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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

Opinion No. 22/2020 concerning Saman Ahmed Hamad (Hungary)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 4 October 2019 the Working Group transmitted to the Government of Hungary a communication concerning Saman Ahmed Hamad. The Government replied to the communication on 23 December 2019. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Saman Ahmed Hamad is a Sunni Muslim from Iraq, born in 1974 and he is an asylum seeker. According to the source, Mr. Hamad fled the city of Makhmur in the Kurdistan region of Iraq because of multiple death threats he had received because of his religious beliefs. The source explains that he left Iraq on 10 August 2016 and travelled through Turkey, Bulgaria and Serbia before arriving in Hungary.

Arrival in Hungary and asylum applications

5. The source explains that Mr. Hamad entered Hungary on 23 August 2017 through a transit zone, with the purpose of applying for asylum, which he did upon entry. There, he also had his first asylum interview. He was required to remain in the transit zone.

6. The source reports that on 4 September 2017, Mr. Hamad's asylum application was rejected and he appealed. On 24 October 2017, the court annulled the asylum decision and a new procedure was ordered. On 24 November 2017, the asylum application was rejected for the second time and Mr. Hamad appealed again. On 18 January 2018, the decision was, once again, annulled by the court and a new procedure was ordered. On 14 March 2018, the asylum application was rejected for the third time and Mr. Hamad appealed again.

7. On 19 March 2018, Mr. Hamad raised an objection to his continued placement in the transit zone and requested that he be transferred to an open accommodation facility. Subsequently, his legal representative requested the court to order immediate legal protection in relation to his de facto detention and requested an interim measure ordering his release.

8. However, on 12 July 2018, the court reviewing the appeal against the decision on the asylum procedure rejected the appeal against his placement in the transit zone as being late. On 4 June 2018, the court also suspended the procedure and sent a request for a preliminary reference to the Court of Justice of the European Union (European Court of Justice) concerning the issue of effective remedy and time limits for decision-making. On 27 September 2018, the Court rejected the request for a prioritized procedure.

9. Mr. Hamad's legal representative appealed to the court of second instance against the rejection by the court of the appeal against his placement in the transit zone. At the time of the submission of the communication to the Working Group, that appeal was still pending.

10. On 24 October 2018, Mr. Hamad filed a complaint to the Prosecutor requesting an examination of the legality of his placement in the transit zone. On 24 January 2019, the Prosecutor rejected the complaint against the placement in the transit zone as lacking jurisdiction. On 8 March 2019, Mr. Hamad sent a request to the Metropolitan Court for an interim measure to be released. On 28 March 2019, the judge of the Metropolitan Court granted an interim measure for his release, which was appealed by the immigration authority on 9 April 2019.

11. According to the source, the length of the procedure to which Mr. Hamad has been subjected shows the ineffectiveness of domestic legal remedies available to him in Hungary.

Legal analysis

12. The source explains that, according to the Hungarian Asylum Act, asylum applications can only be submitted in the transit zones located at the border with Serbia (unless the asylum seeker is already residing lawfully in the territory of Hungary). The National Directorate-General for Aliens Policing (formerly the Immigration and Asylum Office) then issues a ruling ordering the applicant's place of residence in a transit zone based on sections 80/J (5) and 5 (2) (c) of the Asylum Act. All asylum seekers must remain in the transit zones until they receive a final decision on their asylum procedure or until they are transferred to another European Union member State under the Dublin III regulation. According to the source, asylum seekers cannot leave the transit zones unless they want to return to Serbia. In that case, the asylum procedure in Hungary is abandoned and they face the risk of being sent back to their country of origin.

13. The provisions of the Asylum Act were introduced under the “state of emergency” regime and since these amendments came into effect on 28 March 2017, all asylum seekers entering the transit zones of Röszke and Tompa on the Hungarian side of the Serbian-Hungarian border are de facto detained for the whole duration of their asylum procedure. In 2017, a total of 2,107 asylum seekers were detained there.

14. The source further explains that, while the Hungarian authorities refuse to recognize that this situation amounts to deprivation of liberty, on 24 March 2017 in the case of *Ilias and Ahmed v. Hungary*, the European Court of Human Rights ruled that holding asylum-seeking applicants in transit zones amounted to a deprivation of liberty under article 5 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). In addition, the source notes that in its report of October 2017, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (Council of Europe Anti-Torture Committee) stated that transit zones were places of detention.

15. In the present case, the source indicates that on 22 August 2017, the Immigration and Asylum Office issued a ruling, ordering Mr. Hamad’s “place of residence” to be the Tompa transit zone, meaning that he has thus been de facto detained since that day. However, the fact that Mr. Hamad entered the transit zone of his own free will and was allowed entry solely for the purpose of seeking asylum does not mean that he consented to confinement for an indefinite period without an effective legal remedy. The source emphasizes that as an asylum seeker, the only way for him to apply for international protection in Hungary is to do so in the transit zone, given that asylum seekers are denied entry into Hungarian territory beyond the zone. Similarly, the fact that Mr. Hamad is able to leave voluntarily the transit zone to return to Serbia at any time does not rule out the infringement of the right to liberty, given that this would mean losing the chance to have his application examined on the merits. It would also mean that he would be barred from re-entry into the transit zone, triggering the risk of chain refoulement.

16. The source reports that Mr. Hamad is living in deplorable conditions, suffering from lasting physical and psychological effects owing to his ongoing prolonged stay in the transit zone. Allegedly, he has suicidal thoughts, which is also confirmed by a psychiatrist’s reports.

