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Legal & Policy Framework of Migration Governance

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Contents

Acknowledgements	5
Executive summary	6
1. Statistics and data overview	7
Asylum seekers	7
Expulsions	8
Foreign citizens residing in Hungary	9
Migratory balance	9
2. The socio-economic, cultural and political context	10
Migration history in a nutshell - unfolding demographic nationalism	11
3. The constitutional organization of the state, separation of powers and constitutional principles on immigration and asylum	15
Checks and balances	15
Structure and independence of the judiciary	15
Packing and weakening the Constitutional Court	17
Rights protection	18
Constitutional entrenchment of the principle of asylum and case law	19
4. The relevant legislative and institutional framework in the field of migration and asylum	22
Legislative framework	22
Institutional framework	22
Policy	23
Amendments 2015-2017	24
“Stop Brussels” and “Stop Soros” – NGOs under attack	28
5. The legal status of foreigners	30
Asylum applicants	30
Access to the territory	30
Border procedure	31
Airport procedure	33
Regular procedure	33
Personal interview in the regular procedure	34
Appeals in regular procedure	35
Dublin Procedure	35
Admissibility procedure	37
Accelerated procedure	38
Beneficiaries of international protection	39
Refugee	40

Beneficiary of subsidiary protection	41
Beneficiary of temporary protection	42
Person with tolerated stay	43
Regular migrants	44
Irregular migrants	46
6. Conclusion	52
Bibliography	55
List of cases	64
ANNEX I: OVERVIEW OF THE LEGAL FRAMEWORK ON MIGRATION AND ASYLUM	65
ANNEX II: LIST OF AUTHORITIES INVOLVED IN MIGRATION GOVERNANCE	69
ANNEX III: FLOW CHART OF THE INTERNATIONAL PROTECTION PROCEDURE	71
ANNEX IV: THE NATIONAL CONSULTATION AND POSTER CAMPAIGN	72
List of abbreviations:	77

List of tables

Table 1. Asylum applications 2011-2017	7
Table 2. Expulsions 2011-2017	8

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Executive summary

In this report, our objective is to provide a snapshot of the current situation of the governance and management of migration in Hungary, the regulatory landscape, citing and reflecting on developments and events occurred between 2011 and 2018. Section 1) gives a statistical overview of international migration to Hungary. The data displayed shows the main patterns of asylum seeker flows, their recognition rates and the scale of people being expelled from the territory. We briefly describe the demographic composition of third-country nationals residing in the country, closing the section with a few remarks on migratory balance. Section 2) outlines the political, cultural and socio-economic context in which migration management unfolds. It briefly introduces the linguistic and religious cleavages and the political and institutional arrangements of the state. Without engaging in a thorough analysis, we will try to pin down those critical socio-economic and political factors that are accountable for the current escalation of tensions. In doing so, we move on to Section 3) that gives an insight on how the constitutional organization of the state has been altered and restructured over the past years, thus establishing an ideological, legal and institutional base for the transformation of the migration and asylum framework. Section 4) accounts for the legislative and institutional framework of immigration and asylum by introducing the major Acts that govern the field, the authorities that are responsible for the implementation of the policy, and the Government's migration strategy. Since the recent developments fundamentally changed the scope of the framework, now representing its basic tenets, instead of discussing the amendments in a separate section, the refugee crisis driven reforms will be embedded here. In chronological order we will address all major amendments since 2015 that affected the legislative framework. Section 5) explains the legal status of foreigners, including asylum applicants, beneficiaries of international protection, the main categories of third country nationals legally residing in the country in terms of the type of residence permit they hold, irregular migrants, and unaccompanied minors. In describing the situation of asylum seekers, we will outline the first main stages of the application procedure. Reception conditions and detention of asylum seekers, however, being subject of another work package of the project, are out of the scope of the report. Finally, in Section 6) we will analyse the national framework compliance with the European Convention on Human Rights based on the Court's case law in relation to migration and asylum.

1. Statistics and data overview

Asylum seekers

The first significant number of asylum seekers since the Balkan War arrived in Hungary in the winter 2014/2015. They were Kosovars, who only transited through Hungary on their way towards Germany (Kékesi, 2017). Partly due to the worsening socio-economic situation and political deadlock in Kosovo, tens of thousands people have left the country (Alexander, 2015). According to Nagy, the reason for Afghans being one of the three largest groups is because the local networks/smuggling routes are arguably well established, since their arrival to Hungary goes back to 1990s (Nagy, 2016a). As the table shows, the situation escalated when the Syrian asylum seekers reached the border in 2015, and the authorities registered more than 177,000 asylum applications in total.

Table 1. Asylum applications 2011-2017

	2011	2012	2013	2014	2015	2016	2017
Application, total	1,693	2,157	18,900	42,777	177,135	29,432	3,397
3 Main countries of origin	Afghan (649) Kosovar (211) Pakistani (121)	Afghan (880) Pakistani (327) Kosovar (226)	Kosovar (6,212) Pakistani (3,081) Afghan (2,328)	Kosovo (21,453) Afghan (8,796) Syrian (6,857)	Syrian (64,587) Afghan (46,227) Kosovar (24,454)	Afghan (11,052) Syrian (4,979) Pakistani (3,873)	Afghan (1,432) Iraqi (812) Syrian (577)
Refugee	52	87	198	240	146	154	106
Subsidiary Protection	139	328	217	236	356	271	1,110
Tolerated Stay	14	47	4	7	6	7	75
Rejection	740	751	4,185	4,553	2,917	4,675	2,880
Termination	623	1,110	11,339	23,406	152,260	49,479	2,049

Source: Nagy, 2016a; IAO;¹ CSO²

In early 2015, most of the arrivals were men under the age of 20 (70-80%) (WHO, 2016). Over the year this pattern changed, and greater number of women and children arrived. Concerning single men, the age range also expanded to include younger, unaccompanied minors (UAMs), as well as older males (WHO, 2016). In 2016, 6,599 women and 8,551 children, of which 1221 UAMs (ECRE, 2017:8), last year 1,241 women and 1,596 children, of which 232 UAMs, applied for asylum (ECRE, 2018:8).

¹ Statistics of the Immigration and Asylum Office (IAO), Available at: http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en.

² Statistics of the Central Statistical Office (CSO), Available at: https://www.ksh.hu/stadat/annual_1.

Recognition rates, especially in comparison to the EU average, have been extremely low; termination decisions are the most dominant. As Nagy notes, between January 2014 and June 2016, 215,322 cases were closed without decision on merits. Termination refers to situations when the applicant absconds or withdraws the application. Other grounds for termination such as death of applicant or change of immigration status hardly ever occur (Nagy, 2016a).

Although not visible in annual breakdown, the construction of the fence³ at the Serbian-Hungarian border in September 2015, and its later extension along the Croatian section, resulted in a massive decrease in asylum applications. From September to October the total number of applications dropped from 30,795 to 615.⁴ The fence did not deter asylum seekers from coming, it only diverted the entire Western Balkan route towards Croatia, and created a domino effect of border closures throughout the Balkan (Trauner and Neelsen, 2017:180-183). Moreover, the Hungarian authorities transported thousands of asylum seekers to the Austrian border without registration in September 2015.⁵

Expulsions

Table 2. Expulsions 2011-2017

	2011		2012	2013	2014	2015	2016	2017
Expulsions	1,904		2,039	1,352	1,962	2,603	3,274	1,057

Source: IAO

Since the Government criminalised illegal entry, as of 15 September 2015, expulsion of the illegal border crossers has been mandatory.⁶ Until 30 November 2016, 2,843 people were convicted for ‘unauthorised crossing of the border closure’.⁷ The decrease of 2017 may be accounted for by an amendment to the Act on the State Border that came into force 5 July 2016. The new provision provided for the police to automatically push back undocumented migrants apprehended within 8 km of the Serbian/Croatian-Hungarian border, rendering their arrest and conviction ‘unnecessary’. In March 2017, this rule has become applicable to the entire territory of Hungary. Under the new rule, in 2016, 19,057 migrant were refused entry or escorted back to the other side of the fence (ECRE, 2017:17-18); the number reached 20,100 in 2017.⁸

³ See Section 4 of this report.

⁴ Asylum and first time asylum applications by citizenship, age and sex Monthly data (rounded), Eurostat, Available at: <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>.

⁵ See VS. Available at: <https://vs.hu/kozelet/osszes/tizezer-menekultet-engedhettunk-at-a-ausztriaba-regisztracio-nelkul1-0920>.

⁶ See Section 4 of this report.

⁷ HHC, Hungary: Key Asylum Figures as of 1 December 2016. Available at: <https://www.helsinki.hu/wp-content/uploads/HHC-Hungary-asylum-figures-1-December-2016.pdf>.

⁸ HHC, Hungary: Key Asylum Figures for 2017, Available at: <https://www.helsinki.hu/wp-content/uploads/HHC-Hungary-asylum-figures-1-January-2018.pdf>.

Foreign citizens residing in Hungary

In 2011, there were 206,909 foreign citizens residing in the country, which decreased to 141,357 in 2013, a share of 1,4% of the population. It has remained fairly stable, although last year statistics show 7% increase. Regarding the foreign-born population, the number was 383,236 (4%) in 2011, which raised to 4,3% in 2013. Unlike in most EU Member States, where the majority of the foreigner population are third country nationals, in Hungary they made up just over 40% (Gödri, 2015:199). The largest group of third country nationals, approximately 26% of the total foreign population, come from Asia, mainly from China (12%). The share of males and females is generally balanced among them. Men are slightly over-represented concerning Serbia, while more women arrived from Ukraine and Russia.⁹ These immigrants are characterised by a younger age composition, more than half of them aged between 20 and 39 years (Gödri, 2015:191).

Foreigners in Hungary are concentrated in three main settlements. 80% of the Chinese immigrants live in Budapest (Kováts, 2016:357). In general, most of the foreigners live in the capital and Pest county, although people from neighbouring countries prefer the border areas. The Balaton is a favourable destination among elderly generations (Kincses, 2014).

Migratory balance

Between 2011 and 2013, there was a rapid growth in emigration. Although the process somewhat slowed in 2013, the overall number of people living abroad has been constantly increasing (Gödri, 2015). Neither the Central Statistical Office, however, nor other authorities publish data on the emigration of Hungarian citizens (Gödri et al, 2014:7,25). Based on aggregate mirror statistics of 2017, the number of Hungarians resident in other EU Member States is about 600.000. The most popular destination countries are the UK (250.000), Germany (192.340) and Austria (72.390).¹⁰ The reasons are mainly the absence of economic growth, low wages and the difficulties of young generations to enter the labour market. Although the official statistics show positive net migration rate, according to the mirror statistics, Hungary has become an emigration rather than an immigration country (Gödri, 2015). Emigrants who fail to inform the National Health Service and de-register from the system may face a fine up to 100,000 HUF (€320). In case of self-employed persons, the fine may reach up to 1,000,000 HUF (€3,203).¹¹

⁹ See CSO statistics, Available at: https://www.ksh.hu/docs/eng/xstadat/xstadat_annual/i_wvn001b.html.

¹⁰ Portfolio, 'Ide vezetett a tömeges kivándorlás: több magyar lépett le, mint gondoltuk, 30 August 2017, Available at: <https://www.portfolio.hu/gazdasag/ide-vezetett-a-tomeges-kivandorlas-tobb-magyar-lepett-le-mint-gondoltuk.260665.html>.

¹¹ Art 80(5)-(6) of Act LXXXIII of 1997 on the Benefits of Compulsory Health Insurance.

2. The socio-economic, cultural and political context

Although the unemployment rate has been constantly decreasing in Hungary since 2010, it was way over the EU average in 2011, only Greece was behind Hungary in the list (Gödri et al, 2014:46). The decrease, instead of an economic boom, is in large part attributable to the controversial and inadequate public works scheme (Albert, 2017), the growing number of persons working abroad,¹² and the raise of the official retirement age (Scharle, 2016). The Human Development Index (HDI) for 2015 was 0.836, which means an increase of 18.9% since the end of the communist era. The life expectancy increased by 6% and the GNI per capita by about 46.3%. This value still remained below the average of 0.887 for the OECD area, including that of the fellow post-communist countries, Poland, Czech Republic and Slovakia. For every 100.000 live births, 17 women died from pregnancy related causes. The Gender Inequality Index (GII) was 0,252; female participation in the labour market was 46.4% compared to 62.5% for men, the percentage of seats in the Parliament held by women was 10.1 (UNDP, 2016).

According to the last census in 2011, 39% of the population were Catholic (of which 1,8% Greek Catholic), 11,6% Calvinist, 2,2% Evangelical, and only 0,1% Muslim and 0,1% Jewish. 27,2 % did not declare a religion, and 18,2 % answered they had none.¹³

In November 2016, Ásotthalom, a village of Southern Hungary, adopted an anti-Muslim legislation forbidding *inter alia* the wearing of the burka.¹⁴ In June 2017, the Constitutional Court overturned the ban for violating the right to the freedom of conscience and religion, and to the freedom of speech. It is, however, important to note that three judges of the Court stressed in their concurring opinion that there is an “apparent risk for the Islamisation of Europe”, and the Court made its decision merely on procedural grounds and did not go on to consider whether it would be possible to order such a ban at the appropriate legislative level.¹⁵

It is also notable, that as a consequence of the adoption of the 2011 Church Act, several religious communities previously registered as Churches lost their status as such. The ECtHR in *Magyar Keresztény Mennonita Egyház and Others v. Hungary* ruled that this amounted to a violation of the right to freedom of thought, conscience and religion, as well as to the right to freedom of association. To date, both the provisions of the Church Act in question and their legal basis in the Constitution remain intact, no necessary measures were implemented to remedy the breach of the Convention.¹⁶

¹² People having been worked abroad less than a year are included into the employment statistics, as well as those occasionally returning and contributing to the family budget.

¹³ See Central Statistical Office, Census 2011, Available at: http://www.ksh.hu/nepszamlalas/tablak_vallas.

¹⁴ HVG, Toroczkai odacsap a bevándorlóknak: megtiltják a mecsetépítést Ásotthalmon, [Online] Available at: http://hvg.hu/itthon/20161124_toroczkai_asztthalom_muszlim_tiltas.

¹⁵ See 7/2017. (IV.18.) AB.

¹⁶ For further information on the issue, see Forum for Religious Freedom - Europe, ‘Hungary: Two years after ruling by ECtHR Church Law remains unaltered’, Warsaw, 27 September 2016, Available at: <http://www.osce.org/odihr/268711?download=true>.

The official language of Hungary is the Hungarian, the first language of some 99% of the population. The second largest linguistic group is the Romani and Boyash.¹⁷ Roma make up the largest minority group as well as the most marginalised in Hungary. Empirical research estimates 650.000 Roma people living in the country.¹⁸ After Roma, the most populous groups are Germans, Romanians and Slovaks, non-indigenous ethnic minorities are mostly Russians, Chinese, Arabs and Vietnamese (Gödri et al, 2014:41-44).

Concerning internal migration flows, the spatial redistribution of the local population, the most popular destinations are traditionally Budapest and Pest county. In 2011, 29,6% of the entire population (9,982,000) lived here.¹⁹ Fejér and Győr-Moson-Sopron counties have positive migration balance, while only a few people move to Borsod-Abaúj-Zemplén, Szabolcs-Szatmár, Békés and Baranya counties (Bálint and Gödri, 2015). These patterns are not accidental, the employment rate is the highest in the western and central part of the country.

Hungary is a parliamentary representative democracy. The legislative power is vested in the Parliament. The executive Government, accountable to the Parliament, is led by the Prime Minister. As the head of the state, the President mostly performs ceremonial functions, may however veto a law passed by the Parliament by sending it to the Constitutional Court for review. The members of the Parliament are elected to a 4-year term.²⁰ The current Assembly comprises the governing center-right²¹ Fidesz party in alliance²² with the KDNP (Cristian democrats), and the Jobbik (far-right), MSZP (socialists), and the LMP (green-liberals) in opposition. Although the Fidesz-KDNP coalition lost its two-thirds majority after a by-election defeat in February 2015, the governing parties have dominated and controlled the legislative process ever since (see more on that in Section 3).

Migration history in a nutshell - unfolding demographic nationalism

Before 1980, Hungary was a 'closed country'. The political and societal transformation in Southeastern Europe starting in the late 1980's changed the *status quo*, immigration and transit migration were intensified. Immigrants, most of whom were ethnic Hungarian, arrived mainly from the neighbouring countries, Romania, Ukraine and Yugoslavia. With the introduction of the right to free travel abroad in January 1988, out-migration has also

¹⁷ See Central Statistical Office, Census 2011, Available at: <http://www.ksh.hu/nepszamlalas/tablak>.

¹⁸ In the 2011 eleven census 316,000 people claimed to belong this group, however many Roma identify themselves as Hungarian denying their real Roma identity – see Simon cited in Timmer AD (2016) *Educating the Hungarian Roma: Nongovernmental Organisations and Minority Rights*, London: Lexington Books, p31.

¹⁹ Központi Statisztikai Hivatal, 2011. Évi Népszámlálás: 1. előzetes adatok, Budapest, 2012. Available at: <https://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepszelo2011.pdf>.

²⁰ Next general election is scheduled for 8 April 2018.

²¹ In reality, the Fidesz has rather become a radical authoritarian party with a dominant national populist overtone – See Kerekó P and Juhász A (2017) *The Hungarian Far Right: Social Demand, Political Supply and International Context*, Stuttgart: Ibidem.

²² This is a formally coalition government with no significant role assigned to KDNP.

emerged. Hungary faced significant migration flows during the Bosnian War in the early 1990s, when over 100,000 people, also ethnic Bosnians, Croats, Serbs, Albanians and Roma refugees, former-Yugoslav citizens, were settled in the country. In the meantime, although in a small proportion, non-European groups, notably Chinese and some Middle Eastern nationals, took advantage of the collapsing socialist economy and opened small businesses, fast food buffets, restaurants or clothing stores in Budapest. With Hungary's accession to the EU in 2004, both inward and outward migration gained a new impetus. The number of registered immigrants was over 25,000 in 2005, reaching 35,000 in 2008. The new rules on immigration introduced in 2007 allowed EEA citizens to more easily obtain long-term residence permits. Between 2009 and 2012 there was a decline in numbers, partly because the Government introduced a simplified naturalisation procedure available for foreign nationals of Hungarian origin, residing not only in, but also outside Hungary. This procedure applies to anyone who can evidence having had an ancestor living in Hungarian territory and who can speak Hungarian with a certain level of fluency. In the first four years of the implementation, 670,000 people have completed the registration (Gyurok, 1994; Gödri et al, 2014; Gödri, 2015). The number of the new Hungarian citizens under the program reached one million in December 2017.²³

In the April 8th 2018 general election, Hungarian citizens without a Hungarian address (mainly ethnic Hungarians living in neighbouring countries) were eligible to register and vote by mail - as opposed to residents of Hungary who were abroad at the time of the election. This latter group could exercise their right to vote only at a chosen consulate personally. Thus, many were forced to travel hundreds of kilometres to participate in the election.²⁴

In the last two decades, Hungary developed a hierarchy of immigration policies. On one hand, the Government privileges and endorses links with ethnic Hungarians living in neighbouring countries. Unlike other countries, however, it does in a way that shows a symbolic, quasi revisionist attempt of nation building across borders, with the aim of maintaining the “cultural legacies” and “spiritual unity” of the historical Hungary in claiming responsibility for the Hungarians living abroad.²⁵ On the other hand, regarding third-country nationals from non-neighbouring countries, Hungary has adopted a less supportive policy in failing to establish a coherent integration strategy and maintaining a discriminative, if not segregating practices in the institutionalisation of migration: they receive no state support, such as vocational, language training or housing benefits, and issues of cultural diversity and the notion of mutual recognition is disregarded in certain settings, even in education (Melegh, 2016; Ceccorulli et al, 2017). Irrespective of the relatively small number of non-ethnic Hungarian immigrants in the country, “foreignness-aversive” discourses have been constantly bolstering xenophobic feelings towards them (Korkut, 2014).

