

FRO field visit to Hungary 13-15 March 2017

FRO Observations

1. Introduction

In line with Article 71 of the European Border and Coast Guard Regulation 2016/1624 (EBCG Regulation), the Fundamental Rights Officer (FRO) has the task to monitor the Agency's compliance with fundamental rights and to promote its respect. The same Article provides that the FRO shall report on a regular basis to the Management Board and, as such, contribute to the mechanism for monitoring fundamental rights. To perform the aforementioned tasks, the FRO shall have access to all information concerning respect for fundamental rights in all the activities of the Agency, which includes field visits when necessary. Noteworthy, pursuant to Article 25(4) of the EBCG Regulation, the Executive Director of the Agency has the obligation upon consultation with the FRO, to suspend or terminate its operational activities in case of serious or persistent violations of fundamental rights or international protection obligations.

This report aims to update the observations provided to Operations Division and executive management in October 2016 and clarify the possible fundamental rights risks associated to the new practices and procedures in the area, which could potentially trigger responsibilities for the European Border and Coast Guard Agency.

2. Developments at the Hungarian- Serbian border in 2016

In October 2016, after several amendments to the legislation applicable to procedures at the Hungarian border, FRO drafted brief Observations on the situation at the Hungarian-Serbian border and expressed concerns that the Agency might be operating under conditions which do not commit to the respect, protection and fulfilment of the rights of persons crossing the Hungarian-Serbian border and seeking international protection. The objective was to highlight the work of the Agency in that operational area and the impact of host MS's procedures on the Agency's obligation to 'guarantee the protection of fundamental rights in the performance of its tasks (Article 34 of EBCG Regulation) in the context of fundamental rights of persons returned back to Serbia. The new procedures might have put the Agency in a situation of violating the Charter of Fundamental Rights of the European Union (the Charter) and the applicable regional and international law regulating the status of refugees and other vulnerable groups. The findings were shared internally with the Operations Division and executive management.

During 2016, Amnesty International, Hungarian Helsinki Committee, and Human Rights Watch repeatedly expressed their concerns publically and also to the Agency related to the legislation and measures adopted under the asylum legislation in Hungary. These measures approved the creation of two transit zones where fast-track asylum procedure were established, and the obligation for the border police to "escort" any person attempting to cross the border irregularly to the neighbouring country (Serbia). The transit zones became the only areas where the application for asylum was allowed. These measures were adopted under the "state of emergency" firstly introduced for border areas in 2015, and then extended to the entire territory of Hungary until September 2017.

International and civil society organizations as well as media reported regularly on violent episodes against persons crossing the border in an irregular manner during the operations to escort them to Serbia. The accounts of violence allegedly included use of batons, unleashing the dogs without muzzle resulting in visible and medically documented injuries as well as putting intercepted persons face-down on snow,

removing their shoes etc., with alleged purpose to discourage entry in Hungary.¹

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1.1. The FRO Observations from October 2016

The FRO raised several concerns on the situation and with regards to the allegations at the Hungarian-Serbian border:

- The **8-km rule**, which allows Hungarian border guards to send migrants stopped within 8 km of the Serbian border directly back to Serbia without any registration or opportunity to apply for international protection, poses **serious risks to the right to asylum** (Art. 18 EU Charter of Fundamental Rights); **the prohibition of non-refoulement** (Art. 19) as Serbia is not a safe country of asylum according to UNHCR; **and the prohibition against collective expulsions** (Art. 19).
- The **coercive tactics** (e.g., beatings, dog bites, pepper spraying) used to enforce the 8-km rule have led to alleged incidents that **jeopardize the right to human dignity** (Art. 1); **the right to life** (Art. 2); **the right to the integrity of the person** (Art. 3); and **the prohibition of inhuman or degrading treatment** (Art. 4).
- Hungary's **entry limit of 30 asylum-seekers per day** impedes **the right to asylum** (Art. 19) of those forced to wait in Serbia, in particular for **vulnerable groups** for whom no prioritization system exists. Moreover, the dire **humanitarian situation** on the Serbian side can negatively impact the **right to human dignity** (Art. 1) and **the rights of the child** (Art. 24).
- The **transit zone's fast-track asylum procedures** may be placing **the right to asylum** (Art. 19) and **the right to effective remedy** (Art. 47) at risk.
- Hungary's **legislation criminalizing irregular border crossings**, even if legal, might be de facto jeopardizing **the right to access asylum** (Art. 19) due to its weak due process safeguards for those in need of international protection, and **the rights of the child** (Art. 24) since no provisions are included for unaccompanied children nor on the appointment of a legal guardian to act in the best interests of the child.

