core principle that human rights exist to protect everyone, irrespective of their national or ethnic origin, colour, or belief. It further reflects a general attitude based on stereotypes and prejudice that is clearly at odds with the notion of an individual status determination, which the international refugee protection system is based on.

Conclusions

23. The Commissioner finds that the underlying issues identified by the Court in the cases of *Ilias and Ahmed v. Hungary* and *Shahzad v. Hungary* persist and that no progress has been achieved in addressing them. The laws, policies and practices related to asylum and removal procedures in Hungary today remain characterised by a structural lack of safeguards to ensure compliance with Article 3, Article 4 of Protocol 4, and Article 13 of the Convention. As a matter of fact, successive steps taken by the Government in recent years give no indication of a genuine acknowledgement of the issues at hand.
24. The Commissioner considers that a full and effective execution of the present judgments cannot be carried out without far-reaching measures to be taken by the Hungarian authorities, which have thus far not been initiated. Such measures include:
 - Repealing the decreed “crisis situation due to mass immigration” which is not justified by the number of asylum seekers entering or seeking to enter Hungary;
 - Reviewing the asylum legislation applicable under regular circumstances to bring it in line with Hungary’s human rights and refugee protection obligations and establish a fair and effective asylum procedure, specifically by
 - o Suspending the application of the safe third country concept in respect of Serbia until a thorough examination has been performed of the legal framework and policies in place in Serbia with the conclusion that refugees, asylum seekers and migrants are adequately protected from refoulement upon their return from Hungary;
 - o Ensuring that expulsions performed in application of the safe third country and safe first country of asylum concepts only take place in an orderly manner and in cooperation with the respective third country;
 - Revoking transitional measures that prevent asylum seekers from accessing the asylum procedure on the territory of Hungary;
 - Ensuring access to asylum at the borders of Hungary and provide an effective opportunity for all applicants to present their case in an individual examination;
 - Abolishing the duty of police officers to escort all persons apprehended anywhere in Hungary in an irregular situation to the external side of the border fence with Serbia and ensure that all

³⁰ The Court found that the lack of an orderly and negotiated removal process had exacerbated the risk of denial of access to an asylum procedure in Serbia and, therefore, of refoulement, and possible chain refoulement. See [Ilias and Ahmed v. Hungary](#), para. 161.

persons have an effective remedy available to them to protect themselves against forced removal, including basic preconditions such as access to interpretation and legal assistance;

- Refraining from all arbitrary removals outside the scope of readmission agreements and without the agreement of the receiving state;
- Providing clear instructions and training to all border and police units about applicable human rights standards in place and, in particular, the prohibition of inhumane and degrading treatment during all stages of the removal process;
- Carrying out independent and effective investigations into allegations of excessive use of force during removals;
- Refraining from anti-migrant rhetoric and campaigns that fan xenophobic attitudes;
- Acknowledging the crucial role of civil society organisations engaged in the protection of the rights of refugees, asylum seekers and migrants; end hostile rhetoric and cease all judicial, administrative or other harassment targeting them.