17. The source also reports that Mr. Hamad’s movements are highly controlled. According to the source, this also demonstrates that he is de facto deprived of liberty. Specifically, the source explains that the transit zone in Tompa is a compound surrounded by a high barbed-wire fence and rolls of razor blade wire, where the movements of asylum seekers are constantly controlled and monitored by armed police, border guard officers, security guards and closed-circuit television (CCTV) cameras. The asylum seekers live in metal shipping containers, measuring 13 m² (approximately 4 x 3 m) and are furnished with beds and lockers, leaving no room for a table or chairs, or space to freely move around the container. The sector reserved for single men where Mr. Hamad is held has only a narrow strip of land (40 x 30 m) serving as an outside area. Mr. Hamad has no privacy, no meaningful activities to pursue and is totally isolated from the outside world with limited possibilities of communication owing to very weak phone and Internet signals.

18. The source argues that the detention of Mr. Hamad has no precise legal basis in national law and he does not have access to direct, independent and effective judicial remedy in Hungary. Specifically, the source claims that Mr. Hamad has never received a decision or information on his detention, its legal basis, the reasons for his detention, the duration of the detention and the available remedies. The source claims that asylum seekers entering the transit zones are de facto detained without a detention order, but only by a ruling from the National Directorate-General for Aliens Policing. There is no individual assessment to determine whether detention is necessary, nor an application of any permissible grounds for detention.

19. The source further notes that the reason for Mr. Hamad’s deprivation of liberty is the result of exercising his right to seek asylum, as guaranteed under article 14 of the Universal Declaration of Human Rights.

20. The source argues that, pursuant to the Asylum Act, the ruling ordering placement in the transit zones cannot be challenged by way of an independent application for a legal remedy and can only be subjected to judicial review after a decision on the merits of the

asylum application has been reached. In fact, Mr. Hamad challenged his placement in the transit zone when he received the second decision on his asylum claim on 19 March 2018. The court rejected that appeal and Mr. Hamad's lawyer appealed that decision before the second instance court. At the time of the submission of the communication to the Working Group, that appeal was still pending. Mr. Hamad therefore has no effective remedy at his disposal. As such, he has been held in the transit zone without any legal basis (in the absence of a proper decision) or procedural guarantees in relation to his deprivation of liberty.

21. For those reasons, the source considers that Mr. Hamad has been arbitrarily de facto deprived of his liberty in the Tompa transit zone without a legal basis and without the possibility of effectively challenging the decision, amounting to a breach of articles 9 (1) and 9 (4) of the International Covenant on Civil and Political Rights.

Response from the Government

22. On 4 October 2019, the Working Group transmitted the allegations from the source to the Government of Hungary under its regular communications procedure. The Working Group requested the Government to provide its response by 3 December 2019. On that date, the Government requested an extension, in accordance with paragraph 16 of the Working Group's methods of work, which was granted, with a new deadline of 3 January 2020. The Government submitted its reply on 23 December 2019.

23. In its reply, the Government highlights the supremacy of international law in the national system and states that the Covenant was promulgated by Law Decree No. 8 of 1976.

24. The Government notes that since 2015, a change of approach has been needed in immigration policy as huge numbers of third-country nationals have entered or have wanted to enter the territory of Hungary illegally, bringing about imminent danger to public order and security. The rationale behind the 2015 legal amendments was therefore to address the security risk and maintain the internal security of Hungary and the whole Schengen area. The fact that States ensure the protection of their territory and citizens derives from the very principle of sovereignty.

25. The Government argues that the concept of "controlled centres" is currently being developed by the member States of the European Union, in line with the conclusions of the European Council adopted on 28 June 2018. The concept shows similarities with the Hungarian transit zones, as the controlled centres would aim at not letting asylum seekers enter the European Union without first examining whether they are eligible for international protection. Most recently, on 21 November 2019 in its final judgment in the case of *Ilias and Ahmed v. Hungary*, the European Court of Human Rights also confirmed that States had a right to exercise effective control over their territory and that consequently, providing accommodation in the transit zones at the border of Hungary, pending determination of the right of asylum seekers to enter the rest of Hungarian territory, did not qualify as deprivation of liberty.

26. In that context, the Government explains that it is authorized under the Asylum Act to declare a state of emergency owing to mass immigration by a government decree which allows for exceptional provisions to prevent the escalation of a new wave of huge numbers of third-country nationals entering or wishing to enter Hungary illegally or in an uncontrollable manner. The nature of the crisis situation is therefore not only corrective but also preventive. Owing to the large number and geographical proximity of immigrants in Serbia, Bosnia and Herzegovina and North Macedonia, maintaining a state of emergency is absolutely justified.

27. In relation to the specific case of Mr. Hamad, the Government argues that he submitted his first application for asylum in Hungary on 22 August 2017, which was rejected by the asylum authority in respect of both refugee and protected status, establishing that no prohibition of refoulement existed. He appealed and the court revoked the decision, ordering the respondent to conduct new proceedings. At the time, Mr. Hamad lodged no appeal in regard to his placement in the transit zone. In the repeat procedure, the authority delivered another rejection; however, the review procedure revoked the decision again and prescribed new proceedings where, again, no appeal in respect of accommodation was brought.

28. During further proceedings, another rejection followed and the reviewing court suspended the legal action, initiating a preliminary ruling procedure at the European Court of Justice. On 19 March 2019, the Metropolitan Court of Public Administration and Labour ordered that accommodation be arranged outside the transit zone, establishing that the transit zone could not be assigned as accommodation for Mr. Hamad. Based on this, Mr. Hamad was transferred to the community accommodation at Balassagyarmat on 2 April 2019.

