Implementing judgments in the field of asylum and migration on odd days

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Executive summary

Due to the politicized nature of asylum and migration, the relevant EU legislation, UN Conventions, the European Convention on Human Rights and even domestic legislation are not always respected. Litigation, therefore, often results in positive judgments, establishing the breach of the law. However, the anti-migration policies pursued by Governments do not stop there. Non-implementation of judgments in the field of migration and asylum has become more and more frequent in recent years, in order to maintain these policies.

This study analyses the implementation of the Court of Justice of the EU (CJEU) judgments, UN decisions and leading European Court of Human Rights (ECtHR) judgments in the field of asylum and migration in **Czechia, Hungary, Poland, Slovakia** and **Slovenia**. It further looks into relevant examples of where the non-implementation of domestic court judgments reveals serious and systemic problems.

Amongst the five countries involved in the study, **Hungary** rates highest in the non-implementation of judgments. It is the only country amongst the research countries in which the Committee of Ministers of the Council of Europe did not close any of the ECtHR cases in the asylum and migration field, and the only country that was referred by the European Commission to the CJEU over its failure to comply with a CJEU judgment. **Poland** follows closely, having implemented only one ECtHR judgment out of seven, but shows a better picture regarding CJEU judgments, as it had so far implemented all of them, with the exception of the EU relocation judgment. Similarly, Czechia also failed to implement the EU relocation judgment, but is an example of good practice when it comes to the implementation of ECtHR judgments. **Slovenia** has implemented all migration related CJEU judgments and does not have any ECtHR cases in this field. **Slovakia** did not comply with the interim measure issued by the ECtHR, but the case was considered isolated. Otherwise, it has had no migration related CJEU judgments. The non-implementation of domestic judgments was, however, an issue in all five countries.

The study identified various methods of non-implementation according to the extent of non-implementation and whether it appears in legislative deficiencies and/or in the non-compliance of the authorities' practice. Some common areas of non-implementation have also been found, ranging from access to the procedure, through personal liberty and judicial review: (1) immigration detention (**Cz, Hun, Pl, Slo**), (2) EU relocation scheme (**Cz, Hun, Pl**), (3) collective expulsion and access to asylum (Hun, Pl, Slo), (4) access to classified data in national security cases (**Pl, Sk**), (5) statelessness (**Cz, Hun**) (6) effective remedies against expulsion (**Cz, Hun, Pl, Sk**) and (7) disregard of court's instructions in repeated asylum procedures on the merits (**Hun, Sk, Slo**).

While the extent and form of the non-implementation of judgments differ in all researched countries, it seems that the more instrumentalized the issue of migration in a certain country is, the greater the risk of non-compliance with jurisprudence may become. The Governments openly question and intentionally ignore the authority of the courts in politically sensitive questions. On a positive note, notwithstanding the stance of Hungary and Poland, the primacy of EU law has not been ruled upon by the Constitutional Courts in either of these two countries in terms of CJEU cases concerning asylum and migration, despite such a submission having been initiated by the Hungarian government.

The aim of the study is to bring attention to the worrying practices of non-implementation of judgments and the implications on the rule of law, as executing domestic and international court decisions is one of its cornerstones. Through non-implementation, unlawful legislation and practices are preserved, the consequences of which severely affect the rights of a very vulnerable population, leaving them without an effective remedy.

I. Introduction

This study explores the non-implementation of domestic and international judgments with a focus on migration and asylum in **Czechia**, **Hungary**, **Poland**, **Slovakia** and **Slovenia**. Building on the worrying findings of non-implementation of judgments by the Hungarian government in the Hungarian Helsinki Committee's (HHC) study "Non-Execution of Domestic and International Court Judgments in Hungary",[1] the present study looks at the topic of non-implementation in more detail, by focusing only on the field of migration and asylum, and by expanding its geographical scope, in order to explore whether this phenomena is present in neighbouring countries which also pursue (or pursued) harsh anti-migration policies.[2]

Strong anti-migration policies, however, often go against the judgments issued in this field, and vice-versa. The jurisprudence of the Court of Justice of the European Union (CJEU), the European Court on Human Rights (ECtHR), and even domestic Supreme or Constitutional Courts, often show that the correct interpretation of EU law, the European Convention on Human Rights (Convention or ECHR), or domestic legislation is not in line with such political agendas. However, the increasing non-execution of judgments gives the executive additional time to maintain these policies.

The principle of the primacy of EU law, developed over time by the case law of CJEU, establishes the precedence of EU law over the conflicting national legislation of EU Member States, including also priority in relation to national constitutions. Where a conflict arises between an aspect of EU law and an aspect of national law, EU law will prevail. If a conflict cannot be resolved by a consistent interpretation of national law, national courts of the Member States must apply EU law instead of the national law.[3] By not implementing CJEU judgments, the states are also (in)directly questioning the primacy of EU law, which should be applied in a uniform manner throughout the Union, otherwise the pursuit of EU policies would become unworkable.[4]

The aim of the study is to present examples of the non-implementation of judgments in the studied countries, and to draw attention to these worrying practices and their implications for the rule of law, as executing domestic and international court decisions is one of its cornerstones.

The study takes its content from national research papers that were drafted specifically for this study. National researchers worked according to a common, pre-agreed outline, relying mainly on desk research, but also conducting interviews and on-line surveys with lawyers working in the field of asylum and migration. They examined CJEU judgments issued as a result of a preliminary reference procedure or an infringement procedure initiated by the European Commission and ECtHR judgments that were classified as leading[5] by the Committee of Ministers (CM). The study not only presents the judgments, which have still not been implemented, but also contains examples of prior non-implementation issues, which are important to mention, even if they have since been resolved or become irrelevant.

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1 HHC, Non-Execution of Domestic and International Court Judgments in Hungary, 2021, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf.

2 The Governments of the V4 nations are all ideologically right-wing, a position manifested through, among other things, their unfavourable stance towards migration. Until the elections held in April 2022, Slovenia was also ruled by a party that adhered to a right-wing ideological path, with a strong anti-migration policy.

3 EUR-LEX, Glossary of summaries, Primacy of EU law, https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law.html and Summaries of EU legislation, Precedence of European law, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14548.

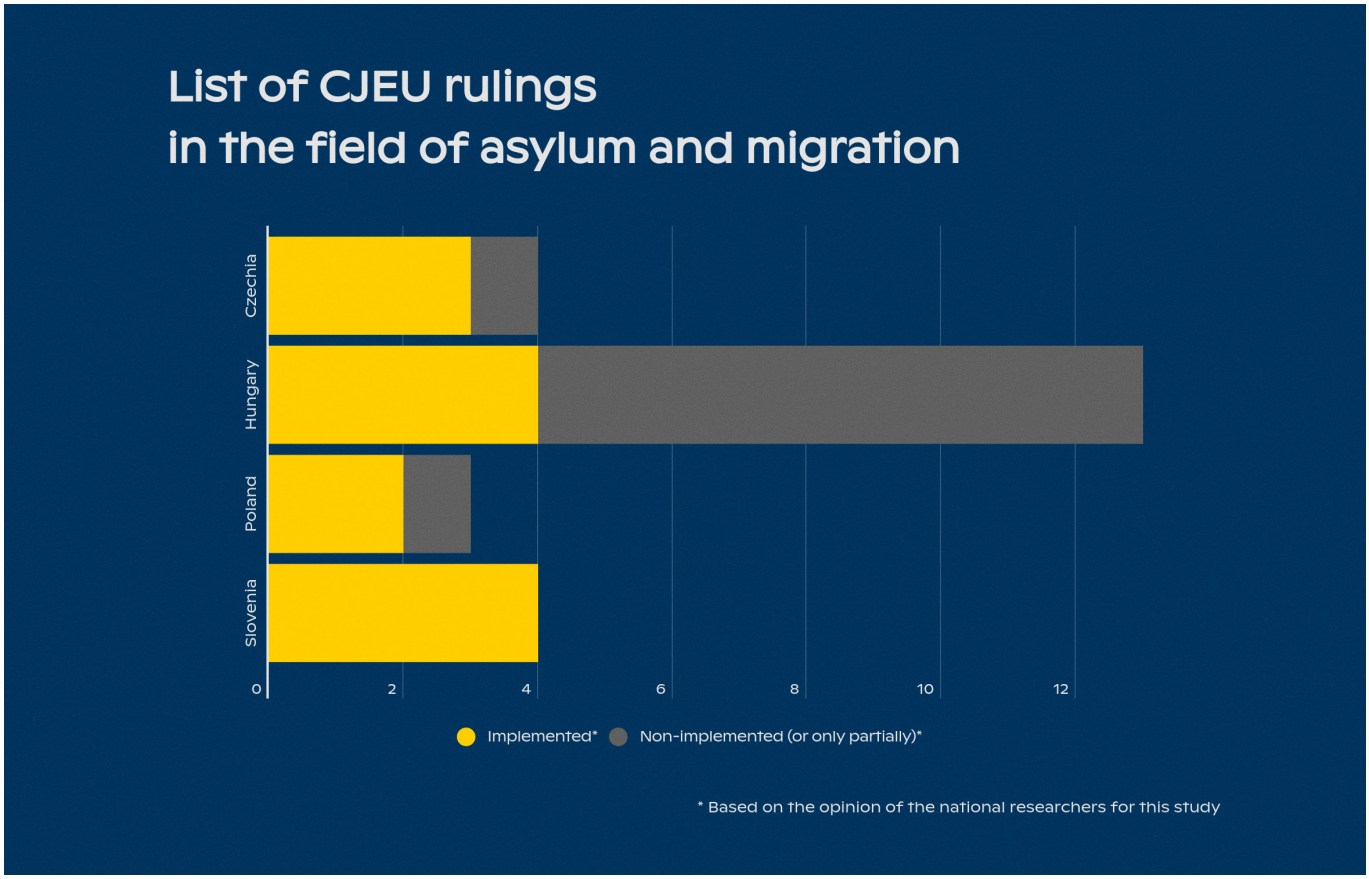
4 This study will not go into the questioning of the primacy of EU law by the Polish Constitutional Tribunal, as the recent Constitutional Tribunal's jurisprudence does not concern migration. For more information on this topic see: European Parliament, Primacy of EU law and jurisprudence of Polish Constitutional Tribunal, June 2022, https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf, where the authors conclude that the recent judgment of the Polish Constitutional Tribunal should without doubt be perceived as producing no legal effects and, as a result, should be of no consequence for the legal order of the Union, its institutional balance, and the distribution of competences between EU and its Member States.