²³ Bloomberg, ‘Hungary Citizenship Plan Reaches 1 Million Mark in Boost for Orban’, [Online] Available at: <https://www.bloomberg.com/news/articles/2018-03-15/trump-s-next-big-idea-to-save-coal-is-miniature-power-plants/>.

²⁴ HVG, ‘Nem változtat a külföldön élők szavazásán a kormány’ [Online] Available at: http://hvg.hu/itthon/20170831_Nem_valtoztat_a_kuloldon_elok_szavazasan_a_kormany.

²⁵ The purposes are electoral rather than irredentist - See Pogonyi Sz (2015) Transborder Kin-minority as Symbolic Resource in Hungary, *Journal of Ethnopolitics and Minority Issues in Europe*, 14(3): 73-98.

In parallel, outward migration of Hungarians has not only become significant, but also particularly high among the skilled and young population; doctors, health care professionals, engineers, technical workers. Labour shortages have already become prevalent in certain professions (Hárs, 2016) with about 200,000 vacant positions in the labour market.²⁶ The *brain drain* effect has also had an impact on higher education, with more and more students planning to get a degree abroad (Gödri et al, 2014). Moreover, there is an “unequal exchange” between emigrants and immigrants, the latter flows do not counterbalance the former (Melegh, 2015; 2016). These patterns and the otherwise aging and shrinking population cause significant loss of welfare contribution putting the sustainability of the pension system in peril, and the economy already shows signs of dependence on migrant remittance (Földházi, 2015; Böröcz, 2014). The Government has so far failed to adequately address these demographic challenges and their associated negative social and financial consequences. Instead of enhancing demographic revitalisation through structural reforms, the Government has focused on non-Western, *illegal* migration flows supposedly threatening the already fragile welfare-system (Melegh, 2016). Right-wing populism has dominated the domestic political scene since the end of the 2000s (Ádám and Bozóki, 2016), and with it a climate of mistrust towards third-country nationals, and in this sense Hungary demonstrates how securitisation of migration has never been unfamiliar to EU migration policy as a whole (Huysmans, 2006; Baldaccini et al, 2007; Karamanidou, 2015). In Hungary, however, as Melegh argues, a radical and “authoritarian version of nationalism” has emerged and become mainstream, to some extent, possibly because of the serious demographic and migration-related challenges the country is facing (Melegh, 2016). Non-supportive institutional attitudes have turned into social exclusion and hostility, sentiments that reached their peak during the refugee crisis. In 2015/2016, the Government claimed “ethnic homogeneity” in demolishing the asylum system, while presenting itself as the defender of the nation and “European Christianity” (Fekete, 2016). The Government exploited the crisis for political purposes to justify its opposition of the elitist liberalism of the West (Korkut, 2012), that was, yet again, politically manifested with the so-called *lenient* politics of Brussels in tackling the migrant crisis. The Prime Minister claimed that only the reconstruction of politics along Christian and national, rather than liberal, principles can save Europe. To understand the Government’s rhetoric, it is important to note that Christianity is embraced by Fidesz as a question of national identity and not as religion, as Brubaker phrased it: “a matter of belonging rather than believing” (Brubaker, 2017). In the Hungarian political discourse, Christianity has been reconstructed in a way that it is lacking religious references, and serves as marker of traditional nationalism. Combined with the memories of “a proud past”, it is utilised to unify and elevate the nation, thus legitimising illiberal and anti-democratic practices (Ádám and Bozóki, 2016). A political asset that enables Fidesz (and the Jobbik) to mainstream their agendas on both issues of Europeanisation and migration (Korkut, 2015).

In reflecting these arguments, in the next section we will briefly outline how the constitutional order and organization of the state has been altered and restructured since 2011, thus

²⁶ Portfolio, ‘Megszólaltak a cégvezetők Már majdnem mindenkit elért Magyarország legnagyobb problémája, [Online] Available at: <https://www.portfolio.hu/gazdasag/megszolaltak-a-cegvezetok-mar-majdnem-mindenkit-elert-magyarorszag-legnagyobb-problemaja.278965.html>.

providing an ideological, normative and institutional base for the transformation of the asylum/migration framework.

3. The constitutional organization of the state, separation of powers and constitutional principles on immigration and asylum

Checks and balances

Hungary has a unicameral parliament. While badly designed unicameral systems may fail to provide a credible control over the government (Constitution Unit, 1998), Hungary's 1989 Constitution ensured an appropriate system of checks and balances. All this changed when the 2010 parliamentary election gave a qualified majority enough to Fidesz-KDNP to rewrite the Constitution. Fidesz expressed the necessity of a new Constitution to enhance democracy, and to demolish the elitist and partocratic scope of the 1989 Constitution. The 2011 "Fundamental Law", the new Constitution, however, led to regression in both terms (Korkut, 2012). As of 1 January 2012, the then well-balanced legislative decision making process has been dismantled, and was replaced by a centralised executive control; "Hungary has become a constitutional democracy in name only", in fact, Hungary has become a "guided" and "broken" democracy (Bánkuti et al, 2012; Korkut, 2014; Bozóki, 2015).

Fidesz laid down a constitutional order where appointments to key offices, independent institutions and parliamentary committees crucial to democracy and to checks on parliamentary procedure, no longer require multi-party consultation or representation. Positions such as the Chief Prosecutor, Head of the State Auditor and the Budget Council, members of the Electoral Commission, judges of the Constitutional Court, the President of the National Media and Info-communications Authority or the National Bank are all unilaterally²⁷ elected by the Fidesz-controlled Parliament (Bánkuti et al, 2012).

In practice, each and every piece of new legislation has been crafted and approved by one party only. Even cardinal laws governing the basic rules of taxation, pensions, and the electoral system have been crafted in a way to reflect the policy preferences of the ruling Fidesz party. Laws are passed without adequate debate on the floor, impact assessment, or without consultation with expert groups or stakeholders.²⁸ Although the President of the Republic is responsible for preliminary norm control and to review the constitutionality of a law proposal, the position has been filled by former Fidesz party leaders, previously Pál Schmitt and now János Áder (Bánkuti et al, 2012). Schmitt signed every law the Parliament passed without objection.

Structure and independence of the judiciary

The new constitution and its amendments introduced changes that raised serious concerns about the independence of judiciary (IBAHRI, 2012). The 'Fundamental Law', even more so,

²⁷ With two-third majority of the Members present.

²⁸ European Parliament Report on the Situation of Fundamental Rights: standards and practices in Hungary, pursuant to the European Parliament of 16 February 2012, 2012/2130 (INI), Committee on Civil Liberties, Justice and Home Affairs.

the subsequent Act on the Organization and Administration of Courts of Hungary²⁹ and the Act on the Legal Status and Remuneration of Judges³⁰ have brought a radical reconstruction of the judicial system.

The Hungarian judiciary comprises of four levels: The *Kúria* (The Supreme Court of Hungary), the regional courts of appeal, regional courts, administrative and labour courts, and the district courts. District courts hear criminal and civil cases in the first instance. Administrative and labour courts, as regional level courts, review decisions in the first instance relating to administrative and employment law. Regional courts are second instance courts but also hear special first instance cases where the law so provides. The regional courts of appeal hear appeals filed against the decisions of the regional courts. On the top of the hierarchy, as the highest judicial body of Hungary, The *Kúria* hears appeals filed against the decision of the regional courts and regional courts of appeal, and ensures the uniform application of the law. It adopts law harmonising decisions with binding force to all other courts, publishes decisions on legal principles, and annuls local authority decrees that are incompatible with these decisions and the law.³¹

Disregarding his 17 years of experience as a judge of the ECtHR, the new 'Fundamental Law' deemed the sitting president of the *Kúria*, András Baka unqualified, and his mandate was terminated. His replacement was elected by the two-thirds majority vote of the (Fidesz-KDNP) Parliament. In *Baka v. Hungary* (App. No. 20261/12) the ECtHR later held that the premature termination of Mr Baka's mandate without providing judicial review violated art 6(1) of the Convention. The Court furthermore found a violation of the right to freedom of expression (Art 10), given the casual link between the termination of the applicant's mandate and his previous criticism concerning the constitutional and legislative reforms.

The central administration of courts, a task that previously belonged to National Judicial Council (NJC), has been transferred to the President of National Office of Judiciary (NOJ), who was elected by the supermajority of the Parliament for a 9-year period. The Act attaches significantly more weight to the President as opposed to the members of the Council. The President exercises most prerogatives of the administration including the appointment of judges to senior judicial positions. Moreover, until its annulment, Art 27(4) of the 'Fundamental Law' authorised the President to allocate and reassign cases from one court to another.³² The NJC only retained a nominal supervisory role. The judges of the Council have very limited power and influence on actual decisions, their opinions and proposals can be ignored, their decisions are not binding. These changes in the institutional structure and the strong personal leadership under which the Office was set up met fierce criticism, focusing on the current system's lack of judicial self-governance and issues relating to accountability (Venice Commission, 2012; Fleck, 2013). Critics raised alarms about the potential danger of political interference with independent judiciary, since the first President of the Office is the wife of a founding member of Fidesz (Badó, 2013).

²⁹ Act CLXI of 2011.

³⁰ Act CLXII of 2011.

³¹ See <http://birosag.hu/en/information/hungarian-judicial-system>.

³² The Fifth Amendment annulled Art 27(4) of the Fundamental Law, previously introduced by Art 14 of the Fourth Amendment.

Finally, the Fundamental Law excessively lowered the mandatory retirement age of judges (from 70 to 62 years), forcing some 270 judges into retirement. The new law met fierce criticism as it undermines the security of judicial tenure,³³ let alone the risk of “political capture” given the extraordinary power of the President of the NJO to fill in the vacant positions (IBAHRI, 2015:26-27).

On 26 March 2018, the first instance court ruled that the President of the NJO abused her power in declining the application of a judge for a senior judicial post.³⁴

Packing and weakening the Constitutional Court

Prior to the introduction of the Fundamental Law, in June 2010, the Fidesz-dominated Parliament amended the old Constitution in order to alter the procedure for electing members of the Constitutional Court. Nomination by the majority of all parties in the Parliament is no longer needed before election, the only requirement is an overall two-thirds parliamentary vote. In September 2011, the number of judges of the Court was increased from 11 to 15. As of now, all judges on the bench were elected after June 2010, each nominated by the governing parties.³⁵ Unlike ‘regular’ judges, members of the Constitutional Court may remain in their seats until the end of their 12-year term, their upper age limit has been abolished (Eötvös Károly Policy Institute et al, 2013b).

The Fundamental Law curtailed the review jurisdiction of the Constitutional Court over budgetary and tax issues. The Court may only review such issues in relation to ‘the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion’ or the rights related to Hungarian citizenship’, and do so only if the state debt exceeds half of the GDP.³⁶ The reasons for setting such criteria are, arguably, politically motivated: the Court has previously abolished tax and financial measures with reference to principles that are not in the list (Kovács and Tóth, 2011; Lembcke and Boulanger, 2012:283). Moreover, in March 2013, the Fourth Amendment annulled the entire case law prior to the entry into force of the Fundamental Law, and provided that the Court may review amendments to the Fundamental Law on procedural grounds only. This latter amendment was, arguably, necessary since the Court, a few months earlier, abolished a provision of the so-called “Transitional Provisions” of the Constitution that provided legal basis for a radical and highly controversial change in the structure and registration of churches in Hungary,³⁷ however, technically restored by the Fourth Amendment (Eötvös Károly Policy Institute et al, 2013a). Such restrictions of the Court’s competence received severe criticism, including that

³³ In *European Commission v Hungary* (C-286/12), the CJEU found the law discriminatory, and ruled that Hungary failed to fulfil obligations under Directive 2000/78/EC on equal treatment in employment and occupation.

³⁴ Budapest Beacon, ‘Court rules: Handó abused her power’ [Online] Available: <https://budapestbeacon.com/court-rules-hando-abused-her-power/>.

³⁵ The last election of four members to fill newly vacant positions due to retirement of former judges was in November 2016. Since the Fidesz-KDNP lost its two-thirds majority in February 2015, for the nomination they made alliance with LMP (Green Liberals).

³⁶ Art 37(4) of Fundamental Law.

³⁷ See p12 of this report and Constitutional Court Decision 45/2012. (XII. 29.).

of László Sólyom, the former President of the Constitutional Court, who stated: “we are back from where the Court started in 1989.”³⁸

Rights protection

The Fundamental Law has been criticised for failing to properly guarantee fundamental human rights, on the basis of being both anti-egalitarian and lacking in explicit protection of minorities (Kovács, 2012). By changing the original “We the people” formula to “We the members of the Hungarian nation”, the Preamble implies an ethnic connotation. Besides being problematic in inter-state relations for a potential revisionist interpretation, it also excludes “nationalities living with us” (non-ethnic Hungarian citizens of Hungary) from the enactment of the Constitution (Venice Commission, 2011:para 40,149; Körtvélyesi, 2012). The Fundamental Law’s concept of human dignity fails to represent an inherent quality acknowledged for all human beings. In attributing constitutive role to Christianity, it is “loaded with religious and family values” whilst restricts women’s dignity, autonomy and privacy (Kis, 2012; Dupré, 2012). Since its birth, the *carved-in-granite* constitution has gone through a number of amendments, very few of which remained without comments condemning the new provisions for, *inter alia*, their incompatibility with EU law, criminalising homelessness, restricting the right to vote,³⁹ narrowing the notion of family, violating the freedom of religion, and undermining the rule of law.⁴⁰

As of January 2012, the National Agency for Data Protection and Freedom of Information was established. The prior independent Data Protection Ombudsman was substituted by the head of the new authority, nominated by the Prime Minister and appointed by the President of the Republic.⁴¹ The offices of the Commissioner for Citizens’ Rights, the Commissioner for National and Ethnic Minority Rights and the Commissioner for Future

³⁸ See, <https://vs.hu/kozelet/osszes/solyom-laszlo-mar-nem-az-orzaggyulessel-harcol-az-alkotmanybirosag-0221#s1>

³⁹ The criticised provisions of the Second Amendment that required preliminary registration for participation in national elections were later abolished by the Constitutional Court on procedural grounds (45/2012 (XII. 29.) AB.).

⁴⁰ European Parliament Report on the Situation of Fundamental Rights: standards and practices in Hungary, pursuant to the European Parliament of 16 February 2012, 2012/2130 (INI), Committee on Civil Liberties, Justice and Home Affairs, Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0229+0+DOC+PDF+V0//EN>; Eötvös Károly Policy Institute, HHC and the Hungarian Civil Liberties Union, Joint Opinion, Main concerns regarding the Fourth Amendment to the Fundamental Law of Hungary, 26 February 2013, Available at: https://helsinki.hu/wp-content/uploads/Appendix_1_Main_concerns_regarding_the_4th_Amendment_to_the_Fundamental_Law_of_Hungary.pdf; Venice Commission, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Venice, 14-15 June 2013, Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2013)012-e); European Commission, The European Commission reiterates its serious concerns over the Fourth Amendment to the Constitution of Hungary. Available at: http://europa.eu/rapid/press-release_IP-13-327_en.htm.

⁴¹ Concerning the independence of the data protection authority, in *European Commission v Hungary* (C-288/12) the CJEU found that Hungary failed to fulfil obligations under Directive 95/46/EC on the Protection of individuals with regard to the processing of personal data and on the free movement of such data.

Generations have been merged into one single office of the Commissioner for Fundamental Rights,⁴² who remained silent during the entire migration crisis.

The European Committee of Social Rights in its latest country report listed the following shortcomings of the Hungarian framework and issues of legislative non-conformity with the European Social Charter:⁴³

- Insufficient access to social services for lawfully resident nationals of all State Parties;
- Inadequate supply of housing for vulnerable families; evicted and Roma families can be left homeless;
- Roma children are subject to segregation in the educational field;
- Inadequate level of social assistance paid to single person without resources including elderly persons;
- Inadequate minimum amount of old-age pensions, jobseeker's aid/allowance, rehabilitation and invalidity benefits;
- Workers are not protected by occupational health and safety regulations;
- Insufficient measures taken to reduce the maternal mortality;
- Persons with disabilities are not guaranteed an effective and equal access to employment and mainstream training.⁴⁴

Constitutional entrenchment of the principle of asylum and case law

As set out in the Fundamental Law: “No one shall be expelled or extradited to a State where he or she would be in danger of being sentenced to death, being tortured or being subjected to other inhuman treatment or punishment”.⁴⁵ As McBride points out, this provision neither includes the risk of being subjected to treatment that is degrading,⁴⁶ nor does it provide protection against expulsion where there is a risk of an unjustified deprivation of liberty, and unfair trial. All of which have been recognized by the ECtHR as requiring a High Contracting Party not to expose an individual to such a risk through his or her deportation or expulsion (McBride, 2012). Moreover, the Fundamental Law provides that noncitizens shall be granted asylum only if another country does not provide protection for them.⁴⁷

⁴² Art 15 and 16 of the Transnational Provisions to the Fundamental Law.

⁴³ Department of the European Social Charter, Directorate General of Human Rights and the Rule of Law, Hungary and the European Social Charter, January 2018. Available at: <https://rm.coe.int/16805ac0a9>.

⁴⁴ Further information on the situation of non-conformity is available at: [http://hudoc.esc.coe.int/eng#{"fulltext":\["hungary"\],"ESCDcType":\["FOND","Conclusion","Ob"\]}](http://hudoc.esc.coe.int/eng#{).

⁴⁵ Art XIV(2) of The Fundamental Law of Hungary.

⁴⁶ See Art 3 of ECHR.

⁴⁷ Art XIV(3) of The Fundamental Law of Hungary.

In June 2016, the Parliament (Fidesz-KDNP and the far-right Jobbik party) introduced the Sixth Amendment to the Fundamental Law.⁴⁸ The new provision enables the Parliament, at the initiative of the Government, to declare a “state of terror threat” in the event of a “significant and direct threat of a terrorist attack” with a two-thirds majority vote of the members present. The Government may introduce extraordinary measures that derogate from or suspend regular procedures prescribed by law governing matters of public administration, defence and law-enforcement forces, security services, as well as procedures laid down in cardinal Acts. The exceptional measures introduced and carried out during ‘state of terrorist threat’ neither require parliamentary oversight nor judicial authorisation. The adopted provision only requires the Government to keep the President of the Republic and the designated parliamentary committees “informed” (Kovács, 2016).

In addition, there is the complete lack of definition provided for what constitutes “threat of terrorist attack” (Amnesty International, 2016a). A couple of weeks before the amendment proposal was released, the Minister of the Prime Minister’s Office, nevertheless, referred to the clashes occurred at Röszke border crossing⁴⁹ in 2015 as a *quasi* “terror threat situation” (Kovács, 2016). In fact, one of the participants was arrested and sentenced to 10 years imprisonment for terrorism on 30 November 2016 (Amnesty International, 2016b).