29. The Government argues that the conditions of entry and stay in the transit zones are made known to the future applicants through information sheets in several languages. Asylum applicants therefore enter the transit zones with full knowledge of their rights and obligations. They enter voluntarily, with the aim of lodging an asylum application. The stay in the transit zone takes place solely with a view to conducting the asylum procedure.

30. Similarly, according to the Government, exit from the transit zone is the choice of the applicant, who is free to express such a wish at any stage of the proceedings. The only restriction is that they cannot enter the territory of Hungary and thus that of the Schengen zone until their application has been decided in their favour. Thus, when entering the transit zone, the applicant is aware that he or she can leave the transit zone at any time; however, the transit zone will be their designated place of accommodation for the duration of the asylum procedure. In that regard the Government also points out that both the asylum procedures directive (No. 2013/32/EU) and the reception conditions directive (No. 2013/33/EU) of the European Parliament and of the Council allow member States of the European Union to require applicants to report to the competent authorities or to appear in front of them in person and those authorities may then decide on their place of residence.

31. The Government thus submits that such accommodation for the duration of the asylum procedure is different from “detention” under the reception conditions directive. The source has not argued that Mr. Hamad was subjected to such detention, since he is not in detention in terms of Hungarian law, but refers to the accommodation in the transit zone as a form of “de facto detention”. According to the Government, since Mr. Hamad is not detained, it is natural that no formal detention decision was issued. Detention in asylum proceedings is a separate legal institution with detailed rules set out in section 31/A of the Asylum Act. The designation of an obligatory place of stay can be clearly distinguished from detention in asylum proceedings, as the former decision does not aim to deprive a person of his or her liberty. Such a decision does not therefore contain any provision on restriction of personal liberty, or its duration, or the reasons for it. The reason for providing accommodation in the transit zone is solely to provide decent waiting conditions until the request for leave to enter Hungary, by way of a request for international protection, is granted.

32. The Government points out that in the present case a preliminary ruling procedure is pending before the European Court of Justice (case C-406/180).

33. Furthermore, the Government emphasizes that the judgment of 24 March 2017 of the European Court of Human Rights in the case of *Ilias and Ahmed v. Hungary*, as submitted by the source, is not the final decision of the Court. In fact, on 21 November 2019, contrary to the earlier findings of the Court, the Grand Chamber of the Court found that providing accommodation in the transit zones at the border of Hungary pending determination of the right of asylum seekers to enter the rest of Hungarian territory did not qualify as deprivation of liberty, thus in essence accepting the position of the Government on this issue.

34. The Government claims that the transit zones serve to accommodate those who seek entry to Hungarian territory without valid travel documents, pending determination of their right to enter, since a request for asylum in itself does not create a right to enter. The length of the pre-entry waiting period depends on the complexity of the case, the cooperation of the asylum seeker and the level of consistency of his or her statements. For the duration of that process, Hungary has undertaken to provide decent waiting conditions, including food and shelter in pre-entry accommodation in transit zones at the borders.

35. The Government explains that the transit zones should not be confused with reception centres for refugees who are entitled to legal protection, including the right to enter and freedom of movement. Transit zones are not closed camps for refugees but temporary accommodation facilities pending determination of someone’s right to enter the

territory of Hungary (and the European Union). Restriction of freedom of movement for asylum seekers in the direction of Hungary (prohibition of leaving the transit zone in the direction of Hungary, that is entering Hungary), pending a decision on their admission to the territory of Hungary, is an inherent limitation stemming from the nature of the admission procedure and not a restriction on or deprivation of the personal liberty of asylum seekers.

36. Furthermore, in respect of the possibility to leave, border transit zones are fundamentally different from airport transit zones, confinement to which the European Court of Human Rights has qualified as a deprivation of liberty in its jurisprudence. While airport transit zones are an enclave deep in the territory of the State, border transit zones are open towards the territory of a neighbouring State, which is exactly the State the applicants have directly arrived from within the meaning of the Geneva Convention. The Government also contrasts the present case with that of *Amuur v. France*.¹

37. The Government argues that unsuccessful asylum seekers have always left the transit zone upon delivery of the final decision without the need to resort to enforcement measures and have gone to achieve their goal of reaching Western Europe by an alternative route. Many foreigners not admitted to Hungarian territory have left even before a final decision on their expulsion, typically right after they were informed of the requirement of recording their fingerprints in the course of the asylum proceedings. There have been no cases when the Serbian authorities have hindered in any way the return of such people to Serbia. Moreover, in the case of voluntary returns it would also be practically impossible to obtain individual consent from the Serbian authorities, since the Hungarian authorities have no means of holding back asylum seekers who are not in detention.

38. The Government specifies that Serbia is bound by the Convention relating to the Status of Refugees and thus the freedom of asylum seekers to leave the transit zone is not a theoretical one, since they can freely return to a State which is offering protection comparable to the protection they expected to find in Hungary. In addition, Serbia is bound by the European Convention on Human Rights, which provides an even stronger protection from refoulement than the Convention relating to the Status of Refugees, in respect of which obligation Serbia is subject to the same international control mechanism as Hungary.

39. The Government further explains that free legal aid is guaranteed for persons involved in an asylum procedure who are considered to be in need of legal aid, regardless of their income and financial situation in the transit zone. Access to State-funded legal aid is, by law, guaranteed to asylum seekers both during the administrative stage of the asylum procedure and the judicial review of the decision.

40. The Government notes that the staff of the National Directorate-General for Aliens Policing also inform asylum seekers orally about the possibility of asking for free legal aid during the procedures at the border. If an asylum seeker requests legal aid, legal aid staff will immediately be involved. Furthermore, in both transit zones, asylum seekers can apply for legal aid on the spot and decisions on asylum and legal aid are provided in the transit zones.