5 Leading case - a case which has been identified as revealing new and often structural and/or systemic problems, either by the Court directly in its judgment, or by the CM in the course of its supervision of execution. Such a case requires the adoption of new general measures to prevent similar violations in the future. Repetitive case – a case relating to a structural and/or general problem already raised before the CM in the context of one or several leading cases; repetitive cases are usually grouped together with the leading case. EIN, Implementation of Judgments of the European Court of Human Rights, 2018, https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5e1c2ac53d0fa72e53f955c4/1578904366756/202001_EIN_HandbookEN_Website.pdf.

II. Legal framework for the execution of judgments

II.1. CJEU rulings execution mechanism

All rulings by the CJEU are binding on all Member States' authorities, including national courts.[6] According to Art. 228 of the EC treaty,[7] if the CJEU finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment. If, despite the Court's judgment, the country still does not rectify the situation, the Commission may refer the country back to the Court. This is a special judicial procedure for the enforcement of judgments that provides for the imposition of penalty payments or lump sums by the CJEU on a Member State which fails to comply with an earlier judgment. It is for the CJEU to take the final decisions on the penalties to be imposed, while the Commission, as a guardian of the Treaties, has a decisive part in initiating the Art. 228 procedure, to bring a case before the CJEU and to give its view on the actual amount to be paid by the Member State concerned.



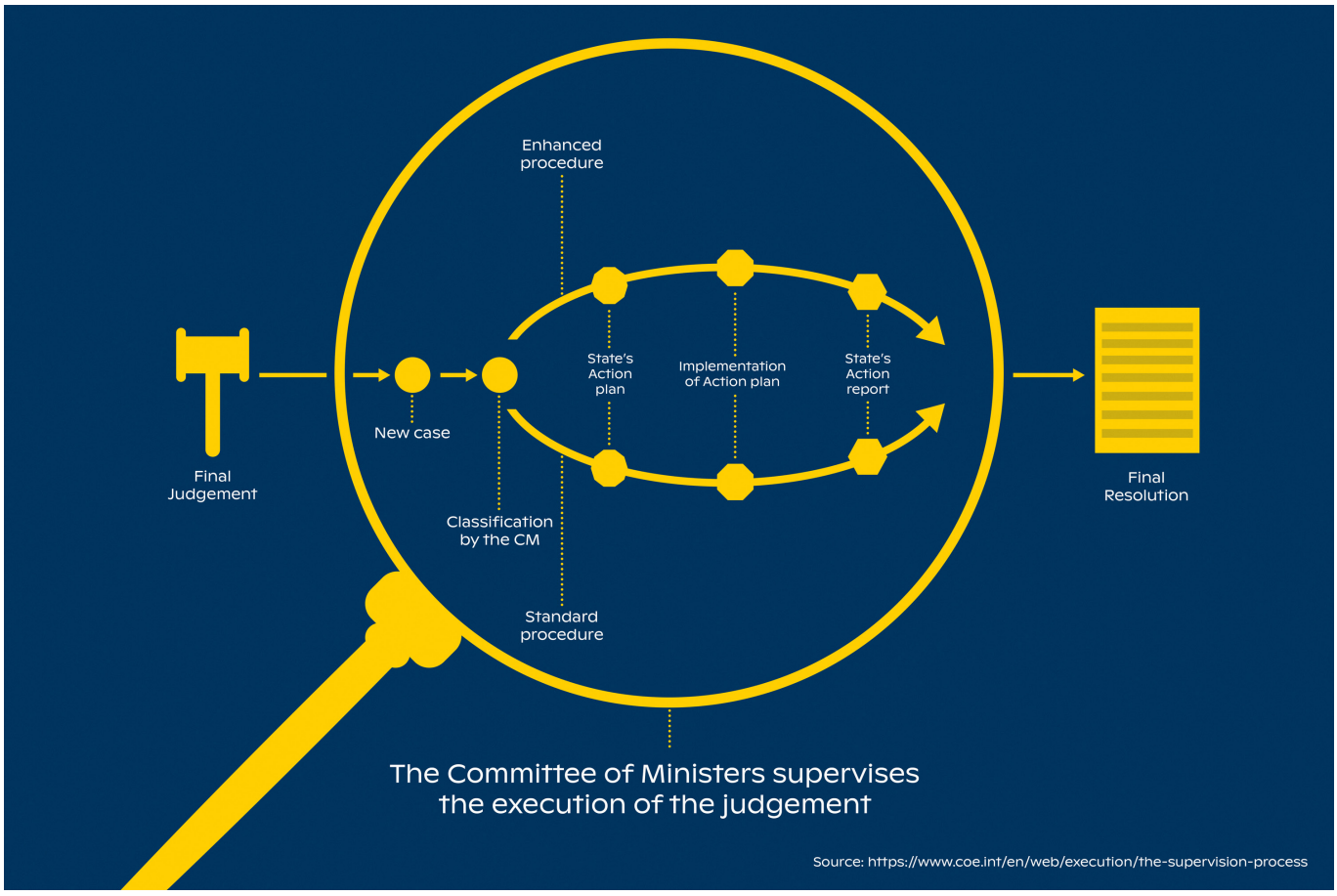
Amongst the cases examined for this study, the only one that has been referred back to the CJEU by the Commission due to *'blatant'* non-implementation is case C-808/18, concerning the unlawful Hungarian practice of pushbacks (see p. 21). **Slovakia** has had no migration-related CJEU cases in which a judgment has already been delivered. **Slovenia** implemented all migration related CJEU judgments. **Czechia** and **Poland** implemented all migration related CJEU judgments, with the exception of the relocation judgment (see IV.2. of the study), while **Hungary** refuses to implement several of CJEU judgments. See all relevant cases in Annex I.

6 https://www.pubaffairsbruxelles.eu/eu-institution-news/european-commission-reaffirms-the-primacy-of-eu-law/.
7 Treaty establishing the European Community, Consolidated Version 2002, OJ C 325.

II.2. ECtHR judgment execution mechanism

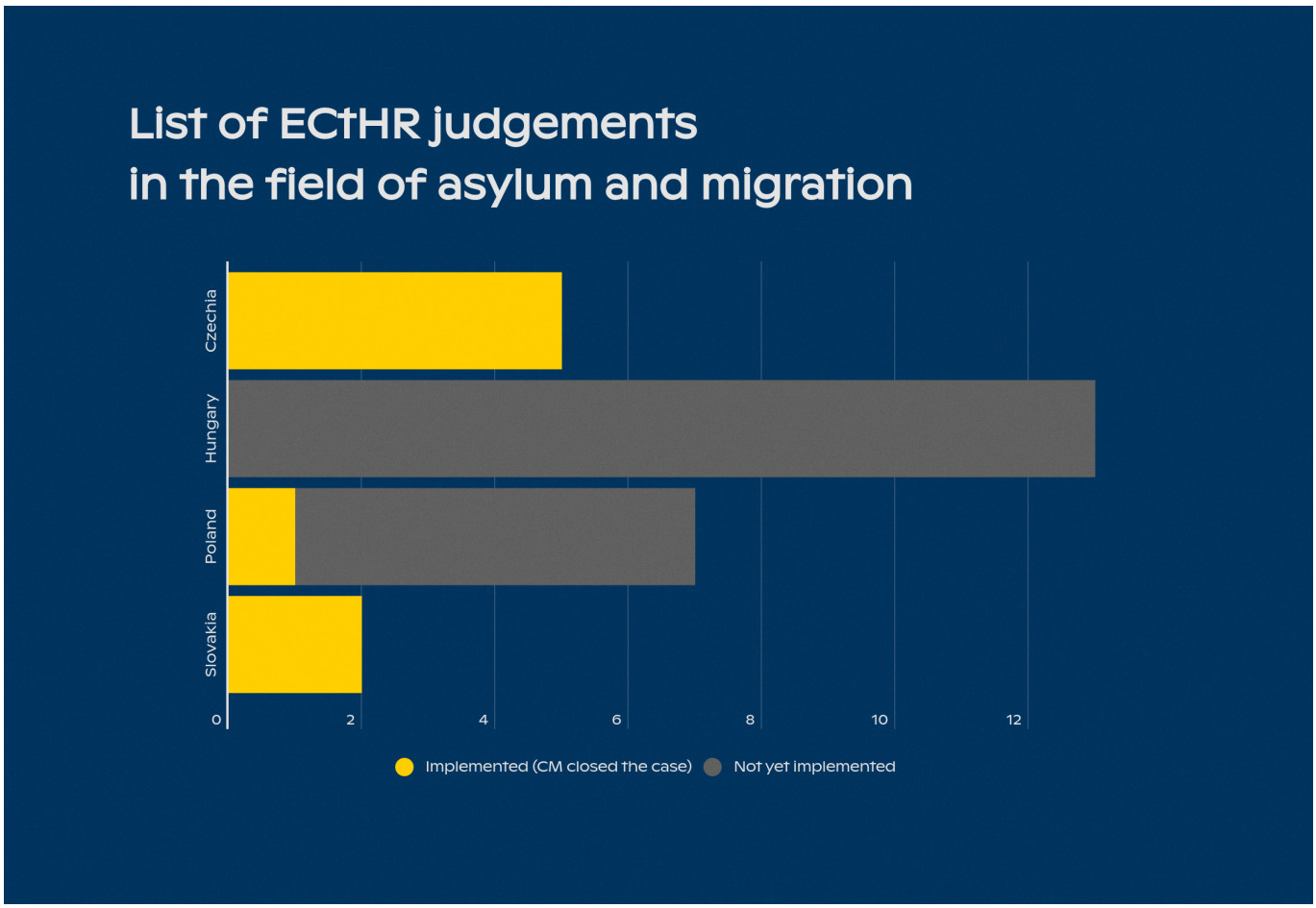
According to Art. 46 of the Convention, contracting parties must abide by the final judgment of the Court in any case to which they are parties. However, states are, in principle, free to choose the means to be used to implement the judgment. In practice, this obligation is fulfilled through implementing two types of measures:

(1) Individual measures, aimed at fully remedying injured parties in order to restore, as far as possible, the situation existing before the breach (e.g. payment of compensation, re-opening of unfair criminal proceedings, enforcement of domestic court decisions, etc.).
(2) General measures target the states' obligation to prevent similar violations in the future (e.g. adopting or amending domestic legislation, introducing a new policy or procedure, or ensuring a certain judicial practice).