In October 2016, Hungary held a referendum whether to comply with the European Council decision 2015/1601 of 22 September 2015 on the mandatory relocation of refugees. Despite the Government ‘NO’-campaign, the referendum was invalid due to insufficient turnout (Halmai, 2016). Shortly after the failed referendum, the Minister of Justice submitted an amendment proposal (Seventh Amendment) to the Fundamental Law, according to which no “foreign population” could be settled in Hungary. Although the draft proposal was rejected, it was a clear attempt of the Government to circumvent and derogate from obligations under EU law, with reference to Hungary’s “constitutional identity” (Nagy-Nádasi and Kőhalmi, 2017; Halmai, 2017).

Regarding the asylum status determination procedure, appeals against rejection are dealt with at the administrative and labour courts by single judges, who are typically not asylum specialists (ECRE, 2017:22). The short notice deadlines⁵⁰ provided for submitting a judicial review requests, let alone during “state of crisis due to mass migration”, arguably constitute serious shortcomings of administrative justice. Moreover, the court’s right to change the decision of the Immigration and Asylum Office (IAO) has been revoked in September 2015, and the decisions passed by the court cannot be challenged by way of a second appeal. Although the law foresees the possibility of constitutional review of administrative matters in general, the effectiveness of the complaint mechanism is questionable. The Constitutional Court’s case law shows that very few appeals are admitted and adjudicated on the merits (Gárdos-Orosz and Temesi, 2017).

⁴⁸ Art 51/A of the Fundamental Law.

⁴⁹ The authorities sealed Röszke border crossing on 16 September 2015 leaving hundreds of asylum seekers stranded in the border zone. 11 migrants (‘the Röszke 11’) were arrested during clashes with the riot police and accused of illegal border crossing and participating in mass-riot, following a spontaneous protest against the blockade.

⁵⁰ See Section 4) of this report.

As the Venice Commission notes, neither the judges of the immigration proceedings, nor the Commissioner for Fundamental Rights (the Ombudsman) submitted complaints to challenge the constitutionality of the new measures introduced in the peak period of the refugee crisis that were at odds with international human rights obligations⁵¹ (Venice Commission, 2016). There were only two cases before the Constitutional Court. The Fundamental Law radically restricted the range of actors who could initiate a constitutional review. Due to the abolition of the institution of *actio popularis*, NGOs and advocacy groups are no longer entitled to submit *ex post* norm control requests (Arato et al, 2012:477).

The first case was submitted by multiple petitioners requesting the Court to declare the referendum against the compulsory relocation of refugees unconstitutional. One of the petitioners' main concerns was that referendums, as set out in the Constitution, may only be held about questions that fall within the scope of the Parliament's power,⁵² while the subject of the upcoming referendum related to EU common policy. The Court in its decision rejected all petitions claiming lack of jurisdiction to examine whether the question of the referendum relates to a matter within the authority of the Parliament.⁵³

The second was filed by the Ombudsman after the failed amendment proposal to the Fundamental Law, in which he asked for an abstract interpretation in relation to the Council decision on the relocation quotas. The Commissioner did not explicitly ask the Court to review the lawfulness of the Decision, but of actions within the EU legal framework that "facilitate the relocation of a large group of foreigners legally staying in one of the Member States without their expressed or implied consent and without personalised and objective criteria applied during their selection" (Drinóczi, 2016). Although the Court in its decision⁵⁴ declared the question out of its jurisdiction, it "rubber stamped the constitutional identity defence of the Orbán-government" by ruling that the Constitutional Court has the power to override EU law if it violates Hungary's sovereignty or constitutional identity rooted in its "historical constitution" (Halmai, 2017). The Government, to date, has failed to comply with the Council Decision which eventually resulted in an infringement procedure against Hungary in May 2017.⁵⁵

As the Venice Commission observed, the way the Constitutional Court protects rights is 'Janus-faced' since both the petition of the Ombudsman and the referendum are in conflict with, if not specifically aimed to undermine, the efforts made by the EU to protect the rights of asylum seekers (Venice Commission, 2016).

⁵¹ See Section 4) of this report.

⁵² Art 8(2) of Fundamental Law.

⁵³ 12/2016. (VI. 22.) AB.

⁵⁴ 22/2016. (XII. 6.) AB.

⁵⁵ Later in the year, the Court of Justice of the European Union turned down Hungary's action against the relocation scheme - See Court of Justice of the European Union, 'The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers', Press Release No 91/17, 6 September 2017, Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf>. On the infringement procedure see European Commission, 'Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland', IP/17/1607, 14 June 2017, Available at: http://europa.eu/rapid/press-release_IP-17-1607_en.htm;

4. The relevant legislative and institutional framework in the field of migration and asylum⁵⁶

Legislative framework

The national legislation alignment with EU law started in early 2000s (Gödri, 2015). During the pre-accession process the main domestic rules on migration were harmonised with EU legal norms. Hungary entered the EU in 2004, and developed a four-tier immigration system in line with all the relevant EU instruments by the adoption of the Schengen *acquis* in 2007 (Gödri, 2015; Melegh, 2016). Act I of 2007 on the Entry and Residence of Persons with the Right of Free Movement and Residence sanctions the situation of EEA citizens, Act II of 2007 that of third-country nationals, and Act LXXX of 2007 sets the rules for asylum. Finally, Act LV of 1993 on Citizenship deals with the naturalisation of foreign citizens with ethnic ties to Hungary, stateless persons and recognised refugees.⁵⁷ The rules of implementation of these Acts are laid down in the corresponding government decrees. After 2010, the policy concerning asylum seekers and beneficiaries of international protection has switched from permissive to rather restrictive mode, and Hungary mainly adopted the stricter rules of the Common European Asylum System (Ceccorulli et al, 2017); the detention of asylum seekers, for example, was introduced in 2013.⁵⁸

The Hungarian framework on immigration and asylum is a centralised system at the national level concerning both legislative and institutional design, local authorities play no role in the process (Ceccorulli et al, 2017).

Institutional framework

In Hungary it is the Minister of Interior who is responsible for policy making in the field of immigration and asylum, as well as for related EU matters. He works in cooperation with other ministries in charge of relevant issues, such as the Minister for National Economy (work permit issuance), Minister of Human Resources (education of migrant children) and the Minister of Foreign Affairs (co-elaboration of migration policy).⁵⁹ Under the oversight of Ministry of Interior, Act XXXIX of 2001 established the Office of Immigration and Nationality (OIN), now Immigration and Asylum Office (IAO), as the only competent authority dealing with administrative duties related to visa, residence permits, asylum, and citizenship.⁶⁰ The IAO is also in charge of running open reception facilities and closed detention centres for asylum seekers, and it works in close partnership with the Police, military and civil security

⁵⁶ The country reports published by ECRE (2017, 2018), that were written by the Hungarian Helsinki Committee, provide extensive and detailed information on the legislative and institutional framework.

⁵⁷ The already mentioned simplified naturalisation process was introduced to the 1993 Act by an amendment of Act XLIV of 2010.

⁵⁸ Detention of asylum seekers as a preventive measure had been in use prior to 2013, the ECtHR was, however, not satisfied with the lawfulness of these practices – see *Lokpo and Touré v. Hungary*; *Abdelhakim v. Hungary*; *Said v. Hungary*; *Nabil and Others v. Hungary*.

⁵⁹ European Commission Migration and Home Affairs, Annual Report 2016 on Migration and Asylum Policy (Part 2) in Hungary, Available at: Framework https://ec.europa.eu/home-affairs/sites/homeaffairs/files/13a_hungary_apr_part2_en.pdf.

⁶⁰ As of 01 January 2017, citizenship matters have been transferred to the Prime Minister's Office and the Government Office of the Capital.

services in migration management. The Police have responsibility for border control, removal-, return procedures and monitoring detention in shelters.⁶¹ According to its website, the IAO maintains “an outstanding relationship with the Regional Representation of the UNHCR”.⁶² Up until October 2017, the IAO had cooperation agreements with NGOs allowing oversight of the sites run by IAO, which was later terminated.⁶³

Policy

The UNHCR in its feedback on the Government Migration Strategy for 2014-2020 expressed concerns about multiple aspects of the draft and called on the Government to adhere to a proactive rather than defensive communication and policy plan (UNHCR, 2013). The comments of the UNHCR, *inter alia*, reflect on the complete lack of ‘Best Interest Determination Procedure’, victim protection of trafficked persons, an institutionalised system of resettlement and a separate ‘Integration Strategy’, and an ‘Exit Strategy’ concerning protected individuals whose entitlement to stay in the reception facilities expires. The UNHCR furthermore underlined the shortcomings of detention monitoring, and criticised the ‘weak’ relationship with NGOs, as well as the lack of explicit reference in the draft for minimum standards of treatment. The Government, however, did not only disregard the UNHCR recommendations, but from 2015 onward, in shifting away from the already positive features of the migration policy, launched a crackdown on immigration.

This began in February 2015, with an anti-immigrant billboard campaign with messages, such as “If you come to Hungary, you have to respect our culture” or “If you come to Hungary, you can’t take the jobs of the Hungarian”. It was followed by the National Consultation on Immigration and Terrorism, a questionnaire sent to every household, in which asylum seekers were portrayed as “economic migrants”, a threat to the welfare system, and included statements suggesting a link between migration and terrorism. The objective of national consultation as policy tool is to gain legitimacy of policy implementations, demonstrating that decisions are made to reflect the majoritarian will.⁶⁴

The campaign was followed by a plethora of law amendments that systematically transformed the framework, which has now arguably become, concerning asylum seekers, a caricature of the 1951 Geneva Convention. The overall restrictive nature of the new developments and the clear negligence of best international practice triggered fierce objection by NGOs, such as the Amnesty International, and the Council of Europe at the very early stages (HHC, 2015a; Amnesty International, 2015; ECRE, 2015; Council of Europe Commissioner for Human Rights, 2015). The measures, however, showed increasing derogation from EU law. The most controversial law amendments relevant to migration and asylum are listed below in chronological order.

⁶¹ For further information on institutional framework, organisational structure, see Annex II.

⁶² See IAO’s website – Available at: http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=391&Itemid=666&lang=en, Accessed on: 21 February 2018.

⁶³ See HHC, Authorities Terminated Cooperation Agreements with the HHC, Available at: <https://www.helsinki.hu/en/authorities-terminated-cooperation-agreements-with-the-hhc/>.

⁶⁴ For national consultations, referendum questions and billboards see Annex IV.

Amendments 2015-2017

2015

Act CVI of 2015 gave authorisation to the Government to issue a decree establishing a list of safe third countries including all countries along the Western Balkans route.⁶⁵

The safe third country concept was introduced into Hungarian law by an amendment to the Asylum Act in November 2010.⁶⁶ The country in respect to which Hungary applied the safe third country concept was mainly Serbia (UNHCR, 2016a), though the Hungarian Helsinki Committee (HHC) warned that Serbia cannot be regarded as safe third country, *inter alia* due to its poor recognition rate (HHC, 2011). In August 2012 the UNHCR reaffirmed this view by calling for the suspension of returns to Serbia (UNHCR, 2012a). The Administrative and Labour Law Panel of the Supreme Court (Kúria) also held that countries whose asylum system is 'overburdened' cannot be considered as safe third country.⁶⁷ Hungary, however, continued to apply this practice, resulting in the UNHCR, to avoid chain-*refoulement*, in October 2012 to call on states to refrain from transferring asylum-seekers back to Hungary (UNHCR, 2012b). When Hungary stopped applying the safe third country concept, UNHCR reversed this position. Notwithstanding these warnings, 30 June 2015 the Hungarian Parliament amended the Asylum Act, which provided for the Government to issue a decree establishing the above list of safe third countries.⁶⁸

Act CXXVII of 2015 introduced the accelerated procedure, where submission deadlines are curtailed and suspensive effect of appeals is denied (Nagy, 2016a).⁶⁹ The Act provides that the asylum application is inadmissible if the applicant stayed/travelled through the territory of a safe third country and would have had the opportunity to apply for effective protection, or has relatives in that country and may enter its territory.⁷⁰ In the event of rejection on this basis, the applicant may - no later than within three days - make a declaration concerning why in her or his case that country in question cannot be considered as safe.⁷¹ Originally, the judicial review request against the rejection decision had to be submitted within 3 days in the first period,⁷² in which new facts or new circumstances could not be referred to.⁷³ The submission of judicial review request, similarly to accelerated procedures, had no suspensive effect on the enforcement of the decision.⁷⁴

⁶⁵ Government Decree no 191/2015 (VII. 21.) on Safe Countries of Origin and Safe Third Countries. Available at: <http://www.refworld.org/pdfid/55ca02c74.pdf>.

⁶⁶ For critical analysis see Gyollai D and Amatrudo A (2018) Controlling irregular migration: International human rights standards and the Hungarian legal framework, *European Journal of Criminology*, (forthcoming).

⁶⁷ 2/2012 (XII. 10.) KMK Opinion, Available at: <http://www.refworld.org/docid/50ee7a732.html>.

⁶⁸ Art 93(2) of Asylum Act, as amended by Act CVI of 2015.

⁶⁹ See 'Accelerated procedure' in this report.

⁷⁰ Art 51(4) of Asylum Act, as amended by Act CXXVII of 2015.

⁷¹ Art 51(11) of Asylum Act, as amended by Act CXXVII of 2015.

⁷² Former Art 53(3) of Asylum Act, later amended by Act CXL of 2015 – now 7 days.

⁷³ Former Art 53(2a) of Asylum Act, as amended by Act CXL of 2015, and abolished by Act CXLIII of 2017.

⁷⁴ Former Art 53(2) of Asylum Act, as amended by Act CXXVII of 2015, and amended by Act CXLIII of 2017 – Judicial review request submitted against rejection decision made on this ground, as

The Act provides for the establishment of border closure (fence) on the border.⁷⁵ By mid-September, a 175 km long barbed wire fence had accordingly been constructed on the border between Hungary and Serbia, which was later extended to the Croatian border section (ECRE, 2015).

Act CXL of 2015 provides for the establishment of ‘transit zones’ at the borders, and refers to asylum-seekers being ‘temporarily accommodated’ in the zones for the purpose of immigration and refugee status determination process.⁷⁶ The Act accordingly introduced a simplified ‘border procedure’, which, in practice, represents a very limited access to the refugee status determination procedure.⁷⁷

The Act provides for the declaration of ‘crisis situation caused by mass immigration’, if, *inter alia*, any circumstance related to the migration situation directly endanger public security, public order or public health.⁷⁸ The Government declared crisis situations in two Southern counties on 15 September 2015,⁷⁹ which was expanded 9 March 2016 covering the whole territory of the country.⁸⁰ The crisis situation has since been extended several times, and is currently in effect until 6 September 2018.⁸¹ During this newly introduced state of emergency, by the explicit order of the minister, the army may be deployed in the registration of asylum applications; the police has been assigned a *quasi*-unfettered power in the management of mass migration.⁸²

The following offences have been introduced to the Criminal Code, punishable by 3 to 10 years’ imprisonment respectively: unauthorised crossing of the border closure,⁸³ damaging the border closure,⁸⁴ and obstruction of the construction works related to the border closure.⁸⁵ Individually, or in combination with other sentences, expulsion of the convicted would be mandatory.⁸⁶

A new chapter of the Act on Criminal Proceedings provides for the procedure to be followed in case of the new criminal offences listed above.⁸⁷ The defendant can be brought

of 01 January 2018, has suspensive effect. As general rule, appeals against inadmissibility decision otherwise have still no suspensive effect, see Art 53(6).

⁷⁵ Art 5 of Act LXXXIX of 2007 on the State Border, as amended by Act CXXVII of 2015.

⁷⁶ Art 15/A of Act LXXXIX of 2007, as amended by Act CXL of 2015.

⁷⁷ See ‘Border procedure’ in this report.

⁷⁸ Art 80/A of Asylum Act, as amended by Act CXL of 2015.

⁷⁹ Government Decree 269/2015. (IX. 15.) announcing crisis situation caused by mass migration. Available at: <http://www.refworld.org/docid/55f90f614.html>.

⁸⁰ Government Decree 41/2016. (III. 9.) Available at: https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a1600041.kor.

⁸¹ Government Decree 21/2018. (II. 16.) Available at: https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1800021.KOR×hift=ffffff4&txtreferer=0000001.TXT.

⁸² Art 80/G of Asylum Act and Act CXLII of 2015 on the Amendments of Certain Acts Related to the More Efficient Protection of Hungary’s Border and the Management of Mass Migration.

⁸³ Art 352/A of Act C of 2012 on the Criminal Code, as amended by Act CXL of 2015.

⁸⁴ Art 352/B of Act C of 2012 on the Criminal Code, as amended by Act CXL of 2015.

⁸⁵ Art 352/C of Act C of 2012 on the Criminal Code, as amended by Act CXL of 2015.

⁸⁶ Art 60(2a) of Act C of 2012 on the Criminal Code, as amended by Act CXL of 2015.

⁸⁷ Chap XXVI/A of Act XIX of 1998 on Criminal Proceedings, as amended by Act CXL of 2015.

to trial within 15 days after his or her interrogation, or within 8 days if caught *in flagrante*.⁸⁸ During the ‘crisis situation caused by mass immigration’ these criminal proceedings are to be conducted prior to all other cases.⁸⁹ There is no requirement to provide a written translation of the indictment and of the judgement to the defendant who does not speak the Hungarian language.⁹⁰ Whilst the amendments also provide for mandatory participation of a defence lawyer, in practice, most lawyers appointed by the court only had met their clients immediately prior to the hearings, where the indictment was generally presented only orally, without having been served in writing beforehand (UNHCR, 2016a:21; HHC, 2015c).⁹¹

2016

Act XXXIX of 2016 reduced the maximum length of stay of people granted international protection in reception centres from 60 to 30 days of the date of the decision on recognition.⁹² In practice, this means they are required to leave the centre before being issued an ID card (ECRE, 2018:106). The entitlement of refugees and beneficiaries of subsidiary protection to basic healthcare was also reduced from 1 year to 6 months.⁹³ The Act provides for the mandatory revision of the existence of criteria for recognition of beneficiaries of subsidiary protection and refugees at least every 3 years following recognition.⁹⁴

Act XCIV of 2016 provides for the police to ‘escort’ migrants illegally present in the territory to the other side of the border closure, insofar as they are apprehended within 8 km of the border.⁹⁵ Asylum seekers who experienced such push backs and were later interviewed by Human Rights Watch, providing accounts of police violence and cruelty: violent pushbacks, beatings, the setting of dogs on asylum seekers (Human Rights Watch, 2016).

Before 2014, recognised refugees and beneficiaries of subsidiary protection were transferred from the reception facilities to a “pre-integration reception centre” in Bicske. The initial length of stay was six months, which could be extended once for another six-month period. Persons with tolerated stay could stay the reception facility in Debrecen, or be placed in the community shelter in Balassagyarmat (ECRE, 2013:35). As of January 2014, the integration system shifted from camp-based to community-based integration. Integration support was provided to a person granted international protection for 2 years following recognition. The amount of integration support was set in an integration contract and the support was provided by the family care service of the local council. A social worker was appointed supporting them throughout the integration process (ECRE, 2018:106-107). In

⁸⁸ Art 542/N of Act XIX of 1998, as amended by Act CXL of 2015.

⁸⁹ Art 542/E of Act XIX of 1998, as amended by Act CXL of 2015.