41. Turning to the point about legal remedies, the Government relies upon section 71/A of the Asylum Act, read together with section 15/A of the Act on State Borders, which provides for the examination of asylum applications lodged before admission into the territory of Hungary to be conducted in transit zones. Since the underlying issue in cases relating to the accommodation for asylum seekers in the transit zones is their right, or lack thereof, to enter Hungary, legal remedies are provided for against the decision on the merits of this issue. Designation of place of stay can be disputed, as a rule, within the framework of the remedy against the decision on the merits. However, the legal institution of immediate legal protection makes it possible to remedy the designation of place of stay without delay. Up to 31 October 2019, this had been applied in 31 cases, including that of Mr. Hamad.

42. Regarding the health and social care provided in the transit zone, the Government submits that it is in line with both European Union and domestic regulations. Asylum seekers are given assistance in various matters by social workers. Some of the social

¹ European Court of Human Rights, application No. 19776/92, judgment of 25 June 1996.

workers are available during official working hours, while others are present in the transit zone 24 hours a day. Round-the-clock health and social care services are also available, with particular attention paid to individuals with special needs. In addition to general practitioners for adults and children and 24-hour paramedic services, psychological and psychiatric assistance are also available. Beds, bedding, hygiene kits, lockers for personal effects, continuous hot water, access to media and telecommunication devices, and (ecumenical) places of worship are made available in the transit zone. Meals are served three times a day.

43. The Government further explains that Mr. Hamad was assigned to the single adult male sector of the transit zone, located in Tompa, on 22 August 2017. This was a small sector despite the high number of individuals requiring accommodation at the time, as the larger sectors were used for families. Following a decrease in the number of individuals who were being accommodated, on 22 February 2018 the single adult males were transferred to the second largest section with an official capacity of 60 but housing only 23 single adult males. That allowed more space for outdoor activity outside the housing containers and there was no overcrowding; in fact every individual was placed in a separate unit. On 12 December 2018, the single adult males were transferred to a medium-sized sector, but at that time their number had fallen to five and each individual was assigned to a separate container. CCTV cameras were used around the transit zone for security reasons, but not in the housing units or the sanitary facilities, so the right to privacy was duly respected.

44. The Government argues that in recent years the asylum authority has continuously developed the conditions of accommodation in the transit zones. That said, beds and lockers were already available in every housing container during the stay of the individual concerned. Separate sanitary facilities for male and female inmates, air-conditioned and heated community rooms and dining units have been available. Free Wi-Fi is available in every sector 24 hours a day, seven days a week and they are allowed to keep their phones. They are able to shop through the social workers and the products available are determined based on agreed shopping lists, followed by the actual shopping transaction against money given and received and with a strict itemized settlement in writing. Within the transit zones the applicants have access to pre-arranged leisure activities. In the transit zone in Tompa, the social workers hold daily activities for the inmates based on voluntary participation. Community programmes are still held regularly in the transit zones offered by the social workers and charitable organizations. Sports equipment is also available in the sectors and in addition to shopping, cooking is also possible. Owing to the availability of various programmes and even education opportunities, the claimed lack of meaningful activity would therefore be primarily attributable to the applicant.

45. Turning to the specific circumstances of Mr. Hamad, the Government explains that he asked to see a psychiatrist in March 2018 and accordingly visited the psychiatrist on 28 March 2018, followed by regular checks conducted by the psychiatrist alongside a psychologist. He also complained about a stomach ache and underwent examination, with the necessary treatment. He began a hunger strike with the other single adult male inmates on 3 December 2018, feeling that his case was not progressing. During this period his health was regularly monitored. The inmates gave up the hunger strike a few days later, having received detailed information about their respective cases from the administrative staff. The social workers made multiple observations about Mr. Hamad's rare involvement in community activities and tried to encourage him in this respect.

46. According to the Government, Mr. Hamad is currently accommodated in the Balassagyarmat community facility, where assistance provided by social workers is also available. Unlimited access to the Internet, free Wi-Fi and cable television with native language channels is ensured. He is accommodated in a separate unit and is granted his own living space. As an applicant, he is accommodated free of charge, provided with three meals a day, personal catering and hygiene supplies (a hygiene kit is provided every month) in the reception centre of the accommodation facility and access to health care, including access to a general practitioner, emergency specialist care, emergency dental care and dental treatment.

47. The members of the Menedék Hungarian Association for Migrants visit the inmates of the facility weekly and try to involve everyone in their activity programmes. In the framework of organized leisure programmes asylum seekers have the opportunity to visit

local tourist attractions. In addition, they have regular access to sports facilities. Psychosocial assistance is provided every two weeks. According to the social workers of the reception centre Mr. Hamad is in a stable condition and is cooperative and helpful. Mr. Hamad has been given no medical treatment during his stay in the reception centre.

48. The Government then compares the case of Mr. Hamad to that of *Torubarov v. Hungary*,² insofar as the procedures concern the judicial review dimension of the public administration ruling delivered in asylum cases. The issues raised by the Metropolitan Court of Public Administration and Labour relate to whether the requirement of effective remedy is satisfied where the court is unable to change the asylum decision, but instead only has the power to revoke it and order new proceedings. The court also objects to the fact that the Hungarian legislation uniformly allows 60 days for conducting judicial review in asylum cases.