Once a judgment or decision becomes final, it is transferred to the CM to supervise its implementation. Within a maximum of six months after the judgment becomes final, the respondent state is expected to provide its action plan, setting out the steps it has already taken/will take in order to fully implement the judgment. When all the measures described in the action plan and its updates have been adopted, the state makes a final update by turning it into an action report, listing the measures planned and the actions taken, and inviting the CM to end its supervision of the case. Where no measures are required, or if the necessary measures have already been taken earlier, the state directly submits an action report. If the CM considers the judgment implemented, it closes the examination of the case.[8]

8 EIN, Implementation of Judgments of the European Court of Human Rights, 2018, https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5e1c2ac53d0fa72e53f955c4/1578904366756/202001_EIN_HandbookEN_Website.pdf.



The study found that **Slovenia** does not have any ECtHR judgment in the asylum and migration field. **Czechia** implemented all the judgments. **Slovakia** did not comply with the interim measure issued by the Court, but the case was considered isolated (see p. 34). **Poland** implemented only one judgment out of seven, while **Hungary,** so far, has not implemented any of the judgments in this field. See all relevant cases in Annex 2.

III. Methods of non-implementation of judgments

The terms implementation or execution of judgments refer to the process of realising the full legal and political consequences of judgments. In this chapter, the methods of non-implementation identified through the research will be presented, with some examples.

(1) "Blatant" non-implementation

Blatant non-implementation entails completely ignoring the judgment. It means that the Government does not (and is often unwilling to) take any measures in order to comply with the judgment or even clearly declares that it will not comply. Sometimes Constitutional Court procedures are initiated by the Governments, in order to obtain the Constitutional Court's opinion on the compliance of an EU norm with the national Constitution. At other times, the Government simply takes no action whatsoever.

A striking example of non-implementation of a Constitutional Court judgment, followed by an ECtHR judgment, in which not even individual measures were executed, is the ***Rana v. Hungary*** case.[9] The case concerns the authorities' refusal in 2016 to change the transgender refugee applicant's name and sex marker from "female" to "male" due to a gap in the relevant legislation, which did not allow for the recognition of gender reassignment and access to the name changing procedure for lawfully settled third-country nationals.[10] In 2018, the Constitutional Court ruled that Hungary was obliged to adopt regulations that acknowledge gender reassignment and provide a discrimination-free opportunity to enter the resulting name change into the register.[11] In 2020, the ECtHR found a violation of Art. 8, as the Hungarian authorities failed to exercise their positive obligation to give the applicant access to the legal gender recognition procedure. The individual measures adopted in the case *"did not remedy the violation of the applicant's rights, as the applicant still has to live with official documents that do not reflect his gender identity and appearance"*.[12] Furthermore, in 2020, the Parliament adopted a law that banned legal gender recognition entirely (also for Hungarian citizens).[13] Due to the general hostile governmental discourse on LGBTQI rights,[14] is it clear that no implementation of the judgment can be expected in the near future.

Another typical example of blatant non-implementation would be the **Hungarian** non-implementation of judgments on collective expulsion, where no legislative amendments or changes in practice followed the CJEU and ECtHR judgments, and illegally staying third-country nationals are still pushed back without any observance of the relevant guarantees. Similarly in **Poland**, the Government clearly stated that it would not implement domestic courts' and ECtHR judgments in this respect (see chapter IV.3.).

And finally, the last example also concerns **Hungary**. In July 2018, Hungary passed legislation criminalising otherwise legal activities aimed at assisting asylum seekers, the so-called "Stop Soros" law.[15] The Commission initiated an infringement procedure, and on 16 November 2021, the CJEU found such legislation in breach of EU law.[16] No legislative change has to date been adopted.

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9 Rana v. Hungary, appl. no. 40888/17, 16 July 2020.
10 HHC, Non-Execution of Domestic and International Court Judgments in Hungary, 2021, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf, p. 46.
11 6/2018. (VI. 27.) AB, 19 June 2018, http://public.mkab.hu/dev/dontesek.nsf/0/c69d7f599b3ce25dc12580e3005e784b/$FILE/6_2018%20AB%20határozat.pdf.
12 Rule 9(2) communication by the Háttér Society concerning the implementation of the Rana v. Hungary judgment, https://hudoc.exec.coe.int/eng?i=DH-DD(2021)816E.
13 Section 33 of Act XXX of 2020; see also https://en.hatter.hu/news/bill-ban-lgr.
14 http://www.miniszterelnok.hu/prime-minister-viktor-orban-on-the-kossuth-radio-programme-sunday-news/; HHC, Illiberal Highlights of 2020, https://helsinki.hu/wp-content/uploads/HHC_Illiberal_Highlights_of_2020.pdf, pp. 13-14.
15 HHC, Criminalisation and Taxation – The summary of legal amendments adopted in the summer of 2018 to intimidate human rights defenders in Hungary, 25 September 2018, https://bit.ly/2GxoLBq.
16 C-821/19, European Commission v. Hungary, 16 November 2021.

(2) "Apparent" implementation

Another method of non-implementation was observed only in **Hungary**, mainly in the context of access to asylum/embassy procedures (see chapter IV.3.). With regard to domestic court judgments that annulled the Immigration Authority's decision and ordered a new procedure, the Immigration Authority initially complied with the judgment and initiated a new procedure. However, the compliance was only apparent, as the procedure was immediately suspended, either because of the initiation of a Constitutional Court review, or by mere reference to such an already pending review, which was not even directly connected to the main procedure.

(3) Adopting new legislation/practices overruling court judgments

A very worrying method, which is also common in some of the other studied countries, is the adoption of new legislation that would maintain the contested position of the Government, but would at the same time deprive the issued judgments of their effect, as they were based on the previous legislation. Sometimes new legislation is already adopted prior to the judgments, as the Government anticipates the direction of the courts, and therefore prepares the field in advance in order to avoid any changes that the judgment might bring to their policies.

Such an example can be found in **Slovakia**, where legislative amendments concerning national security related cases had been introduced, even before the Constitutional Court issued a ruling declaring the contested provisions previously in force unconstitutional (see p. 28). Or in **Slovenia**, where the amendments to the Foreigners Act restricting access to the asylum procedure were reintroduced, despite previously having been ruled unconstitutional (see p. 25). In **Czechia**, the Foreign Police introduced a new age assessment method, after the Supreme Administrative Court and Constitutional Court ruled that the margin of error of previous methods used had to be respected (see p. 13-14). Also in Czechia, the Government adopted a new legislation regulating statelessness purposefully with the aim to circumvent the jurisprudence guaranteeing certain rights to the applicants for stateless status (see p. 29).

(4) Implementation in the concrete case without following the judgment's general principles in other similar cases

A common method of non-implementation present in all studied countries is when the authorities comply with the judgment in the individual case, but refuse to properly address the underlying systemic issues and disrespect the standards that the judgment brought forward in other similar cases, despite the issue at stake being identical, and not depending on particular facts.

The judgment of the **Polish** Supreme Administrative Court regarding the refusal of entry to persons arriving at eastern Polish border by train is such an example (see p. 23), as well as the issue of access to the essence of grounds in national security cases in Poland (see p. 27). Having to always request an interim measure from ECtHR in order to provide applicants with food in transit zone detention in **Hungary**, despite the identical legal situation in all cases, or the statelessness judgments in **Czechia** (see p. 29) are also representative examples of this method of non-implementation (see p. 15).

(5) Implementation varies in practice

Sometimes the implementation of judgments varies in practice, as not all authorities follow the relevant judgments to the same extent. This can, for example, be observed in **Czechia** regarding the detention of children accompanied by family members, where some police units, as well as the courts, maintain the position that children are not actually detained, but merely "accommodated" in the detention centre, despite a Constitutional Court ruling to the contrary (see p.12). Or the implementation of the CJEU *TB case*[17] in **Hungary**, which did not require a change in legislation, but in practice. The Court ruled that the dependency clause in the Family Reunification Directive has to be assessed on a case-by-case basis, taking into account all the relevant aspects of the personal situation of a refugee's siblings. Regrettably, though, as per the experience of the HHC, the Immigration Authority still fails to apply the complex examination of the dependency condition[18] and categorically excludes mental health issues from sicknesses that might justify dependency.[19] As opposed to the practice of the Immigration Authority, there are instances where the

17 C 519/18, TB, 12 December 2019.
18 Decisions of the NDGAP no. 106-1-11174/6/2020-T, 11 March 2020 (first instance) and no. 106-T-12841/1/2020, 8 May 2020 (second instance).
19 Decisions of the NDGAP no. 106-1-13733/2020-T, 30 January 2020 (first instance) and no. 106-T-8959/2/2020, 31 March 2020 (second instance).

court, reviewing the negative decision on family reunification has already ruled by referencing the *TB* judgment that the examination of the dependency limiting it solely to the health status of the applicant is unlawful.[20] The jurisprudence of the courts is not unified though, as in another case, without mentioning the *TB* judgment, the court explicitly rejected the need for complex examination.[21]

(6) Insufficient implementation

Sometimes the legislation is amended following the judgment, but the implementation is still deemed insufficient. An example is the implementation by **Hungary** of the CJEU ruling in the *Ahmed case*,[22] which concerns the exclusion from subsidiary protection for those who commit a serious crime. The Court ruled that the asylum authority/court deciding on the asylum application had to assess the seriousness of the crime by carrying out a full investigation into all circumstances of the individual case concerned. The Hungarian Parliament amended the asylum law, with an explicit reference to the CJEU ruling in its official reasoning.[23] Nevertheless, the current legislation is still not in line with the requirements the CJEU laid down in the *Ahmed* judgment, as it sets out specific cases according to which an asylum seeker must automatically be excluded from international protection. Therefore, the obligation of individual assessment is still infringed upon by the applicable law.[24]

(7) Implementation in practice but not in the law

It is interesting to observe that certain judgments were implemented by changing the practice, but not the legal provisions which were found to be incompatible with EU standards. These provisions have not been repealed, but are merely temporarily not applied. Are the Governments waiting for the moment when such provisions could be used again? A revealing example of such practice can be observed in **Hungary**, where provisions relating to transit zone detention and "safe transit country" as an inadmissible ground are still in the law, but have not been applied in practice (see p. 21 and p. 33).

