CAUGHT IN BETWEEN BORDERS

citizens, migrants and humans

LIBER AMICORUM in honour of prof. dr. Elspeth Guild

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Hungary, In Front of Her Judges

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Invocation

Few persons (if any) are more interested in justice than Elspeth Guild. Refugees, citizens, societal security, fairness of social services, borders, illiberal governance and the many ailings of the EU are all in the limelight of her inexhaustible attention.

Our dialogue over the last, almost four decades, has touched upon all of them (and hopefully will extend for many more years to come). The optimism of the early nineties may be more coloured by now, but the determination to resist and fight back when our shared values are under attack has not dwindled an inch.

And fight we must.

So it may be justified to confront the threatening phenomena, even though writing about the Refugee Law Reader or the commentary to the Global Compact on Safe and Orderly Migration and other projects I had the privilege to share with her, would be more rewarding. But justice comes first (not America, Britain or Hungary)!

This brief contribution will look into the question of how the two courts of Europe and other major players have reacted to the gradual dismantling of a functioning refugee regime and the poisonous discourse accompanying it and to the threats against those assisting asylum seekers. So „justice' is understood both in a legal and a moral sense, as the goal of righting wrongs, as offering legal and moral remedy. Space limitations require that judgments of national courts affecting Hungary (like transfer decisions in Dublin cases) will be left beyond the scope of this study.

The Strasbourg Mirror

The European Court of Human Rights (ECtHR) has decided six cases of asylum seekers' human rights complaints against Hungary, all after 2010 when the Fidesz – Christian Democratic People's Party alliance – came to power. In *Lokpo and Touré v. Hungary,*[1] *the applicants claimed* that their five months long detention (still under the previous government[2]) violated Article 5 (1)[3] of the European Convention on Human Rights (ECHR).[4] The subsequent cases also related to the detention of asylum seekers. These

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1 Application no. 10816/10, judgment of 20 September 2011.

2 The reason for including the case is that the it was already the Orbán government that was notified of the case on 25 August 2010. It could have settled, but instead 'adopted' the behaviour of the preceding government.

3 The applicants also claimed breaches of Articles 5 (4) and 13, but the Court did not rule on those.

4 Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4 November 1950.

were: *the Al-Tayyar Abdelhakim* case,[5] the *Said* case,[6] the *Nabil* case,[7] the *O.M.*[8] case and finally the *Ilias and Ahmed* case.[9] *Ilias and Ahmed* – unlike the other cases – was not limited to a breach of Article 5 (1) of the ECHR, but also entailed a claim based on Article 3 concerning the treatment by the Hungarian authorities in the transit zones at the Hungarian-Serbian border and the threat of ill-treatment if returned to Serbia. Whereas in the first three cases the Court established the violation by a majority votes, all the judgments since 2015 were unanimous.

There is another set of thirteen cases, not available in HUDOC yet, which involve the starving of 21 individuals. In all these cases the Court granted interim measures in 2018 and 2019, ordering the restoration of food provision to rejected asylum seekers, who are nevertheless detained in the transit zone after an expulsion order that for practical reasons cannot be implemented.[10]

The detention cases were responding to three distinct types of detention. The first four revolved around the then applicable rules on detention of Act no. II of 2007 on the Admission and Right of Residence of Third Country Nationals (Third Country Nationals Act /TCNA/) read in conjunction with Act no. LXXX of 2007 on Asylum (Asylum Act). In *Lokpo and Touré*, *Abdelhakim*, *Said and Said* the asylum seekers were held in aliens law detention with a view to deportation and were not transferred to open reception centres, even when the asylum case entered the in-merit phase after admissibility was established. That was seen by the applicants as a breach of section 55 of the Asylum Act:

> 'If the refugee authority proceeds to the substantive examination of the application and the applicant is detained by order of the immigration authority, the immigration authority shall release the applicant at the initiative of the refugee authority.'

The refugee authority systematically refrained from initiating their release, therefore the applicants were held continuously even during the substantive examination of their case. The ECtHR did not decide whether the refugee authority was under an obligation to initiate the transfer (as claimed in each case by the applicant) or simply had the discretionary right to do so (as stated by the government.)