49. The Government also emphasizes that article 46 of the European Union asylum procedures directive (No. 2013/32/EU) in the context of article 47 of the Charter of Fundamental Rights of the European Union should be interpreted in a way that the right to an effective remedy can be enforced by a member State, even if a court has no power to change the decisions in asylum procedures but is able to revoke them while ordering the authorities to initiate new proceedings. The Government does not therefore consider it justifiable for the courts to change the decisions of the asylum authorities *ex officio*. The Government notes that in asylum procedures applicants are granted the possibility of appeal against decisions before an independent judicial body and emphasizes that the right to an effective remedy defined by article 46 of the asylum procedures directive is not violated.

Additional comments from the source

50. On 23 December 2019, the response of the Government was transmitted to the source for further comments, which the source submitted on 13 January 2020.

51. The source contests the migrant crisis situation presented by the Government, states that there was no crisis situation in Hungary as of 2017 and therefore contests the reasons given by the Government justifying the introduction of emergency measures. The source also states that there is no provision in any of the European directives that would allow asylum seekers to be kept at the border for an indefinite period of time for reasons of public order and internal security.

52. In support of that position, the source argues that the European Commission also found that the provisions of the law on the right to asylum, according to which applicants are required to remain in the transit zones until their application for international protection is settled, gave rise to a situation whereby Hungary systematically detained all asylum applicants, contrary to the reception conditions directive (No. 2013/33/EU).³

53. The source then argues that the United Nations, the Council of Europe and European Union bodies that either visited the transit zone facilities or analysed the general situation there, including the Office of the United Nations High Commissioner for Refugees, the Council of Europe Anti-Torture Committee and the European Commission, found that the situation qualified as deprivation of liberty. The source recognizes that in the case of *Ilias and Ahmed v. Hungary*, the European Court of Human Rights concluded that holding Mr. Ilias and Mr. Ahmed, two Bangladeshi nationals, in the Rozske transit zone in 2015 did not amount to deprivation of liberty. However, that case is significantly different from the present case. The source therefore argues that the findings of the Grand Chamber in that case are applicable to the specific factual circumstances of the case and the findings of the judgment reflect the precise factual and legal situation of the applicants at the material time, which was applicable until 28 March 2017. As of that date, major amendments to the relevant domestic laws came into force, significantly altering the legal regime applicable to asylum seekers in the transit zones. The factual and legal situation of persons accommodated in the transit zones has therefore substantially changed. Consequently, the source submits it is crucial to distinguish the present case from that of the Ilias and Ahmed case.

² European Court of Justice, application No. C-556/17.

³ See *European Commission v. Hungary*, case No. C-808/18, 21 December 2018.

54. The source then recalls that deprivation of personal liberty occurs when a person is being held without his or her free consent. It is, however, important not to abuse that voluntariness and to ascertain that any individual who is said to be in a given place voluntarily is indeed there entirely of their own free will. In the present case, entering Hungary was not Mr. Hamad's free choice but a necessity, as he would not have got protection in Serbia owing to the shortcomings in the asylum system there.

55. The source therefore maintains that the placement of Mr. Hamad in the transit zone is not a simple restriction of his freedom of movement but, owing to the factors described above (keeping asylum seekers placed there for the whole duration of the asylum procedure, which is against European Union law, a lack of procedural safeguards, no maximum time limit, the nature and degree of actual restriction as experienced by Mr. Hamad) amounts to arbitrary deprivation of liberty. It is therefore unlawful for the Hungarian authorities to consider such a placement a designation of obligatory place of stay rather than detention.

56. As regards the Government's observations on the legal remedies available, in which it stated that the legal institution of immediate legal protection made it possible to remedy the designation of place of stay without delay and that it had been applied in 31 cases up to 31 October 2019, the source argues that this institution cannot be considered an effective remedy. Firstly, most of the interim measures to transfer Mr. Hamad out of the transit zone were granted by the Szeged Administrative and Labour Court, which had jurisdiction over the asylum cases in the transit zone until February 2019. Since then, all the decisions in asylum cases have been issued in Budapest, making the Metropolitan Court of Budapest the competent court for adjudication of cases from the transit zones. That has also led to changes in the jurisprudence. While the Szeged court decided that stay in the transit zone beyond four weeks breached the asylum procedures directive and annulled the placement decisions, the Metropolitan Court has adopted its own interpretation. The source reports that in more than 200 asylum cases heard by the Metropolitan Court in 2019, only 5 interim measures were granted.

57. The source further contests the Government's observations that pre-arranged leisure activities are available for adults in the transit zone and its submission that Mr. Hamad is now in a stable condition and is cooperative and helpful. The source submits that Mr. Hamad has not been given any medical treatment during his stay in the reception centre where he is currently resident.

58. The source thus concludes that Mr. Hamad has been subject to arbitrary detention due to (a) the inability to leave the Tompa transit zone voluntarily, as it would entail him giving up on his right to asylum under article 14 of the Universal Declaration of Human Rights and irregularly crossing into Serbia without any guarantees of non-refoulement from Serbia or that he would not be subject to conditions that would amount to treatment prohibited by international law; (b) the duration of deprivation of liberty for 1 year, 7 months and 11 days; (c) deprivation of liberty in unsuitable conditions and lasting physical and psychological effects; and (d) the absence of an effective remedy to challenge the detention.

Discussion

59. The Working Group thanks the source and the Government for their timely and detailed submissions in the present case.

60. The Working Group notes that it is not disputed that Mr. Hamad was moved from the transit zone on 2 April 2019 and is therefore no longer detained. However the Working Group considers that the present case raises an important question as to whether his prior stay in the transit zone constitutes a case of arbitrary deprivation of liberty and therefore it proceeds to consider the communication in accordance with paragraph 17 (a) of its methods of work.