(8) Unreasonably delayed implementation

Finally, it is necessary to note the example of unreasonably delayed implementation, in cases where despite the ultimately positive result, it took the authorities too long to comply with the judgment. Such an example can be found in **Slovenia**, where the Supreme Court ruled in November 2017 that an applicant for international protection had to be provided with the assistance of an interpreter in order to file a lawsuit in an administrative dispute, if so requested and if communication with the legal representative was otherwise hindered.[25] The Migration Directorate continued to reject the requests of refugee counsellors for interpreters[26] until the amended International Protection Act-1A entered into force four years later, including the provision under which applicants and refugee counsellors are entitled to the assistance of an interpreter during the procedure before the Administrative or Supreme Court.[27]

20 Metropolitan Regional Court, judgment no. 38.K.701.960/2020/6.
21 Judgment no. 16.K.706.405/2020/8, point [26] of the Metropolitan Regional Court, 5 November 2020. The judgment was upheld by the Supreme Court, Kfv.II.37.074/2021/2, 16 February 2021.
22 C 369/17, Ahmed, 13 September 2018.
23 See the official reasoning to Act no. CXXXIII of 2018 on the amendment of certain laws in relation to migration: https://www.parlament.hu/irom41/03366/03366.pdf, paras. 62-65.
24 Read about how the current legislation violates EU law: https://helsinki.hu/en/wp-content/uploads/sites/2/2021/04/info-note-exclusion.pdf.
25 I Up 226/2017, 22.11.2017.
26 See for example: I U 1934/2020-6, 7.2.2021.
27 Art. 11(1) IPA-1A.

IV. Examples of (non)implemented judgments: common themes among the studied countries

National reports show the following common areas in terms of the non-implementation of judgments: (1) immigration detention (**Cz, Hun, Pl, Slo**), (2) EU relocation scheme (**Cz, Hun, Pl**), (3) collective expulsion and access to asylum (**Hun, Pl, Slo**), (4) access to classified data in national security cases (**Pl, Sk**), (5) statelessness (**Cz, Hun**) (6) effective remedies against expulsion (**Cz, Hun, Pl, Sk**) and (7) disregard of court's instructions in repeated asylum procedures on the merits (**Hun, Sk, Slo**).

IV.1. Immigration detention

Czechia

When it comes to the implementation of the **European courts' judgments** concerning immigration detention, no major non-implementation issues have been reported.

In the *Arslan case*,[28] the CJEU held that the domestic provision allowing for the detention of asylum seekers was in compliance with EU law. The *Al-Chodor* judgment,[29] concerning detention under Dublin Regulation, according to which a definition of serious risk of absconding has to be established in domestic legislation, was "implemented" even before the CJEU adopted the judgment.[30] Similarly, legislation had been amended even before the ECtHR issued a judgment in the *Singh case*,[31] where a violation of Art. 5(1) of the Convention was found due to the excessive length of detention and lack of due diligence and a violation of Art. 5(4) was established due to the length of the proceedings relating to the applications for release.[32]

Two ECtHR judgments concerning *de facto* detention at an airport due to entry refusal decisions are also considered as implemented by the CM, as in both cases the relevant legislation was amended after the judgment. Following the *Rashed case*,[33] where the Court found a violation of Art. 5(1) and 5(4) of the Convention, as the applicant did not have access to an effective and speedy judicial review and the domestic legislation was of insufficient clarity to prevent arbitrariness regarding the applicant's right to liberty, the procedure and time-limits on entry refusal decisions were specified in the Asylum Act and judicial review proceedings for such decisions were introduced. Following the *Buishvili case*,[34] where the Court found the breach of Art. 5(4) because the court reviewing the refusal of entry did not have the competence to decide on the lawfulness of the detention and to order the release, if the detention is unlawful, the relevant sections of the Asylum Act and the Act on Residence of Foreigners were amended. If a court annuls a Ministry of Interior (MoI) decision on the refusal of entry, the MoI does not issue a new decision but takes, without delay, all necessary measures to transfer the individual to an open reception facility for asylum seekers outside the airport. The person's release is thus a consequence of the reviewing court's decision.

When it comes to the **immigration detention of children**, however, non-implementation of **domestic court judgments** has been observed.

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28 C-534/11 Arslan, 30 May 2013.
29 C-528/15 Al-Chodor, 15 March 2017.
30 Relevant amendments to the legislation entered into force on 18 December 2015. Although OPU continues to argue that, the definition is still overbroad resulting in a de facto automatic detention of every foreigner who comes to Czechia after having applied for asylum in a different Member State.
31 Singh v. the Czech Republic, appl. no. 60538/00, 25 January 2005.
32 In 2002, the domestic authorities amended the Criminal Procedure Code, obliging the courts to decide on an application for release within five working days. In their action report to the CM, the authorities also provided statistics showing a decrease in the length of detention from 2001 to 2004.
33 Rashed v. the Czech Republic, appl. no. 298/07, 27 November 2009.
34 Buishvili v. the Czech Republic, appl. no. 30241/11, 25 October 2012.

In the case *B. G., A. G. and R. G. v the Czech Republic*,[35] concerning detention of a father with two minor children for the purpose of their Dublin transfer, the Constitutional Court held that - although the children had officially not been detained but only "accommodated" in the detention centre with their father[36] - they had been *de facto* detained. The detention decision relating to their father had also an impact on their right to liberty and family life. This finding continues to be disregarded to some extent in practice. Some Police units continue to argue that children are not officially detained and suggest that they could leave the detention centre with their parents' consent.[37] This argument has been accepted by some courts. As a result, the judicial review of detention is limited to the child's right to family life, but the right to liberty is completely left out of consideration.[38]

Additionally, there has been extensive jurisprudence by the Supreme Administrative Court (SA Court) focusing on a range of procedural safeguards for children in immigration detention. In particular, the SA Court has repeatedly found that the principle of the best interest of the child is to be assessed throughout the whole detention decision, in relation to detention alternatives, length, detention conditions and the purpose of the detention.[39] In particular, in case of detention for the purpose of a Dublin transfer, the Foreign Police has to include at least a preliminary reflection on the reception conditions and the capacity of the asylum system in a receiving country to accommodate for the needs of vulnerable groups. Nonetheless, as the SA Court has recently noted, the Foreign Police has so far failed to execute even these arguably minor improvements.[40]

Non-implementation has also been observed in relation to **age assessment** in immigration detention. Systemic gaps emerge from the fact that the domestic legislation does not establish any specific procedure for age assessment. Two medical methods using bone scans (the Greulich-Pyle method and the Tanner-Whitehouse III method) have been used by the Foreign Police, but the scientific limitations of these methods and their limited reliability for assessing chronological age of persons close to the age of adulthood have frequently been disregarded. No additional psychological or social assessments, as recommended by international standards, have been conducted. As a result, potential minors end up detained in adult immigration detention.

The first leading judgment on age assessment is the *H. R. v. Regional Police Directorate of Pardubice Region* of the SA Court.[41] The applicant challenged the age assessment proceedings as part of the appeal against his detention. The Court concluded that age assessment based on bone scans might discredit a person's claim about their minority, should the difference between the age stated by the person and the age determined by this method be greater than three years. If the difference is under three years, the person is to be considered credible. The court recommended that the Police complement medical assessment with other methods, such as a psychological interview. Moreover, in dubious cases, the initial length of detention must correspond to the time necessary to carry out the age determination, which is a few days, or weeks at maximum.

The Constitutional Court has further expanded safeguards relating to age assessment in *A. A. W. v. the Czech Republic*,[42] relying on the best interests of the child principle and the child's right to be heard. Accordingly, the Police must ensure the presence of an interpreter and a guardian from the beginning of the process, and the person concerned may comment on the results of the age assessment. Given the fundamental impact of age assessment on the right to liberty, it is necessary to carry out the age assessment thoroughly. The Court found it was also necessary to apply the benefit of the doubt principle, and to use non-medical methods of age determination.

The above standards are applied only partially by the Foreign Police and domestic courts. Following the *H. R.* judgment, medical assessment continued to be the primary method of age assessment, with no other procedures carried out. This was mainly due to the reluctance of the MoI to reimburse the Police for any tests other than bone scans. Accordingly, the Police is in a situation where the courts expect them to apply methods other than just bone scans, yet they lack any means or instructions from the superior authorities. Moreover, only some Police units observed the SA Court's instructions regarding the scientific limitations. As a result, some persons - for whom the difference between stated age and measured bone age was under three years - have been released, while others remained in detention.

