

# AMNESTY INTERNATIONAL

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## **Hungary: Legal amendments to detain all asylum-seekers a deliberate new attack on the rights of refugees and migrants**

Amnesty International regrets the adoption of the latest comprehensive set of amendments to Hungarian asylum laws in the National Assembly on 7 March 2017. The amendments to five different laws<sup>1</sup>, if signed into law by the President and proclaimed in the official journal will lock up all asylum-seekers in border “transit zones” for the whole duration of their asylum process, including any appeals, as well as enable the push-back (summary expulsion) of all persons found in an irregular situation in Hungary to the external side of the country’s extensive border fences.

The amendments submitted by the Minister of Interior on 14 February 2017 and adopted without consultation with asylum experts and civil society, enable the automatic *de facto* detention without judicial review of asylum-seekers in the “transit zones”, essentially heavily guarded container camps at Hungary’s border, and any area designated as a “transit zone” inside Hungary, during a “crisis situation due to mass immigration”. Such a “crisis situation” has been invoked continuously since September 2015 and will be in force at least until September 2017, despite the number of arrivals to Hungary having been consistently low since the introduction of a push-back law in July 2016.<sup>2</sup> Under the now amended rules lowering the threshold for a “crisis situation due to mass immigration”, henceforth any condition “endangering the protection of external borders” will enable the government to invoke and uphold such a “crisis situation”.

The organization calls on the President of Hungary to exercise his veto and prevent these amendments from coming into force by either referring the amendments for constitutional review or by returning them to the National Assembly.<sup>3</sup>

The newly adopted measures, collectively punishing and harming refugees and migrants who enter the territory of Hungary solely on the grounds of their immigration status, represent another clear risk of serious breaches of the common values of the European Union (EU), including human rights. The organization calls on the European Commission, as well as EU Member States, to do everything in their power to ensure Hungarian laws are in line with EU law and international standards, including by submitting a reasoned proposal to the European Council to activate the preventive mechanism foreseen under Article 7(1) TEU.

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<sup>1</sup> T/13976 Proposal on amending certain laws to tighten the procedures in the border custody area (*A határőrizeti területen lefolytatott eljárás szigorításával kapcsolatos egyes törvények módosításáról*) amends the Law on the Protection of the Child and Public Guardianship, the Law on the National Border, the Law governing the Entry and Stay of Third Country Nationals, the Law on Asylum and the Law on Minor Offences.

<sup>2</sup> See Amnesty International: Crackdown on the rights of refugees and migrants continues unabated amidst European Commission inaction, 5 July 2016, <https://www.amnesty.org/en/documents/eur27/4405/2016/en/>.

<sup>3</sup> Article 6 of the Fundamental Law of Hungary.

States participating in the Dublin Regulation should refrain from transferring asylum-seekers back to Hungary on the basis of systemic deficiencies in reception conditions and asylum procedures, including a real risk of unlawful and arbitrary detention and a genuine risk of *refoulement* due to legislation designating Serbia as a safe third country and attempted Dublin returns from Hungary to Greece<sup>4</sup>.

#### AUTOMATIC DE FACTO DETENTION OF ASYLUM-SEEKERS BY ASSIGNING RESIDENCY

The new detention provisions are expanding the scope and application of provisions on assigned residency – seeking to effectively detain all asylum-seekers, including unaccompanied children aged 14-18, for the whole duration of their asylum application, including any appeals.

The compulsory place of residence is foreseen to be the “transit zone” containers which can only be left through exit to a third country (Serbia, Croatia) and which would signify withdrawal from the asylum process. These container camps are not suitable for long-term accommodation and will not guarantee access to basic services. The *de facto* detention will be implemented by administrative decisions of the Immigration and Asylum Office (formerly the Office of Immigration and Nationality) during the course of submitting an asylum application at the border.

Any custodial or non-custodial measure restricting the right to liberty of refugees and asylum-seekers must be exceptional and based on a detailed and case-by-case assessment of the personal situation of the individual concerned, including their personal history and, as relevant, the risk of absconding. Detention of asylum-seekers should be a measure of last resort, applied strictly on an individual basis, and in case other measures are not adequate to achieve a legitimate aim as set out in national and EU law. Mandatory detention is a form of collective punishment.

The UN Refugee Convention, which Hungary has ratified, specifies that states should not detain refugees as a form of punishment for irregular entry or presence on their territory and that registered asylum-seekers should have freedom of movement.<sup>5</sup> The EU directive on reception conditions, applicable in Hungary, prescribes that EU member states “shall not hold a person in detention for the sole reason that he or she is an applicant”.<sup>6</sup> It also specifies that detention may be ordered “if other less coercive alternative measures cannot be applied effectively”. This has to be assessed and proven by the authorities individually. The directive also lists guarantees for detained applicants as well as minimum standards on conditions for asylum detention, most of which will not be applied in the new regime. The decision to assign place of residency in the “transit zone” cannot be challenged and will not be subject to speedy judicial review, and is potentially indefinite. The already operational “transit zones” are not specialized detention facilities, they do not provide adequate open-air spaces and family members and legal advisers have had no, or extremely limited access.<sup>7</sup>

Anyone arrested or detained solely for immigration purposes should be brought promptly before a judge or other officer authorised by law to exercise judicial power to review the lawfulness of the

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<sup>4</sup> Returns to Greece were halted by the European Court of Human Rights in 2011, in the case *M.S.S v Belgium and Greece*. Amnesty International considers that asylum-seekers cannot be returned to Greece due to impediments to access asylum in Greece, substandard reception conditions and shortcomings in the identification and reception of unaccompanied minors.