61. As a preliminary matter, the Working Group must examine whether Mr. Hamad was deprived of liberty during his stay in the Tompa transit zone, as this is the core of the disagreement between the source and the Government.

62. The Working Group has previously stated that "deprivation of liberty is not only a question of legal definition, but also of fact. If the person concerned is not at liberty to leave

[a place of detention], then all the appropriate safeguards that are in place to guard against arbitrary detention must be respected” (A/HRC/36/37, para. 56). It thus observes that deprivation of liberty is not limited to the classic case of detention following arrest or conviction, but may take numerous other forms.

63. According to the Human Rights Committee, “Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12. Examples of deprivation of liberty include police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported.”⁴

64. It is therefore incumbent that each instance of alleged deprivation of liberty is examined in the light of the individual circumstances of that case (see E/CN.4/1993/24). To that end, the Working Group wishes to emphasize that it does not consider itself bound by the legal conclusions of the domestic authorities as to whether or not there has been a deprivation of liberty and undertakes an autonomous assessment of each situation (A/HRC/42/39, para. 54).⁵

65. The Working Group notes that when presented with a dispute as to whether deprivation of liberty has occurred, it must examine the specific situation as a whole and account must be taken of a wide range of factors including the type, duration, effects and manner of implementation of the measures imposed⁶ and not just of the way it is described in national legislation (A/HRC/36/37, para. 52).⁷ Therefore, when making this determination the Working Group considers, *inter alia*, whether the person has freely consented to the confinement measures, what the limitations are on the person’s physical movements, on receiving visits and having various other means of communication with the outside world, the modalities of the imposed daily regime and the level of security around the place.⁸ In the present case, the source argued that Mr. Hamad was obliged to remain in the Tompa transit zone for the duration of his asylum application, a fact not contested by the Government. However, the Government claims that this did not constitute detention, since Mr. Hamad had entered the transit zone freely and was free to leave it at any time if he decided not to enter Hungary but to leave in the direction of Serbia. The Working Group notes that the source does not dispute that Mr. Hamad entered the transit zone freely but argues that he had no other choice. The dispute therefore lies in whether the circumstances of Mr. Hamad in the Tompa transit zone amounted to deprivation of liberty.

66. The Working Group observes that while the situation before it is similar to the one addressed by the European Court of Human Rights in the case of *Ilias and Ahmed v. Hungary*, there are significant differences in the material and temporal aspects of the two cases. It is, however, the same situation as a case currently pending before the European Court of Justice. In that connection, the opinion of the Advocate General in the joined cases C-924/19 PPU and C-925/19 PPU was published on 23 April 2020.⁹ That contains the most recent and therefore up-to-date examination of the situation in the transit zone and of the applicable regime there. In his examination, the Advocate General observes that (a) the transit zones are surrounded by a high fence and barbed wire and each sector is separated from the others by fences, making it rarely possible to leave one sector and go to others,

⁴ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 5.

⁵ See also, for example, opinion No. 16/2011, in which the Working Group concluded that house arrest did amount to deprivation of liberty and contrast that with opinion No. 37/2018 in which it concluded that the conditions of house arrest did not amount to deprivation of liberty.

⁶ This is the approach adopted by the Working Group when considering whether house arrest, rehabilitation through labour, immigration detention and detention in psychiatric facilities amount to deprivation of liberty. See deliberations in E/CN.4/1993/24, E/CN.4/2005/6 and A/HRC/39/45.

⁷ See also Human Rights Committee, general comment No. 35, para. 6.

⁸ See, for example, opinion No. 16/2011 in which an individual under house arrest could not meet with foreign diplomats, journalists or other visitors at her apartment and her mobile telephone and the internet were cut off. She was not allowed to leave her apartment, except on short approved trips and under police escort, and the entrance to the compound was guarded by security agents (para. 7). See also decision No. 41/1993 and opinions No. 30/2012 and No. 39/2013.

⁹ Available from <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62019CC0924&from=EN>.

concluding that the asylum seekers accommodated there are physically cut off from the outside world and forced to live in a situation of isolation; (b) asylum seekers are monitored within the zone, deprived of freedom of movement and may have contact with the outside world, including with their lawyers and families, only with prior authorization and only in separate areas of the transit zone where they are brought under police escort; and (c) leaving the transit zone prior to the resolution of their asylum application will entail renouncing the possibility of obtaining the international protection sought and asylum seekers can only leave in the direction of Serbia, which is practically excluded as Serbia is not willing to receive migrants from the Hungarian transit zones. The Advocate General thus concludes that the situation of isolation and the high degree of restriction of freedom of movement of asylum seekers amount to deprivation of liberty.

67. The Working Group concurs with this assessment and rejects the Government's description of the transit zones as mere waiting areas for asylum seekers while their applications are processed. As the Working Group was able to observe during its visit to Hungary in 2018, the physical structure of the two compounds at the Tompa and Röske border crossing points with Serbia bear the hallmarks of a detention facility (A/HRC/42/39, paras. 53–58). The compounds are secluded from the public areas, surrounded by high fences with barbed wire, there are large numbers of police and security officers present, outside visitors are not allowed to enter the facility without prior authorization and those inside the facility are constantly monitored. The Working Group also recalls the findings of the Council of Europe Anti-Torture Committee following its visit to the transit zones in 2017 in which it described the physical compounds as “carceral”, expressing its “misgivings about the fact that the transit zones at Röske and Tompa constituted the only gateway to the asylum system in the country”.¹⁰

68. The regime applicable within the compound is highly restrictive, with large numbers of guards, preventing the asylum seekers from moving freely within the facility or receiving visitors from outside. As reported by the Council of Europe Anti-Torture Committee: “two police officers were present in front of each caged accommodation area. Asylum-seekers were not allowed to leave the area in which they were placed on their own, but for any movement, even within the highly-secure environment of the transit zone ..., they had to be escorted by two police officers even when they went to see a doctor, lawyer or IAO staff”.¹¹ In that regard the Working Group particularly recalls its earlier view that placing individuals in facilities where they remain under constant surveillance, including in non-recognized centres for migrants or asylum seekers and transit zones in ports or international airports, constitutes a deprivation of liberty (A/HRC/22/44, para. 59).

