



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



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**Third Party Intervention**  
**by the Council of Europe Commissioner for Human Rights**

under Article 36 of the European Convention on Human Rights

**Applications No. 44825/15 and No. 44944/15**

**S.O. v. Austria and A.A. v. Austria**

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## Introduction

1. On 28 September 2015, the President of the First Section of the European Court of Human Rights (hereinafter: 'the Court') invited the Council of Europe Commissioner for Human Rights (hereinafter: 'the Commissioner') to intervene as a third party in the Court's proceedings, in accordance with Article 36 of the European Convention on Human Rights (hereinafter: 'the Convention'), and to submit written observations concerning the cases of *S.O. v. Austria* and *A.A. v. Austria*. These cases relate to the transfer of the two applicants from Austria to Hungary under Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013<sup>1</sup> (hereinafter "the Dublin III Regulation").
2. According to his mandate, the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region.<sup>2</sup>
3. The protection of the human rights of migrants, including asylum-seekers and refugees, is a priority theme of the Commissioner's work in all Council of Europe member states. Following the extensive changes to Hungarian law and practice in the field of immigration and asylum which were recently introduced in response to current refugee movements across Europe, the Commissioner decided to carry out a visit to Hungary from 24 to 27 November 2015.<sup>3</sup>
4. This intervention is based on the above-mentioned visit, during which the Commissioner met with a number of state authorities and with representatives of civil society and international organisations. It is also based on the Commissioner's report published on 16 December 2014 following his visit to Hungary from 1-4 July 2014, which addressed *inter alia* the human rights of immigrants, asylum seekers and refugees, as well as on his continuous country monitoring.<sup>4</sup>
5. Section I of the present written submission refers to the Commissioner's work in all member states of the Council of Europe to ensure access to international protection, prevent *refoulement* and avoid unlawful detention of asylum seekers; Section II provides some background information and sets out the Commissioner's concerns on the situation as regards access to international protection in Hungary; and Section III deals with the risk of *refoulement* due to Serbia being considered by Hungary as a safe third country. Section IV explains how these concerns apply specifically to persons returned to Hungary under the Dublin III Regulation. It is followed by the Commissioner's conclusions.

### **I. Ensuring access to international protection, preventing *refoulement* and avoiding unlawful detention of asylum seekers: an important component of the Commissioner's work**

6. The Commissioner has repeatedly stressed the importance of guaranteeing the individual right to seek and enjoy asylum and has addressed a number of relevant recommendations to member states of the Council of Europe. As concerns the current refugee movements across Europe, he acknowledges that an effective response to the ensuing challenges can only be found through

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<sup>1</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

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

<sup>3</sup> See Nils Muižnieks, Council of Europe Commissioner for Human Rights, "[Hungary's response to refugee challenge falls short on human rights](#)", 27 November 2015.

<sup>4</sup> [Report](#) by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Hungary from 1 to 4 July 2014, CommDH(2014)21, 16 December 2014.

concerted European action, but he also stresses that all states must live up to their obligation to manage migration flows in a manner which fully abides by international human rights and refugee protection standards.

7. In December 2013, the Commissioner undertook a thematic visit to Turkey, Bulgaria and Germany, to raise awareness about the situation of Syrian refugees fleeing the conflict in their country and about the need for member states to respond more generously and effectively to the growing needs for international protection. He reiterated his call on member states to immediately cease any expulsions of Syrians at their borders and other practices contrary to the principle of *non-refoulement*. He concluded in particular that “Syrian refugees should not be returned to countries whose asylum systems and economies cannot cope with increased numbers of refugees and are thus unable to provide adequate reception and protection especially to particularly vulnerable persons such as children”.<sup>5</sup>
8. The Commissioner has repeatedly stressed that asylum seekers and migrants should not be considered as criminals and that all migration policies – including as concerns reception conditions and the use of detention – should reflect this approach. In particular, the Commissioner recalls his position that, as a matter of principle, no person seeking international protection should be subject to detention. As regards migrant children in particular, they should never be detained. The fact of having a dependent child must be grounds for an adult not to be detained except in accordance with the lawful order of a criminal court.<sup>6</sup>

## **II. Background information and the Commissioner’s observations and concerns on access to international protection in Hungary**