⁹⁰ Art 542/K of Act XIX of 1998, as amended by Act CXL of 2015.

⁹¹ For critical analysis see Gyollai D and Amatrudo A (2018) Controlling irregular migration: International human rights standards and the Hungarian legal framework, *European Journal of Criminology*, (forthcoming).

⁹² Art 32(1) of Asylum Act, as amended by Act XXXIX of 2016 on the Amendment of Certain Acts Relating to Migration and Other Relevant Acts.

⁹³ Art 32(1a) of Asylum Act, as amended by Act XXXIX of 2016.

⁹⁴ Art 7/A and 14 of Asylum Act, as amended by Act XXXIX of 2016.

⁹⁵ Art 5(1a) of Act LXXXIX of 2007, as amended by Act XCIV of 2016.

2016, the Government significantly decreased the financial support provided to asylum seekers, including the monthly cash allowance and the school enrolment benefit for minor asylum seekers.⁹⁶ Moreover, the new decree abolished all previous integration benefits, and the integration contract for asylum seekers who are granted international protection,⁹⁷ meaning that upon exit of the reception facilities they cannot rely on any institutionalised support other than that of NGOs.

2017

Act XX of 2017 provides for the extension of the '8-km Rule' to the entire territory of Hungary during 'crisis situation caused by mass immigration'.⁹⁸ The grounds for declaration of such state of crisis have been broadened,⁹⁹ and so have the discretion of the authorities in this regard.¹⁰⁰ During the state of crisis, asylum application can only be submitted in person in the transit zone.¹⁰¹ Third country nationals, who are otherwise accommodated in open reception facilities or detained in immigration or asylum detention centres, may be allocated and transferred to the transit zone,¹⁰² including unaccompanied minors between the age of 14 and 18 years; if new applicants, even without guardian assigned.¹⁰³ The HHC successfully requested interim measures by ECtHR to halt, among others, eight unaccompanied minor asylum seekers to the transit zone (HHC, 2017a). The Act eliminates the maximum time cap of 4 weeks and provides for indefinite placement (*de facto* detention)¹⁰⁴ of third country nationals in the transit zone.¹⁰⁵ Unless granted protection, the expenses of the stay are borne by the third-country national.¹⁰⁶ The deadline for submitting judicial review request against inadmissibility decision and against rejection in accelerated procedure is shortened to 3 days.¹⁰⁷

The latest amendment package (Act CXLIII of 2017) amending 16 related Acts came into force 01 January 2018. The amending Act mainly contains technical changes that were necessary due to the coming into force of Act CL of 2016 on General Public Administration Procedures, leaving the above issues unresolved.

⁹⁶ Former Art 22 and 30 Government Decree 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on Asylum, repelled by Art 8 of Government Decree 62/2016 (III. 31.) on the Amendments of Certain Government Decrees Relating to Migration and Asylum.

⁹⁷ Former Art 37 of Government Decree 301/2007 (XI. 9.), abolished by Art 8 of Government Decree 62/2016 (III. 31.).

⁹⁸ Art 5(1b) of Act LXXXIX of 2007, as amended by Act XX of 2017.

⁹⁹ Art 80/A(c) of Asylum Act, as amended by Act XX of 2017.

¹⁰⁰ Art 80/H-I of Asylum Act, as amended by Act XX of 2017.

¹⁰¹ Art 80/J (1) of Asylum Act, as amended by Act XX of 2017.

¹⁰² Art 62 (3a) and Art 110 (20) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals; Art 92/C of Asylum Act, as amended by Act XX of 2017.

¹⁰³ Art 80/H and Art 92/C of Asylum Act, Art 62 (3a) and Art 110 (20) of Act II of 2007, read in conjunction with Art 4 (1)(c) of Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship, as amended by Act XX of 2017.

¹⁰⁴ See *Ilias and Ahmed v Hungary*, ECtHR, 14 March 2017, App no 47287/15.

¹⁰⁵ Art 15/A (2) and (2a) of Act LXXXIX of 2007, as amended by Act XX of 2017.

¹⁰⁶ Art 62 (4) of Act II of 2007, as amended by Act XX of 2017 – not applied in practice.

¹⁰⁷ Art 80/K of Asylum Act, as amended by Act XX of 2017.

The Government's opposition to and non-compliance with EU law have not remained without consequence. In December 2015, and then in May 2017 the European Commission opened infringement procedure against Hungary claiming the new rules were in breach of the recast Asylum Procedures Directive (2013/32/EU), the Return Directive (2008/115/EC), the Reception Conditions Directive (2013/33/EU), the Directive on the right to interpretation and translation in criminal proceedings (2010/64/EU), and 'several provisions of the Charter of Fundamental Rights of the EU'.¹⁰⁸

“Stop Brussels” and “Stop Soros” – NGOs under attack

One month prior to the infringement procedure in May, the Government, launched another national consultation entitled “Stop Brussels” focusing on various topics. The questionnaire included statements such as, “Brussels wants to force Hungary to let in illegal immigrants”, “Illegal immigrants heading to Hungary are encouraged to illegal acts by not just human traffickers but also by some international organizations” or “More and more organizations supported from abroad operate in Hungary with the aim to interfere with Hungarian internal affairs in a non-transparent manner”.¹⁰⁹

Instead of supporting, at the very least, making use of the expertise, enthusiasm and sources provided by the NGOs in Hungary during the migration crisis, the Government, in fact, launched an offensive against civil organizations as the “enemies of the state” (Nagy, 2016a; Timmer, 2017). The explanation given by the Government is as follows: the migration crisis is attributable to and stoked by the Hungarian-American investor and philanthropist George Soros, whose plan is to “settle one million migrants in Europe”. NGOs providing humanitarian aid to asylum seekers only serve the execution of this so-called “Soros Plan” acting on behalf of Mr Soros as his *agents*. The “Stop Brussels” campaign was followed by, yet again, another consultation; this time entitled “About the Soros-Plan: Let us not leave it without comment!”. The summary of the questionnaire in brief: Soros along with EU leaders want to dismantle the fence and open borders for immigrants Africa and Middle-East. In order “to enhance the integration of illegal immigrants”, he is aiming “to push the native population's language and culture into the background”. It singled out the Hungarian Helsinki Committee and the Amnesty International as Soros-founded organizations defending illegal immigrants.¹¹⁰ The Government has spent 7.2 billion forints (€23 million) in total on the anti-EU and anti-Soros campaigns to support and spread its views.¹¹¹ Moreover, in January 2018, the Government outlined a law proposal including mandatory registration of all NGOs

¹⁰⁸ European Commission, ‘Commission opens infringement procedure against Hungary concerning its asylum law’, IP/15/6228, 10 December 2015, Available at: <http://europa.eu/rapid/press-release-IP-15-6228-en.htm>; European Commission, ‘Commission follows up on infringement procedure against Hungary concerning its asylum law, IP/17/1285, 17 May 2017, Available at: <http://europa.eu/rapid/press-release-IP-17-1285-en.htm>.

¹⁰⁹ European Commission, Facts Matter: European Commission responds to Hungarian National Consultation, Available at: https://ec.europa.eu/commission/sites/beta-political/files/commission-answers-stop-brussels-consultation_en.pdf.

¹¹⁰ The questionnaire in English available at: <https://theorangefiles.hu/?s=stop+soros&submit=Search>.

¹¹¹ EUobserver, ‘Orban stokes up his voters with anti-Soros consultation’, 22 November 2017, Available at: <https://euobserver.com/beyond-brussels/139965>.

that “support migration” and 25% tax imposition on foreign donation of such NGOs.¹¹² The new bill would restrict movements of activists in preventing them from approaching the borders, activities of advocacy, recruitment of volunteers, production of information booklets. NGOs continuing such activities without the approval of the Interior Minister would face heavy fines, and potential total ban by withdrawal of their tax number. The draft proposal has now been submitted to the Parliament and will be debated after the election in April.¹¹³ Although unprecedented in scope, the draft proposal did not come as a surprise. In October 2017, the Prime Minister called on national security services to investigate NGOs of the “Soros Empire” that criticise his policies.¹¹⁴ Earlier, in June, the Parliament already passed a law on the mandatory registration and transparency of foreign-funded NGOs.¹¹⁵ Interfering with the right to freedom of association, the right to protection of private life and of personal data, the law met fierce criticism (Venice Commission, 2017), and eventually led to, yet again, another infringement procedure.¹¹⁶ In December 2017 the case was referred to the Court of Justice of European Union.

¹¹² See draft proposal, Available at: <https://www.helsinki.hu/wp-content/uploads/Stop-Soros-package-Bills-T19776-T19774-T19775.pdf>.

¹¹³ Reuters, ‘Hungary submits anti-immigration ‘Stop Soros’ bill to parliament’, 14 February 2018, Available at: <https://uk.reuters.com/article/uk-hungary-soros-law/hungary-submits-anti-immigration-stop-soros-bill-to-parliament-idUKKCN1FY1O0>.

¹¹⁴ Financial Times, ‘Orban calls for Hungarian spy agencies to probe ‘Soros empire’ of NGOs’, 27 October 2017, Available at: <https://www.ft.com/content/e3888348-bb23-11e7-9bfb-4a9c83ffa852>.

¹¹⁵ Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds, Available at: <https://www.helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf>.

¹¹⁶ European Commission, Hungary: Commission launches infringement procedure for law on foreign-funded NGOs, Brussels, 13 July 2017, Available at: http://europa.eu/rapid/press-release_IP-17-1982_en.htm.

5. The legal status of foreigners¹¹⁷

Asylum applicants

There is no time-limit or restrictions prescribed by law for submitting an asylum application. The application shall be submitted to the refugee authority in person.¹¹⁸ If the asylum application was submitted in immigration, criminal, or misdemeanour procedure, the proceeding authority shall refer the applicant to the refugee authority with no delay.¹¹⁹

Concerning individuals, however, who were prosecuted for unauthorised crossing of the border fence¹²⁰ and applied for asylum during the criminal trial, as witnessed by the UNHCR, applications for the stay of criminal proceedings referring to the non-penalisation principle of the 1951 Convention were dismissed on the grounds that eligibility for international protection was not a relevant issue to criminal liability. The judge argued, *inter alia*, that the defendant did not contact the authorities immediately after entering the territory; he presented an asylum application at the court three days after being apprehended. The applicants were referred to the IAO only after being convicted and sentenced to expulsion (UNHCR, 2016a:23). While the asylum application has a suspensive effect, and the law foresees the possibility to order a stay of enforcement of the expulsion if the individual in question is entitled to international protection,¹²¹ the stay order does not annul the sentence, never mind the conviction.

Access to the territory

Under the '8-km Rule' that came into force in July 2016 and its expansion in March 2017,¹²² the police automatically push back potential asylum seekers to the external side of the border fence. As a consequence of the measure, between 5 July 2016 and 31 August 2017, 14,438 irregular migrants were pushed back from Hungarian territory, either towards Serbia or Croatia, without registration or allowing them to submit an asylum application (HHC, 2017c).

As of 28 March 2017, transit zones have been the only access to the territory for asylum seekers. There are two transit zones along the Serbian border located in Tompa and Rösztke, and two along the Croatian section in Beremend and Letenye.¹²³ The zones comprise of containers that serve as accommodation for asylum seekers as well as place for the refugee status determination process.¹²⁴ The process starts with recording new arrival and clarifying the route taken by the applicant, who is then handed over to an immigration officer (Nagy, 2015). The identification process comprises document-, body- and luggage

¹¹⁷ The country reports published by ECRE (2017, 2018), that were written by the Hungarian Helsinki Committee, provide extensive and detailed information on the legal status of asylum seekers and beneficiaries of international protection.

¹¹⁸ Art 35(1)-(2) of Asylum Act.

¹¹⁹ Art 64(2)-(3) of Government Decree 301/2007. (XI. 9.).

¹²⁰ See '2015-2017 Amendments' in this report.

¹²¹ Art 301(6) of Act CCXL of 2013 on the Execution of Criminal Punishments and Measures, read in conjunction with Art 51-52 of Act II of 2007.

¹²² See '2015-2017 Amendments' in this report.

¹²³ Transit zones at Baranya and Letenye have never been visited by asylum seekers.

¹²⁴ See 'Border procedure' in this report.

check, registration of personal data, provision of information on the procedure, taking photograph and sending fingerprints to AFIS (Automated Fingerprint Identification System) and the EURODAC (EASO, 2015).¹²⁵

Although the fence along with other deterrence measures have successfully diverted the Western Balkans route towards Croatia, the Hungarian-Serbian border section remained one of the major entry points to Western Europe (ECRE, 2017:16).

Between 15 and 19 September 2015, thousands of asylum seekers arrived at Röszke, but only 352 people were allowed to enter the transit zone. Many of them left towards Croatia after waiting days on the other side of the fence without adequate care in a so-called 'pre-transit zone' (UNHCR, 2016a:11). The processing capacity of each zone was said to be 100 people per day, which was later reduced to 20-30, and as of 2 November 2015, only 10 people were let in, and on working days only (ECRE, 2017:16). As of 23 January 2018, only 1 person is let in at each zone (ECRE, 2018:11). The conditions in the pre-transit zones were reported as appalling. As described by HHC (2016) and the UNHCR (2016b) asylum seekers were waiting for entry in tents made of blankets distributed by UNHCR, while others sat amidst rubbish. Approximately one-third of the people waiting were children, many infants, some still breastfeeding. Families with small children and usually unaccompanied minors enjoyed priority over single men in terms of admission. Some single men had to wait for over 20 days without toilets and without being able to take a shower. While UNHCR distributed food packages every day, on at least one documented occasion the authorities prevented access to the volunteers of Oltalom and Migszol (Hungarian NGOs) to deliver food for those waiting in the pre-transit zone at Röszke.¹²⁶

In Autumn 2016, the Serbian authorities put an end to the practice of waiting in pre-transit zones. Asylum seekers are now placed in temporary reception centres in Serbia. The admission to transit zones is coordinated by a "community-leader" chosen by the Serbian Commissariat for Refugees, who serves as a contact person for both the Hungarian and Serbian authorities, the only person staying in the pre-transit zone. The waiting lists are managed by the Commissariat. The criteria determining the order of entry is the time of arrival and the scale of vulnerability (ECRE, 2018:17-18).

Border procedure

Border procedure is to be followed in case the application has been submitted in the transit zone.¹²⁷ During the procedure conducted at the border, the applicant is neither entitled to stay/obtain a permit authorising stay in the territory of Hungary, nor does she or he have the right to work in a reception centre or at a workplace¹²⁸ as set out elsewhere in the Asylum

¹²⁵ See also IAO, Transit zones of Röszke and Tompa Expanded, April 2017, Available at: http://www.bmbah.hu/index.php?option=com_k2&view=item&id=1055:transit-zones-of-roszke-and-tompa-expanded&lang=en.

¹²⁶ Szlakovits, R. Határsértésnek számít az ételosztás Röszkénél? Megtiltották az ételosztást az Oltalom Karitatív Egyesületnek a röszkei tranzitónánál, közben a száz fő befogadására alkalmas szabadkai táborban is már több mint ötszázan vannak. Delmagyar, 29 July 2016, Available at: http://www.delmagyar.hu/szeged_hirek/hatarsertesnek_szamit_az_etelosztas_roszkenel/2484185/.

¹²⁷ Art 71/A of Asylum Act, as amended by Act CXL of 2015. As of 28 March 2017, the regular procedure is conducted in transit zones – See Amendments 2017 in this report.

¹²⁸ Art 71/A (2) of Asylum Act, as amended by Act CXL of 2015.

Act and as determined by the general rules applicable to foreigners.¹²⁹ Asylum seekers can be held in the transit zone for a period of maximum 4 weeks.¹³⁰ The refugee authority shall deliver a decision on admissibility ‘with priority’ but no later than within 8 days.¹³¹ The deadline for submitting a judicial review request was extended from 3 days to 7 days.¹³² The rules of the review process are the same that apply in admissibility or accelerated procedure.¹³³ In the review process, before January 2018, a court clerk, as well, had the authority to act, including the decision on the merits of the case.¹³⁴ The personal hearing can be conducted via telecommunication network.¹³⁵

Although the border procedure cannot be applied to vulnerable individuals requiring special treatment,¹³⁶ in practice, there is no assessment mechanism in place, only visible vulnerabilities are considered.¹³⁷ Usually only families, unaccompanied minors, single women, elderly and disabled people are excluded from the border procedure after admittance to the transit zone, and transferred to open or closed reception facilities (ECRE, 2018:42).¹³⁸ These centres are run by IAO in cooperation with NGOs providing supplementary services for applicants. Medical services are available in each facility, though with insufficient access to interpretation (ECRE, 2018:70).

Until spring 2017, the assessment of the asylum application focuses, in most cases, on the whether the applicant entered Hungary from a safe third country. The applicant’s personal circumstances and his or her need for international protection are not examined or taken into account. The IAO, in cases witnessed by the HHC, delivered an inadmissible decision in less than an hour, and ordered a ban on entry and stay for 1 or 2 years in the Schengen Information System (SIS). Regarding the opportunity to challenge that decision based on the safe third country concept, after providing brief information, IAO offered the applicants to sign a statement format, according to which the applicant disagrees. The IAO did not provide an opportunity to consult a legal adviser or to collect a supporting argument. The asylum-seekers interviewed by HHC did not understand the reasons for the inadmissibility and their right to judicial review (HHC, 2015b). NGOs, such as the HHC, have not always been able to monitor the procedure and provide legal advice due to lack of access to the zones. In 2015 only nine rejected asylum seekers submitted requests for judicial review, of which seven later withdrew their request. The hearings of the remaining two were conducted over Skype, and the judge after appeal still upheld the IAO’s decision,

¹²⁹ Art 5(1) a) and c) of Asylum Act.

¹³⁰ Art 71/A (4) of Asylum Act, as amended by Act CXL of 2015.

¹³¹ Art 71/A (3) of Asylum Act, as amended by Act CXL of 2015.

¹³² Art 53(3) of Asylum Act, as amended by Act CXL of 2015.

¹³³ See ‘Admissibility procedure’ in this report.

¹³⁴ Former Art 71/A (9) of Asylum Act, as amended by Act CXL of 2015 and abolished by Act CXLI of 2017.

¹³⁵ Art 71/A (10) of Asylum Act.

¹³⁶ Art 71/A (7) of Asylum Act, as amended by Act CXL of 2015.

¹³⁷ Inadequate vulnerability assessment has always been an issue of concern - See *O.M v. Hungary*, ECtHR, App no 9912/15.

¹³⁸ All this changed in March 2017 – See Amendments 2017 in this report.

irrespective of the medical evidence proving that the applicants were suffering from post-traumatic stress disorder (UNHCR, 2016a).¹³⁹

Airport procedure

Although the Asylum Act provides for ‘airport procedure’ in case the asylum application is submitted at the airport, the procedure is rarely applied in practice. In the airport procedure the applicants shall be provided accommodation in the designated facilities in the transit area of the airport.¹⁴⁰ If the application is not inadmissible, or a period of 8 days has elapsed after submitting the application, the applicant shall be permitted entry to the territory.¹⁴¹ Asylum seekers admitted to the country are, however, routinely detained (ECRE, 2017:36); as of July 2013, applying for asylum in airport procedure constitutes grounds for asylum detention.¹⁴² There are approximately 100-200 applications submitted at the airport each year (ECRE, 2017:35).