69. Finally, the Working Group cannot accept the Government's argument that the asylum seekers are free to leave the transit zone at any stage during their asylum process; neither can it accept the argument that the asylum seekers enter the zone freely. As the Working Group has stated previously, while deprivation of liberty occurs when a person is held without free consent, it is “paramount that the element of voluntariness is not abused and that any claim that an individual is at a certain place at his or her own free will is indeed the case” (A/HRC/36/37, para. 51). In the present case, all those entering Hungary from Serbia and wishing to apply for asylum have no choice but to remain in the transit zones until their asylum claims have been processed. The Working Group cannot accept that an individual who must either agree to remain in the transit zones or lose the possibility of lodging an asylum application could be described as freely consenting to stay in the transit zones.¹² Moreover, as noted by the Advocate General, the possibility of leaving for Serbia is practically excluded, a point confirmed by the Council of Europe Anti-Torture Committee.¹³

70. Consequently, noting the regime applicable in the transit zones, as well as their physical structures and the high degree of isolation imposed by the authorities on those in transit zones, the Working Group concludes that they are places of deprivation of liberty.

¹⁰ CPT/Inf (2018) 42, para. 42.

¹¹ *Ibid.*, para. 40 and see also paras. 43–45.

¹² See opinion No. 54/2015, para. 73, in which the Working Group concluded that a person could not be said to be freely consenting to a deprivation of liberty when not doing so would result in that person being forced to abandon his or her asylum claim.

¹³ CPT/Inf (2018) 42, paras. 28 and 32.

71. The source has not employed the categories of the Working Group but has argued that Mr. Hamad's detention is contrary to article 9 of the Covenant. The Working Group observes that the Government has not denied that Mr. Hamad was detained without a detention order, since the Government considers that Mr. Hamad was not deprived of his liberty. However, noting that the Working Group has established that Mr. Hamad was in fact deprived of his liberty when he was required to remain in the transit zone, the Working Group concludes that the safeguards encapsulated in article 9 of the Covenant should have applied to his detention but that this was not the case. Mr. Hamad was detained without a detention order and he had no possibility of challenging the legality of his detention. While the Government has argued that such a challenge was inherent in his asylum application, meaning that he was only required to remain in the transit zone while his asylum application was being considered, the Working Group recalls that article 9 (4) of the Covenant entitles anyone detained to challenge the legality of the detention itself and that this right cannot be assimilated into different proceedings, in this case the asylum application.

72. As the Working Group has consistently argued, in order to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9 (4) of the Covenant.¹⁴ The Working Group wishes to recall that according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society (A/HRC/30/37, paras. 2 and 3). That right, which is in fact a peremptory norm of international law, applies to "all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including ... migration detention, detention for extradition ..." (A/HRC/30/37, annex, guideline 1, para. 47 (a)).

73. The Working Group further considers that judicial oversight of detention is a fundamental safeguard of personal liberty and is essential to ensuring that detention has a legal basis (A/HRC/30/37, para. 3). Since this was denied to Mr. Hamad the Working Group concludes that his detention lacked a legal basis and therefore falls within category I.

74. The Working Group has already established that the situation in the transit zones amounts to a deprivation of liberty and therefore concludes that Mr. Hamad was detained on 23 August 2017 for the sole reason of submitting an asylum application in Hungary.

75. The Working Group reiterates that seeking asylum is not a criminal act; on the contrary, it is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights, and in the Convention relating to the Status of Refugees of 1951 and its 1967 Protocol. The Working Group notes that these instruments constitute international legal obligations that Hungary has undertaken.

76. The Working Group notes that detention in the course of proceedings for the control of immigration is not arbitrary per se. However, such detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends over time.¹⁵ It must not be punitive in nature and should be based on an individual assessment of each person.¹⁶ While the Government has argued that Mr. Hamad was not detained but merely required to stay in the transit zone, the Working Group observes that the Government has not explained why this would be required at all. The Government has merely referred to the general context of mass migration; however, as the Working Group has explained in its revised deliberation No. 5, the international law standard applicable to detention in the migration context applies also in the context of an influx of a large number of migrants (A/HRC/39/45, annex, para. 48).

77. Deprivation of liberty in the migration context must be a measure of last resort and alternatives to detention must be sought in order to meet the requirement of proportionality (A/HRC/10/21, para. 67). According to the Human Rights Committee, "asylum seekers

¹⁴ See, for example, opinions No. 1/2017, 43/2018 and 79/2018.

¹⁵ See Human Rights Committee, general comment No. 35, para. 18.

¹⁶ Ibid.

who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of a particular reason specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security".¹⁷

78. In its response the Government has failed to explain the individualized, specific reasons that would justify the need to deprive Mr. Hamad of his liberty. Such a blanket policy of mandatory detention of immigrants is contrary to article 9 of the Covenant and breaches the right to seek asylum, as envisaged in international law. The Working Group therefore concludes that Mr. Hamad was detained owing to his exercise of the right to seek asylum and his detention is therefore arbitrary, falling within category II. The Working Group calls upon the Government to revise its legislation on migration to ensure that it respects the obligations the Government has undertaken under international law. It specifically recalls the recommendations made in 2018 by the Human Rights Committee (CCPR/C/HUN/CO/6, paras. 45–46); in 2019 by the Committee on the Elimination of Racial Discrimination (CERD/C/HUN/CO/18-25, paras. 22–23); and in 2020 by the Committee on the Rights of the Child (CRC/C/HUN/CO/6, paras. 38–39) in that regard.