9. At the juncture of various migration routes in Central Europe, Hungary has experienced a considerable increase in asylum applications in recent years, which has put a strain on its asylum system. The pressure was particularly high in 2015 in the context of growing numbers of refugees attempting to reach Europe to flee wars and persecution. The Hungarian authorities indicated that up to 23 November 2015, 391,115 persons crossed the border irregularly to enter the country.<sup>7</sup> The two main countries of origin were Syria (132,169 from 1 January up to 30 September 2015) and Afghanistan (71,557 for the same period).
10. According to figures provided by the Office of Immigration and Nationality (OIN), in 2015 up to 24 November, 176,637 persons applied for asylum, of whom approximately 65,063 were Syrians (37%) and 46,571 Afghans (26%). In other words, as also noted by the United Nations High Commissioner for Refugees (UNHCR),<sup>8</sup> a large percentage of asylum seekers in Hungary come from conflict zones and many are likely to be in need of international protection. While the number of asylum applications amounted in some cases to over 10,000 per week during the summer of 2015, from the beginning of October applications have dramatically dropped to 60 for the week starting 16 November.

<sup>5</sup> Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, [Human Rights Comment](#): Syrian refugees: ‘Reset’ needed in Europe’s approach, 3 February 2015.

<sup>6</sup> See the Commissioner’s recommendations in [Issue Paper](#), Criminalisation of Migration in Europe – Human Rights Implications, 2010.

<sup>7</sup> As of 23 November 2015, 204,320 persons were apprehended at the Serbian border and 185,634 at the Croatian border.

<sup>8</sup> See the [Press release](#) published on 2 July 2015 by UNHCR referring to around 80% of asylum seekers then coming from conflict zones - Syria, Afghanistan and Iraq. UNHCR, “UNHCR urges Hungary not to amend its asylum system in a rush, ignoring international standards”, 2 July 2015.

11. Hungary has a low recognition rate of international protection compared to other EU countries. In 2015, the average recognition rate was of 17% while in 2014 it was 9% (compared to 45% for the whole EU in 2014). Worryingly, the recognition rate has drastically decreased since mid-September 2015, when a series of restrictive measures entered into force as further detailed below. During his visit, the Commissioner was informed by the OIN that from 15 September to 27 November 2015, 5,081 asylum claims were registered (2,000 originating from Afghans and 1,362 from Syrians). Out of these applications 1,189 were discontinued because the asylum seeker was assumed to have left Hungary; 372 were declared inadmissible (of which 311 on grounds that the asylum seeker had transited through a safe third country -- see below, Section III); 23 applications were rejected; four persons received subsidiary protection; and nobody was recognised as a refugee.

#### **Introduction of measures seriously restricting access to international protection**

12. During the summer, the Hungarian authorities had difficulties in coping with the high number of arrivals and this led to chaotic situations, including in the Keleti railway station in Budapest. During this period, some people were registered and allegedly in some cases forced to leave their fingerprints, while many others crossed Hungary without even having been registered. In the meantime, the Hungarian authorities took a series of swift measures that rendered access to international protection virtually impossible.
13. The authorities built a razor-wire fence first at the border with Serbia and then at the border with Croatia, and created makeshift transit zones -- during his November 2015 visit, the Commissioner visited the one established in Röszke -- where an extremely accelerated asylum procedure (referred to as the border procedure) applies. Under this procedure, asylum applications are hardly ever examined on the merits and some asylum seekers have seen their claims processed in less than a day and have been sent back to Serbia directly from the transit zone. According to reports, only a few asylum seekers were allowed to enter through the official crossing border points. In one serious incident that occurred on 16 September 2015 at the Röszke crossing point, water cannons and tear gas were used by the Hungarian authorities against migrants trying to enter Hungary.
14. In September, the Hungarian Parliament also introduced new criminal offences related to the illegal crossing of the razor-wire border fence, punishable with up to several years of imprisonment, accompanied by a special fast-track criminal procedure that presents shortcomings in terms of fair trial standards. At the end of his November 2015 visit, the Commissioner urged the Hungarian authorities to remove these newly created criminal offences, stressing that immigrants and asylum seekers are not criminals and should not be treated as such.<sup>9</sup>
15. In addition to creating these physical and procedural hurdles at the borders, in July 2015, the Hungarian Parliament had already hastily introduced a number of problematic provisions into the 2007 Asylum Act,<sup>10</sup> in spite of the Commissioner's call not to do so.<sup>11</sup> The new provisions put in place for the first time in Hungary an accelerated asylum procedure whereby the decision by the OIN has to be taken within 15 days. This procedure is lacking essential legal safeguards. In particular, there is a high risk of judicial review being ineffective. A personal hearing at the court is no longer mandatory, and in some cases there is no automatic suspensive effect against the negative decision on protection and the removal decision. The time-limit to file a request for judicial review of a negative decision is three days. A new provision allows the authorities to oblige asylum seekers to contact their country of origin while their asylum application is still pending, a requirement that could put applicants in

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<sup>9</sup> See Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, "[Hungary's response to refugee challenge falls short on human rights](#)", 27 November 2015.