Regular procedure

Following the submission of an application, the refugee authority shall determine whether the applicant falls under the Dublin Regulations, then examines whether the application is inadmissible, or if the conditions are met for an accelerated procedure. The inadmissibility decision, or the decision in accelerated procedure shall be made within 15 days, otherwise the IAO shall deliver its decision within 60 days.¹⁴³ In practice, the deadlines are not always met; in cases that involve age assessment of unaccompanied minors, the procedure may take up to 2-5 months (ECRE, 2017:17). With respect to detained individuals seeking asylum¹⁴⁴ and unaccompanied minors¹⁴⁵, the procedure shall be conducted as a matter of priority. Unlike in case of detainees, regarding unaccompanied minors, this requirement is hardly fulfilled in practice (ECRE, 2017:20).

The first instance decision is taken by the Refugee Directorate of the IAO.

The possible outcomes are (ECRE, 2018:23):¹⁴⁶

- a) Grant refugee status;
- b) Grant subsidiary protection status;
- c) Grant tolerated status;
- d) Rejection due to inadmissibility;
- e) Rejection on merits.

¹³⁹ For critical analysis see Gyollai D and Amatrudo A (2018) Controlling irregular migration: International human rights standards and the Hungarian legal framework, *European Journal of Criminology*, (forthcoming).

¹⁴⁰ Art 72(3) of Asylum Act.

¹⁴¹ Art 72(5) of Asylum Act.

¹⁴² Art 31/A (1) e) of asylum Act, as amended by Act XCIII of 2013.

¹⁴³ Art 47 of Asylum Act.

¹⁴⁴ Art 35/A of Asylum Act.

¹⁴⁵ Art 35(7) of Asylum Act.

¹⁴⁶ See ‘Beneficiaries of International Protection’ in this report.

Personal interview in the regular procedure

Personal hearing of the asylum applicant is mandatory. It can be omitted only if the applicant:

- a) Is not fit for being heard;
- b) Submitted a subsequent application in which he or she failed to share facts or provide evidence that would indicate his or her recognition as a refugee or beneficiary of subsidiary protection. The personal interview cannot be omitted if the subsequent application is submitted by someone whose previous application was submitted on his or her behalf, referring to the applicant as a dependent person or an unmarried minor.¹⁴⁷

To determine the applicants' fitness for interview, the IAO may consider a psychologist's expert opinion. If necessary, the applicant may be given the opportunity to provide a written statement, or alternatively family members can be interviewed. If the applicant does not feel fit to be interviewed, the IAO may give permission for a family member or psychologist to be present at the hearing (ECRE, 2018:50-51).

With the consent of the applicant, the IAO may require medical expert opinion to determine whether the applicant would comply with the criteria of a person with special needs.¹⁴⁸ However, the procedure for requesting such document is not laid down in law. The Asylum Act further provides for the issuance of medical expert opinion in order to determine whether previous trauma, psychological condition accounts for contradictions and the incoherence of the applicant's statement.¹⁴⁹ In practice, however, medical expert opinions were mostly issued at the applicants' request (ECRE, 2018:52).

As the ECRE report notes, the only NGO that provides psycho-social rehabilitation for victims of torture is the Cordelia Foundation.¹⁵⁰ Although Cordelia Foundation issues medical expert reports in line with the Istanbul Protocol, it does not qualify as forensic expertise in Hungarian law: thus both the IAO and the courts sometimes exclude or disregard its opinions. Moreover, the Cordelia Foundation has no access to transit zones, medical expert reports are therefore not used in border procedures (ECRE, 2018:52-53).

The applicant may use his or her mother tongue or a language he or she understands. The refugee authority shall provide an interpreter, unless the refugee officer speaks a language understood by the applicant, and the asylum seeker gives his or her consent in writing to exclude the interpreter.¹⁵¹ Upon request, unless considered to be an obstacle, a same-sex interpreter and interviewer shall be provided.¹⁵² For asylum seekers who have faced gender-based persecution, this designation is compulsory, the provision gives no discretion whatsoever to the authority in this regard.¹⁵³

¹⁴⁷ Art 43 of Asylum Act.

¹⁴⁸ Art 3(2) of Government Decree on the Implementation of the Asylum Act.

¹⁴⁹ Art 59(2) of Asylum Act.

¹⁵⁰ See <http://www.cordelia.hu/index.php/en/>.

¹⁵¹ Art 36 of Asylum Act and Art 66 of Government Decree 301/2007. (XI. 9.).

¹⁵² Art 66(2) of Gov. Decree 301/2007. (XI. 9.).

¹⁵³ Art 66(3) of Gov. Decree 301/2007. (XI. 9.).

Asylum seekers have their first interview usually within a few days after arrival. According to HHC, based on their observations in Békéscsaba asylum detention centre, asylum seekers often undergo an excessive number of repeated interviews (4-6). To HHC's knowledge, there are no gender- or vulnerability-specific guidelines available for officers to conduct interviews. There is no code of conduct for interpreters in the context of asylum procedures, many of the interpreters have received no training on dealing with asylum cases. There is no quality assessment, nor are there professional standard requirements to become an interpreter for the IAO. The interpretation is often full of flaws and anomalies both in refugee camps and at the court (ECRE, 2017:20-22). In May 2017, the prosecutors sought a suspended prison sentence for an interpreter who was found deliberately tampering and falsifying the testimony of an asylum-seeking defendant put on trial in 2016 for his alleged role in the Battle of Rőszke.¹⁵⁴

Appeals in regular procedure

The decision must be communicated to the applicant orally in his or her mother tongue or in a language he or she understands, as well as in writing in Hungarian.¹⁵⁵

According to HHC's observation in Kiskunhalas refugee camp, most decisions are not translated to asylum seekers by an interpreter, only by case officers, or even by fellow applicants. Only the main points of the decision are communicated, the decision is hardly ever explained (ECRE, 2017:22). There is no hard copy of the decision available for asylum applicants (ECRE, 2018:40).

Decisions rejecting the application may be subject to judicial review. The review request shall be submitted to the IAO within 8 days of the communication of the decision, and the court shall decide within 60 days of receipt of the claim.¹⁵⁶ The judicial review request has suspensive effect. The procedure is a single instance judicial review; the law provides for no onward appeal.¹⁵⁷

The personal hearing of the applicant is mandatory if she or he is a detainee, unless:

- a) The applicant cannot be summoned from his or her accommodation;
- b) The applicant has departed to an unknown destination;
- c) The appeal concerns a subsequent application presenting no new facts or circumstances.¹⁵⁸

Dublin Procedure

The Dublin Procedure is applied whenever the criteria of the Dublin Regulation are met.¹⁵⁹ Once it is initiated, the asylum procedure is suspended until a decision is made determining the state responsible. This decision suspending the procedure is not challengeable.¹⁶⁰

¹⁵⁴ The Budapest Beacon, Pro-gov't media's Middle East "expert" has long history of plagiarism, bribery and perjury. November 15, 2017.

¹⁵⁵ Art 36(2) of Asylum Act.

¹⁵⁶ Art 68(1)-(2) of Asylum Act.

¹⁵⁷ Art 68(6) of Asylum Act.

¹⁵⁸ Art 68(3) of Asylum Act.

¹⁵⁹ Art 49-50 of Asylum Act.

¹⁶⁰ Art 49(2)-(3) of Asylum Act.

There is no available official information on how the criteria are applied. If an asylum seeker informs the refugee authority about a family member in another Member State, the IAO would request for original documents as proof of family ties. Costs of DNA testing shall be payable by the applicant (ECRE, 2017:25).

Asylum seekers are systematically fingerprinted by the police. In 2015/2016, the IAO did not have the capacity to store all fingerprint data under the 'asylum seeker' category (category 1) in EURODAC. In some occasions, the fingerprints have been registered in category 2 and 3 of 'irregular migrants'. Some people were forced to give fingerprints (ECRE, 2017:26). Refusal constitutes a ground for accelerated procedure,¹⁶¹ or the IAO may proceed with a decision on the merits of the application without conducting a personal interview.¹⁶² Dublin procedure can no longer be initiated after the IAO has made a decision on the merits of the asylum application (ECRE, 2017:26).

As of February 2017, the HHC was not aware of cases where the IAO sought personal guarantees from the receiving Member State prior to the transfer (ECRE, 2017:26). If a Member State accepts responsibility, the IAO issues a decision on the transfer within 8 days.¹⁶³ Once this resolution is issued, the asylum seeker can no longer withdraw his or her application.¹⁶⁴

The asylum seeker has the right to appeal against the Dublin decision within 3 days.¹⁶⁵ The IAO shall forward the request to the court with no delay.¹⁶⁶ The judicial review request has no automatic suspensive effect, nor has the application for such suspension of the implementation of the transfer.¹⁶⁷ The court shall deliver its decision within 8 days. There is no personal hearing in the procedure, and the decision is not appealable.¹⁶⁸

The applicant is not always informed of the 3-day deadline for the review request. In case of submission of review request, the HHC observed cases when the Dublin Unit of the IAO forwarded the appeals to the court with several months delay. This practice has, since the end of 2016, been changed, when the HHC and the UNHCR raised the issue with IAO, and the head of the Dublin Unit was replaced. Although the Asylum Act does not provide for suspensive effect of appeals, in practice it leads to having a suspensive effect. While the court, as opposed to the 8-day deadline, delivers its decision within months (ECRE, 2017:28).

Where the applicant is not detained, it may be prohibited for him or her to leave the designated place of residence for a maximum of 72 hours in order to ensure the transfer is carried out.¹⁶⁹ The transfer is organized by the Dublin Unit of the IAO in cooperation with the receiving Member State. The transfer is carried out by the police who assist with boarding

¹⁶¹ Art 57(7) i) of Asylum Act.

¹⁶² Art 66(2) f) of Asylum Act, as amended by Act CXXVII of 2015.

¹⁶³ Art 83(3) of Gov. Decree 301/2007. (XI. 9.).

¹⁶⁴ Art 49(4) of Asylum Act.

¹⁶⁵ Art 49(6) of Asylum Act.

¹⁶⁶ Art 49(7) of Asylum Act.

¹⁶⁷ Art 49(9) of Asylum Act

¹⁶⁸ Art 49(8) of Asylum Act.

¹⁶⁹ Art 49(5) of Asylum Act.

and escort the foreigner unless the circumstances do not require; voluntary transfers are rare (ECRE, 2017:27).

Admissibility procedure

The admissibility of the application shall be decided within 15 days. In practice, due to the large number of asylum seekers in 2015 and 2016, the procedure took a few weeks longer (ECRE, 2017:32).

The application is inadmissible if:

- a) The applicant is EU citizen;
- b) The applicant was granted international protection by another EU Member State;
- c) The applicant was recognised as refugee by a third country, and the protection exists at the time of the assessment, and the third country in question is ready to readmit the applicant;
- d) The application is repeated and no new circumstance or fact occurred that would suggest that the applicant's recognition as refugee or beneficiary of subsidiary protection (BSP) is justified;
- e) There exists a country that qualifies as a safe third country for the applicant.¹⁷⁰

The application may be declared inadmissible under e) if:

- a) The applicant stayed in or travelled through the territory of a safe third country, and she or he would have had the opportunity to apply for effective protection;
- b) Has relatives in that country and may enter the territory;
- c) The safe third country requests the extradition of the person seeking recognition.¹⁷¹

If the application was found inadmissible due to the safe third country concept, the applicant may declare immediately, but within 3 days, why in his or her case the country in question does not qualify as safe.¹⁷² Request for judicial review shall be submitted within 7 days,¹⁷³ the court shall deliver its decision within 8 days,¹⁷⁴ which is not appealable.¹⁷⁵ The judicial review request has no suspensive effect, unless it challenges a decision based on the safe third country concept.¹⁷⁶ If the safe third country refuses to readmit the applicant, the refugee authority shall withdraw its decision and continue the procedure.¹⁷⁷

Before its abolishment as of January 2018, Art 53(2a) of the Asylum Act provided that no new facts or circumstances could be referred to in the judicial review request.

Although Serbia, since 15 September 2015, has not readmitted third-country nationals under the readmission agreement, except for those who hold valid travel documents issued

¹⁷⁰ Art 51(2) of Asylum Act, as amended by Act CXXVII of 2015.

¹⁷¹ Art 51(4) of Asylum Act.

¹⁷² Art 51(11) of Asylum Act.

¹⁷³ Art 53(3) of Asylum Act.

¹⁷⁴ Art 53(4) of Asylum Act.

¹⁷⁵ Art 53(5) of Asylum Act.

¹⁷⁶ Art 53(6) of Asylum Act.

¹⁷⁷ Art 51/A of Asylum Act.

by former Yugoslav states, the IAO kept issuing inadmissibility decisions based on safe third country grounds. The IAO did not automatically withdraw the inadmissibility decision, and individuals had to apply for asylum again. The ECRE report notes that asylum seekers had to go through the admissibility assessment two or three times. In some cases, their case has been declared admissible only after the fourth repeated application. Many failed to understand the reasons for rejection, as the vast majority had no access to legal assistance. Asylum seekers were sometimes being held in detention pending removal to Serbia after the final rejection decision. The IAO argued that Serbia could at any time change its position and start respecting the readmission agreement. In 2017, the IAO stopped issuing inadmissibility decisions based on safe third country grounds.¹⁷⁸

Accelerated procedure

The accelerated procedure was introduced in 2015. The decision on the asylum application shall be made within 15 days.¹⁷⁹ The application may be decided in an accelerated procedure if the applicant:

- a) Only discloses irrelevant information supporting his or her recognition as refugee or BSP;
- b) Originates from a country listed as a safe third country by national law or by the EU;
- c) Misled the authorities concerning his or her identity or nationality:
 - by providing false information;
 - by submitting false documents;
 - by withholding information or documents that may have had a negative influence on the decision making process;
- d) Presumably with bad-faith intent, has destroyed or dropped his or her ID card or travel document that would have been helpful in establishing his or her identity or nationality;
- e) Makes incoherent, contradictory, false or unlikely statements contradicting the substantiated information related to the country of origin, which makes clear that on the basis of his or her application, he or she is not entitled to recognition as refugee or BSP;
- f) Submitted a subsequent application with a new circumstance or fact that suggests that the applicant's recognition as refugee or BSP is justified;
- g) Submitted an application with the only purpose of delaying or obstructing the expulsion order, or the implementation of the expulsion order issued by the refugee authority, the immigration police or the court;
- h) Unlawfully entered or extended his or her stay in the territory by failing to submit an application for recognition within a reasonable time frame, although he or she would have had an opportunity to submit such application, and has no reasonable excuse for the delay;
- i) Refuses to comply with his or her obligation to give fingerprints;

¹⁷⁸ For further information on the discrepancies of the admissibility process and its judicial review, see ECRE, Country Report: Hungary, February 2018, p37-40.

¹⁷⁹ Art 47 of Asylum Act, as amended by Act CXXVII of 2015.

- j) He or she represents a serious threat to national security or public order, or an expulsion order has been issued by the immigration authority for violating or 'endangering' public order.¹⁸⁰

To determine whether the applicant represents a serious threat to national security or public order, the IAO shall request the national intelligence agency of Hungary (Alkotmányvédelmi Hivatal) or the Counter Terrorism Centre (Terrorrelhárítási Központ – TEK) to provide an expert opinion.¹⁸¹ The ECRE report notes, however, as set out in Art 71/A(8) of the Asylum Act, these authorities are not involved in asylum status determination in border procedures (ECRE, 2018:117).

The application cannot be rejected solely on the ground of subsection h).¹⁸² The IAO, with the exception of subsection b), shall assess the merits of the application for recognition as refugee or BSP.¹⁸³ When applying subsection b), the applicant may declare immediately, but within 3 days, why in his or her case the country in question does not qualify as safe.¹⁸⁴ The rules governing the judicial review request in accelerated procedure are the same as that apply in case of inadmissible decisions.

In practice, before March 2017, the IAO initiated the execution of the expulsion order before the 7-day deadline for submitting a judicial review request, and asylum seekers were automatically transferred to immigration detention (ECRE, 2017:40-42).

Beneficiaries of international protection

The Hungarian legal framework distinguishes four categories of beneficiaries of international protection: refugee ('menekült'), beneficiary of subsidiary protection ('oltalmazott'), beneficiary of temporary protection ('menedékes'), and person with tolerated stay ('befogadott')¹⁸⁵. The refugee/subsidiary protection status is to be reviewed every 3 years.¹⁸⁶ Refugees and beneficiaries of subsidiary protection have the right to free movement in the country, although shelters provided by NGOs are all located in Budapest. Concerning their education, adults have access to courses offered by NGOs and other independent bodies, such as the Central European University (ECRE, 2018:108). Refugees and beneficiaries of subsidiary protection have access to the labour market and healthcare under the same conditions as Hungarian citizens. There is, however, no data available on their employment. Due to the lack of institutionalised state support in place to enhance their employment prospects, they face serious difficulties and obstacles, as well as a significant language barrier. There are several forms of social welfare benefits available, such as public health care, unemployment benefit and other entitlements and social assistance, many of which, social housing for example, however, are conditioned to certain number of years of established domicile. Thus, protected persons, in practice, have very limited access to these benefits upon exit of reception facilities (ECRE, 2018:99-109).

¹⁸⁰ Art 51(7) of Asylum Act.

¹⁸¹ Art 2/A(a) of Government Decree on the Implementation of the Asylum Act.

¹⁸² Art 51(8) of the Asylum Act.

¹⁸³ Art 51(9) of Asylum Act.

¹⁸⁴ Art 51(11) of Asylum Act.

¹⁸⁵ Ch V/A of Asylum Act, as amended by Act XXXIX of 2016.

¹⁸⁶ Art 7/A(1) and 14(1) of Asylum Act, as amended by Act XXXIX of 2016.

Refugee

A refugee is a foreign individual experiencing persecution, or holds a well-founded fear of persecution, in his or her country of origin or in the country of his or her usual residence, for reasons of race, nationality, membership of a particular social group, religious or political belief. The well-founded fear of persecution may also be based on events which occurred, or on activities that the foreigner has been engaged in, following departure from his or her country of origin.¹⁸⁷ Hungary shall recognise a person as such if she or he verifies or implies that the criteria determined above, in compliance with the 1951 Geneva Convention, applies in his or her case,¹⁸⁸ and she or he does not receive protection from his or her country of origin or from any other country.¹⁸⁹ The minister responsible for immigration and asylum policy may otherwise grant refugee status to a foreigner in an *ad hoc* manner, if such recognition is warranted due to humanitarian reasons.¹⁹⁰ The minister also may grant refugee status to a foreigner who was recognised as such by the UNHCR or another state, provided that the refugee authority established the applicability of the 1951 Convention in case of the foreigner in question.¹⁹¹ Besides the reasons set out in the 1951 Convention,¹⁹² a foreigner shall not be recognised as a refugee if he or she represents a risk to national security,¹⁹³ or is convicted for a crime punishable by at least 5 years' imprisonment (in Hungarian law).¹⁹⁴ If the country of origin of the applicant is on the national list of safe third countries or that of the EU, the burden of proof is on the applicant to prove that the country in question is not safe for him or her.¹⁹⁵ For the purpose of family reunification, upon request, family members of a foreigner recognised as refugee shall as well be recognised as refugee.¹⁹⁶ Children of recognised refugees born in Hungary, upon request, shall also be recognised as refugee.¹⁹⁷

The status shall cease if the refugee acquires Hungarian citizenship or it is withdrawn by the authority.¹⁹⁸ The recognition can be withdrawn if:

- a) the refugee re-availed himself or herself of the protection of the country of origin;
- b) the refugee has voluntarily re-acquired his or her nationality;
- c) the refugee has acquired new citizenship and enjoys the protection of the new country of citizenship;
- d) the refugee has voluntarily resettled in the country he or she fled from;
- e) the reason of recognition has ceased to exist;

¹⁸⁷ Art 6(3) of Asylum Act.