*All articles refer to **EU Charter on Fundamental Rights**

Further, in the conclusions of the Observations, it was noted that the Annexes to the Operational Plans, more specifically "Description of the Tasks and Specific Instructions to Guest Officers and Other Participants (**Rules of Engagement**)" cites the Article 3b(4) of Frontex Regulation: "*Members of the European Border Guard Teams shall, in the performance of their tasks and in the exercise of their powers, fully respect fundamental rights, including access to asylum procedures, and human dignity. Any measures taken in the performance of their tasks and in the exercise of their powers shall be proportionate to the objectives pursued by such measures...*".

However, the Hungarian officials refer to the officers deployed by the Agency, as support to the efforts of Hungarian authorities in managing pressure from migration.³ As a consequence, there is a serious concern

1 Human Rights Watch (13 July 2016), Hungary: Migrants abused at the border, <https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border>, and FFM-ONLINE (26 February 2017), Testimonies of the Violence at the Hungarian-Serbian Border, <http://ffm-online.org/2017/02/26/testimonies-of-the-violence-at-the-hungarian-serbian-border/>, accessed 23.03.2017.

2 Serious Incident Report of 17.12.2016., 'Hungarian/Serbian border section- Physical violence by the Hungarian Police perpetrated on Serbian territory against a group of Afghans, including unaccompanied children,' Log Number 4183/2016

3 Statement by the National Police Headquarters, 5 August 2016, <http://www.kormany.hu/en/news/currently-42-international-police-officers-support-hungarian-efforts>, accessed 30.09.2016.

that this support from Frontex may be interpreted as if the manner in which the provisions of the new law are implemented and its impact on the fundamental rights are done with the consent and even the support of the Agency. Noteworthy, the UN Resolution *“Responsibility of States for internationally wrongful acts”* defines responsibilities of the States or entities related to such acts committed by another state. *Omission to act may be understood as giving consent, aiding and assisting another State in committing the internationally wrongful acts especially if knowing the circumstances of such an act.*⁴ Similar provision in relation to international organisations apply to the responsibility in aiding and assisting the internationally wrongful acts of States,⁵ which has been referred to as “indirect responsibility” and could be tested upon the concept of “shared responsibility” foreseen in Article 5 of the Regulation 2016/1624.

As conclusion, the FRO suggested that the Agency may wish to revise its support in the operational areas where there are several and repeated allegations of disrespect to the obligations and the values enshrined in the EU Treaty and legislation, as well as in regional and international laws. Otherwise, the Agency is at risk by omission in respecting, protecting and fulfilling the aforementioned EU Charter of Fundamental Rights’ obligations.

3. Field visit to Hungary: March 2017

In 2017, the Agency’s operational activities at the Hungarian-Serbian border are ongoing

② [REDACTED]

In March 2017, the Hungarian Parliament adopted new amendments to the asylum legislation that allows to return people wishing to apply for asylum or international protection to the neighbouring countries from anywhere in Hungary, surpassing the 8 kms rule. Further the law to automatically detain asylum seekers including children in the transit zones with indefinite duration. Moreover, the unaccompanied minors (UAMs) above the age of 14 are treated, under the “state of emergency”, as adults.