The Court's line of argument was elaborated in *Lokpo and Touré* and taken over – in the form of long quotes – in *Abdelhakim* and *Said and Said*. The key observation is that 'lawfulness' and 'a procedure prescribed by law' cannot be limited to the adopted rules of the state. The Court assumes that the ECHR includes express or implied general principles and requires a certain quality of the national law, which must be 'compatible with the rule of law' (*Lokpo and Touré*, § 18) and has to follow the purpose of Article 5 of the Convention that no person be deprived from their liberty in an arbitrary

5 Application no. 13058/11, judgment of 23 October 2012.
6 *Hendrin Ali Said and Aras Ali Said v. Hungary*, application no 13457/11.
7 *Nabil and others v. Hungary*, application no. 62116/12, judgment of 22 September 2015.
8 Application no. 9912/15, judgment of 5 July 2016.
9 Application no. 47287/15, Chamber judgment of 14 march 2017, Grand Chamber judgment pending at the time of writing the manuscript.
10 For more detail see: Hungarian Helsinki Committee, *Hungary Continues to Starve Detainees in the Transit Zones Information update by the Hungarian Helsinki Committee* 23 April 2019, Budapest: HHC 2019, https://www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf, accessed on 15 June 2019.

fashion (§ 21). The detention is arbitrary if it is not executed in good faith, is not closely connected to the purpose of preventing unauthorised entry or if the place and conditions of detention are not appropriate and, lastly when the length of the detention exceeds that reasonably required for the purpose pursued (§ 22). A motive that ought to pervade any decision on asylum seekers is introduced in para 22: asylum seekers have not 'committed criminal offences but [are] aliens who, often fearing for their lives, have fled from their own country'.

The breach of Article 5 (1) f was established partly by the fact that the five months long detention was not proportionate to the aim pursued (§ 23), partly by the fact that detaining persons simply because the refugee authority failed to initiate their freeing 'verges on arbitrariness' and the lack of an 'elaborate reasoning' of the detention decision deprived it from lawfulness (§ 25). In all the three cases the Court refrained from examining the appropriateness of the judicial remedy required by Article 5 (4).

The balance so far: the ECtHR found in three subsequent cases that the detention of asylum seekers as practiced in Hungary in around 2010 was not compatible with the rule of law, verged on arbitrariness and was unlawful because of the lack of elaborate justification of the detention.

In *Nabil* the argument differed slightly as the rule on freeing the detained asylum seeker was removed from the Asylum Act, but the Third Country Nationals Act still required that detention be terminated when 'it becomes evident that the expulsion or transfer cannot be executed' (Section 54 (6) b).

Decided in the fall of 2015, *Nabil* showed more sympathy towards a state subject to large scale of arrivals. The Court accepted, that a detention may be with a view to deportation even if there is a pending asylum case (§ 38), repeated the *Saadi* doctrine,[11] according to which

> '[... U]ntil a State has 'authorised' entry to the country, any entry is 'unauthorised' and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to 'prevent his effecting an unauthorised entry' (Nabil, § 27 quoting Saadi, § 65).

It refrained from addressing the odd argument of the Hungarian Government, according to which there are two meanings of the term 'safe third country', one for asylum cases and a more restricted one for the 'immigration perspective" trying to argue that from the immigration perspective Serbia was safe (§ 25).

The question of *Nabil* was when detention is justified under the second limb of Article 5 (1) f. The Court stressed that detention is lawful only if deportation or extradition proceedings are in progress and are conducted with due diligence and there is true prospect of executing the deportation. A further requirement is that there be no national rule that prohibited deportation pending a decision on asylum (§§ 29, 38 and 35). The Court based the finding of breach on the new consideration that the domestic courts ought to have investigated – as prescribed by the TCNA – whether there was an actual risk of absconding, whether alternatives to detention were available and lastly whether the expulsion eventually could be enforced (§ 41).

11 *Saadi v. the United Kingdom* [GC], application no. 13229/03, judgment of 28 January 2008.