<sup>10</sup> Act LXXX of 2007 on Asylum.

<sup>11</sup> See the Commissioner's [declaration](#) made on 3 July 2015.

danger. The lack of access to proper information on the new asylum procedures and of interpretation is also an issue of concern.

### **Increasing use of asylum detention**

16. In his December 2014 report, the Commissioner had already highlighted a number of shortcomings related to the detention of asylum seekers in Hungary, including its arbitrariness and the very little use made of alternatives to detention. He also noted the absence of individualised decisions ordering detention. Another serious issue of concern at that time was the lack of an effective judicial review of the decisions ordering detention.
17. Unfortunately, the recent changes in asylum law and practice have resulted in a further deterioration of the situation, with increasing use of asylum detention made by the Hungarian authorities, often in inadequate conditions. The Commissioner was informed by the OIN that at the time of his visit, 412 asylum seekers were detained in the three operating asylum detention centres while 525 were in open reception centres, meaning that around 44% of asylum seekers were detained. Official figures show that at other points in time the proportion of asylum seekers in detention was even higher: on 2 November 2015, for instance, 52% of asylum seekers were detained.<sup>12</sup> In contrast, in 2014 a total of 4,806 asylum seekers were detained (11% of the total number of asylum seekers).<sup>13</sup>
18. The insufficient use of alternatives to detention seems to be continuing. In January 2015, UNHCR observed that only the applicability of asylum bail was considered in practice, while other alternative measures, such as a regular reporting requirement and a designated place of accommodation, were rarely applied as stand-alone measures.<sup>14</sup> As to the use of bail, the Commissioner was informed that the implementation of this scheme is limited by a lack of clear rules and information provided to the persons concerned.
19. The detention conditions in asylum detention centres are reportedly inadequate in all existing centres for various reasons. Both NGOs entitled to access these centres and the Commissioner for Fundamental Rights in his capacity as National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture have described the existing problems in recent reports.<sup>15</sup> An NGO report dated December 2015 underlines that detainees of the Nyírbátor asylum centre had said that the facilities were infested with bedbugs and that, although the temperature was cold (around five degrees centigrade), many people were without sweaters and were wrapped in bed sheets.<sup>16</sup>
20. Access to healthcare in asylum detention centres leaves much to be desired, particularly as concerns mental health, as there is no psycho-social support available in any of the detention centres. The Commissioner could note during his visit to the (now closed) Debrecen Asylum detention centre, that while a paramedical nurse is present at all times, the doctor is there only for a few hours a day. There are also problems of communication between the medical staff and the detainees due to language barriers and the lack of interpreters.

<sup>12</sup> See OIN figures quoted in ECRE, Asylum Information Database (AIDA), Country [Report](#): Hungary, (fourth update), November 2015, p. 59.

<sup>13</sup> European Asylum Support Office (EASO), [Description](#) of the Hungarian asylum system, 4 June 2015, p. 12.

<sup>14</sup> See UNHCR [Comments](#) and recommendations on the draft modification of certain migration, asylum-related and other legal acts for the purpose of legal harmonisation, January 2015, p.16.

<sup>15</sup> See ECRE, Asylum Information Database (AIDA), Country [Report](#): Hungary, (fourth update), November 2015, p. 59. The Commissioner for Fundamental Rights started his mission as NPM for the OPCAT in January 2015. See the Report in case AJB-366/2015 concerning the visit to the Debrecen Guarded Refugee Reception Centre, April 2015 (available in [English](#)).

<sup>16</sup> Human Rights Watch, [Hungary: Locked up for Seeking Asylum](#), 1 December 2015.