¹⁸⁸ Art 7(1) of Asylum Act.

¹⁸⁹ Art XIV(3) of The Fundamental Law of Hungary.

¹⁹⁰ Art7(4) of Asylum Act.

¹⁹¹ Art 7(5) of Asylum Act.

¹⁹² Art 8 (1) - (3) of Asylum Act.

¹⁹³ Art 8(4) of Asylum Act, as amended by Act CXXVII of 2015.

¹⁹⁴ Art 8(5) of Asylum Act, as amended by Act CXLIII of 2017.

¹⁹⁵ Art 9 of Asylum Act.

¹⁹⁶ Art 7(2) of Asylum Act.

¹⁹⁷ Art 7(3) of Asylum Act.

¹⁹⁸ Art 11 of Asylum Act.

- f) the refugee waives the legal status of refugee in writing;
- g) the refugee was recognised in spite of a reason for exclusion or such a reason occurred;
- h) the refugee has been granted status even though the criteria for recognition were not met;
- i) Having influenced the decision on its merits, the refugee failed to disclose relevant information, made a false statement or used false/forged documents in the application process.

As a general rule, with exceptions provided by certain acts and government decrees, refugees enjoy the same rights and have the same obligations as Hungarian citizens.¹⁹⁹ Refugees have no right to vote, except in local elections, and may not hold an office tied by law to Hungarian citizenship (civil servant positions).²⁰⁰ The refugee is entitled to an identity card and a bilingual travel document, unless public order and national security considerations require otherwise.²⁰¹

Beneficiary of subsidiary protection

Beneficiaries of subsidiary protection (BSPs) are foreigners who do not satisfy the criteria for recognition as refugee, but they face a real risk of being exposed to serious harm upon return to their country of origin, and are unable or, due to fear of such risk, unwilling to benefit from the protection of their country of origin.²⁰² The fear of serious harm or of the risk of such harm is also considered to be well-founded if it relates to events that occurred, or to activities that the BSP has been engaged in, following departure from his or her country of origin.²⁰³ Hungary shall recognise a person as BSP if she or he verifies or implies that the criteria determined above applies in his or her case.²⁰⁴

Children of BSPs born in Hungary, upon request, shall be recognised as BSP.²⁰⁵ Family members of BSPs shall as well be recognised as BSPs if the application for recognition has been jointly submitted, or the application of the family member is submitted with the consent of the BSP prior to the decision on his or her own application.²⁰⁶ No subsidiary protection shall be granted to a foreigner if there are reasonable grounds to believe that he or she has committed a war crime, crimes against humanity as defined in international law, a crime punishable by at least 5 years' imprisonment in Hungarian law, or a crime contrary to the purposes and principles of the United Nations. Nor shall a person be granted subsidiary protection whose presence in Hungary is not conducive to national security.²⁰⁷ Concerning safe third countries, the same rules apply to BSPs as to refugees. Moreover, if the applicant travelled through or stayed in a safe third country prior to his or her arrival to Hungary, it is

¹⁹⁹ Art 10(1) of Asylum Act.

²⁰⁰ Art 10(2) of Asylum Act.

²⁰¹ Art 10(3)(a) of Asylum Act.

²⁰² Art 12(1) of Asylum Act.

²⁰³ Art 12(2) of Asylum Act.

²⁰⁴ Art 13(1) of Asylum Act.

²⁰⁵ Art 13(3) of Asylum Act.

²⁰⁶ Art 13(2) of Asylum Act.

²⁰⁷ Art 15 of Asylum Act.

the applicant who shall prove that she or he had no opportunity for effective protection in that country.²⁰⁸ The rules of cessation and withdrawal are the same that apply to refugees.²⁰⁹

Unless act or government decree provides otherwise, BSPs have the same rights and obligations as refugees.²¹⁰ They receive a special travel document, not a refugee passport.²¹¹

Beneficiary of temporary protection²¹²

A foreigner shall be granted temporary protection for one year if she or he belongs to a group of displaced persons arriving in Hungary *en masse* who are recognised by:

- a) the Council of the European Union as eligible for temporary protection under the procedure determined by Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance efforts between Member States in receiving such persons and bearing the consequences thereof.²¹³
- b) the Government as eligible for temporary protection as they have been forced to leave their country due to armed conflict, civil war or ethnic conflict, or systematic, widespread or severe violation of human rights, torture, cruel, inhuman or degrading treatment in particular.²¹⁴

Regarding eligibility criteria, similarly to refugee and BSP status, the burden of proof is on the applicant.²¹⁵ Family members of beneficiaries of temporary protection who are under the temporary protection of another Member State of the EU shall also be recognised as beneficiaries of temporary protection.²¹⁶ Concerning the rules of exclusion, besides those applicable to BSPs, no temporary protection shall be granted to a foreigner, if she or he committed a serious, non-political criminal offence outside the territory of Hungary.²¹⁷ They are entitled to a document verifying their identity, a travel document authorising a single exit and return, and employment according to general rules applicable to foreigners.²¹⁸ The duration of protection granted by the Government is set out in the normative decision of the Government, which can be extended.²¹⁹

²⁰⁸ Art 16 of Asylum Act.

²⁰⁹ Art 18 of Asylum Act.

²¹⁰ Art 17(1) Asylum Act.

²¹¹ Art 10(3)(a) and 17(2) of Gov. Decree 101/1998. (V. 22.) on the Implementation of Act XII of 1998 on Travelling Abroad.

²¹² Prescribed by law, but not used in practice.

²¹³ Art 19 a) of Asylum Act.

²¹⁴ Art 19 b) of Asylum Act.

²¹⁵ Art 20 (1) of Asylum Act.

²¹⁶ Art 20 (2) of Asylum Act.

²¹⁷ Art 21 (1) ab) and (2) of Asylum Act.

²¹⁸ Art 22 (1) of Asylum Act.

²¹⁹ Art 24 of Asylum Act.

The status shall cease if:²²⁰

- a) The term of temporary protection as determined by the Government expires;
- b) The Council of the EU withdraws recognition;
- c) The beneficiary of temporary protection is granted resident status;
- d) He or she is recognised as refugee or BSP;
- e) The authority withdraws the status if;
- f) He or she acquires Hungarian citizenship.²²¹

The recognition shall be withdrawn if:²²²

- a) The beneficiary of temporary protection, with his or her consent, is granted temporary protection status by another state applying Directive 2001/55/EC;
- b) He or she was recognised in spite of a reason for exclusion or such a reason occurred;
- c) He or she waives the legal status of refugee in writing;
- d) He or she has been granted status even though the criteria for recognition were not met.

Person with tolerated stay

Hungary shall grant protection of “tolerated stay” to a foreigner who does not comply with the requirements for recognition as refugee or BSP, however, in the event of his or her return to the country of origin, he or she would face a real risk of persecution for reasons of race, religion, ethnicity, membership of a particular social group, political opinion, or would be exposed to danger of being sentenced to death, being tortured or subjected to other inhuman treatment or punishment.²²³ The refugee authority shall recognise a foreigner as a person with tolerated stay regarding whom the prohibition of *non-refoulement* was found established during the immigration procedure, even if his or her asylum application was rejected.²²⁴ Persons with tolerated stay are entitled to the rights afforded to residence permit holders.²²⁵

Since the status is granted on the basis of the *non-refoulement* obligation, as opposed to subsidiary protection and refugee status, the law provides no grounds for exclusion.

The status shall cease if:²²⁶

- a) The beneficiary of tolerated status is granted resident status on different grounds;

²²⁰ Art 25 of Asylum Act.

²²¹ As of 01 Jan 2018, as amended by Act CXLIII of 2017.

²²² Art 25(2) of Asylum Act.

²²³ Art 25/A of Asylum Act.

²²⁴ Art 25/B of Asylum Act, as amended by Act XXXIX of 2016. (This status based on the principle of *non-refoulement* had been existing before the amendment - Art 45 -, it has only been distinguished in a new chapter in 2016.)

²²⁵ Art 25/C of Asylum Act.

²²⁶ Art 25/D(1) of Asylum Act.

- b) The authority withdraws the status;
- c) She or he acquires Hungarian citizenship.²²⁷

The rules for withdrawal are the same that apply for refugees.²²⁸

Regular migrants

Since Hungary is part of the Schengen Area, the entry conditions for third-country nationals for a stay in Hungary of a duration of no more than 90 days in a 180-day period are as per Regulation (EU) 2016/399 (Schengen Borders Code).²²⁹ No one shall stay in the country who is subject to expulsion or ban on entry or stay, or whose stay is not conducive to public order, public health or to national security.²³⁰ Third country nationals who intend to stay for over three months may apply for long-term visa and residence permit. Rules of eligibility and the procedure to be followed are set out in Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) on the Implementation of the Act. The applying rules are fairly complex, a simplified English language guideline for each category is available on OIN's website.²³¹ The main purposes for applying for residence are: gainful activity, employment, studies, and family reunification.²³²

The application may be submitted in the country of origin. Documents verifying evidence of the purpose of the stay, sufficient means of subsistence (including healthcare, accommodation and return travel), proof of address, and a valid travel document shall be enclosed. A third-country national holding a valid residence permit has the right to entry and residence in a Schengen Member State, not exceeding 90 days within any 180-day period. They are required to promptly report if the residence permit is lost, stolen or destroyed. In case of change of address they shall notify the regional directorate of jurisdiction within three days. Third-country nationals shall report the birth of a child.

Residence permit for the purpose of study may be issued to a third country national who is accepted by a public education institution pursuing full-time or daytime course, or preparatory course prior to such education, and able to verify the linguistic knowledge required for the pursuit of studies. The validity of the residence permit shall correspond with the duration of studies, or be extended if it is more than two years. Third-country nationals holding a residence permit for the purpose of studies may engage in any full time occupational activity, and have the right to the pursuit of gainful activity or to engage in employment. No work permit is necessary during the time of studies, insofar as the total working hours do not exceed a maximum of 24 hours weekly during term-time, and 90 days or 66 working days per year out of term-time.

²²⁷ As of 01 January 2018, as amended by Act CXLIII of 2017.

²²⁸ Art 25/D(2) of Asylum Act.

²²⁹ Art 6(1) of Act II of 2007.

²³⁰ Art 6(3); 9(1); 13(1)(h) of Act II of 2007, as amended by Act XXXIX of 2016.

²³¹ IAO - <http://www.bmbah.hu/index.php?lang=en>, Accessed: 26 February 2018.

²³² See IAO Statistics, Available at: http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en.

Regarding residence permit for the purpose of employment, the validity of the permit is determined by the authority. As to gainful activities, the period is maximum three years, which may be extended by another three years. As mentioned before, as of June 2017, Serbian and Ukrainian citizens do not need work permit for employment in certain job categories, such as catering, nursing, IT,²³³ and no visa is required for them for a stay of up to 90 days.²³⁴

For the purpose of family reunification, family members are:

- The spouse of a third-country national;
- The minor child (including adopted and foster children) of a third-country national with his/her spouse;
- The minor child of a third-country national who is a custodial parent and the child is dependent on him/her;
- The minor child of the spouse of a third-country national, where the spouse is a custodial parent.

The spouse of a person granted refugee status may be issue residence permit if their marriage was contracted before the entry of the person with refugee status. The validity period of the residence permit issued for family reunification cannot exceed that of the sponsor.²³⁵

Besides the categories discussed in the previous section, residence permit is granted on humanitarian grounds to stateless persons, third-country nationals who cooperate with the Police in fighting crime, to those who have been exposed to particularly exploitative working conditions, and minors who were employed illegally without valid residence permit (Ceccorulli, 2017:126).

‘Beneficiaries’ of residency bond

The Hungarian Investment Immigration Programme was launched in 2013 and had undergone several changes before the Government Debt Management Agency put a hold on the sale in March 2017. The programme, justified by the state’s economic interests in reducing state debt, made available for third-country nationals long-term residency in Hungary through the purchase of a ‘state bond’ worth €250.000, which was raised to €300.000 in 2015. The transactions were made via intermediary – mainly offshore – companies, selected by the Economic Committee of the Parliament then chaired by Antal Rogán (Fidesz). The service charge was €40-60,000 per bond. Between 2013 and 2016,

²³³ Hivatalos Értesítő, A Magyar Közlöny Melléklete, 15 June 2017, p2928, Available at: <http://www.kozlonyok.hu/kozlonyok/Kozlonyok/12/PDF/2017/28.pdf>.

²³⁴ HVG, ‘Engedély sem kell a szerb és ukrán gazdasági bevándorlóknak Magyarországon,’ 13 July 2017, Available at: http://hvg.hu/gazdasag/20170712_Engedely_sem_kell_a_szerb_es_ukran_gazdasagi_bevandorlokna_k_Magyarorszagon.

²³⁵ IAO website, Residence Permit for the Purpose of Family Reunification, Available at: http://www.bmbah.hu/index.php?option=com_k2&view=item&id=54:residence-permit-for-family-reunification&Itemid=808&lang=en#eligibility. Accessed: 27 February 2018.

altogether 17,009 bonds were sold for a total amount of €1.158 billion.²³⁶ Although the Government denied any connection or influence, prior to the termination of the settlement bond programme, Jobbik (right wing) offered their votes for the planned amendment of the Fundamental Law²³⁷ in condition that the Government stop the sale.

Nagy concludes that, 1) the programme did not entail any investment into the economy, as the immigrants actually bought “securities” from the intermediary companies, who in turn purchased five-year zero bonds issued on behalf of the State at a discount; 2) most of the investors did not move to Hungary, the system functioned as a “loosely controlled backdoor into the Schengen area”,²³⁸ 3) the system was designed with minimal parliamentary scrutiny. The real beneficiaries of the Programme are the agent companies, whose income, through a complex web of further contributors, is not taxable in Hungary (Nagy, 2016b).

Irregular migrants

Immigration to Hungary is mainly transit migration. Irregular migrants using the Western Balkan path have been en route to Western European countries when passing through Hungarian territory. Approximately 90% of them stay only for a few days, maximum two weeks before absconding (WHO, 2016:4). The paths to irregularity are: irregular entry, overstay visa/residence permit, leaving the reception facility during immigration process (possibly moved on to other EU Member States), unlawful employment, typically seasonal or temporary (EMN, 2015; Futo, 2016).

Although there is no official statistical data available, based on expert opinion and administrative data of the Police, the number of long-term resident irregular population in Hungary is low. The estimate number was between 10,000 and 50,000 in 2008 (EMN, 2015:7-9; Biffi, 2012:50).

Irregular migrants mainly arrived from the neighbouring countries, especially from Romania. With Romania’s accession to the EU in 2007, and even more so after the naturalisation programme, this ceased to be a problem (Szeman, 2012). In 2008, Chinese and Vietnamese visa over-stayers constituted the largest number of irregular migrants residing in the country.

Hungary initiated only one amnesty programme. During EU accession in 2004, the authorities declared amnesty for those who clarified their personal data and fulfilled one of the following criteria: a) were married to a Hungarian citizen or to a non-Hungarian citizen legally resident in Hungary, b) had a Hungarian citizen child, c) were able to prove that they received income as the owner or manager of a company, d) were able to prove cultural link to Hungary, e) applied for asylum and were able to provide proof of entry prior to 1 May

²³⁶ HVG, ‘Kiderült, mennyit kapott a letelepedési kötvényekért az állam’, 28 June 2017, Available at: http://hvg.hu/gazdasag/20170628_Kiderult_ennyit_nyert_az_allam_a_letelepedesi_kotvenyekkel.

²³⁷ Failed Seventh Amendment - See Section 3 of this report.

²³⁸ See 444.hu, ‘A suspected international criminal and the Syrian dictator’s money man also bought Hungarian residency bonds’ [Online] Available at: <https://444.hu/2018/03/28/a-suspected-international-criminal-and-the-syrian-dictators-money-man-also-bought-hungarian-residency-bonds>.

2003. Altogether 1,406 people registered and reported themselves to the authorities, more than 60% of which Chinese and Vietnamese citizens.²³⁹

In past years, the primary issue of irregular migration was the increasing number of irregular border crossings attributable to the refugee crisis. In 2014, there were 43,360 irregular border crossings registered (EMN, 2015). According to the IAO's statistical data, two thirds of the 161,000 asylum seekers registered in the first eight months of 2015 entered the country irregularly (Amnesty International, 2015:4). The overall number of irregular migrants who are not in contact with the authorities, however, cannot be defined.

When apprehended, for most irregular migrants, entering the asylum process were the major form of regularising their stay. Since the entry into force of Act I of 2007 on the Entry and Residence of Persons with the Right to Free Movement and Residence, legalisation by marriage of an EEA citizen or by parenthood has become more frequent than legalisation by asylum application (Futo, 2008).

Irregular migrants only have the right to emergency health care. The service includes, among other things, major trauma and wounds, maternity needs, serious infectious diseases, attempted suicide and acute psychological disorders (WHO, 2016:13). Maternity needs means basic care, in which pregnancy related complications are included, but further maternity care is conditioned to residence (Björngren-Cuadra, 2012:118). Any medical issue beyond that would have to be paid by the irregular migrant. A 2010 research found that irregular migrants' biggest concern was the high cost of healthcare services, since it is very difficult to access medical services without insurance coverage. Whilst doctors occasionally provided service out of personal compassion, migrants were usually refused service provision by general practitioners. The only exception in this regard is HIV/AIDS and hepatitis treatment, which are free of charge. The most vulnerable group of irregular migrants were women, especially single women with children; many cases of sexual harassment were reported. There are no official transition services in place, only NGOs have the capacity to inform and help migrants with advice if they are approached with such requests. Irregular migrants have no access to social housing or homeless centres; often their only alternative is sleeping outdoors (PICUM, 2010).