35 Constitutional Court no. III. ÚS 3289/14, 10 May 2017.
36 In accordance with Art. 140(1) of the Act on the Residence of Foreigners.
37 Meaning that the parents could place the child in foster care instead. In the Police view, the child does not need to be detained and the detention is the result of the decision of its parents.
38 Prague Municipal Court judgments no. 13 A 36/2021 – 87, 22 October 2021; no. 19 A 39/2021- 47, 11 November 2021; no. 20 A 76/2021-107, 22 November 2022; no. 2 A 1/2022-55, 12 January 2022; no. 2 A 19/2022- 66, 3 May 2022; no. 19 A 17/2022- 48, 3 May 2022.
39 E.g. judgment of the SA Court no. 4 Azs 248/2019 – 65, 22 April 2020; no. 2 Azs 230/2019 – 60, 16 July 2020; no. 5 Azs 166/2020 – 54, 8 February 2021.
40 Judgment of the SA Court no. 5 Azs 166/2020 – 54, 8 February 2021.
41 5 Azs 107/2020-46, 25 June 2020.
42 II. ÚS 482/21, 7 July 2021.

The practice has further shifted following the Constitutional Court's *A. A. W. case,* as this judgment had more weight. Age assessment now consists of a wrist bone scan and an interview conducted by a social worker in the detention centre. In most cases, individuals are first detained for two weeks for the expected duration of the age assessment, after which detention can be prolonged. Interpreters and guardians are present at each step of the age assessment and the person concerned is given the opportunity to comment on the results. But even such changes are insufficient, as in the experience of the Organisation for Aid to Refugees (OPU), guardians are often overburdened and do not make significant effort to support the presumed minors. Moreover, medical assessment is still considered the primary assessment method. The results of the social worker's interview are considered inferior, and in the event that they are in the individual's favour, it is often argued that the assessment is inconclusive and a third medical method, the collarbone scan (Schmeling-Kellinghouse method), is applied. The results of this method are then usually considered as decisive, and possible margins of error are again disregarded. Any other evidence presented by the person concerned is typically dismissed.

Introducing the Schmeling-Kellinghouse method is an interesting move by the Foreign Police. As this method has not been previously used in Czechia, the courts have limited experience on which to base any questioning of its validity. This enables the Police to evade the above-noted jurisprudence relating to potential margins of error. Accordingly, a more profound shift towards a more holistic age assessment has not yet taken place, which also stems from the authorities' punitive approach towards migrants, especially those staying in the country irregularly.

It is also worth noting that the lower courts' assessment of the legality of Police conduct in cases where these safeguards were not upheld varies. While the majority of the lower courts appear to follow the ruling of the SA Court and the Constitutional Court, and annul detention decisions when these safeguards are disregarded,[43] some tend to take no account of the existing jurisprudence and continue to uphold such Police decisions.[44]

Hungary

None of the 14 ECtHR judgments concerning immigration detention in Hungary is considered to have been executed by the CM. There are two leading cases: the *Lokpo and Touré case*[45] and the *R.R. case*.[46]

The *Lokpo and Touré case* concerns the unlawful **detention of asylum seekers in immigration detention centre**. The Court ruled that the absence of elaborate reasoning for an applicant's deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Art. 5 of the Convention. The CM has been awaiting information from the Government for four years on the measures taken or envisaged to ensure that the Convention principles of individual, written, well-reasoned detention (or prolongation of detention) orders are adhered to.[47]

Since the delivery of the *Lokpo and Touré* judgment, the Court has found a violation of Art. 5(1) in several subsequent cases regarding the detention of asylum-seekers.[48] Although legislative changes were introduced, institutionalising "asylum detention" based on the Reception Conditions Directive,[49] the same shortcomings with regard to the quality of detention orders and their judicial review persist. The Working Group of the Supreme Court in Hungary (Kúria), examining judicial practice on asylum, concluded that asylum detention, introduced in 2013, revealed the same systemic problems that had previously been identified with regard to immigration detention. Notably, the reasoning for decisions to order detention is schematic. Since judges are not given the necessary documents to decide on detention, they are unable to conduct sufficient individual assessments of the necessity thereof. Consequently, the court decisions usually simply repeat the wording of the motion submitted by the Immigration Authority. The HHC observes that these shortcomings persist up to date. Therefore, despite the legislative changes, the Lokpo and Touré judgment remains the leading case as to the issue of asylum detention. The effectiveness of the judicial review has

43 Supreme Administrative Court judgments 7 Azs 100/2020 – 43, 8 July 2020; 5 Azs 106/2020 – 42, 31 July 2020; 5 Azs 105/2020 – 41, 31 July 2020, 3 Azs 112/2020-49, 26 August 2021. Regional Court in Prague judgments 52 A20/2021-19, 11 October 2021; 42 A 4/2021-17, 16 September 2021, 57 A 5/2021-39, 31 August 2021. Regional Court in Brno judgment 41 A 57/2019-38, 23 August 2020. Regional Court in Ostrava judgment 62 Az 18/2020-22, 2 April 2020. Regional Court in Hradec, Králové-Pardubice section judgments 61 A 2/2021-34, 17 March 2021, 66 A 3/2021-31, 20 April 2021.

44 Supreme Administrative Court judgment 1 Azs 1/2021-38, 10 June 2021. Prague Municipal Court judgments 20 A 76/2021-107, 20 October 2021; 13 A 36/2021-87, 22 October 2021, 16 A 45/2021- 23, 10 December 2021.

45 Lokpo and Touré v. Hungary, appl. no. 10816/10, 8 March 2012.

46 R.R. and Others v. Hungary, appl. no. 36037/17, 5 July 2021.

47 This was requested on 4 November 2018, 22 March 2019, 20 November 2020 and 29 June 2021.

48 Al-Tayyar Abdelhakim v. Hungary, no. 13058/11, 23 October 2012; Hendrin Ali Said and Aras Ali Said v. Hungary, no. 13457/11, 23 October 2012; Nabil and others v. Hungary, no. 62116/12, 22 September 2015; O.M. v. Hungary, no. 9912/15, 5 July 2016, M.K. v. Hungary, no. 46783/14, 9 June 2020.

49 An asylum seeker submitting their first asylum application immediately upon apprehension can no longer be detained in order to ensure the execution of an expulsion or deportation order.

been criticised by several international bodies, such as the Council of Europe's Commissioner for Human Rights, UNHCR and UNWGAD.[50]

On the contrary, **transit zone detention** cases can be considered partially implemented. Following the *FMS case*,[51] where the CJEU ruled that the placement of the applicants in the transit zone constituted unlawful deprivation of liberty, the Hungarian government ended the entire transit zone detention regime and people are no longer detained there. Nevertheless, the transit zones have never been officially closed, and still host case officers of the National Directorate-General of Aliens Policing (NDGAP). Moreover, the legislative framework has also been left intact,[52] but is not currently applicable by virtue of the provision of the Transitional Act.[53] Just five days after emptying the transit zones, on 26 May 2020, the Government introduced the so-called "embassy procedure", meaning that, except for very limited cases, anyone wishing to seek asylum must submit a statement of intent at the Hungarian Embassy in Belgrade or Kyiv. The relevant law has been enacted within the pretext of Covid pandemic related state of emergency ("state of danger and epidemic preparedness") and is in force until the end of December 2022, but is expected to be prolonged. No political will has been shown to end this special emergency regime and the law has accordingly been prolonged multiple times before. The Government, however, might decide at any moment to set the transit zone regime in motion again.

The Centre for Fundamental Rights (Alapjogokért Központ), a Government-friendly think-tank, commented on the true intent of the Government in relation to the *FMS* judgment and the embassy procedure in 2020 as follows: "*The act of the Hungarian legislature serves to make illegal migration impossible, a kind of response to the recent ruling of the European Court of Justice, according to which transit zones can no longer function. It should be emphasised that the ruling of the EU Court of Justice has not achieved its purpose: as a result of the current amendment to the law, migrants will not be in a more favourable position, but in a less favourable position, as they will no longer be able to apply at the border.*"[54] It further stated that the ECtHR supports migration and, together with the CJEU, is among the organisations that twist asylum legislation from its original sense.

In the leading ECtHR transit zone case, *R.R.*,[55] the Court also ruled that the placement of the asylum-seeking family in the transit zone constitutes unlawful deprivation of liberty due to the lack of any statutory basis for the applicants' detention, or any formal decision thereon. The *R.R.* judgment followed the CJEU's *FMS* judgment, more than a year after the transit zones had been closed down and asylum seekers had been released from there. Based on this, the Government argues in its Action Report that any general measures concerning the regime at issue are obsolete. It is true that the current rules of "embassy procedure" laid down in the Transitional Act override those of the transit zone regime. However, taking into account the temporary nature of the rules in the "embassy procedure", there is a clear need for a change in legislation, since to date, the same legal provisions enabling the *de facto* detention of asylum seekers are in force and can be reactivated at any time. The lack of foreseeability with regard to this legislation is clearly in contradiction with the principles of the rule of law.

It is important to note that in some of the transit zone cases, the ECtHR indicated an interim measure to the Hungarian government, namely that the applicants should be placed in conditions compliant with Art. 3 of the Convention, but the Government did not comply with it.[56] Nevertheless, since the interim measure related to the complaint under Art. 3, the ECtHR did not rule separately on the complaint under Art. 34 of the Convention.

Finally, interim measures issued by the ECtHR in order to prevent starvation of failed asylum seekers held in transit zone detention under the return procedure must be mentioned. Despite the fact that the Government complied with each of them (all 34 applicants were given food), they refused to give food to people in the same legal situation. An interim measure request had to be submitted in each case.[57] The Immigration Authority even informed the people when their asylum procedure ended and they were moved to the sector for those under return procedure, that if they wished to get food, they should turn to the ECtHR.