3.1. Visit to ICC [REDACTED] and BCP [REDACTED]

③ [REDACTED] the FRO conducted a field visit to Hungary from 13 to 15 March 2017,

[REDACTED]

On 14 March 2017, the FRO joined the morning briefing in ICC Szeged attended by the Hungarian Head of the Border Police Division, a representative of the NFPoC, Deputy Head of the Csongrad County Police, CI.

[REDACTED] Head of ICC and LCC Szeged, Head of LCC Szeged, and the Agency’s deployed officers.

① [REDACTED]

⁴ UN General Assembly, Responsibility of States for internationally wrongful acts, Resolution adopted by the General Assembly, 8 January 2008, A/RES/62/61, Article 6, 16, 20, <http://www.refworld.org/docid/478f60c52.html>, accessed 03.10. 2016.

⁵ http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf

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[REDACTED]

The Frontex Support Officer (FSO) briefed on last 24-hour situation and provided data on BCPs [REDACTED]

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[REDACTED]

As reported, Afghan, Pakistani and Syrian nationals were the main nationalities reported for illegal border-crossing at the Hungarian-Serbian border, being the vast majority of them single males under the age of 25.

The morning briefing in ICC Szeged was followed by the visit to BCP [REDACTED]

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[REDACTED]

The accommodation capacity of [REDACTED] transit zone is 50 persons, however, with newly amended asylum legislation, the capacity will be extended to 200. [REDACTED]

[REDACTED]

3.2. LCC [REDACTED] and BCP [REDACTED]

On 15 March 2017, FRO team attended the LCC briefing at which the Coordinator provided an introduction of the area covered. When influx of people originating from Kosovo started in 2014, a temporary interviewing centre was established [REDACTED] Upon adoption of border-control measures i.e. new legislation, engineering technical obstacle and deployed human resources, the number of persons crossing the border irregularly had drastically decreased. However, in 2016, the Western Balkans route was opened and the number of irregular crossings increased urging the Hungarian government to continue amending the legislation [REDACTED]

. After briefing [REDACTED]

the FRO was accompanied to the BCP [REDACTED]

3.3. Meeting at the Police Headquarters

Following prior practice from FRO, an initial meeting was offered to national authorities in order to have a preliminary exchange of views and information to complete the findings of the visit. The meeting at the [REDACTED] with the High Commissioner of the Hungarian National Police focused on updating the Serious Incident Reports from Hungary that had been submitted to FSC and later handled by the FRO that serve to update the dossiers of the open cases. Several procedural questions that were pending from the trip were also extensively answered, including confirmation on whether children identified in the framework [REDACTED]

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FRO also informed on the need to carefully update the referral mechanisms for vulnerable groups and persons in need of international protection in the Frontex Operational Plans in accordance with the new legislation adopted in the country.

3.4. Main Findings of the FRO

The Hungarian authorities escort one-by-one through the gates the persons intercepted in the 8-km zone, provide them with written information in Hungarian, English, French, Albanian, Arabic, Farsi, Urdu, Turkish and Serbian languages on "Foreigner residing illegally in Hungary". The information refers to the legal framework for escorting them to Serbia and informs on possibility to apply for asylum in the transit zones, as well as the availability of a complaints procedure against measures taken by the police.

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A so called "community leader" selected among the persons waiting in Serbia to enter in Hungary, compiles priority admission lists to the transit zones. For the purpose of information exchange, the Hungarian and Serbian authorities have appointed a contact point within the border guard authorities. However, there are still around 8.000 persons stranded in Serbia while the Hungarian authorities are accepting around 5 persons per day from each transit zone instead of the 15 as was previously the case.⁶

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A legal guardian is assigned to the UAMs before procedure commences. Each detention centre has a doctor who has a task to conduct also age assessment. Whenever there is a doubt about the precise age of a person, he or she is treated as a minor. All detention centres have complaint boxes which are accessible only by the Head of Detention Centre who hands over the complaints to the Immigration Office or other relevant authorities.

The visit and the discussions were conducted in a very constructive manner and the authorities and colleagues answered all the questions posed by the FRO team without limitations or restrictions.

