



Hungarian Helsinki Committee

Protecting fundamental rights or shielding fundamental rights violations? Evaluating Frontex's human rights mechanisms related to Hungary

**Information Note by the Hungarian Helsinki Committee (HHC)
8 January 2021**

This information note summarises the HHC's experiences with Frontex and its human rights compliance mechanisms. Drawing on exchanges between the HHC, various stakeholders of Frontex and its Executive Director, we show how the Agency turned a blind eye towards well documented systemic human rights violations at Hungary's Schengen borders for more than four years. Moreover, the Agency remained in Hungary even after the CJEU ruled in December 2020 that extrajudicial push-backs taking place at the Hungarian-Serbian border breach EU law. The note also examines Frontex's complaints mechanism that is supposed to remedy violations of human rights related to the operations of the Agency.

The evidence, including previously unpublished documents presented in this paper show shockingly ineffective human rights compliance mechanisms within the Agency. As serious allegations have surfaced regarding the role and responsibility of Frontex in fundamental rights violations at other sections of the external Schengen Borders, recommendations included at the end aim to strengthen the weak mechanisms pending changes are introduced to the current legal framework of Frontex.

At its 40th meeting in September 2012, the Management Board of Frontex appointed the Agency's first Fundamental Rights Officer, tasked with "contributing to the Agency's fundamental rights strategy, monitoring its compliance with fundamental rights and promoting its respect of fundamental rights".¹ The board also adopted working methods for the newly established Consultative Forum on Fundamental Rights.² A complaints mechanism was also envisioned to "ensure the respect for fundamental rights in all the activities of the Agency."³ **Since 2016, evidence of grave and systemic fundamental rights violations at external Schengen borders have been presented, raising also the potential responsibility of the Agency.**

Due to the longstanding and wide-ranging issues related to the legal framework of the asylum system and the operations of the asylum authority in Hungary, the HHC has been engaged with Frontex's human rights mechanisms several times. **To contribute to the evolving discussion on the Agency's compliance with its duty to respect fundamental rights, the HHC provides this comprehensive overview of its experience with Frontex and its operations in Hungary.**

Since the envisioned reinforcement of rights compliance at Frontex, the HHC has lodged formal **complaints pertaining to 17 individuals** and informed the previous Fundamental Rights Officer during her two monitoring visits to Hungary.

¹ Article 71 (1) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 (EBCGA Regulation)

² See the press statement on the website of Frontex: <https://frontex.europa.eu/media-centre/news-release/management-board-designates-fundamental-rights-officer-8IK8Im>

³ Article 72 (1) of EBCGA Regulation

I. The monitoring visits of Frontex's Fundamental Rights Officer

On 5 July 2016, amendments entered into force to the State Border Act and to the Asylum Act in Hungary.⁴ The provisions created a fictitious area, spanning 8 kilometres from the external Schengen borders of Hungary, from where push-backs could be carried out to Serbia without any identification or the possibility to ask for asylum. Section 5 (1a) of the State Border Act stipulates that

"The Police may intercept third country nationals staying unlawfully in Hungary within the 8 kilometre area of Hungary's external Schengen area as defined by Article 2 (2) of the Schengen Borders Code, and may escort him/her through the nearest gate of the establishment described in Section 5 (1), except if suspicion of a crime arose."

The establishment referred to in Section 5 (1) is the border fence, erected at the Hungarian-Serbian and Hungarian-Croatian border sections. The provision does not prescribe any identification, individualised documentation during these operations for the Police. From the amendment to the Asylum Act that entered into force the same day it is also evident that third country nationals staying unlawfully in this fictitious 8 km area do not have the right to seek asylum.⁵

The legalisation of extrajudicial push-backs results in

- Systemic human rights violations denying access to asylum;
- Substantial security risk to the entire Schengen Area as no identification or documentation takes place when third country nationals are pushed back outside of the Schengen Area by law enforcement agencies.