21. The Commissioner finds the detention regime applied to asylum seekers particularly worrisome. In Békéscsaba and Nyírbátor, when escorted from the facility to the court for hearings, or on other outings (such as to visit a hospital, bank or post office), detained asylum seekers are handcuffed and escorted on leashes, which are normally used for the accused in criminal proceedings. Detainees also reported that they would be escorted by police officers handcuffed and on a leash to go to the town for instance to collect the money sent to them by their families.<sup>17</sup> During his visit to Debrecen in November 2015, the Commissioner saw a group of detainees handcuffed and on leashes being escorted outside one of the buildings within the centre. Inside the facilities, the Commissioner noticed that every asylum seeker who left the closed part of the building – for instance to see the administration personnel - was accompanied by one security official. At the end of his visit, the Commissioner urged the authorities to improve asylum detention conditions and treat detained asylum seekers in a more humane way.<sup>18</sup>
22. The problem of arbitrariness of detention orders remains acute. There seems to be no clear explanation as to why some people are detained while others are sent to open reception centres or are allowed to continue their travel to other European countries. Decisions ordering and upholding asylum detention are reportedly “schematic, lack(ing) individualised reasoning with regard to the lawfulness and proportionality of detention and fail(ing) to consider the individual circumstances (including vulnerabilities) of the person concerned”.<sup>19</sup> The necessity and proportionality tests are reportedly not used.
23. The lack of efficient judicial review of asylum detention orders also remains a serious problem. In 2014, the Commissioner already noted the ineffectiveness of judicial review of decisions ordering detention. The Kúria (Supreme Court) concluded in 2014 that the judicial review of asylum detention was ineffective and called for improvements including at the legislative level.
24. As to the length of detention, further to the legislative changes introduced in September 2015, the detention of asylum seekers is implicitly allowed during the judicial review procedure which would mean that it could be extended beyond the 6 month time limit.<sup>20</sup>
25. Some additional elements are particularly worrisome as they indicate the authorities’ current focus on detaining migrants, including asylum seekers, rather than offering them accommodation in open reception centres. The Commissioner was informed that the open reception capacities are being diminished and the asylum detention capacities have been increased, further to the closing down of the open reception centre in Debrecen and the opening of a new asylum detention centre in Kiskunhalas. The Commissioner notes in particular that the Debrecen reception centre was the largest one and was generally considered as the best open reception centre in all of Hungary.
26. Another change brought to the Asylum Government Decree turned a mandatory requirement of at least 5 sq. metres moving space and 15 cubic metres space per person in the cells of asylum jails into a non-binding recommendation. In addition, under a new provision introduced on 15 September 2015, if an extraordinarily great number of persons seeking protection puts an unforeseen burden

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<sup>17</sup> Ibid.

<sup>18</sup> See Nils Muižnieks, Council of Europe Commissioner for Human Rights, “[Hungary’s response to refugee challenge falls short on human rights](#)”, 27 November 2015.

<sup>19</sup> Hungarian Helsinki Committee, Information [Note](#) on Asylum-Seekers in Detention and in Dublin Procedures in Hungary, May 2014.

<sup>20</sup> Section 68 (4) of the amended Asylum Act. See ECRE, Asylum Information Database (AIDA), Country [Report](#): Hungary, (fourth update), November 2015, p. 63.

on the capacity of the asylum detention centres and/or on the refugee authority, the refugee authority may carry out detention in locations other than specific asylum detention centres.<sup>21</sup>

### **Vulnerable persons in detention**

27. The problem of vulnerable persons being placed in asylum detention has further intensified in 2015. Vulnerable persons are in principle exempted from asylum detention under the law. However, in the continuing absence of a reliable system for identifying vulnerable asylum seekers, such as victims of torture and human trafficking or those suffering from post-traumatic stress disorder, it is not rare for specialised NGOs to find such vulnerable persons in asylum detention.
28. Another issue of serious concern to the Commissioner is the detention of unaccompanied asylum seeking minors, despite the fact that it is prohibited by law. In his December 2014 report, the Commissioner called on the Hungarian authorities to establish an adequate system of age assessment in order to avoid placing unaccompanied minors in detention. During his November 2015 visit, the Commissioner received numerous concurring reports that some persons who were likely to be minors have indeed been placed in detention following questionable age-assessment tests.
29. Detention of families with children has again become a serious issue. Further to his July 2014 visit, the Commissioner noted that while the law provided for the detention of families with minors for a maximum period of 30 days, in practice families with children (as well as single women) were no longer detained in asylum detention centres. He called on the authorities to remove the possibility of detaining families with children from the law. Unfortunately, however, the authorities appear to have taken steps in the opposite direction, with numerous reports indicating that in practice families with children have been detained again since September 2014.