3.5. The European Court on Human Rights (ECtHR) position on the Hungarian-Serbian Border: the case of Ilias and Ahmed vs. Hungary

During the visit of the FRO team to the Hungarian-Serbian border in March 2017, the ECtHR adjudicated a decision on first instance on the human rights violations enshrined in the transit zones and other practices at this border. In the case of *Ilias and Ahmed v. Hungary* (no. 47287/15) from 14 March 2017, there are three main arguments against the procedures and practices of Hungary.

3.5.1. Lack of individual assessment prior to expulsion to Serbia

In the case of *Ilias and Ahmed v. Hungary*, the Court holds that there was a violation of Article 3 on prohibition of inhuman and degrading treatment from the European Convention of Human Rights as the Hungarian authorities omitted to carry out individual assessments and to take into the consideration reports on safe third countries in order to guarantee protection of applicants from being subjected to the risk of inhuman or degrading treatment in a *chain-refoulement*.⁷

The practice to escort intercepted persons through the gates raises concern as these actions are de facto carried out without an individual assessment of each person's circumstances. The good practice of handing over written information on how to seek asylum or international protection in the transit zones cannot replace the scope of protection mechanisms for refugees and asylum seekers as set by the EU and

⁶ Biweekly Analytical Briefing, JO FOA 2017 LBS-WB- weeks 7-8, 13 – 26 February 2017, p. 4

⁷ European Court of Human Rights, *Ilias and Ahmed v. Hungary* (no. 47287/15) from 14 March 2017

international law. In brief, there are two arguments: firstly, there is no guarantee that the persons returned to Serbia will have any opportunity to apply for asylum in Serbia, and secondly, based on UNHCR's report,⁸ Serbia is not considered as a safe third country where, which potentially puts people at risk of a chain-refoulement and to be subjected to inhuman or degrading treatment.

Lack of individual assessments especially impacts upon the rights of the child as there is a certain possibility that minors, including UAMs, are included among those persons returned to Serbia. Notably, as reported in the Frontex Bi-weekly Analysis in March for the JO FOA 2017-WB, roughly 7 % of persons apprehended for irregular border-crossing were under the age of 18.⁹

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In addition, compilation of priority lists for admission to the transit zones is not under the scrutiny either by Hungarian or Serbian authorities. This procedure could be easily misused and might have a strong impact on the UAMs who are especially vulnerable to any form of exploitation.

This Article of the European Convention on Human rights and Fundamental Freedoms corresponds to Article 4 of the Charter of Fundamental Rights of the European Union.

3.5.2. Unlawful deprivation of liberty

The persons admitted to the transit zones were confined in its facilities up to 28 days without having legal guarantees that should be provided to the people with limited freedom of movement. The legislation amended in March 2017, provides that the asylum applicants may be hold in the transit zones for an indefinite duration of time. Referring to the aforementioned ECtHR's ruling in the case of *Ilias and Ahmed v. Hungary*, the Court holds that the application of asylum law is in violation of Article 5 on the Right to liberty and security, because the applicants' confinement in the Röske transit zone had amounted to unlawful detention as they had been effectively deprived of their liberty without any formal decision and without appropriate judicial review.¹⁰

With regards to deprivation of liberty of children, the Council of Europe's Lanzarote Committee considers that confining the children and the UAMs above the age of 14 in the transit zones with indefinite duration, will negatively impact on implementation of the Convention on the Protection of Children against Sexual exploitation and Sexual Abuse, ratified, among others, by Hungary.¹¹ Treating the UAMs between the age of 14 and 18 as adults under the 'state of emergency' deprives them from the benefits under the child protection measures, including appointment of a legal guardian and thus, exposes them at greater risk of becoming victims of sexual abuse and exploitation.¹²

This Article of the European Convention corresponds to Article 6 of the Charter of Fundamental Rights of the European Union.