Undocumented migrants have restricted access to the education system in Hungary (PICUM, 2012). Concerning the irregular employment of migrants, there is no statistical data available. It is notable that irregular employment, irrespective of immigration status, looks back on a long tradition in Hungary. Irregular employment of legally residing migrants and employment of irregular migrants is just a piece in the puzzle. Foreigners are most likely employed irregularly in sectors that are already affected by irregular employment, such as catering, agriculture, household, process manufacturing, and construction. Regarding labour rights, undocumented migrants are vulnerable to exploitation, if caught, they face the risk of expulsion (Menedék, 2014). Although irregular migrant workers have mainly arrived from neighbouring countries, the recently adopted favourable conditions concerning their employment will most likely change this pattern: according to a Communication issued by

²³⁹ DEMIG (2015) DEMIG POLICY, version 1.3, Online Edition, Oxford: International Migration Institute, University of Oxford. Available at: <https://www.imi.ox.ac.uk/data/demig-data/demig-policy-1/download-the-data/demig-policy-data-downloads>; Futo P (2016) Hungary: A Quantitative Overview of Irregular Migration, In: A Triandafyllidou (ed) *Irregular Migration in Europe: Myths and Realities*, Abingdon: Routledge.

the Minister of National Economy, as of June 2017, Serbian and Ukrainian jobseekers do not need work permit for employment within 41 skill shortage categories.²⁴⁰

Unaccompanied minors

Under Hungarian law, an unaccompanied minor (UAM) is a foreigner, under-18 years of age, who entered the territory of Hungary without the company of an adult responsible for his/her supervision on the basis of law or custom, or remained without supervision following entry; as long as she or he is not transferred under the supervision of such a person.²⁴¹ Since they lack parental care, the IAO is responsible for initiating the placement of UAMs under interim care,²⁴² by contacting the guardianship authority for placement and requesting for the appointment of a guardian who represents the UAM's interests.²⁴³ UAMs cannot be detained.²⁴⁴ They may be placed in child protection institution or in private accommodation at relatives, if the relative undertakes a commitment in writing to provide room, board and support for the minor, and if it is evident that such placement is in the minor's best interest.²⁴⁵ In practice, UAMs are accommodated in the Children's Home in Fót. Until April 2016, non-asylum seeker unaccompanied minors were accommodated in the Children's Home in Hódmezővásárhely. This practice has since been changed, the institution only receives Hungarian citizen children (Ivan, 2016:20). Unaccompanied minors seeking international protection (UASC) are all accommodated in a designated child protection institution in Fót.²⁴⁶ The home can host 50 children. Between April and October 2017, the occupancy level was 36-74%.²⁴⁷ In January 2017, the Government announced the shutdown of the Home by mid-2018. Besides Hungarian citizen children with special needs, the institution currently provides accommodation for UASC awaiting a decision in their asylum case, and minors who have already been granted international protection. At the time of writing, however, it is not entirely clear where the unaccompanied minors will be allocated after the closure (HHC, 2017b:17). UASC (and UAMs) fall within the category of a 'person in need of special treatment',²⁴⁸ and as such they cannot be subject to the border procedure in the transit zone.²⁴⁹ As of March 2017, UASC above 14 are held in transit zones in *de facto* detention. In 2017, altogether 91 unaccompanied children were detained in transit zones (ECRE, 2018:82).

²⁴⁰ Hivatalos Értesítő, A Magyar Közlöny Melléklete, 15 June 2017, p2928, Available at: <http://www.kozlonyok.hu/kozlonyok/Kozlonyok/12/PDF/2017/28.pdf>.

²⁴¹ Art 2 e) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, and Art 2(f) of Asylum Act.

²⁴² Art 72 (1) of 1997 on the Protection of Children and the Administration of Guardianship.

²⁴³ Art 72 (2)(3) of Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals.

²⁴⁴ Art 56(2) of Act II of 2007 and Art 31/B (2) of Asylum Act.

²⁴⁵ Art 62(1) b) of Act II of 2007 and Art 130(4) of Government Decree 114/2007 (V. 24.).

²⁴⁶ Art 48(2) of Asylum Act.

²⁴⁷ See 24.hu, 'Európában példátlan, amit a kormány a kiskorú menekültekkel tenne' [Online] Available at: <https://24.hu/belfold/2017/10/11/europaban-peldatlan-amit-a-kormany-a-kiskoru-menekultekkel-tenne/>.

²⁴⁸ Art 2(t) of Act II of 2007, and Art 2(k) of Asylum Act.

²⁴⁹ Art 71/A of (7) Asylum Act.

UAMs, regardless of immigration status, cannot be returned to a country where family reunification or adequate care is not possible.²⁵⁰ Rejected UASC usually abscond and continue their journey in an irregular manner. Since September 2015, Serbian authorities have been reluctant to readmit third-country nationals. Prior to that practice, UAMs, including rejected UASC, were readmitted to Serbia as well (HHC, 2017b:7). UAMs shall be granted a residence permit on humanitarian grounds,²⁵¹ and have access to Hungarian citizenship on preferential terms.²⁵² The asylum procedure shall be conducted as a matter of priority in their case.²⁵³ The refugee authority shall, without delay, request the guardianship authority to appoint a child protection guardian, who serves to represent the minor. The guardian shall be appointed within 8 days of the arrival of the request. Both the unaccompanied minor and the OIN shall, without delay, be notified of the person of the guardian appointed.²⁵⁴

Prior to an amendment to the Child Protection Act, before 2014, a ‘temporary guardian’ was appointed to UASC, who was responsible for their legal representation in the asylum procedure, the children’s overall care and property management. As of January 2014, a ‘child protection guardian’ shall be appointed to both UASC and UAMs.²⁵⁵ The child protection guardian is employed by the Child Protection Services of Budapest (TEGYESZ).

In 2015, due to the high number of new arrivals, there were significant delays in the process, and UAMs having transited through Hungary often never met their appointed child protection guardian. Since the legislator set an 8-day deadline,²⁵⁶ and the number of asylum seekers entering the country dropped, there has been a major improvement in the practice. Although the guardians provided by Child Protection Services are not affiliated to, but are based at the designated children protection institution in Fót, as they were before the amendment, they frequently visit the children, and actively cooperate with NGOs in performing their tasks (Ivan, 2016:10).

The child protection guardian is responsible for the legal representation of the UAM in all proceedings, making sure that the child’s opinion is heard.²⁵⁷ In order to ensure the child’s physical, mental and emotional development, the guardian, *inter alia*:

- Contacts and communicates with the child in a manner appropriate to the child’s age;
- Shall be available for the child for consultation over the phone, and upon request, arrange personal meetings;
- Supervises the education of the child by consulting with the educational institution;
- Cooperates with the children protection institution in obtaining information about the family of the child;
- Participates in drafting the child’s personal care plan;

²⁵⁰ Art 45(5) of Act II of 2007, and Art 45(2) of Asylum Act.

²⁵¹ Art 29(d) of Act II of 2007.

²⁵² Art 4(4) Act of LV of 1993 on Hungarian Citizenship.

²⁵³ Art 35(7) of Asylum Act.

²⁵⁴ Art 35(6) of Asylum Act.

²⁵⁵ Art 84 (1)(c) of Act XXXI of 1997. See Policies, practices and data on unaccompanied minors in 2014: Hungary, European Migration Network, 2014, p11-14, Supra note x.

²⁵⁶ Art 35(6) of Asylum Act, as amended by Act CXXVII of 2015.

²⁵⁷ Art 11(2) of Act XXXI of 1997.

- Cooperates with the children protection institution in order to prevent reoffending in case the child has been charged/convicted of a criminal offence;
- Assists the child in choosing profession and career;
- Shall, at least semi-annually, submit reports on the guardianship activity.²⁵⁸

Except UASC during ‘crisis situation caused by mass immigration’,²⁵⁹ UAMs fall under the personal scope of the Child Protection Act.²⁶⁰ Thus, with a very few exceptions they enjoy the same rights, including access to kindergarten and school education, and healthcare as children with Hungarian citizenship.

Under the age of 16, UAMs are entitled and obliged to attend public education.²⁶¹ UASC granted international protection are enrolled in the mainstream child welfare system, the same rules apply as to all other children in Hungary. Upon request, until the UASC (also children with parents) turns 21, during his or her stay in the reception centre, the refugee authority shall reimburse the costs of education, inclusive the relevant travel expenses, the costs of meals at the educational institution, and of the accommodation at a student hostel.²⁶² Once they turn 18, only UAMs granted international protection are eligible for after-care arrangements (EMN, 2014:17). After-care service provides financial support, free education and housing, and some personal assistance until the age of 24.²⁶³

Within Fót Children’s Home, the educators provide educational, lifestyle and economic monitoring. Several NGOs, such as SOS Children’s Village, Menedék, Open Doors provide non-formal education sessions, Hungarian language classes and community programs for minors (HHC, 2017b:19).

Irrespective of immigration status, UAMs have unconditional access to emergency health care services, inclusive life-saving medical interventions and all treatment necessary to prevent any severe or irreversible health deterioration.²⁶⁴ Otherwise, only UAMs with refugee status and beneficiaries of subsidiary protection are entitled to the same health care services as Hungarian citizen children, as well as to health insurance during their enrolment to school (EMN, 2014:22). Fót Children’s Home provides paediatric services for the children, and there is a hospital with qualified child specialist staff in close proximity (HHC, 2017b:19).

Representatives of international organizations and NGOs (HHC, Menedék, Cordelia Foundation, Terre des Homes, Kék Vonal, Refugee Mission of the Reformed Church and the UNHCR) organized a roundtable with the Ministry of Human Resources in 2013 on the situations of UAMs. After three meetings, it stopped functioning in 2014 (Ivan, 2016:18).

²⁵⁸ Art 86 of Act XXXI of 1997.

²⁵⁹ Art 4 (1) (c) of Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship. See 2017 amendments in Chapter 6 of this report.

²⁶⁰ Art 4 (3) of Act XXXI of 1997.

²⁶¹ Art 45(3) Act of CXC of 2011 on National Public Education.

²⁶² Art 29 (1) of Government Decree 301/2007 (XI. 9.), as amended by Government Decree 62/2016 (III. 31.).

²⁶³ Art 77(1)(d), (2) and Art 93 of Act XXXI of 1997; See HHC, Best Interest Out of Sight - The Treatment of Asylum Seeking Children in Hungary, 17 May 2017, p8; Ivan J (2016) Research Report: Children on the Move in Hungary, Terre des Hommes, p13.

²⁶⁴ Art 4 (1)(a) and Art 6 of Act CLIV of 1997 on Health Care.

The registration of UAMs in transit zones shows inconsistency, and due to the contradictions found in IAO's statistical data, is arguably dysfunctional (Ivan, 2016:9). Although the best interest of minors should be a primary consideration throughout the entire asylum procedure,²⁶⁵ the practice is far from satisfying the specific needs arising from their situation.

Despite the efforts made by HHC, the Hungarian asylum system still lacks a formalized best interest determination procedure or protocol (Ivan, 2016:29). Although the Asylum Act provides that the detention shall be terminated without delay if it has been established that the detainee is UASC,²⁶⁶ the age assessment practices are not of multidisciplinary character, as opposed to the guidelines of, *inter alia*, EASO and UNHCR. The applied methods are merely based on medical examinations, completely disregarding the differences between various populations of the world regarding pubescence, psychological and emotional development of children, as well as their cultural background and the impact of different nutrition. In some cases, the IAO rejects the applicants' request for age assessment, or claims that the costs of assessment, unaffordable to many, are payable by the asylum seeker. Children arriving in Hungary without valid documents face a real risk of being detained due to the inaccuracy of the age assessment (HHC, 2017b:10-12).

The 2015 amendments to the Act on Criminal Procedure require that all coercive measures must be used with respect to the interest of minors.²⁶⁷ The special safeguards and rules applying to minors in general²⁶⁸ were, however, not applicable in the criminal procedures relating to the border closure.²⁶⁹ There was no requirement to appoint a guardian for minors, and legal guardians, if there were any, were not able to exercise their rights related to the criminal case. Neither the favourable rules relating to deferred prosecution, nor the specialised rules of evidence pertaining to juveniles (minors between 12 and 18) applied in these cases (HHC, 2015c). This complete exemption of the favourable rules applying to minors was abolished in 2017, the new amendments are nevertheless still restrictive compared to the general procedures.²⁷⁰

²⁶⁵ Art 4 of Asylum Act.

²⁶⁶ Art 31/A 8(c) of Asylum Act.

²⁶⁷ Art 542/H of Act XIX of 1998 on Criminal Proceedings, as amended by Act CXL of 2015.

²⁶⁸ Ch. XXI of Act XIX of 1998 on Criminal Proceedings.

²⁶⁹ Art 25 of Act CXL of 2015.

²⁷⁰ Art 542/M of Act XIX of 1998 on Criminal Proceedings, as amended by Act XXIX of 2017.

6. Conclusion

On 14 March 2017, the ECtHR delivered its judgement in *Ilias and Ahmed v Hungary*, a case of two Bangladeshi asylum seekers who were held in Rösztke transit zone for 23 days, and then sent back to Serbia based on Hungary's safe third country rules.²⁷¹ The Court held that the applicants' expulsion from the transit zone to Serbia constituted a breach of Art 3 of ECHR, arguing that the procedure applied by the authorities was not appropriate to provide necessary protection against a real risk of inhuman and degrading treatment: the authorities relied on the Government's list of safe third countries, disregarding reports by, *inter alia*, the UNHCR, and other evidence submitted by the applicants, and imposed an unfair and excessive burden of proof on them.²⁷² Furthermore, the Court found that the Hungarian practice of holding asylum seekers in the transit zone can amount to the deprivation of liberty within the meaning of Art 5. The measure, however, has no legal basis, the rules regarding procedural safeguards sufficiently guaranteeing the applicants' right to liberty are not laid down in Hungarian law. It follows that there has been a violation of Art 5 (1) and (4) of ECHR.²⁷³ Although the ECtHR found no violation of Art 3 in respect of the conditions in which the applicants were held in Rösztke transit zone, the Court observed that the Government has not indicated any remedy by which the applicants could have complained about it: there has been a violation of Art 13 read in conjunction with Art 3 of the Convention.²⁷⁴

Rules governing the appeal process in transit zones: by not providing adequate access to legal advice, given the short notice deadlines, never mind accelerated procedure, and the extremely limited admission, the authorities are arguably in breach of Art 13 of ECHR.²⁷⁵

People waiting in pre-transit zones: in *Hirsi Jamaa and others v Italy* (para 74) the ECtHR held that whenever a state exercises effective control and authority over an individual, the state is under an obligation to secure the rights that are relevant to the situation. It is irrelevant whether the acts attributable to the state happen within or outside the territory of the state.²⁷⁶ Moreover, in *M.S.S v Belgium and Greece* (para 263-264), the Court found that the humiliating conditions coupled with '*the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.*'

'House arrest' of asylum seekers during criminal procedure:²⁷⁷ since the measure is to be carried out in immigration detention centres, alternatively in police jails, as HHC argued, it technically constitutes pre-trial detention of asylum seekers (HHC, 2015c). In *Amuur v France* (para 43) the ECtHR made it clear, that detention of asylum seekers is not arbitrary *per se*, if prescribed by and done in accordance with the law in compliance with international

²⁷¹ The case has since been referred to the Grand Chamber.

²⁷² See *Ilias and Ahmed v Hungary* (para 102-125).

²⁷³ See *Ilias and Ahmed v Hungary* (para 48-77).

²⁷⁴ See *Ilias and Ahmed v Hungary* (para 91-101).

²⁷⁵ See *Bahaddar v. The Netherlands* (para 45); *Jabari v. Turkey* (para 50); *Chahal v. United Kingdom* (para 154);

²⁷⁶ Also see *Loizidou v. Turkey*.

²⁷⁷ Though applied in a very few cases.

obligations. In illuminating the non-penalisation obligation of the 1951 Geneva Convention, the Court implicitly prohibits practices where asylum seekers and criminals fall into the same category. Furthermore, the expression ‘in accordance with the law’ also refers to the ‘quality’ of the law: whenever domestic law authorises deprivation of liberty, it must be sufficiently accessible and precise (*Amuur*, para 50). House arrest as a measure in the context of pre-trial detention is blurred and contradictory. Moreover, detention of asylum seekers under such indirect and equivocal authorisation is arguably not ‘carried out in good faith’, thus arbitrary and violates Art 5 of ECHR, as established in the *Saadi v. United Kingdom* (para 74), let alone the ‘appropriateness’ of a police jail as the place of detention’ (*Amuur* para 43).

‘8-km Rule’: on 3 October 2017, in *N.D. and N.T. v. Spain* the Court found that the applicants’ removal to Morocco amounted to a violation of Art 4 of Protocol 4 of ECHR. The case concerned a Malian and an Ivorian national who illegally crossed the border fence between Melilla and Morocco. When apprehended, they were sent back to Morocco by the Spanish Guardia Civil without identification and without being given the opportunity to apply for asylum. Although collective expulsion has been explicitly acknowledged in Art 4 of Protocol 4 as an absolute prohibition with no exception whatsoever, the Hungarian authorities pushed back tens of thousands asylum seekers in a manner identical to that of the fellow Spanish officers.

The new criminal offences criminalised migration and the asylum procedure limited access to refugee status determination by deterring and *de facto* preventing asylum seekers from entering Hungarian territory. Deprivation of fundamental rights has become an everyday reality at the borders without adequate constitutional control.²⁷⁸ Dublin transfers to Hungary had already been suspended by a number of EU member states, before the UNHCR requested full suspension in April 2017,²⁷⁹ on the basis that asylum seekers would have to face a real risk of treatment contrary to Art 3 of ECHR (ECRE, 2016b). A razor-wired fence constructed to keep asylum seekers out of the territory, as well as (criminal) proceedings specifically tailored to the situation at hand can all be interpreted as examples of the wholesale rejection of existing social and legal norms, and as Nagy has shown, these are all “textbook examples of crimmigration” (Nagy, 2016). Moreover, not only asylum seekers, but also their supporters, NGOs have been portrayed and dealt with as ‘enemies’. A case study focusing on public attitudes towards Roma communities has recently established how intolerance and xenophobia can go mainstream in public discourse in Hungary (Vidra and Fox, 2014). Negative public perception towards migration in Hungary arguably peaked in 2016 (Simonovits and Bernát, 2016). The fact that the term “Gypsy criminal” has been taken over by the “criminal migrant” shows, as Thorleifsson phrased, “how old grammars of exclusion inform new fears” (Thorleifsson, 2017). The Hungarian Government’s ambition to define itself in opposition to liberal values is well-demonstrated by the new developments of migration and asylum policy. Moreover, this inflexible and monolithic approach to the governance of migration has gained an overwhelming social

²⁷⁸ For further analysis of the framework in relation to ECtHR case law see Gyollai D and Amatrudo A (2018) Controlling irregular migration: International human rights standards and the Hungarian legal framework, *European Journal of Criminology*, (forthcoming).

²⁷⁹ See UNHCR, ‘UNHCR urges suspension of transfers of asylum-seekers to Hungary under Dublin’ [Online] Available at: <http://www.unhcr.org/news/press/2017/4/58eb7e454/unhcr-urges-suspension-transfers-asylum-seekers-hungary-under-dublin.html>.

acceptance and support: the Fidesz-KDNP won a landslide victory at the parliamentary election of April 8.

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Said v. Hungary, 23 October 2012, App no 13457/11.