From the end of May 2016, the HHC began receiving reports of violence occurring at the Hungarian-Serbian border. On 1 June 2016, a Syrian man drowned in the river Tisza after he attempted to cross into Hungary but, according to the statement of his surviving brother, was made to turn back by Hungarian police officers.⁶ In response to the growing number of reports,⁷ the HHC prepared a form to report abuses⁸ and alerted officially the Hungarian Police. The Police failed to provide any meaningful response to these complaints and did not address them in any other substantial way.⁹

The legalisation of push-backs only exacerbated the violence. The first comprehensive report in English about systemic violent abuses committed by Hungarian law enforcement agents was published on 13 July 2016 by Human Rights Watch.¹⁰

On 17 October 2016, the HHC sent a letter to the Executive Director of Frontex, requesting that the Agency makes its findings public that led to the Agency's spokesperson stating that there are "well-documented abuses on the Hungarian-Serbian border". The HHC also requested that the Executive Director ensures that Frontex and Frontex-operations play an active role in preventing and investigating the widespread violence.¹¹

In his response to the HHC, the Executive Director of Frontex stated, among others that "[w]hen performing their duties, Frontex-deployed officers may participate and support the interception of irregular migrants. Other activities, like escorting migrants to the closest transit zone, are not performed by Frontex-deployed officers." The director emphasised that "[s]hould there be violations of fundamental rights or international protection obligations that are of a serious nature or are likely to

⁴ Act XCIV of 2016

⁵ Section 71/A (1) of Act LXXX of 2007 on Asylum, as modified by Act XCIV of 2016.

⁶ See the statement of the UNHCR: <https://www.unhcr.org/ceu/387-ennews2016unhcr-alarmed-at-refugee-death-on-hungary-serbia-border-html.html>

⁷ Some of these reports appeared publicly as well. See the first extensive coverage of the violence and then still unlawful push-backs dated 13 June 2016: <https://abcug.hu/kinyitottak-kaput-es-kuldttek-kutyakat/>

⁸ Available at: https://www.helsinki.hu/wp-content/uploads/Form_to_Report_Abuse.pdf

⁹ HHC's letter to the Police of 14 June 2016: <https://www.helsinki.hu/wp-content/uploads/ORFK-elfogasok-20160614.pdf> and the response

¹⁰ Human Rights Watch, *Hungary: Migrants Abused at the Border*, 13 July 2016, available at <https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border>

¹¹ HHC's letter is available at: <https://www.helsinki.hu/wp-content/uploads/Frontex-letter-HHC-17102016.pdf>

persist in relation to operations assisted by Frontex, a procedure allows for withdrawing the financing of joint operation, and/or suspending or terminating, in whole or in part such activity.”¹²

The first monitoring visit of the Frontex Fundamental Rights Officer

It was against these developments that the Fundamental Rights Officer carried out a monitoring visit to Hungary. In her report, which was only made public following a freedom of information request by the HHC,¹³ the Fundamental Rights Officer analysed in detail the possible impact on fundamental rights of the legalisation of push-backs.¹⁴ Echoing the concerns raised by the HHC since the introduction of these changes, she specifically mentioned in this context:

- the prohibition of collective expulsions;¹⁵
- the right to asylum;¹⁶
- the right to an effective remedy;¹⁷
- the prohibition of cruel, inhuman or degrading treatment;¹⁸
- the right to life;¹⁹
- the prohibition of *refoulement*;²⁰ and
- the right to integrity of the person.²¹

The report concluded that “[t]he Agency may wish to revise its support [...] [o]therwise, the Agency is at risk by omission in respecting, protecting and fulfilling the aforementioned EU Charter of Fundamental Rights’ obligations.”

On 10 November 2016, the Frontex Consultative Forum on Fundamental Rights, in light of the available reports of violence, the legal framework and the Fundamental Rights Officer’s report, recommended to the Executive Director and the Management Board that Frontex suspends its activities in Hungary.²²

The Executive Director decided to respond to this recommendation on 1 February 2017, almost three months after the recommendation was made. During those almost three months, a total of 3 254 push-backs took place from Hungary according to the Police. The Executive Director decided not to take action and not to suspend the operational activities of Frontex at the Hungarian-Serbian border.