### **Negative climate against refugees and asylum seekers and integration issues**

30. In his report published in December 2014, the Commissioner was already alarmed at the tone of the political discourse in Hungary stigmatising migrants. On 29 April 2015, he expressed his heightened concerns in this field in connection with the organisation of a “national consultation on immigration and terrorism”, which he saw as an “additional manifestation of the Hungarian government’s negative stance on human rights”.<sup>22</sup> The Commissioner considered that the content of the consultation was unacceptable, notably as it fed intolerance against migrants who were portrayed as a danger to Hungarian society. He urged the Hungarian government and political leaders to adopt a more human-rights oriented approach to migration issues.
31. However, the Commissioner regrets that anti-migrant sentiment has since been further fuelled, including at the highest political level. The Commissioner is particularly shocked at repeated references by the Hungarian Prime Minister to the danger for Hungary’s culture posed by the arrival of Muslim migrants. The Commissioner was all the more dismayed to learn during his November visit that the government was planning a new media campaign under the headline: “The quota increases the terror threat!” (referring to the EU plans to relocate asylum seekers in different countries according to quotas) and other statements reading: “An illegal immigrant arrives in Europe on average every 12 seconds”; other messages read: “We don’t know who they are, or what their intentions are”; and “We don’t know how many hidden terrorists are among them”.<sup>23</sup>
32. Another element that is conducive to a negative environment for asylum seekers and refugees in Hungary is the lack of effective integration measures. In his December 2014 report, the

<sup>21</sup> See Section 31/1 of the amended Asylum Act.

<sup>22</sup> See Nils Muižnieks, Council of Europe Commissioner for Human Rights, [statement](#) made on 29 April 2015.

<sup>23</sup> See Deutsche Welle, press [article](#), 3 December 2015.

Commissioner was concerned that refugees and other beneficiaries of international protection in Hungary faced serious integration challenges which threaten their enjoyment of social and economic rights, including a real risk of becoming homeless, high levels of unemployment, and problems in accessing health care services. In November 2015, the Commissioner called again for a genuine, fully-fledged programme of integration that would ensure migrants' acquisition of the Hungarian language and access to housing, employment and other social rights.

### III. Risk of *refoulement*: Serbia considered by Hungary as a safe third country

33. A major issue of concern to the Commissioner resulting from the recent legislative changes is the very high risk of *refoulement* to Serbia of asylum seekers, including persons transferred to Hungary from other EU member states under the Dublin regulation ("Dublin returnees"). This risk is the consequence of Serbia being considered a safe third country to which asylum seekers can be returned without their claims being considered on the merits in Hungary.
34. From January 2013 to 31 July 2015, Hungary stopped applying the safe third country rule to asylum seekers arriving via Serbia and their cases were examined in Hungary. However this has now changed further to the legal amendments introduced in July 2015. Since 1 August 2015, all asylum claims lodged by applicants who came through what is considered a safe third country are to be considered inadmissible, when the applicant would have had the opportunity to apply for effective protection in that country. On 21 July, the Governmental Decree 191/2015 created a list of "safe third countries" including Serbia.<sup>24</sup>
35. However, UNHCR recommended in 2012 that Serbia not be considered a safe third country of asylum, and that countries therefore refrain from sending asylum seekers back to Serbia.<sup>25</sup> The Commissioner understands that no other EU member state currently regards Serbia as a safe third country for asylum seekers. In addition, the newly established list of safe third countries does not take into account the guidelines issued by the Kúria, the Supreme Court of Hungary, about countries to be considered as a safe third countries.<sup>26</sup> The Supreme Court concluded in particular that "the country information issued by UNHCR shall always be taken into consideration." Furthermore, the UN Committee against Torture was concerned in June 2015 at information that persons expelled from Hungary to Serbia were subjected to forced return to "the former Yugoslav Republic of Macedonia", "in application of the readmission agreements, without effective procedural guarantees to gain access to legal remedies against the decision, free legal aid or information provided through interpretation services". The Committee was concerned that those individuals are at "a heightened risk of *refoulement*, including chain *refoulement*".<sup>27</sup> In this respect, it should also be noted that, according to UNHCR's latest assessment in August 2015, "the former Yugoslav Republic of

<sup>24</sup> The countries which are now considered both as safe country of origin and safe third countries are: Member States of the European Union (EU); candidate states to the EU (except for Turkey): Albania, "the former Yugoslav Republic of Macedonia", Montenegro, Serbia; Member States of the European Economic Area (EEA): Iceland, Liechtenstein, Norway; those States of the USA not applying death penalty; Switzerland; Bosnia and Herzegovina; Kosovo\*; Canada; Australia; and New-Zealand.