Nabil confronted Hungary with the rigidity of its practice that systematically refrained from looking for alternatives to detention even though that was required by Section 54 (2) of the TCNA.

The second type of case is *O.M.,* with a new legal institution in the centre: the asylum detention as introduced by Section 31/A of the Asylum Act in 2013. By implication the case could also have been a test of the recast Reception Conditions Directive,[12] as by 2014 the relevant rules on detention were transposed. The Court evaded the challenge to assess the compatibility of the Reception Conditions Directive rules on detention with the taxative list in Article 5 (1) of the ECHR. Instead, it only examined the nature of the obligation under Article 5 (1) b justifying detention.[13] The Government's argument implied in essence that all the grounds of detention, as formulated in the Reception Conditions Directive and transposed into Section 31/A of the Asylum Act, constituted such obligations.

The Court refused that implicitly and explicitly. The implicit rejection took the form of recalling the eight general principles guiding the interpretation of Article 5 (1) b.[14] As the conditions permitting asylum detention in Hungary went beyond them, they had to fail. In the explicit refusal of the Government's defence the Court remarked that the applicant 'made reasonable efforts to clarify his identity and nationality: there is no indication that he did not fully cooperate with the authorities'. As Hungarian law did not expressly require documentary evidence of identity and nationality no obligation justifying detention was identified, especially, as the Court also noted the lack of any effort to find alternatives to detention or to assess the case 'in a sufficiently individualized manner' (§§ 51-2).

In the context of detention, *O.M.* pointed out that the systematic detention of asylum seekers as an administrative measure under the Asylum Act is untenable. The practice contradicted the strict principles defining the conditions in which Article 5 (1) b could serve as the basis of detention. The Court did not recognise that the EU or Hungary would be entitled to expand permissible grounds for detention (which they, in fact, did). The judgment revealed the bad faith of the system when requiring an identity document not available to the asylum seeker, and presuming the risk of absconding without even trying to apply alternatives to detention. It also revealed the reification of the asylum seeker by not providing sufficiently individualised assessment of the risk of flight.

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12 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 (OJ L 180, 29.6.2013, p. 96-116).

13 'The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.'

14 The eight principles based on O.M. §§ 42-3:
- there must be an unfulfilled obligation incumbent on the person concerned,
- the arrest and detention must be for the purpose of securing its fulfilment,
- detention must not be punitive in character,
- as soon as the relevant obligation has been fulfilled, detention must end,
- the enforced obligation must be interpreted narrowly,
- the detention must be truly necessary for the purpose of ensuring its fulfilment,
- no milder means are available and applicable,
- a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty.

The only example of the third type of cases is *Ilias and Ahmed*, in which a Grand Chamber judgment has not yet been adopted, albeit the hearing was held more than a year ago. The case scrutinised yet another form of detention, that occurring in the transit zones established by Hungary at the Hungarian-Serbian border in 2015.[15] First, the Court refuted the Government's claim that confinement in the transit zone is not detention (and therefore Article 5 (1) ECHR does not apply), as the detained people were free to leave the zone towards Serbia. The Court found that since leaving the zone could only occur if asylum claims were abandoned and since Serbia never consented to their irregular entry into its territory, 'confinement to the transit zone amounted to a *de facto* deprivation of liberty' (§ 56). In the standard examination of lawfulness of the measure, the Court listed not only the national rules but, referring to the Asylum Procedures Directive, also noted that EU law demands that no asylum seeker be detained for the sole reason that he or she is an asylum applicant (§ 64). As the border procedure according to Section 71/A of the Asylum Act is based on the legal fiction that the procedure in the transit zone is conducted before admission, the right to stay in the territory of Hungary otherwise guaranteed by Section 5 (1) a of the Asylum Act is denied. People are detained in the transit zone without a formal decision on the detention and without separate legal remedy addressing the detention.

According to the judgment, the 23 day detention took place 'without any formal decision of the authorities and solely by virtue of an elastically interpreted general provision of the law .... no special grounds for detention in the transit zone were provided for in Article 71/A.' (§ 68). That made the confinement of the asylum seekers arbitrary and a breach of Article 5 (1) f (§ 69).