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50 AIDA Country Report: Hungary. https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU_2020update.pdf, p. 106.
51 C-924/19 PPU and C-925/19 PPU, FMS, FNZ, SA, SA junior, 14 May 2020.
52 Section 80/H-80/K of the Asylum Act.
53 Act LVIII of 2020 on the provisional rules concerning the termination of the state of danger and epidemic preparedness.
54 Centre for Fundamental Rights (2020), A bevándorlás valójában szuverenitáskérdés, Gyorselemzés a tranzitzónák kivezetése nyomán született menekültügyi szigorításokról, http://alapjogokert.hu/wp-content/uploads/2020/06/bevandorlas_szuverenitaskerdes.pdf.
55 R.R. and Others v. Hungary, appl. no. 36037/17, 5 July 2021. Other transit zone judgments finding violation of Art. 5 are: M.B.K. and Others v. Hungary, appl. no. 73860/17, 24 February 2022; A.A.A. And Others v. Hungary, appl. no. 37327/17, 9 June 2022; H.M. and Others v. Hungary, appl. no. 38967/17, 2 June 2022; W.O. and Others v. Hungary (not final), appl. no. 36896/18, 25 August 2022.
56 See: https://helsinki.hu/en/iraqi-family-detained-in-transit-zone/ and https://helsinki.hu/en/hungarian-state-obliged-to-compensate-asylum-seeking-family-tormented-in-the-transit-zone/.
57 HHC, Input for the report "Psychosocial dynamics conducive to torture and ill-treatment" of the Special Rapporteur on torture and other cruel, inhuman or degrading treatments or punishments, 21 June 2020, https://www.ohchr.org/sites/default/files/Documents/Issues/Torture/Call/NGOs/HHC.pdf.

Poland

When it comes to **the implementation of the ECtHR judgments**, two cases were signalled out.

In the *Shamsa case*,[58] which concerned detention in the airport transit zone without legal basis, the Court held that the Polish legislation lacked foreseeability for not containing specific provisions on the detention of foreigners with a view to their expulsion after an initial 90-day period. An Art. 5(1) violation was also found, as the detention had not been ordered by the court or "any other person authorised by law to exercise judicial power". Following the judgment, the Polish government introduced new legislation concerning the detention of migrants against whom an expulsion decision was issued[59] and the CM closed the examination of the case.[60]

In the *Bistieva* judgment,[61] concerning the nearly six-month-long detention of an asylum-seeking family following their return from Germany, the Court held that their detention interfered with their family life, thereby violating Art. 8 of the Convention. The Court found that detention was not considered a measure of last resort, while alternatives and the best interest of the children were not given due consideration. The Court also stated that even in light of the risk of absconding, the authorities failed to provide sufficient reasons to justify the detention of the family for nearly six months.

The execution of the judgment is pending.[62] Statistics show that in years following the *Bistieva* judgment, the number of migrant children in detention decreased,[63] though the duration of their detention remained long.[64] However, a significant change took place in 2021, when large numbers of third-country nationals started to cross the Polish-Belarusian border. Detention of children became routine practice[65] in heavily criticised conditions.[66]

It seems that shortly after the *Bistieva* judgment, the Polish authorities started to take into account the best interest of the child in the detention proceedings and to limit their detention. However, in the face of the crisis situation on the Polish-Belarusian border - which bore great political significance - the position of the Polish authorities has changed. Therefore, it appears that despite the actions indicated by the Government in the proceedings concerning the execution of *Bistieva* judgment, this judgment cannot be considered implemented.

When it comes to **the execution of domestic judgments**, a Supreme Court case concerning a compensation claim for unlawful detention and the obligation to appoint an expert for the assessment of the mental and physical health of the foreigner in detention is relevant.[67] Pending the proceedings, experts were appointed by the Court to assess the impact of detention on the children and their mother. The Regional Court considered opinions prepared in respect of children to be unprofessional and ignored them. As a result, the Regional Court assessed the situation of the children without referring to the experts' opinions. The Supreme Court, referring to Art. 193(1) of the Code of Criminal Procedure ruled that, if the determination of the facts of the case requires special knowledge, then the court was always to appoint an expert to issue an opinion. If the court considers that an opinion is unprofessional, it should appoint another expert. Although this judgment concerned a case for compensation for unlawful detention, it is also applicable to ordinary detention cases.[68] Therefore, in a situation where there are grounds to believe that a foreigner might have been a victim of violence, the court considering the application for detention should appoint such an expert.

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58 Shamsa v. Poland, appl. nos. 45355/99, 45357/99, 27 November 2003.

59 The Act of 13 June 2003 on Foreigners provides a legal basis for the detention of foreigners, which is based on a court decision subject to appeal. According to the Act on Foreigners, the initial detention period may not exceed 90 days and may be extended by up to one year. It also provides for the award of compensation for unlawful detention.

60 https://hudoc.exec.coe.int/eng?i=004-17981.

61 Bistieva and Others v. Poland, appl. no. 75157/14, 10.04.2018.

62 https://hudoc.exec.coe.int/eng?i=004-50019.

63 In its Action report the Government presented statistics concerning detention and the use of alternatives to detention in cases concerning minor migrants, both accompanied and unaccompanied. According to the data provided by the Government, in 2018, 229 minors were detained, and alternatives were applied to 605 minors. In the first half of 2019, there were 71 children in detention, while in the same period alternatives were applied to 327 minors. AIDA reports show that a total of 132 children were detained in 2019 and 101 in 2020.

64 83 days in 2019 and 70 days in 2020, AIDA Country Report: Poland, https://asylumineurope.org/reports/country/poland/.

65 According to the AIDA report in 2021, the number of detained children has increased to 567, https://asylumineurope.org/reports/country/poland/.

66 In February 2020, the Human Rights Commissioner expressed his concern about the harsh conditions in Polish detention centres and stated that it may give rise to inhuman and degrading treatment, especially when it comes to minors. The Human Rights Commissioner also has stated that none of the Polish detention centres is suitable for keeping children, https://bip.brpo.gov.pl/pl/content/rpo-sady-migranci-strzezone-osrodki-rodziny-dzieci.

67 Supreme Court judgment II KK 358/16, 2 March 2017, http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/ii%20kk%20358-16.docx.html.

68 This was also pointed out by the Human Rights Commissioner in his letter to the Commander-in-Chief of the Border Guard, 30 June 2017, https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Komendanta%20G%C5%82%C3%B3wnego%20Stra%C5%BCy%20Granicznej%20w%20sprawie%20identyfikacji%20ofiar%20tortur.pdf.

It should nonetheless be noted that despite the explicit provisions of the law, Polish courts, when deciding on detention, rarely use expert opinions to assess the foreigner's mental and physical health, but rely on the Border Guards' medical opinions. They also usually ignore psychological opinions presented by NGOs. Migrants, who suffered trauma, including victims of torture, are thus placed in detention centres.[69] In 2019, a psychologist or psychiatrist was appointed in only four detention cases to assess the mental health of the foreigner. In 2020, no expert was appointed at all, and in 2021, the court appointed a psychologist in only one case.[70] These data indicate that the judgment in question has not been executed and there is a clear need to change the practice of the courts. Although it might be difficult to appoint an expert in every case, their involvement would be imperative at least at the stage of appeal and in situations where there are reasonable grounds to believe that the foreigner has been a victim of violence.

Slovenia

Slovenian authorities have faced difficulties in correctly applying the detention ground involving the **assessment of the risk of absconding**.

In March and April 2019, the Supreme Court ruled, in accordance with the CJEU's *Al Chodor* judgment, that the provisions of the International Protection Act-1 (IPA-1) regarding detention in the Dublin procedure were not in accordance with the Dublin Regulation, since the IPA-1 does not contain a definition of the "risk of absconding" and objective criteria needed to establish the risk of absconding in an individual case.[71] The Supreme Court, therefore, ruled that detention in the Dublin procedure was not lawful, since the IPA-1 did not contain a proper legal ground for detention.

The judgment was not immediately followed by the Migration Directorate. They continued issuing detention orders for the purpose of Dublin transfers. The Administrative Court quashed such detention orders as being unlawful, explicitly stating that the Migration Directorate should have been aware of the Supreme Court judgments. The Administrative Court had to issue several such judgments before the Migration Directorate in fact stopped the unlawful practice.[72]

Despite the Supreme Court judgments, the provisions of the IPA-1 were not amended in order to define the risk of absconding. However, the Migration Directorate, following the above Supreme Court judgment, stopped detaining asylum seekers for the purpose of Dublin transfer, and asylum seekers were rarely detained even on other grounds. However, in May 2020, the Migration Directorate started once again detaining asylum seekers more frequently, this time often referring to the grounds in the second paragraph of Art. 84(1) of IPA-1 - to establish certain facts on which the application for international protection is based, which could not be obtained without detention, and there is a reasonable risk of absconding.

This practice ended in August 2020, as most of the detention orders were successfully challenged before the Administrative Court. The view of the Administrative Court after the Supreme Court decisions mentioned above was that detention based on the risk of absconding is not possible without a definition of the risk of absconding, and not only in Dublin transfer cases,[73] unless the intent to leave Slovenia was clearly established (obvious risk of absconding).[74] However, it should be noted that not all judges agreed with this interpretation, as some considered the judgment of the Supreme Court to be relevant only when a person was detained for the purpose of a Dublin transfer.[75]

The reason for the increased use of detention between May and August 2020 was that detained asylum seekers had their applications processed according to the accelerated procedure, if possible, in order to facilitate their return afterwards. If the asylum procedure is completed within a year, it is possible to return the person to Croatia based

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69 *"Insufficient capacity to identify asylum seekers, refugees and other persons in need of international protection who are survivors of torture"* was observed by the UN Committee against Torture: Concluding observations on the seventh periodic report of Poland, 29 August 2019, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/POL/CAT_C_POL_CO_7_35715_E.pdf.