The second monitoring visit

On 7 March 2017 the Hungarian Parliament adopted an omnibus bill that fundamentally changed the asylum system.²³ According to the changes, the 8 km area from where push-backs could be carried out was extended to the entire territory of Hungary.²⁴ The Frontex Fundamental Rights Officer undertook a second monitoring mission to Hungary after the changes were adopted, but before they entered into force, between 13 and 15 March 2017. This report was again made public following the HHC’s “freedom

¹² Frontex’s response to the HHC is available at: <https://www.helsinki.hu/wp-content/uploads/Frontex-04112016-Letter-to-HHC.pdf>

¹³ The full batch of documents obtained is available at: https://www.asktheeu.org/en/request/operations_in_hungary

¹⁴ Frontex, *Situation at the Hungarian-Serbian border, 2016, FRO Observations*, available at: <https://www.helsinki.hu/wp-content/uploads/10.-FRO-observations-HU-SR-border-October-2016-Redacted.pdf>

¹⁵ Article XIV of the Fundamental Law of Hungary; Article 4 Protocol 4 of the European Convention on Human Rights (ECHR); Article 19(1) of the Charter of Fundamental Rights of the European Union (Charter).

¹⁶ Article XIV of the Fundamental Law; Article 18 of the Charter; Article 14 of the Universal Declaration of Human Rights (UDHR); 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.

¹⁷ Article XXVIII of the Fundamental Law; Article 13 of the ECHR; Article 47 of the Charter.

¹⁸ Article III of the Fundamental Law; Article 3 of the ECHR; Article 4 of the Charter; Article 5 of the UDHR; Article 7 of the International Covenant on Civil and Political Rights (ICCPR); Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT).

¹⁹ Article II of the Fundamental Law; Article 2 of the ECHR; Article 2 of the Charter; Article 3 of UDHR; Article 6 of the ICCPR.

²⁰ Article XIV of the Fundamental Law; Article 3 of the ECHR, Article 19 of the Charter; Article 3 of CAT; Article 33 of the 1951 Convention Relating to the Status of Refugees;

²¹ Article 3 of the Charter.

²² The full text of the recommendation is available at: <https://www.helsinki.hu/wp-content/uploads/8.-Recommendation-from-CF-Redacted.pdf>

²³ See HHC’s analysis: <https://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-New-Asylum-Bill-15.02.2017.pdf>

²⁴ Newly introduced Article 5 (1b) of Act LXXXIX of 2007 on State Borders.

of information” request, unfortunately with large sections of the document covered in black.²⁵ The Fundamental Rights Officer took note of the adopted legal changes and thus concluded that “[t]he 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.”

By the time this second monitoring visit was concluded, a total of 11 188 extrajudicial push-backs had taken place from Hungary, according to the daily statistical updates provided by the Hungarian Police on its official website.

On 17 May 2017, the European Commission decided to move forward with its infringement procedure started in December 2015 related to the changes to the Hungarian asylum system.²⁶ In its complementary letter of formal notice, the Commission considered, referring in technical terms to push-backs, that “Hungary is returning migrants (including asylum-seekers) who cross the border irregularly to Serbia without following the procedures and conditions of EU law on return and asylum.”²⁷

The Commission referred Hungary to the Court of Justice of the European Union (CJEU) on 21 December 2018 for a number of breaches of EU law, including for “moving third-country nationals staying illegally in Hungary to the other side of the border fence, without respecting procedures and guarantees laid down in Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115.” According to the claims put forward by the Commission, the legalisation of push-backs also violate Articles 6, 18, and 47 of the Charter of Fundamental Rights.²⁸

On 17 December 2020, the CJEU delivered its judgment in case C-808/18. The Court found, among others, that **Hungary’s push-back legislation, especially when assessed in light of the prevalent legal and practical restrictions on lodging an asylum application, is in breach of EU law.**²⁹ The landmark judgment has put an end to the legal debate surrounding the Hungarian push-back practice. Hungary has a mixed record of implementing CJEU judgments,³⁰ therefore it is unpredictable to what extent it will comply with the clear obligations set by this milestone judgment. At the same time, Frontex, as an EU agency, can be expected to automatically respect and act in accordance with CJEU rulings. By the time the CJEU rendered its judgment, over 50 000 push-backs had taken place from Hungary. Since the judgment 2000 cases of push-backs have been reported on the website of the Hungarian Police. At the time of the publication of this note, Frontex is still present in Hungary. The HHC once again approached the Agency’s Executive Director on this matter.³¹