It is a systemic failure of Hungarian asylum law, one can add, as the rules are applicable to everyone in the transit zone. In fact, further curtailment of asylum seekers' rights occurred since the judgment: by 2019 anyone who is in an irregular situation and apprehended by the authorities anywhere in Hungary is by force taken to the Serbian side of the fence, with a view to approach the transit zone from there, in which a full procedure (not only a border procedure) is conducted and the asylum seeker is detained until the end of it including the court appeal phase.[16]

Ilias and Ahmed went beyond the earlier ECtHR judgments as it established a violation of Article 5 (4) as 'the applicants did not have at their disposal any 'proceedings

15 For a most detailed account of the legal developments in Hungary see: Boldizsar Nagy, 'From Reluctance to Total Denial. Asylum Policy in Hungary 2015-2018', in: Vladislava Stoyanova & Eleni Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis*, Leiden: Brill 2019, p. 17-65, and for an earlier account offering more detail of the same author: 'Hungarian Asylum Law and Policy in 2015-2016. Securitization Instead of Loyal Cooperation', 17(6) *German Law Journal* 2016, p. 1032-1081. The same story told by an outside observer in great detail: Ashley Binetti Armstrong, 'Chutes and Ladders: Non-refoulement and the Sisyphean Challenge of Seeking Asylum in Hungary', 50 *Columbia Human Rights Law Review* 2019, p. 46; for a very well documented review of the situation see: Daniel Gyollai, *Global Migration: Consequences and Responses*, RESPOND Working Paper 2018/05; Hungary Country Report: Legal & Policy Framework of Migration Governance, May 2018, Uppsala: Uppsala Universitet 2018, http://www.crs.uu.se/respond/working-paper-series/ (accessed: 15 June 2019).

16 When this regime was introduced in 2017 UNHCR made a statement in which it stressed 'that physical barriers and restrictive policies have resulted in effectively denying access to territory and asylum'. UNHCR, *UNHCR urges suspension of transfers of asylum-seekers to Hungary under EU Dublin regulation*, Geneva: UNHCR, 10 April 2017, https://www.unhcr.org/news/press/2017/4/58eb7e454/ unhcr-urges-suspension-transfers-asylum-seekers-hungary-under-dublin.html (accessed 15 June 2019).

by which the lawfulness of [their] detention [could have been] decided speedily by a court' ' (§ 76). The applicants' claim that the treatment in the transit zone amounted to a breach of Article 3 ECHR was rejected, but the ECtHR accepted that they 'did not have the benefit of effective guarantees which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment in breach of Article 3 of the Convention' after expulsion to Serbia or further down their route of arrival.

The present system which is a generalised version, without time limits, of the border procedure declared illegal in *Ilias and Ahmed* will be tested in a case communicated to the Government on 30 August 2017 that concerns the confinement, in conditions which are allegedly inhuman, of an unaccompanied Afghan national minor to the Röszke transit zone and revolves around three questions:

- is the treatment in the transit zone contrary to Article 3,
- does the deprivation of liberty in the transit zone breach Article 5 (1),
- is there an effective procedure and remedy to challenge the detention and complaint against the treatment?[17]

The Strasbourg mirror painted a gloomy image of the Hungarian situation in the early 2010s in two Austrian cases, dealing with transfers to Hungary under the Dublin II regulation.[18] None of the judgments established that the concrete person ran the real and individual risk of ill treatment reaching the threshold of Article 3 in Hungary, nor that a possible return to Serbia would entail that, but especially *Mohammed v Austria* was critical:

> 'The Court notes the seemingly general practice of detaining asylum-seekers for a considerable time and partly under conditions that fell short of international and EU standards, which, in conjunction with the repeatedly reported deficiencies in review proceedings for administrative detention, depicted a situation raising serious concern. Note is further taken of the reports of abuse of detained asylum-seekers by officials and of forced medication.' (§ 103)

Two more cases against Austria[19], started in 2015, implicated the Hungarian conditions and the transfer under Dublin III regulation[20] but were concluded with an order as Austria quashed decisions on transferring the applicants to Hungary. That move may have been inspired by the invited intervention of the Council of Europe Commissioner

17 *I.A. v. Hungary*, application no. 38297/17.