\*Throughout this text, all references to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

<sup>25</sup> See in particular, UNHCR [statement](#) that "Hungary has also begun to return asylum-seekers to Serbia, against standing UNHCR advice to governments. The argument that refugees can be denied entry because it is possible to be returned to Serbia does not take into account the asylum system Serbia is currently building is not able to cope with the magnitude of the current inflow of people who require effective protection.", UNHCR, *UNHCR urges Europe to change course on refugee crisis*, 16 September 2015.

<sup>26</sup> Opinion No. 2/2012 (xii.10) KMK of the Supreme Court of Hungary (Kúria) on certain questions related to the application of the safe third country concept, unofficial translation available [here](#).

<sup>27</sup> UN Committee against Torture, Concluding Observations on Serbia, [CAT/C/SRB/CO/2](#), Paragraph 15.



Macedonia” is not to be considered as a safe third country due to outstanding gaps in the asylum system in the country and the sharp increase in the number of new arrivals in the country more recently, which presents major challenges to the asylum environment. Accordingly, UNHCR advised that other states should refrain from returning or sending asylum-seekers to the country, until further improvements to address these gaps have been made by the national authorities.<sup>28</sup>

36. In principle, the presumption that Serbia or another country is a safe third country can be rebutted, but this possibility is more theoretical than real, as the law requires that the applicant has to *prove* that she or he had no opportunity for effective protection in that country. However, it would be difficult for an individual to prove that there is a general lack of a functioning asylum system in a country he does not come from. Additional problems come from the very short time (three days) to submit the requested evidence and the 15-day time-limit within which the OIN must examine this claim.
37. During his visit, the Commissioner was informed that the rule concerning Serbia as a safe third country was effectively applied to asylum seekers both in the accelerated and border procedures and that people had already been returned to Serbia on this ground. As mentioned above, from 15 September to 27 November 2015, the vast majority (372 out of 399) of the asylum applications that were not discontinued on grounds that the asylum seeker had left Hungary, were declared inadmissible and in 311 cases this was done on safe third country grounds.
38. The judicial review of the inadmissibility decisions is characterised by insufficient legal safeguards, including very short time-limits to appeal and a lack of mandatory, free-of-charge legal assistance of good quality.
39. In practice, since almost all asylum seekers came to Hungary via Serbia (or another country on the safe third country list), their asylum claim will be considered as inadmissible and therefore rejected before having been examined on the merits. Once the claim is rejected, the next step consists in ordering and implementing the expulsion of the asylum seeker to Serbia.
40. The Commissioner considers that this situation renders access to international protection in Hungary virtually impossible and entails a real risk of *refoulement* of persons with international protection needs (including Dublin returnees) to Serbia, and of onward chain *refoulement*. It is therefore at variance with Hungary’s international obligations under the European Convention on Human Rights and 1951 Refugee Convention.

#### **IV. The treatment of returnees under the Dublin III Regulation in Hungary**

41. Persons returned to Hungary under the Dublin III Regulation are affected by the situation resulting from the restrictive changes in asylum policies and practices described above. As regards conditions of reception, Dublin returnees run first of all the risk of being placed in asylum detention, where the conditions give rise to a number of concerns as mentioned above. In this respect, the Commissioner was informed by the OIN that in 2015 (up to 26 November) there were 1,338 successful transfers to Hungary under the Dublin III Regulation.<sup>29</sup> Of these, 332 were placed in asylum detention and the others in open reception centres. Civil society organisations reported to the Commissioner that on 15 October 2015, out of the 145 persons held in asylum detention at Debrecen, approximately half were single male adult Dublin returnees. During his visit to the Debrecen asylum detention centre in November, the Commissioner spoke to a number of Dublin returnees who said they had been detained for a few weeks already. All of them claimed that they did not belong in detention as they

<sup>28</sup> See UNHCR, “The former Yugoslav Republic of Macedonia” As a Country of Asylum: [Observations](#) on the situation of asylum-seekers and refugees in “the former Yugoslav Republic of Macedonia”, August 2015.

<sup>29</sup> The total amount of return requests from other EU member states to Hungary for the same period was 39,299.

had not committed a crime and many of them also did not understand the content of the documents they had been handed ordering their detention and the grounds on which this had been done.