²⁵ The provided document is available at: <https://www.helsinki.hu/wp-content/uploads/9.-FRO-observations-2017-Field-visit-to-Hungary-March-2017-Redacted.pdf>

²⁶ See the press statement on the website of the European Commission: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6228

²⁷ See the press statement on the website of the European Commission: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1285

²⁸ Case C-808/18, Commission v. Hungary, available on the CJEU’s website: <https://bit.ly/386mcS8>

²⁹ Case C-808/18, Judgment of 17 December 2020, §§ 227-266 available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=235703&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=19322935>

³⁰ See HHC’s information update of 18 August 2020, *Hungary de facto removes itself from the Common European Asylum System*, p.5. <https://www.helsinki.hu/wp-content/uploads/new-Hungarian-asylum-system-HHC-Aug-2020.pdf>; and HHC co-chair András Kádár Kristóf *A warning to the guardians*, 26 October 2020, <https://www.euractiv.com/section/justice-home-affairs/opinion/a-warning-to-the-guardians/>

³¹ HHC’s letter to the Executive Director of Frontex, 7 January 2021: https://www.helsinki.hu/wp-content/uploads/HHC_Frontex_07012021.pdf

II. Individual complaints

The Agency regularly rebuts allegations of fundamental rights violations by referring to its complaints mechanism and the lack of robust findings in the outcome of the investigations following such complaints. The HHC's experience regarding the effectiveness of Frontex's complaints mechanism is, however, very bleak.

On 20 November 2017, the HHC alerted Frontex regarding the imminent deportation of an Afghan national whose expulsion order was annulled by the court on 17 November 2017. Frontex was provided with all available documents and the HHC attorney who represents the Afghan national rushed to the airport during the night of 20 November but was not allowed to get in touch with either the client or the officers present on site. On 29 November 2017, 9 days after the deportation was carried out via a joint return operation organised by Hungary and coordinated by Frontex, the HHC attorney was informed that on the same day when the court annulled the expulsion order, a formally new procedure was initiated against the client, which provided the basis for his expulsion three days later, on 20 November 2017. In short, the authorities released the client from detention and immediately placed him in detention based on a new ground, in a new procedure, without informing his legal representative. After 35 months (almost three years) of investigation, the Frontex Fundamental Rights Officer issued a final report on the complaint. The report concludes, among others, that "[t]he Hungarian authorities violated the principle of non-refoulement; the right to effective remedy, the right to legal representation, legal remedy and therefore the right to a fair trial; and the right to protection in the event of removal, expulsion or extradition."³²

On 6 May 2019, the HHC alerted Frontex regarding the imminent and unlawful deportation of three Afghan families through a joint return operation coordinated by the Agency. The three families' asylum applications were all rejected based on a new inadmissibility ground. This meant, in practice, that the asylum authority only examined whether Serbia, from where they had entered Hungary, is a safe country for them, and did not look into the merits of their asylum application. As a result of their rejection, the families were expelled to Serbia. However, as Serbia refuses to readmit asylum-seekers from Hungary, the families could not be deported there. The immigration authority, instead of conducting an in-merit examination of their asylum applications, simply changed the destination country of the expulsion order to Afghanistan. No effective legal remedy is available against such changes under domestic legislation.³³ The European Commission had already initiated, before these events, an infringement procedure against Hungary for introducing this admissibility grounds, at variance with EU law. The infringement procedure was already at the last step before referral to the CJEU, when the three family's expulsion was ordered to Afghanistan.³⁴