18 *Mohammed v. Austria*, application no. 2283/12, judgment of 6 June 2013, and *Mohammadi v. Austria*, application No. 71932/12, judgment of 3 July 2014. Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50/1.

19 Applications No. 44825/15 and No. 44944/15, *S.O. v. Austria* and *A.A. v. Austria.*

20 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) (OJ 2013 L 180/96).

for Human Rights. As a third party[21] he gave a detailed account of the critical elements of the substantive law, of the procedure and of the detention regime, warned against the threat of chain *refoulement* as a consequence of returning persons to Serbia without examining their cases, even if transferred to Hungary under the Dublin regime and concluded that the authorities intention is to 'deter asylum seekers from entering the country and applying for asylum'.[22]

Much could be added on the role of other third party interveners in highlighting those elements of the Hungarian legal system that are incompatible with international standards, (UNHCR, Aire Centre, International Commission of Jurists), on the repeated calls of the Court not to treat asylum seekers as criminals and consider their individual circumstances, especially in cases of vulnerability and for offering substantive arguments, whether in detention cases or when qualifying another country as safe third, but space limitations require us to turn to other judges of Hungary: the CJEU.

The Court of Justice of the European Union: An Effort to Socialise the Antisocial

Hungarian courts were instrumental in clarifying important aspects of EU law by way of preliminary questions[23] – but they are not the subject of this study beyond noting that *F.* and *Shajin Ahmed* reflected the rigidity and alienation of the system. In the first case the authority wished to establish the credibility of the applicant with the help of a forensic psychologist's expert opinion based on projective personality tests, what – according to the CJEU – entailed an unjustified interference into private life. In the second case the 'severity' of a crime in the exclusion procedure was determined simply by a reference to the sole criterion of the penalty provided for it, which again was found

21 Council of Europe, Commissioner for Human Rights, 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* 5-7 (Council of Europe, 17 December 2015).

22 *Ibid.*, p. 10

23 *Bolbol* (CJEU C-31/09, judgment of 17 June 2010) and *El Kott a.o.* (CJEU C-364/11, judgment of 19 Dec. 2012) contributed greatly to the interpretation of the Qualification Directive exclusion clause in Article 12 para 1 a, in case of Palestine applicants, *F.* (CJEU C-473/16, judgment of 25 Jan. 2018) on the available tools to examine sexual orientation, *Shajin Ahmed* (CJEU C-369/17, judgment of 13 Sep. 2018) clarified the meaning of 'serious crime' in Article 17 para 1 (b) in exclusion from subsidiary protection status, *L.H,* (Case C-564/18, pending in June 2019) will address whether states may add inadmissibility grounds to those listed in the Procedures Directive (in this case a watered down safe third country concept) and whether an eight day limit for the court to decide in the review procedure is compatible with the requirement of fair procedure and effective remedy. The *Alekszij Torubarov* (Case C-556/17 – pending) is asking if – based on Article 46(3) of the Procedures Directive in conjunction with Article 47 of the Charter of Fundamental Rights – the Hungarian courts have the power to amend administrative decisions of the competent asylum authority refusing international protection and also to grant such protection, notwithstanding that the law only gives them the right of annulment of the administrative decision. *PG* (Case C-406/18 – also pending) asks whether fair procedure and effective remedy are compatible with the Hungarian rule, according to which courts cannot amend decisions given in asylum procedures but may only annul them and order that a new procedure be conducted and with the single mandatory time limit of 60 days in total for judicial proceedings in asylum matters, irrespective of any individual circumstances and without regard to the particular features of the case.

to be incompatible with the requirement to assess the specific facts of each individual case and weigh them in the light of the nature of the act, its consequences, the practice of other states sentencing a similar act and other criteria.