Court of the Justice of the European Union (CJEU)

European Commission v Hungary, C-286/12

European Commission v Hungary, C-288/12

Slovakia and Hungary v Council, C-643/15 and C-647/15

ANNEX I: OVERVIEW OF THE LEGAL FRAMEWORK ON MIGRATION AND ASYLUM

Legislation title (original / English) and number	Date (passed/ commencement)	Type of law	Link
2003. évi LXXX. törvény a jogi segítségnyújtásról / Act LXXX of 2003 on Legal Aid	20/10/2003 / 01/04/2004	Act	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300080.TV (HU)
2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról / Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals	18/12/2006 / 01/07/2007	Act	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0700002.TV (HU) http://www.refworld.org/pdfid/4979cae12.pdf (EN) (as of 29/05/2012)
114/2007. (V. 24.) Korm. rendelet a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. Törvény végrehajtásáról / Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals	24/05/2007 / 01/07/2007	Decree	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700114.kor (HU) http://www.refworld.org/docid/4979cae12.html (EN) (as of 29/05/2012)
2007. évi LXXX. törvény a menedékjogról / Act LXXX of 2007 on Asylum	25/06/2007 / 01/01/2008	Act	http://www.refworld.org/docid/4979cc072.html (EN) (as of 5 July 2016) https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700080.tv (HU)
301/2007. (XI. 9.) Korm. rendelet a menedékjogról szóló 2007. évi LXXX. törvény végrehajtásáról / Government Decree 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on Asylum	09/11/2007 / 01/01/2008	Decree	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700301.kor (HU)
2007. évi LXXXIX. törvény az államhatárról / Act LXXXIX of 2007 on the State Border	18/06/2007 / 01/01/2008	Act	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0700089.tv (HU)
29/2013. (VI. 28.) BM rendelet a menekültügyi őrizet végrehajtásának szabályairól és a menekültügyi óvadékról / Interior Minister Decree	28/06/2013 / 01/07/2013	Decree	http://www.police.hu/sites/default/files/29-2013.pdf (HU)

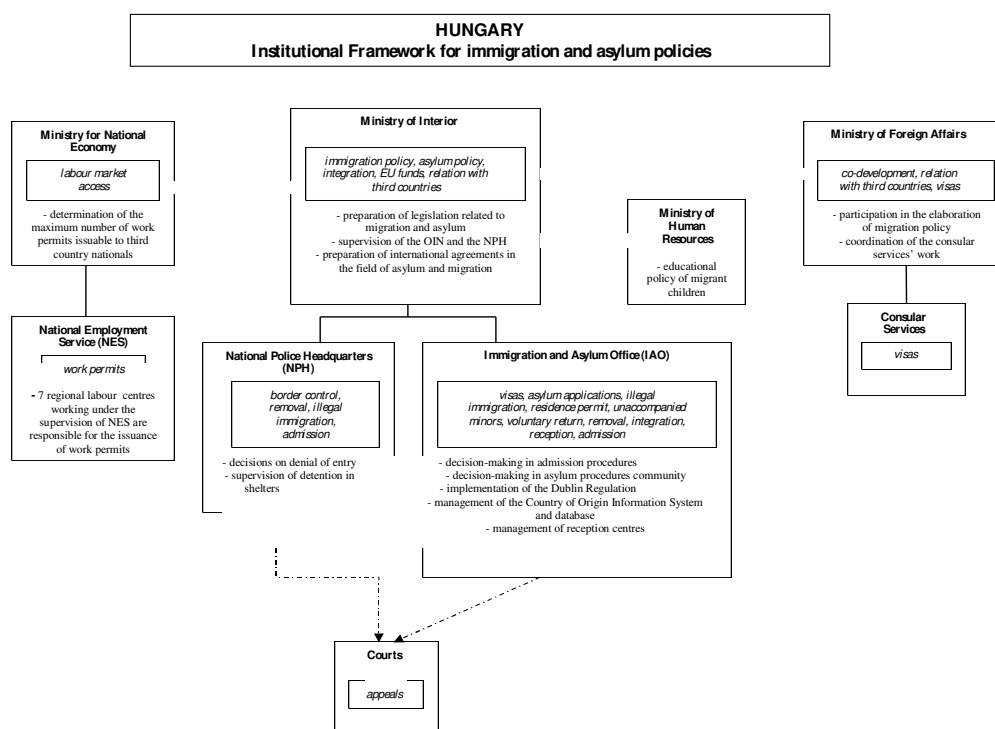
no. 29/2013 (VI.28.) on the rules of execution of asylum detention and bail.			
2015. évi CVI. törvény a menedéjogról szóló 2007. évi LXXX. törvény módosításáról / Act CVI of 2015 on the amendment of Act LXXX of 2007 on Asylum	30/06/2015 / 09/07/2015	Act	https://mkogy.jogtar.hu/?page=show&docid=A1500106.TV#lbj0id9947 (HU)
191/2015 (VII. 21.) Korm. rendelet a nemzeti szinten biztonságosnak nyilvánított származási országok és biztonságos harmadik országok meghatározásáról / Government Decree no 191/2015 (VII. 21.) on safe countries of origin and safe third countries	21/07/2015 / 22/07/2015	Decree	http://www.refworld.org/docid/55ca02c74.html (EN) https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a1500191.kor (HU)
2015. évi CXXVII. törvény az ideiglenes biztonsági határzár létesítésével, valamint a migrációval összefüggő törvények módosításáról / Act CXXVII of 2015 on the temporary closure of the borders and amendment of migration related acts	06/07/2015 – 01/08/2015	Act	https://mkogy.jogtar.hu/?page=show&docid=a1500127.TV (HU)
2015. évi CXL. törvény egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról / Act CXL of 2015 on the amendment of certain acts related to the management of mass migration	04/09/2015 / 15/09/2015	Act	https://mkogy.jogtar.hu/?page=show&docid=a1500140.TV (HU)
2015. évi CXLII. törvény az egyes törvények Magyarország államhatárának hatékonyabb védelmével és a tömeges bevándorlás kezelésével összefüggő módosításáról / Act CXLII of 2015 on the Amendments of Certain Acts Related to the More Efficient Protection of Hungary's Border and the Management of Mass Migration.	21/09/2015 / 22/09/2015	Act	https://mkogy.jogtar.hu/?page=show&docid=a1500142.TV (HU)
2016. évi XXXIX. törvény egyes migrációs tárgyú és ezekkel összefüggésben más törvények módosításáról / Act XXXIX of 2016 on the amendment of certain acts relating to migration and other relevant acts	10/05/2016 / 01/06/2016	Act	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600039.TV&timeshift=ffffff4&txreferer=00000001.TXT (HU)
2016. évi XCIV. Törvény a határon lefolytatott menekültügyi eljárás széles körben való alkalmazhatóságának megvalósításához szükséges	13/06/2016 / 05/07/2016	Act	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600094.TV&timeshift=20160705&txreferer=0000

törvények módosításáról / Act XCIV of 2016 on the amendment of acts necessary to the broad application of the border procedures			0001.txt (HU)
62/2016. (III. 31.) Korm. rendelet az egyes migrációs és menekültügyi tárgyú kormányrendeletek módosításáról / Government Decree no. 62/2016. (III. 31.) on the amendments of certain government decrees relating to migration and asylum	31/03/2016 / 01/04/2016	Decree	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600062.KOR&timeshift=ffffff4&txtreferer=00000001.TXT (HU)
113/2016. (V. 30.) Korm. rendelet az egyes migrációs tárgyú és velük összefüggésben egyes további kormányrendeletek módosításáról / Government Decree no. 113/2016. (V. 30.) on the amendments of certain government decrees relating to migration and other relevant decrees	30/05/2016 / 01/06/2016	Decree	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600113.KOR&timeshift=ffffff4&txtreferer=00000001.TXT (HU)
2017. évi XX. törvény a határőrizeti területen lefolytatott eljárás szigorításával kapcsolatos törvények módosításáról / Act XX of 2017 on the amendment of certain acts relating to the strengthening of the procedure conducted in border areas	07/03/2017 / 28/03/2017	Act	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700020.TV&timeshift=ffffff4&txtreferer=00000001.TXT (HU)
70/2017. (III. 31.) Korm. rendelet a határőrizeti területen lefolytatott eljárás szigorításával kapcsolatos egyes kormányrendeletek módosításáról / Government Decree no. 70/2017. (III.31.) on the amendments of certain governmental decrees relating to the strengthening of the procedures conducted in border areas	31/03/2017 / 01/04/2017	Decree	https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700070.KOR&txtreferer=00000003.TXT (HU)

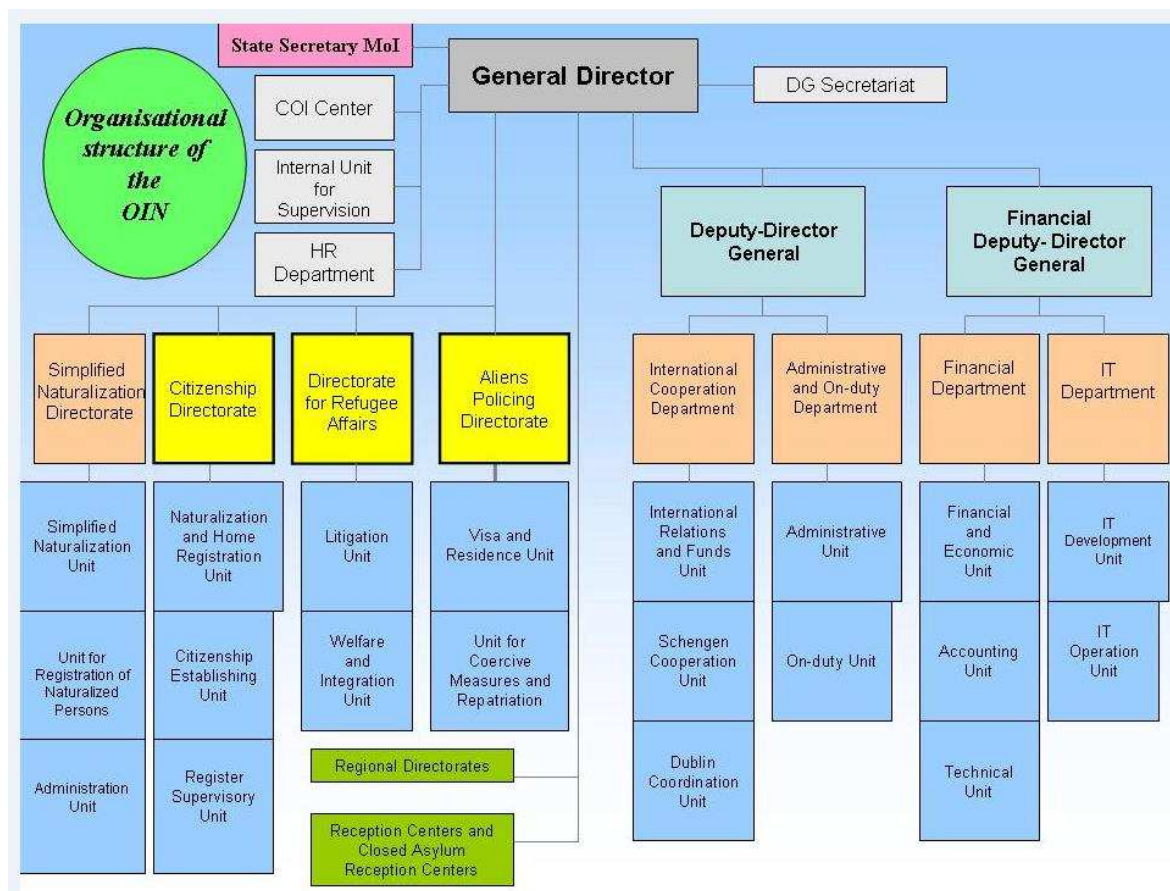
<p>147/2017. (VI. 12.) Korm. rendelet a menedékjogról szóló 2007. évi LXXX. törvény végrehajtásáról szóló 301/2007. (XI. 9.) Korm. rendelet módosításáról / Government Decree no. 147/2017. (VI. 12.) on the amendments of Government Decree no. 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on asylum</p>	<p>12/06/2017 – 27/06/2017</p>	<p>Decree</p>	<p>https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700147.KOR&timeshift=ffffff4&txtreferer=00000001.TXT (HU)</p>
<p>2017. évi CXLIII. törvény az egyes migrációs tárgyú törvények módosításáról / Act CXLIII of 2017 on the amendments of certain acts relating to migration</p>	<p>31/10/2017 / 01/01/2018</p>	<p>Act</p>	<p>https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700143.TV&timeshift=ffffff4&txtreferer=00000001.TXT (HU)</p>
<p>411/2017. (XII. 15.) Korm.rendelet az egyes migráció tárgyú és velük összefüggésben egyes további kormányrendeletek módosításáról / Government Decree no. 411/2017 (XII. 15.) on the amendments of certain governmental decrees relating to migration and of other related decrees</p>	<p>15/12/2017 / 01/01/2018</p>	<p>Decree</p>	<p>https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700411.KOR&timeshift=ffffff4&txtreferer=00000001.TXT (HU)</p>

ANNEX II: LIST OF AUTHORITIES INVOLVED IN MIGRATION GOVERNANCE

Authority	Tier of Government	Area of competence in the fields of migration and asylum	Link
Immigration and Asylum Office	Ministry of Interior	Application at the border, Application on the territory, Dublin (responsibility assessment), Subsequent application (admissibility), Refugee status determination, Issuance of visa and resident permit.	http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=390&Itemid=459&lang=hu .
Regional Administrative and Labour Court		Appeal	http://birosag.hu/kozgazgatasi-es-munkaugyi-regionalis-kollegium .
Police	Ministry of Interior	Application at the border, border control, return, removal, detention.	



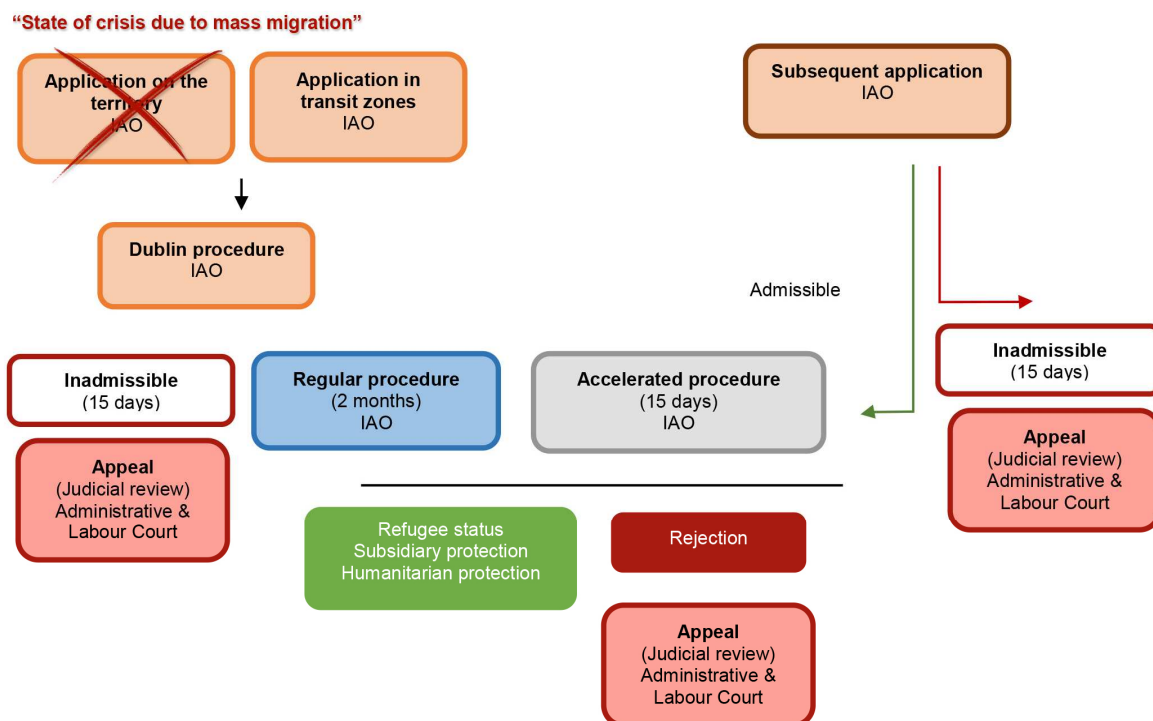
Source: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/docs/pages/hu_organogram_dec_2017.pdf.



Source: EASO²⁸⁰

²⁸⁰ EASO, Description of the Hungarian asylum system, May 2015, p3. Available at: <https://www.easo.europa.eu/sites/default/files/public/Description-of-the-Hungarian-asylum-system-18-May-final.pdf>;

ANNEX III: FLOW CHART OF THE INTERNATIONAL PROTECTION PROCEDURE



Source: ECRE²⁸¹

²⁸¹ Asylum Information Database, Country Report: Hungary, 2016, p13, Available at: <http://www.asylumineurope.org/reports/country/hungary/asylum-procedure/general/flow-chart>.

ANNEX IV: THE NATIONAL CONSULTATION AND POSTER CAMPAIGN

NATIONAL CONSULTATION on immigration and terrorism

Published by the Prime Minister's Office

Please complete this questionnaire.

1] We hear different views on increasing levels of terrorism. How relevant do you think the spread of terrorism (the bloodshed in France, the shocking acts of ISIS) is to your own life?

Very relevant Relevant Not relevant

2] Do you think that Hungary could be the target of an act of terror in the next few years?

There is a very real chance It could occur Out of the question

3] There are some who think that mismanagement of the immigration question by Brussels may have something to do with increased terrorism. Do you agree with this view?

I fully agree I tend to agree I do not agree

4] Did you know that economic migrants cross the Hungarian border illegally, and that recently the number of immigrants in Hungary has increased twentyfold?

Yes I have heard about it I did not know

5] We hear different views on the issue of immigration. There are some who think that economic migrants jeopardise the jobs and livelihoods of Hungarians. Do you agree?

I fully agree I tend to agree I do not agree

6] There are some who believe that Brussels' policy on immigration and terrorism has failed, and that we therefore need a new approach to these questions. Do you agree?

I fully agree I tend to agree I do not agree

7] Would you support the Hungarian Government in the introduction of more stringent immigration regulations, in contrast to Brussels' lenient policy?

Yes, I would fully support the Government
I would partially support the Government
I would not support the Government

8] Would you support the Hungarian government in the introduction of more stringent regulations, according to which migrants illegally crossing the Hungarian border could be taken into custody?

Yes, I would fully support the Government

I would partially support the Government

I would not support the Government

9] Do you agree with the view that migrants illegally crossing the Hungarian border should be returned to their own countries within the shortest possible time?

I fully agree

I tend to agree

I do not agree

10] Do you agree with the concept that economic migrants themselves should cover the costs associated with their time in Hungary?

I fully agree

I tend to agree

I do not agree

11] Do you agree that the best means of combating immigration is for Member States of the European Union to assist in the development of the countries from which migrants arrive?

I fully agree

I tend to agree

I do not agree

12] Do you agree with the Hungarian government that support should be focused more on Hungarian families and the children they can have, rather than on immigration?

I fully agree

I tend to agree

I do not agree

“If you come to Hungary, you can't take the job of the Hungarian!”



Source: <http://shelener2.blogspot.co.uk/2015/06/ha-magyarorszagra-jossz-nem-veheted-el.html>.

“If you come to Hungary, you have to respect our culture!”



Source: <http://4.kerulet.ittlakunk.hu/utcak-terek/150609/ujpesten-egy-iskola-udvarara-kerult-bevandorlas-ellenes-plakatokbol>.

“Let us stop Brussels!”



Source: <https://theorangefiles.hu/2017/10/11/from-the-archives-the-lets-stop-brussels-national-consultation/>.

“Do not let Soros have the last laugh!”



Source: <https://www.npr.org/sections/parallels/2018/02/23/588218227/hungarys-leader-pushes-for-stop-soros-laws-against-ngos-that-help-migrants>.

“Soros would settle millions from Africa and the Middles-East”



Source: <http://www.euronews.com/2018/02/14/hungary-submits-anti-immigration-stop-soros-bill-to-parliament>.

List of abbreviations:

BSPs: Beneficiaries of Subsidiary Protection
EASO: European Asylum Support Office
ECHR: European Convention on Human Rights
ECtHR: European Court of Human Rights
EMN: European Migration Network
HHC: Hungarian Helsinki Committee
IAO: Immigration and Asylum Office (former OIN)
OIN: Office of Immigration and Nationality
UAM: Unaccompanied minor
UASC: Unaccompanied asylum seeking children
UNHCR: Office of the United Nations High Commissioner for Refugees
WHO: World Health Organisation