3.5.3. Lack of an effective remedy

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Referring to the aforementioned case of *Ilias and Ahmed v. Hungary*, the Court further found that there was a violation of Article 13 on right to an effective remedy as the applicants did not have opportunity to complain about their conditions of detention or to bring "proceedings by which the lawfulness of their detention could have been decided speedily by a court."¹³ As noted in the Court's decision, the applicants were in a guarded compound not accessible from the outside even by their lawyers.

8 AIDA, Country Report: Serbia, 2016

9 Frontex Biweekly Analytical Briefing, JO FOA 2017 LBS-WB- weeks 7-8, 13 – 26 February 2017

10 European Court of Human Rights, *Ilias and Ahmed v. Hungary* (no. 47287/15) from 14 March 2017

11 Council of Europe (24 Mart 2017), Council of Europe calls on Hungary to reconsider new law that risks exposing migrant children to sexual exploitation, <http://bit.ly/2n0WXb7>, accessed 23.03.2017.

12 Ibid.

13 European Court of Human Rights, *Ilias and Ahmed v. Hungary* (no. 47287/15) from 14 March 2017

This Article of the European Convention corresponds to Article 47 of the Charter of Fundamental Rights of the European Union.

3.5.4. Physical violence

The allegations from various sources on physical violence in the course of expulsions through the gates cannot be dismissed as evidence based information, as they originate and are repeatedly reported by the well-known organizations such as UNHCR, Médecins sans frontières, Human Rights Watch and Amnesty International. Noteworthy, in August 2016, the National Police acknowledged that excessive use of force may have occurred at the border with Serbia. As a result, the Prosecutor's Office opened 44 investigations against law enforcement officers.¹⁴ FRO was informed by the Prosecutor's Office that some additional investigations had been opened in 2017.

4. FRO Observations

Despite the limited level of engagement,¹⁵ the deployed officers will continue carrying out [REDACTED] activities in Hungary [REDACTED]. Based on the FRO findings, there are a few concerns related to these activities. As deployed officers are engaged in the [REDACTED]

③ [REDACTED] the Agency may contribute to actions that lack guarantees to ensure access to asylum and international protection procedures. This is further linked to exposure to potential risk of chain-refoulement and inhuman and degrading treatment.

[REDACTED] As provided by the 1989 United Nations Convention on the Rights of the Child, a child means every human being below the age of 18.¹⁶ Further, as provided by the Charter, the children shall have the right to such protection and care as is necessary for their well-being and in all actions related to children by public authorities, the child's best interest must be a primary consideration.¹⁷ [REDACTED]

[REDACTED] Note that the case of *Ilias and Ahmed v Hungary* did not tackle the issue of minors in this context, hence the issue remains a very high risk for the Agency.

The conclusions and observations provided above, along with repeatedly reported accounts of physical violence and the recent case in the European Court of Human Rights, are basis for the FRO to confirm the argumentation provided in the FRO Observations on the situation at the Hungarian-Serbian border, issued on 14 October 2016. Then, the FRO raised a serious concern that the support provided by the Agency's deployed officers may be understood in the manner in which the provisions of the asylum law are implemented and its impact on the fundamental rights are done with the consent and even the support of the Agency. **The risk for shared responsibility of the Agency in the violation of fundamental rights in accordance to Article 34 of the European Border and Coast Guard Regulation remains very high.**

14 HIR TV (24 August 2016), "The police are investigating the alleged abuses",

https://translate.google.com/translate?sl=auto&tl=en&js=y&prev=_t&hl=en&ie=UTF-8&u=http%3A%2F%2Fhirtv.hu%2Fahirtvhirei%2Farendorseg-vizsgalja-az-allitolagos-tulkapasokat-1358455&edit-text=&act=url, accessed 29.09.2016.

¹⁵ There were 34 officers deployed to Hungary by the Agency at the time of visit. See Section 3 above.

¹⁶ United Nations Convention on the Rights of the Child, Article 1

¹⁷ The Charter of Fundamental Rights of the European Union, Article 24.1 and 2

FRONTEX FUNDAMENTAL RIGHTS OFFICER

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