Turning to the broader picture one may state that Hungary undermines the EU asylum system in two different ways: it rejects solidarity and the sharing of responsibility in providing protection and adopts rules and practice contradicting to the EU asylum acquis.[24]

Solidarity was not only rejected at the political level[25] and by the total refusal to participate in the relocation of asylum seekers from Greece and Italy in and after 2015 as well as in any form of resettlement, but also took the form of – just like Slovakia – seeking annulment of Council Decision (EU) 2015/1601 of 22 September 2015[26] which established provisional measures in the area of international protection for the benefit of Italy and Greece.[27] The court refused more than a dozen arguments by Hungary and Slovakia. It denied that the decision was (or had to be) a legislative act amending the Dublin Regulation, it saw no violation of the procedural rules governing a decision under Article 78 (3) TFEU and, finally found no basis to the material law claims related to proportionality, legal certainty, normative clarity and compatibility with the Geneva Convention relating to the Status of Refugees.[28]

From the point of view of solidarity para 293 of the judgment may be the most important, recalling that it was Hungary that opted against being a beneficiary of relocation – together with Greece and Italy – and in so

> 'the Council cannot be criticised, from the point of view of the principle of proportionality, for having concluded on the basis of the principle of solidarity and fair sharing of responsibility laid down in Article 80 TFEU that Hungary had to be allocated relocation quotas in the same way as all the other Member States that were not beneficiaries of the relocation mechanism.'[29]

The Commission did not wait until the judgment came out and started infringement procedures against the Czech Republic, Hungary and Poland for refusal to relocate.[30] As the three states did not act even after the judgment confirming the validity of the

24 For an elaboration of these ideas see: Boldizsár Nagy, 'Renegade in the club. Hungary's resistance to EU efforts in the asylum field', *Osteuroparecht, Fragen zur Rechtsentwicklung in Mittel- und Osteuropa sowie den GUS-Staaten*, 63. Jahrgang, Heft 4|2017 'Rechtsdurchsetzung durch die EU', p. 413-427.

25 The Hungarian Parliament adopted an Act on 17 November 2015, the preambular paragraphs of which reflect the tenor of the resistance: 'condemning the failed immigration policy of Brussels; rejecting the compulsory settling-in quota as the quota is senseless and dangerous, it would increase crime, spread terror and it endangers our culture; finding that no sovereign state may be forced to take over and examine applications for international protection submitted in another member State' and the operative part invites the government to initiate the annulment procedure in front of the CJEU. Act No CLXXV of 2015.

26 OJ 2015 L 248, p. 80.

27 Case C-643/15, *Slovak Republic v. Council of the European Union*, Case C-647/15, *Hungary v. Council of the European Union*, 2016 E.C.R 43.

28 Judgment of 6. 9. 2017 – joined cases C-643/15 and C-647/15, *Slovakia and Hungary v. Council of the European Union.*

29 Hungary was expected to take in 1294 of the 120 000 persons to be relocated in the course of two years.

30 IP/17/1607 Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland Brussels, 14 June 2017

relocation decision, the case was referred to the CJEU on 22 December 2017, where at it is still pending in June 2019.[31] The Commission is seeking a declaratory judgment confirming that Hungary had failed to fulfil its relocation obligations.

The second way of undermining the system includes laws and practices that are incompatible with the norms and the principles of the EU *acquis*. The number of problems identified in several infringement procedures against Hungary reflect their scope, especially as the Commission is known to use infringement procedures as a last resort.[32]

In 2013 an infringement procedure started[33] finding non-compliance with the Asylum Procedures Directive, the Reception Conditions Directive and Article 47 of the Charter. Its precise content was not made public and it did not make it to the court.