70 AIDA Country Report: Poland, updates 2019 and 2021, https://asylumineurope.org/reports/country/poland/.

71 X Ips 1/2019, 13 March 2019; X Ips 11/2019, 3.4.2019.

72 I U 722/2019-6, 29.4.2019; I U 608/2019-5, 9.4.2019; I U 735/2019-6, 30.4.2019; I U 736/2019-7, 30.4.2019.

73 For example: I U 633/2020-17, 12.6.2020; I U 634/2020-18, 12.6.2020; I U 635/2020-17, 12.6.2020; I U 637/2020-17, 12.6.2020; I U 659/2020-6, 17.6.2020; I U 683/2020-6, 19.6.2020; I U 698/2020-6, 23.6.2020; I U 819/2020-8, 3.7.2020; I U 836/2020-10, 7.7.2020; I U 907/2020-8, 13.7.2020; I U 910/2020-10, 14.7.2020; I U 1000/2020-15, 22.7.2020; I U 1044/2020-7, 27.7.2020; I U 1059/2020-8, 29.7.2020; I U 1074/2020-6, 31.7.2020; I U 1370/2020-15, 23.9.2020; I U 1722/2020-14, 12.11.2020; I U 476/2021-13, 26.3.2021; I U 1458/2021-14, 7.10.2021.

74 For example: I U 636/2020-13, 15.6.2020; I U 695/2020-14, 23.6.2020; I U 1309/2020-15, 16.9.2020; I U 1308/2020-20, 18.9.2020; I U 1473/2020-15, 8.10.2020; I U 1547/2020-21, 19.10.2020; I U 1838/2020-17, 30.11.2020; I U 1516/2021-16, 19.10.2021.

75 For example: I U 757/2020-14, 1.7.2020; I U 835/2020-14, 7.7.2020; I U 913/2020-16, 13.7.2020; I U 915/2020-14, 13.7.2020; I U 909/2020-15, 14.7.2020; I U 911/2020-22, 15.7.2020; I U 1042/2020-14, 27.7.2020; I U 1040/2020-15, 28.7.2020; I U 1087/2020-13, 5.8.2020; I U 1088/2020-18, 5.8.2020; I U 1233/2020-15, 1.9.2020; I U 1231/2020-14, 2.9.2020; I U 1289/2020-14, 14.9.2020.

on the readmission agreement, instead of their country of origin. Refused asylum seekers were returned to Croatia, from where the majority were pushed back to Bosnia. The number of asylum seekers from Algeria and Morocco significantly decreased due to this practice, which was one of the reasons for its establishment in the first place.[76]

The new IPA-1A, which entered into force in November 2021, finally contains the definition of the risk of absconding. The Migration Directorate started to automatically detain asylum seekers under Dublin procedure, referring to the objective criteria of the risk of absconding under the third alinea of Art. 84.a of IPA-1A, namely that the person has previously submitted an application in Slovenia or another Member State.

The Supreme Court issued several judgments[77] regarding this practice, clarifying that: *"The Supreme Court has repeatedly emphasised that the fulfilment of one of the criteria from Article 84a of IPA-1A is not in itself sufficient for the use of a detention measure. It follows from the provision of Article 28 of the Dublin III Regulation that the detention of the applicant for the purpose of handing him over to another Member State responsible for processing his application for international protection is only permissible (subject to other restrictions) if there is a significant risk of absconding, whereby the assessment of such risks should be based on individual assessment. Therefore, in order to apply the measure in question, a high level of the risk of absconding has to be established, which means a direct and concrete risk of its execution. It is established by additional qualified circumstances that are different from those that correspond to the legally defined objective criterion. These are circumstances that originate from the sphere of the individual in question, and refer to e.g. to his personal characteristics, to his behaviour before detention, to the way he moves between Member States, etc."*

Despite these judgments, unlawful detention orders, as well as some Administrative Court decisions confirming such detention orders, still appeared until March 2022, which were again successfully challenged in the Supreme Court.[78]

Another detention related issue reported in Slovenia was the **application of the alternatives to detention**. IPA-1 did not contain any such alternatives. The Administrative Court pointed to this systemic problem in several judgments as an improper transposition of Art. 8(4) of Reception Conditions Directive[79] and in certain cases the lack of alternatives even led to unlawful detention.[80]

Recent amendments of IPA-1 still have not introduced any alternatives to detention. The Migration Directorate considers detention on the premises of the asylum reception centre as an alternative to detention. According to the case law of the Administrative Court, the measure amounts to deprivation of liberty and not a limitation on freedom of movement, and therefore represents detention and not an alternative.[81] The Supreme Court also pronounced on the matter, pointing out that *"It appears to be a particularly serious fact that the Slovenian legislator has not yet fully transposed the provisions of the Article 8(4) of the Reception Directive. Precisely in cases where the assessment of the proportionality of the detention measure, especially due to the protection of human rights guaranteed under the Charter and the ECHR, would dictate an alternative measure, the non-fulfilment of the requirements of the directive also has the consequence that the Administrative Court cannot decide on choosing another, proportionate measure (such as regular reporting, financial guarantee or staying in a certain area, etc.)."*[82] Therefore, alternatives to detention are still not available in Slovenia and court judgments have not been implemented in this regard.

76 AIDA Country Report: Slovenia, 2020 update, https://ecre.org/aida-2020-update-slovenia/.
77 I Up 12/2022, 26.1.2022; I Up 11/2022, 2.2.2022; I Up 16/2022, 9.2.2022; I Up 68/2022, 30.3.2022.
78 I Up 76/2022, 6.4.2022.
79 For example: I U 802/2018-15, 18.4.2018; I U 882/2018-14, 25.4.2018; I U 961/2018-13, 3.5.2018; I U 636/2020-13, 15.6.2020; I U 695/2020-14, 23.6.2020; I U 1308/2020-20, 18.9.2020; I U 1838/2020-17, 30.11.2020.
80 For example: I U 618/2017-14, 6.4.2017; I U 1582/2017-14, 28.7.2017; I U 921/2018-16, 26.4.2018; I U 2588/2018-13, 31.12.2018; I U 269/2019-21, 14.2.2019; I U 1557/2019-14, 14.10.2019; I U 711/2020-14, 24.6.2020; I U 908/2020-17, 14.07.2020; I U 476/2021-13, 26.3.2021; I U 1806/2021-10, 15.12.2021.
81 See footnotes 79 and 80.
82 I Up 1/2022, 2.2.2022.

IV.2. Non implementation of relocation decisions, European Commission v. Czech Republic Hungary, Poland, joined cases C 715/17, C 718/17 and C 719/17

As a result of the increased number of asylum applicants registered in Greece and Italy in 2015, as well as for the general high migratory influx, the Council adopted two Decisions introducing a mechanism to relocate asylum seekers to other Member States.[83]

Despite the fact that Decisions were binding upon Member States, the Czech, Hungarian[84] and Polish governments decided not to participate in the relocation mechanism. Together with Slovakia, Hungary unsuccessfully challenged the Council Decision at the CJEU.[85] The relocation scheme was also heavily used and "abused" in the Hungarian government's domestic discourse on migration. The 2017 national consultation addressed the mandatory relocation scheme by adding false data and statements, and portraying it under the aegis of the so-called "Soros plan". In July 2018, as part of the Stop Soros legislative package, the Fundamental Law of Hungary was amended so that it introduced an additional provision which to date has remained in force: '*[N]o foreign population shall be settled in Hungary. A foreign national, not including persons who have the right to free movement and residence, may only live in the territory of Hungary under an application individually examined by the Hungarian authorities. The basic rules on the requirements for the submission and assessment of such applications shall be laid down in a cardinal Act.*'[86] Poland refused to comply with the Council Decisions by relying on the security risk that people from the Middle East could cause. It also argued that security policy falls outside the scope of EU law.[87]

The European Commission referred Czechia, Hungary and Poland to the CJEU for non-compliance with the Council Decision on 7 December 2017.[88] The CJEU delivered its judgment in April 2020.[89] Therein, it established that Czechia, Hungary and Poland had breached the Council Decision by failing to relocate asylum applicants from Italy or Greece.

Since the relocation obligation expired at the end of 2017, the judgment had no enforceability in practice. It is, however, important to note that all three countries continue to defend their opposing position vis-à-vis relocation despite the judgment. In the domestic discourse in Czechia, the relocations continued to be labelled as a "Brussels diktat" and the fight against relocation quotas was presented as part of the Government's tough stance on migration, with little to no opposition voices resisting such narratives. This background has made it in practice impossible for any later Government to agree with relocations, even if this would be in the interest of Czechia. Both Hungary[90] and Poland[91] portrayed the infringement procedure as discriminatory, since although most EU states did not fully implement the relocation decisions, the EC decided to bring action only against Poland, Hungary and Czech Republic. The Polish government reiterated that refusal to implement relocation decisions was based on the need to protect Poland's internal security and defend against uncontrolled migration.

Indeed, this judgment can no longer be executed. However, the behaviour of the three Governments may have broader consequences in terms of weakening solidarity between the Member States on the issue of asylum policy.

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83 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

84 The Government even set up a website campaigning against the Council Decision: https://kvota.kormany.hu/#kvota.

85 C-643/15 and C-647/15 Slovakia and Hungary, 6 September 2017.

86 Art. XIV(1) of the Fundamental Law of Hungary.

87 Polish Press Agency, No forced refugee relocation – Polish MP, https://www.pap.pl/en/news/news%2C288943%2Cno-forced-refugee-relocation-polish-pm.html, Ministry of the Interior and Administration, Reply to the European Commission: Poland is against the relocation mechanism, https://archiwum.mswia.gov.pl/en/news/932,Reply-to-the-European-Commission-Poland-is-against-the-relocation-mechanism.html.

88 https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5002.

89 Joined cases C-715/17, C-718/17 and C-719/17, 2 April 2020.

90 https://hvg.hu/itthon/20190515_kvotaper_luxemburg_europai_birosag.

91 https://www.gov.pl/web/premier/komunikat-centrum-informacyjnego-rzadu-w-zwiazku-z-wyrokiem-tsue-w-sprawie-relokacji-uchodzcow.

IV.3. Collective expulsion and access to asylum

Hungary

1. Non-implementation of judgments delivered in the so-called "embassy procedures"

On 26 May 2020, the so-called "embassy procedure" was introduced as a new asylum system by Government decree,[92] which made access to asylum almost non-existent. The new procedure foresees that an asylum seeker must first submit a "statement of intent for the purpose of lodging an asylum application" at the Hungarian Embassy in Belgrade or Kyiv, and only if the statement is assessed favourably by the NDGAP is the applicant allowed to enter the country in order to apply for asylum. In the case that such entry is refused, the applicant will only receive an email about it, without any factual justification or legal grounds, and without information on existing legal remedies.