<sup>5</sup> Article 26 and 31 of the UN Convention on the Status of Refugees.

<sup>6</sup> Article 8, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>.

<sup>7</sup> As prescribed in Article 9 and 10, respectively.

arrest and/or detention and its/their continued necessity; and to order unconditional release and/or less coercive measures, if warranted. Further, reviews of the continued necessity and lawfulness of the detention should be carried out at regular intervals by a judge or other officer authorised by law to exercise judicial power. The presumption in favour of liberty means the burden of proof must rest on the detaining authorities to demonstrate the necessity and lawfulness of continued detention.

The principle of proportionality allows states to detain refugees and asylum-seekers only as a last resort, and when it is strictly necessary, and to give preference to less coercive measures, that is non-custodial measures, whenever such measures suffice to achieve the objective pursued. The amendments adopted by the national assembly are at odds with these requirements.

#### DETENTION OF CHILDREN

Families with children are to be detained in the “transit zones”, as well as other vulnerable individuals. The amendments also broaden the scope of this form of detention to include unaccompanied minors between 14-18 years of age, going against the basic principles set out in international law that children should not be detained. The detention of migrant children on the grounds of their immigration status is never in the best interest of the child and cannot be justified. This age group of children is being taken out from the general protection provided to minors under the Law on Protection of the Child and Public Guardianship. The Fundamental Law of Hungary prohibits discrimination not just on the grounds of race and nationality, but also on any other “distinctive grounds”<sup>8</sup>. Discrimination against asylum-seeking children on the grounds of their immigration status and age is unlawful.

#### PUSH-BACKS FROM INSIDE HUNGARY

The amendments will allow the swift return to the external side of the border fence – effectively to Serbia – of anyone in an irregular status apprehended in Hungary, thus broadening the application of the so-called 8 km rule, in force since July 2016, to the whole territory of Hungary – a form of collective expulsion which is unconstitutional<sup>9</sup> and unlawful under international law. This measure is implemented without procedure and without examination of any protection needs in all cases, except if there is a suspicion that a criminal act has been committed. Push-backs breach, among others the UN Refugee Convention, the EU border and asylum acquis and Charter of Fundamental Rights, and the European Convention on Human Rights.<sup>10</sup>

Under international and EU law, individuals whose transfer is sought from the jurisdiction of a state to that of another state have the right to both substantive and procedural safeguards. Substantively, the principle of *non-refoulement* prohibits states from transferring anyone, whether directly or indirectly, to a place where they would have a well-founded fear of persecution or would face a real risk of other serious human rights violations or abuses. Procedurally, states are obliged to give the individuals concerned an effective opportunity to challenge the transfer.

The current law and its amendments do not include any safeguards against *refoulement* and do not include any assessment of the individual circumstances and risks upon return of each individual.

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<sup>8</sup> Article XV. of the Fundamental Law of Hungary.

<sup>9</sup> Article XIV. of the Fundamental Law of Hungary.

<sup>10</sup> Article 33 of the Refugee Convention; Articles 18 (right to asylum), 19 (protection in the event of removal, expulsion or extradition), and 47 (right to an effective remedy and to a fair trial) of the Charter of Fundamental Rights of the European Union; the Schengen Borders Code and EU asylum procedures and return directives, Article IV Protocol I of the ECHR.

These do not provide any opportunity to challenge the expulsion and to claim asylum on the spot. This measure is directly discriminating against refugees and migrants residing irregularly in Hungary and puts them at risk of *refoulement* to Serbia.<sup>11</sup>

#### “TRANSIT ZONES” – STATUS AND JURISDICTION

The rationale of the amendments makes it clear that asylum-seekers will not be allowed to move freely on the territory of Hungary – in fact the amendments now adopted attempt to assign special territorial status to “transit zones”. Amnesty International is concerned that Hungary aims to arbitrarily exempt part of its territory from its jurisdiction and from the application of its human rights obligations.

However, Hungarian authorities have full jurisdiction in the “transit zones”, which are effectively closed container camps at the Hungarian side of the border. In these camps refugees and migrants have no freedom of movement and these are not suitable for long-term accommodation. During a “crisis situation due to mass immigration”, residency would be assigned to the existing “transit zones” or to any address or facility designated as “transit zone”. This allows the Immigration and Asylum Office to designate territories with special status anywhere inside Hungary and as a general rule make them a compulsory place of residence for asylum-seekers.

Hungary has the same obligations towards the asylum-seekers in the “transit zones” as towards asylum-seekers in the rest of its territory, including providing safeguards against *refoulement*. Although there is no official upper limit to the number of asylum-seekers that could be processed in the “transit zones”, as of late January 2017 the Hungarian authorities have adopted the arbitrary and deterring practice of registering only 5 asylum-seekers per working day in each of the two currently operating facilities at the border with Serbia, leaving thousands stranded across the border.

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<sup>11</sup> Amnesty International research established that Serbia is not a safe third country for asylum-seekers. See Amnesty International: Europe’s Borderlands. Violations against refugees and migrants in Macedonia, Serbia and Hungary, July 2015  
<https://www.amnesty.org/en/documents/eur70/1579/2015/en/>.