The construction of the fence and the drastic tightening of the applicants' procedural rights led to another infringement procedure[34] the scope of which was extended after the 2017 March changes that practically ended all regular asylum procedures. The press release reflecting the points of sustained disagreement lists the following:

- asylum applications can only be submitted within the transit zones
- only a limited number of persons are granted access to the two zones after excessively long waiting periods
- the border procedure implemented by Hungary is longer than the 4 weeks accepted as the maximum length of border procedures
- no special guarantees for vulnerable applicants exist,.
- effective access to asylum procedures is denied as irregular migrants are escorted back across the border, even if they wish to apply for asylum.
- indefinite detention of asylum seekers in transit zones without respecting the applicable procedural guarantees.[35]

A long dormant procedure concerning the transposition of the Qualification Directive[36] was revived in January 2019, when the Commission sent reasoned opinion on shortcomings of implementation (without adding details). On the same day it announced its reasoned opinion challenging the 2018 amendments[37] criminalisation of support to asylum applicants and the introduction of an additional non-admissibility ground for asylum applications not provided for by EU law, which essentially excludes anyone who has arrived to Hungary, from a country, where 'the appropriate level of protection' is secured (Asylum Act, 51§ (2) f).

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31 C-718/17 *Commission v. Hungary*. Hearing was held on 15 May 2019

32 Olivier De Schutter, *Infringement proceedings as a tool for the enforcement of fundamental rights in the European Union Open Society*, Brussels: European Policy Institute 2017, p. 46-47.

33 2013/4062, dates 17 October 2013. No press release appeared and info on the content of the exchanges were denied to the Hungarian Helsinki Committee. (Ref. Ares(2014)521571 – 27/02/2014) The procedure was closed in November 2018 (http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true& active_only=0&noncom=2&r_dossier=&decision_date_from=01%2F05%2F2012&decision_date_to=20%2F06%2F2019&EM=HU&DG=HOME&DG=JLSE&title=&submit=Search (accessed 1 June 2019).

34 2015/2201, announced in IP/15/6228.

35 IP/18/4522 of 19 July 2018.

36 2014/0116.

37 IP/19/469 14 January 2019.

The CJEU is not engaged in a friendly dialogue with the Hungarian Government or the courts – beyond the Palestine refugee cases. In the preliminary question cases it tends to agree with the applicants and in the infringement cases with the Commission. In minor, technical issues the Commission or at least the Court is successful[38] but the in matters of solidarity or the deprivation of asylum seekers of fundamental rights no progress can be recorded.

Conclusion – The Broader Frame

The decisions of the two courts may have done justice to the victims or preserved the integrity of the relocation decision, but were incapable to stop the rapid destruction of the Hungarian asylum system. Filippo Grandi, the United Nations High Commissioner for Refugees, during his visit in Hungary in 2017 stated:

> When I was standing at the border fence today, I felt the entire system is designed to keep people, many of whom are fleeing war and persecution, out of the country and preventing many from making a legitimate asylum claim.[39]

The European Parliament's Proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded[40] registers a long list of concerns related to the asylum system.[41]

Dunja Milatović, the Commissioner for Human Rights of the Council of Europe, in her 2019 May report on Hungary[42] observed that

> the notably negative stance against immigration and asylum seekers adopted by the Hungarian government since 2015 has resulted in a legislative framework which has undermined the reception and protection of asylum seekers and the integration of recognised refugees

and called upon the government to revoke the decreed 'crisis situation due to mass immigration' serving as the (il)legal basis of channelling all cases to the transit zone.[43]

The trend of liquidating the protection space in Hungary cannot be reversed by court action. The hole political system has to be changed, the rule of law and democracy restored. Pressure must come from inside as well as from outside.

Fight we must. If Elspeth is for us, who can be against us?

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38 No longer may court secretaries proceed instead of judges, a few procedural deadlines have been extended.

39 UNHCR, *UNHCR Chief visits Hungary, calls for greater access to asylum, end to detention and more solidarity with refugees*, 12 September 2017, ttps://www.unhcr.org/news/press/2017/9/59b809d24/unhcr-chief-visits-hungary-calls-greater-access-asylum-end-detention-solidarity.html (accessed: 19 June 2019).

40 Annex to resolution P8_TA-PROV(2018)0340 (the so-called Sargentini report).

41 *Ibid.*, paras 62-72.

42 Commissioner for Human Rights of the Council of Europe Dunja Mijatović, Report Following her visit to Hungary from 4 to 8 February 2019, https://search.coe.int/commissioner/Pages/result_details.aspx?ObjectId=0900001680942f0d#_Toc6306514 (accessed: 19 June 2019).

43 *Ibid.*, point 37.