The HHC managed to suspend the expulsion of one of the families by successfully obtaining an interim measure by the European Court of Human Rights. The Court did not suspend the expulsion of the other two families. On the late afternoon of 7 May, the authorities tried to board the two families onto a police vehicle to transfer them from the transit zone at the Hungarian-Serbian land border to the airport in Budapest. One of the expelled women, who was pregnant, fainted and had to be taken to hospital for emergency care. The rest of her family was also removed from the police vehicle. By the time the police vehicle could leave the transit zone for the airport, it was already too late to reach the scheduled flight. Thus, the Hungarian authorities decided to forcibly push-back the family to Serbia at a gate built into

³² The full report is available at: <https://www.helsinki.hu/wp-content/uploads/Frontex-Complaint-CMP201700014.pdf>

³³ More on this in HHC's information update *One year after: How legal changes resulted in blanket rejections, refoulement and systemic starvation in detention* <https://www.helsinki.hu/wp-content/uploads/One-year-after-2019.pdf>

³⁴ On 24 January 2019, the Commission sent a reasoned opinion to Hungary because of, among others, this new inadmissibility ground being "incompatible with the Asylum Qualifications Directive (Directive 2011/95/EU) and the EU Charter of Fundamental Rights." See the press statement on the website of the European Commission: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_469

the border fence nearby. Upon return from the hospital, during the night, the pregnant woman was also pushed back to Serbia together with members of her family.³⁵

Following the incident, UNHCR “has advised the European Border and Coast Guard Agency, Frontex, to refrain from supporting Hungary in the enforcement of return decisions which are not in line with International and EU law.”³⁶

On 15 May 2019, the Frontex Fundamental Rights Officer informed the HHC that the communication of 6 May that alerted the Agency to the imminent, unlawful deportation of the three Afghan families was registered as a complaint. In her letter, the Officer noted that the complaint was shared, among others, with the Hungarian Commissioner for Fundamental Rights and the Executive Director of Frontex.

On 25 July 2019, the European Commission decided to refer Hungary to the CJEU for the introduction of the inadmissibility ground that led to the expulsion decisions in the case of the Afghan families.³⁷

On 19 March 2020, the CJEU ruled in a preliminary ruling request, where the HHC provided representation, that the inadmissibility ground based on which the three Afghan families were rejected was in breach of EU law. The Court also established that the lack of available remedy against the modification of the destination country of an expulsion order, the framework which led to the attempt to expel the families to Afghanistan, was also in breach of EU law.³⁸ Between 1 July 2018 and 19 March 2020, the vast majority of asylum applicants in Hungary’s two land-border transit zones were rejected based on this inadmissibility ground and soon were in the same situation as the Afghan families: after Serbia refused to readmit them, the Hungarian immigration authority simply modified the destination country of their expulsion order to their country of origin, without any possibility of appeal or legal remedy.

On 12 May 2020, Frontex informed the HHC of the closure of the complaint. The letter notes that a number of fundamental rights were at stake during the planned expulsion of the families: the right to asylum;³⁹ the right to protection in the event of removal, expulsion or extradition;⁴⁰ the rights of the child;⁴¹ the right to health;⁴² and the right to an effective remedy.⁴³ Despite the established risks of a wide range of fundamental rights violations in a procedure that was systematically applied to almost all asylum-seekers in Hungary, the Fundamental Rights Officer did not make any substantial recommendations or statements. In fact, the response to the complaint did not even take note of the fact that, by then, the CJEU had found the legal basis of the expulsion of the Afghan families to be in breach of EU law. On the other hand, the Fundamental Rights Officer took note of the push-back of two of the families to Serbia during the night of 8 May in the following way: “In this regard, the FRO notes positively that the complainant’s rights have been guaranteed and protected by the authorities, specifically the right to protection in the event of removal, expulsion or extradition.”⁴⁴ It is highly concerning that the Fundamental Rights Officer noted positively a measure that by then the European Commission had already declared unlawful (later confirmed by the above-mentioned CJEU ruling) and which itself had found potentially in breach of EU law in its previous monitoring reports (see above).