42. Dublin returnees also run a very high risk of being expelled to Serbia without having their asylum claims examined on the merits, as a result of the application to their cases of the safe third country rule described above. It should be noted in this respect that the rule applies retroactively, in that it operates with respect to persons who initially entered Hungary before the coming into force of the list of safe third countries. As a result, their application will likely be declared inadmissible, without the possibility for these persons to be heard beforehand.<sup>30</sup>
43. The Commissioner notes that several national courts have suspended Dublin returns to Hungary in recent months. In particular, on 26 November 2015, the Dutch Council of State allowed the appeals of two asylum seekers to prevent their transfer to Hungary, under the Dublin III Regulation. Relying on the Court's case *M.S.S. v Belgium and Greece*<sup>31</sup>, the Council of State asked for further investigation into whether the situation of Dublin returnees in Hungary would lead to a violation of the European Convention on Human Rights.<sup>32</sup> On 3 September 2015, the Administrative Court of Dusseldorf in Germany ruled against the transfer of an asylum seeker from Germany to Hungary under the Dublin Regulation. Its decision was based on evidence of the existence of systemic failings in the asylum system in Hungary and the risk of removal from Hungary to an unsafe third country following recent changes to the law in Hungary.<sup>33</sup> Several NGOs including ECRE,<sup>34</sup> Amnesty International<sup>35</sup> and the Swiss Refugee Council (OSAR)<sup>36</sup> have already asked EU member states and Switzerland to refrain from transferring Dublin returnees to Hungary and to assume responsibility for examining their asylum applications.

## Conclusions

44. The Commissioner considers that the very restrictive measures taken in recent months by the Hungarian authorities translate into a deliberate intention of the latter to deter asylum seekers from entering the country and applying for asylum therein. In conclusion, the Commissioner considers that:
  - The current asylum law and practice in Hungary are not in compliance with international and European human rights standards. At the moment, virtually nobody can access international protection in Hungary. The asylum procedure is too expedited and lacks essential safeguards; the use of asylum detention and the detention conditions are problematic; and the general negative climate against migrants fostered by the authorities is not conducive to the integration of asylum seekers and refugees in Hungarian society. All of the above has a serious negative impact on the conditions of reception of Dublin returnees.

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<sup>30</sup> See ECRE, Asylum Information Database (AIDA), Country [Report](#): Hungary, (fourth update), November 2015, p. 24.

<sup>31</sup> European Court of Human Rights, Grand Chamber, 21 January 2011, *M.S.S. v Belgium and Greece*<sup>31</sup>, application No. 30696/09.

<sup>32</sup> See European Database on Asylum Law (EDAL), The Netherlands: Raad van State rulings on Dublin transfers to Hungary, [news](#), 26 November 2015.

<sup>33</sup> See European Database on Asylum Law (EDAL), Germany: Administrative Court of Dusseldorf suspends Dublin transfer to Hungary, [news](#), 2 October 2015.

<sup>34</sup> ECRE, Asylum Information Database (AIDA), [Crossing Boundaries: The new asylum procedure at the border and restrictions to accessing protection in Hungary](#), 27 October 2015, p. 36.

<sup>35</sup> Amnesty International, "[Fenced out](#): Hungary's Violations of the Rights of Refugees and Migrants", 7 October 2015, p. 26.

<sup>36</sup> Organisation Suisse d'Aide aux Réfugiés (OSAR), « [Stopper les renvois Dublin vers la Hongrie](#) », 25 September 2015.

- A considerable proportion of those returned to Hungary under the Dublin III Regulation are currently detained. The detention regime is very restrictive, a circumstance which the Commissioner considers cannot be reconciled with the fact that asylum seekers are not criminals and should not be treated as such. The material conditions of detention are also reported to be substandard. Furthermore, the remedies available to challenge detention cannot, in the Commissioner's view, be considered effective.
- Due to the introduction of the rule according to which Serbia is to be considered as a safe third country, persons currently returned to Hungary under the Dublin III Regulation do not, as a rule, have their asylum application examined on the merits by the Hungarian authorities, contrary to the latter's international obligations in matters of asylum. As a result, Dublin returnees to Hungary are exposed to a very high risk of being subject to deportation to Serbia and to onward chain *refoulement*, with the corresponding risk of treatment contrary to Article 3 of the European Convention on Human Rights.