79. Mr. Hamad remained in the transit zone from 23 August 2017 until 2 April 2019, which is a lengthy period of some 20 months, on the basis of the Immigration and Asylum Office ruling ordering Mr. Hamad's "place of residence" to be the Tompa transit zone. It therefore falls to the Working Group to consider whether his detention falls within category IV as an asylum seeker held in prolonged administrative custody without the possibility of administrative or judicial review or remedy.

80. In that regard, the Working Group notes that Mr. Hamad's case concerns two sets of proceedings: the asylum application and applications to be removed from the transit zone. Although those proceedings are interconnected in the domestic legal system of Hungary, the Working Group wishes to make it clear that the substance of Mr. Hamad's asylum claim falls outside its mandate.¹⁸ The Working Group therefore refers the case to the Special Rapporteur on the human rights of migrants.

81. The Working Group observes the explanation of the Government (see paragraph 41 above) that section 71/A of the Asylum Act, read together with section 15/A of the Act on State Borders, provides for the examination of asylum applications lodged before admission into Hungary to be conducted in transit zones. Since the reason for remaining in the transit zone is the question of whether the asylum seeker has the right to enter Hungary, the legal remedies provided are therefore aimed at a decision on the merits. In other words, the Government confirms that there is no remedy available to contest the detention in the transit zone until the resolution of the asylum claim.

82. The Working Group recalls that detention in the context of immigration proceedings must also comply with basic international standards. As is noted in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right that is essential to the preservation of legality in a democratic society (principles 2 and 3). That right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty (principle 8) and it applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including migration detention. Moreover, it applies "irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary" (guideline 1).

83. The present case is one of administrative detention of an asylum seeker. As such, the decision to detain Mr. Hamad must have been periodically reviewed in order to ascertain its continued necessity and proportionality. Moreover, Mr. Hamad must have had a legally

¹⁷ Ibid.

¹⁸ See opinion No. 72/2017, para. 56.

enforceable right to challenge the continued legality of his detention before a judicial authority. As the Working Group has stated earlier, detention in the immigration context must be ordered or approved by a judicial authority and there should be automatic, regular and judicial, not only administrative, reviews of the detention in each individual case, which would extend to the lawfulness of the detention and not merely to its reasonableness or other lower standards of review (A/HRC/13/30, para. 61). That however has not taken place in relation to Mr. Hamad. Since the date of his detention, Mr. Hamad has not been able to challenge the continued legality of his detention, which is a clear breach of article 9 (4) of the Covenant.

84. Furthermore, to ensure that detention in the course of immigration proceedings is, as it must be, an exceptional measure used only as a last resort, consideration must be given to alternatives.¹⁹ That did not take place in the case of Mr. Hamad.

85. The Working Group therefore concludes that the detention of Mr. Hamad was arbitrary and falls within category IV. In making this finding the Working Group once again recalls the concluding observations of the Human Rights Committee in 2018 (CCPR/C/HUN/CO/6, paras. 45–46) and of the Committee on the Elimination of Racial Discrimination in 2019 (CERD/C/HUN/CO/18-25, paras. 22–23), in which both Committees expressed concern, *inter alia*, over the indefinite detention of asylum seekers in the transit zones, the lack of individual assessment of the need to detain and the lack of judicial review of detention.

86. The Working Group planned its follow-up visit to Hungary to take place from 12 to 16 November 2018. However, on 14 November the Working Group suspended the visit because it was not permitted access to the detention facilities for migrants at Röszke and Tompa. Since then the Working Group has pursued a dialogue with the Government of Hungary to resume the visit as soon as possible. Recalling Human Rights Council resolution 33/30 in which the Council called upon all States to cooperate with the Working Group fully and specifically encouraged States to extend invitations to the Working Group to visit, the Working Group is also mindful that Hungary has maintained a standing invitation to the special procedures since March 2001. The Working Group therefore looks forward to constructive engagement with the Government, including an invitation to conduct a thorough visit in accordance with the terms of reference for visits by independent experts appointed by the Council.

Disposition

87. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Saman Ahmed Hamad, being in contravention of articles 3, 8, 9 and 14 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and IV.

88. The Working Group requests the Government of Hungary to take the steps necessary to remedy the situation of Mr. Hamad without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

89. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Hamad an enforceable right to compensation and other reparations, in accordance with international law.

90. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Hamad and to take appropriate measures against those responsible for the violation of his rights.

91. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants for appropriate action.

¹⁹ See, for example, E/CN.4/1999/63/Add.3, para. 33; A/HRC/27/48/Add.2, para. 124; and A/HRC/30/36/Add.1, para. 81. See also opinion No. 72/2017.

92. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

93. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether compensation or other reparations have been made to Mr. Hamad;
- (b) Whether an investigation has been conducted into the violation of Mr. Hamad's rights and, if so, the outcome of the investigation;
- (c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Hungary with its international obligations in line with the present opinion;
- (d) Whether any other action has been taken to implement the present opinion.

94. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

95. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

96. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.²⁰

[Adopted on 1 May 2020]

²⁰ See Human Rights Council resolution 42/22, paras. 3 and 7.