³⁵ International media was present on the day next to the transit zones for a government press conference that was cancelled late afternoon without explanation. Some media crews remained on site during the night and witnessed and recorded the push-backs. See for example: <https://apnews.com/article/64c8502d3b0947dd9e571dcbc61336e2> or <https://www.bbc.com/news/world-europe-48198645>

³⁶ UNHCR *Hungary’s coerced removal of Afghan families deeply shocking*, 8 May 2019, available at: <https://www.unhcr.org/news/press/2019/5/5cd3167a4/hungarys-coerced-removal-afghan-families-deeply-shocking.html>

³⁷ See the press statement on the website of the European Commission: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260

³⁸ C-564/18, judgment of 19 March 2020, available at: <https://bit.ly/2LJUy5Z>

³⁹ Article 18 of the Charter.

⁴⁰ Article 19 of the Charter.

⁴¹ Article 24 of the Charter.

⁴² Article 35 of the Charter.

⁴³ Article 47 of the Charter.

⁴⁴ The full report is available here: <https://www.helsinki.hu/wp-content/uploads/Frontex-Complaint-CMP20190004.pdf>

III. Recommendations

The currently existing human rights compliance mechanisms are clearly ineffective as the above cases exemplify. The lengthy procedures resulting in at best a listing of grave human rights violations committed or witnessed by the Agency without an attempt to remedy the situation cannot be called a complaints mechanism. For the Fundamental Rights Officer to be able to act in line with the mandate of their office, legal amendments that strengthen the powers of the Officer and the Consultative Forum are necessary. In the absence of such legal changes, action can still be taken to enforce compliance with fundamental rights. The recommendations below could bolster the effectiveness of human rights compliance mechanisms within the Agency without further legal changes.

For the Frontex Fundamental Rights Officer and the Frontex Consultative Forum

- Monitoring reports of the Fundamental Rights Officer shall be published, the redactions minimised;
- In any case, a list of potential rights violations identified through monitoring visits of the Fundamental Rights Officer shall be made public regularly;
- Recommendations made in the context of individual complaints shall be published;
- The Fundamental Rights Officer shall follow up with previous recommendations and regularly publish progress reports;
- In cases where the Commission decides to launch infringement procedures against a Member State that are related to the EU asylum or Schengen *acquis*, an assessment of the risks of the Agency's ongoing presence and/or joint operations with the Member State concerned shall be prepared and made public by the Fundamental Rights Officer;
- The complaints mechanism shall be altered in a way that the complainant is able to respond to claims made by authorities, including the Agency prior to closing the case;
- As the human and other resources available for the office of the Fundamental Rights Officer are clearly inadequate, substantially more funding should be made available;
- The enlarged office of the Fundamental Rights Officer should have a liaison officer who regularly consults with a network of independent experts and civil society organisations providing information on the activities of the Agency from a human rights point of view;
- The complaints mechanism should be made more effective by introducing stricter deadlines to the investigation of incoming complaints;
- When systematic complaints arrive from a certain border section, the Agency should make sure that its staff is adequately trained in order to avoid complicity in human rights violations;
- When reforming the complaints mechanism, the Fundamental Rights Officer shall make use of the expertise of the European Committee of the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in setting up effective complaints against ill-treatment.⁴⁵

For the Executive Director of Frontex

- On its own initiative the Executive Director shall report annually to the European Parliament on the implementation of the recommendations made by the Fundamental Rights Officer and the Consultative Forum.

For the European Parliament

- The Parliament shall open an inquiry either through establishing a special or an inquiry committee to assess the fundamental rights compliance of the Agency. The inquiry should specifically assess the
 - effectiveness of the complaints mechanism;
 - the depth and promptness of information provision of the Agency to requests made by the Fundamental Rights Officer and the Consultative Forum;

⁴⁵ See for example CPT guidelines on effective complaints mechanisms: <https://rm.coe.int/16807bc668>

- internal mechanisms in place (if any) to evaluate potential systemic rights violations related to the activities of the Agency of national authorities the Agency cooperates with;
- legislative changes necessary to strengthen existing internal and external human rights monitoring mechanisms related to the Agency's operations.

During the inquiry, the Parliament shall also invite the European Ombudsman as well as relevant stakeholders from member states to provide expert opinions and, where relevant, statements and testimonies on the Agency's human rights compliance record.