Several court judgments have found that these decisions (sent via email) constitute a serious violation of procedural requirements, and have ordered the NDGAP to conduct a new procedure.[93] Using a loophole created recently to channel sensitive cases out from the ordinary court system,[94] NDGAP challenged the first such judgment at the Constitutional Court and requested that the Court grant suspensive effect. Despite the Constitutional Court's rejection of the request for suspensive effect, the NDGAP did not continue with the procedure and therefore did not implement the judgment in question. In all the other cases, where the court ordered a new procedure, the asylum office *ex officio* started repeated procedures, but it immediately suspended them based on a pending Constitutional Court complaint procedure. More than half a year later, however, the court annulled the suspension decisions of the NDGAP.[95] Meanwhile, the Constitutional Court dismissed the application on 24 May 2022, pointing out that the NDGAP did not name any fundamental rights that would have been violated by the court judgment subject to review by the Constitutional Court.[96] The NDGAP has so far issued only three new decisions in a repeated procedure (in October, September and August 2022). Although they contained some justification for rejection, the requirements resulting from the court judgment have still not been properly met, and judicial review of the decisions has been initiated.

The NDGAP "apparent implementation method" by which they suspended repeated procedures resulted in extremely lengthy procedures (lasting more than a year). Thus, asylum seekers are systematically denied access to asylum. Additionally, their right to an effective remedy was also consistently violated for two years, as until very recently applicants were not informed about the opportunity to submit an appeal upon receipt of the negative decision of the NDGAP. It seems that this practice may have started to change, as in decisions made as a result of repeated procedures ordered by the court there is at least information about the available legal remedy.

2. Non-implementation of judgments regarding access to asylum

The impossibility of applying for asylum in Hungary can be demonstrated by the *case of H.Q.,* an Afghan citizen, who legally entered Hungary, but overstayed his student residence permit. He applied for asylum in September 2021 because of the Taliban takeover.[97] His asylum application was rejected as inadmissible. The NDGAP held that, based on Section 32/F(1)(b) of the Act LXXX of 2007 on Asylum (Asylum Act), he was requesting something impossible as according to the Transitional Act, an asylum application can only be submitted through a "statement of intent" at the Embassies of Hungary in Belgrade or in Kyiv. Even though the decision stated that there is no possibility of appeal, the applicant requested judicial review and asked to be granted the right to remain on the territory during the appeal procedure. However, in accordance with Section 5(1b) of the State Border Act,[98] the Police drove the applicant to the Serbian border and escorted him through the gate in the fence.

92 Government Decree 233/2020. (V. 26.) on the rules of the asylum procedure during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens. On 18 June 2020, its provisions were included in the Act LVIII on the transitional provisions related to the termination of the state of danger and on epidemiological preparedness (Transitional Act).

93 Eg. 11.K.704.266/2021/6, 5 October 2021; 49.K.704.624/2021/16, 3 February 2022; 11.K.704.127/2021/11, 5 October 2021.

94 The critique of the standing of administrative bodies in such procedure can be found here: https://helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf.

95 E.g. 49.K.700.743/2022/5, 5 July 2022.

96 Ruling of the Constitutional Court IV/3538-1/2021.

97 For more information on the case see: https://bit.ly/3FNx5Hw.

98 Act no. LXXXIX of 2007 on state border.

The Metropolitan Court adjudicating the case delivered its judgment on 12 November 2021 and annulled the decision of the NDGAP.[99] It ordered that a new asylum procedure is to be conducted in accordance with the general rules of the Asylum Act. Even though the NDGAP started the new asylum procedure, it concurrently suspended it on account of a pending Constitutional Court procedure, in which the NDGAP was contesting the legality of the judgment in the embassy procedure (see previous sub-chapter). The suspension was nonetheless declared unlawful by the Metropolitan Court on 3 March 2022.[100] Resorting to the complaint procedure before the Constitutional Court, which was not even directly related to the case at stake, is another example of "non-implementation tactic" used by the NDGAP.

Another example is the partial implementation (in practice, but not in law) of the three CJEU judgments concerning shortcomings in the examination of asylum claims. *LH and FMS cases*, as well as the *C-821/19 case* that followed the infringement procedure, all concern the inadmissibility ground of "safe transit country" introduced into the Hungarian asylum legislation in July 2018 and later found in breach of Art. 33 of the Procedures Directive.[101]

Following these judgments, the relevant legislative framework[102] has not been amended. Nonetheless, since August 2019, without any official reasoning, the NDGAP has not applied this inadmissibility ground in its decisions. However, since the contested legal provisions are still in force, there is no legal guarantee that this practice will remain the same in the future. Thus, the implementation of these CJEU judgments will depend solely on the courts' willingness to directly apply EU law.

In the *FMS case*, the Court also stated that the *LH* judgment is to be considered a new fact in the meaning of Art. 33(2)(d) of the Procedures Directive, and thus, a new application for international protection by the applicant concerned should not be registered as a subsequent application within the meaning of Art. 33(2)(d). Despite this clear instruction from the CJEU, the NDGAP considered two applicants of *FMS case* as subsequent applicants until the end of their asylum procedure, denying them the right to reception conditions.

It is also worthy of note that Gabriella Szabó, the administrative judge, who referred the case of LH to a preliminary reference procedure before the CJEU, was dismissed from her position by the president of the court as a result of the judicial evaluation procedure before the end of her tenure. She was also subjected to harassment and discrimination within the court after she delivered her ruling on the reference.[103]

3. Non-implementation of judgments on collective expulsion

The Hungarian Borders Act authorises the Hungarian Police to apprehend and escort foreign nationals staying illegally on Hungarian territory to the external side of the Hungarian border fence (on the border with Serbia) without any decision and individual examination.[104]

On 19 July 2018, the European Commission decided to refer Hungary to the CJEU for the non-compliance of its asylum and return legislation with EU law.[105] On 17 December 2020, the CJEU issued a judgment in the case *C-808/18* and ruled that moving illegally staying third-country nationals to a border area, without observing the guarantees surrounding a return procedure constitutes infringements of EU law. In addition, it found that Hungary failed to provide effective access to asylum procedures, as an asylum application could only be made in one of the transit zones at the Hungarian-Serbian border, while adopting a consistent and generalised administrative practice drastically limiting the number of applicants authorised to enter those transit zones daily.

No legislative amendments followed the judgment, and the practice remains the same.[106] In 2021, a total of 72,787 and in 2022, until 30 September, 114,881 asylum seekers and migrants were pushed back by law-enforcement agents.[107]

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99 11.K.705.686/2021/22, 12 November 2021.
100 49.K.700.170/2022/8.
101 C-564/18 LH, 19 March 2020, C-924/19 PPU and C-925/19 PPU FMS, 14 May 2020 and C-821/19, 16 November 2021.
102 Section 51(2)(f) of the Asylum Act as well as Art. XIV(4) of the Basic Law of Hungary.
103 See https://helsinki.hu/en/the-forcing-out-of-a-judge-and-meantime-a-threat-to-all-hungarian-judges/ and https://euobserver.com/rule-of-law/152349.
104 HHC, Hungary: Access denied, Information Note, 14 July 2016, https://bit.ly/3xodQU9.
105 European Commission, Migration and Asylum: Commission takes further steps in infringement procedures against Hungary, 19 July 2018, https://bit.ly/2uMEJ2c.
106 See: https://helsinki.hu/en/wp-content/uploads/sites/2/2021/07/PRAB-Report-April-to-June-2021.pdf.
107 See the statistics published by the Police: https://www.police.hu/sites/default/files/HatarrendeszetSK%202021_12_ENG.pdf.

In February 2021, the Hungarian Minister of Justice requested the interpretation of the Hungarian Fundamental Law by the Hungarian Constitutional Court, arguing that the implementation of the *C-808/18* CJEU judgment regarding pushbacks would be in breach of the Fundamental Law.[108] On 7 December 2021, the Constitutional Court refused to explicitly rule that the decision of the CJEU could not be implemented. However, the judgment states that Hungarians have a right to "constitutional identity", to be interpreted as the right to live in a culturally homogeneous country, essentially associating the arrival of migrants and asylum seekers with a threat to said identity.[109] The Government's response to the judgment was that it confirms the Hungarian approach to migration, and that pushbacks are allowed to continue.[110] The Constitutional Court, therefore, did not effectively uphold the primacy of EU law.

On 12 November 2021, the European Commission decided to refer Hungary to the CJEU, requesting the Court to order the payment of financial penalties for Hungary's failure to comply with a *C-808/18* ruling.[111] The judgment is awaited.

On 8 October 2021, the ECtHR also found the breach of the prohibition of collective expulsion (violation of Art. 4 of Protocol 4 and Art. 13) in the *Shahzad case*.[112] The applicant, together with other men, was apprehended by the Hungarian Police and removed through the border fence without any identification or examination of his personal situation, although the applicant stated that he wanted asylum.[113] The CM is examining the implementation of *Shahzad* judgment under the leading *Ilias and Ahmed case*.[114]

In the *Ilias and Ahmed* Grand Chamber judgment,[115] the Court established that the authorities failed to fulfil their procedural obligations under Art. 3 to assess the risks of ill-treatment before expelling asylum-seeking applicants from the transit zone to Serbia. The Court concluded that there was an insufficient basis for the Government's decision to establish a general presumption that Serbia could be considered a safe third country. Accordingly, the expulsion decisions disregarded the authoritative findings of the UNHCR as to a real risk of denial of access to an effective asylum procedure in Serbia and summary removal from Serbia to North Macedonia and then to Greece. The Court found that the Hungarian authorities exacerbated these risks by inducing applicants to enter Serbia illegally instead of negotiating an orderly return.

There has been no implementation of the judgments. The legislative presumption concerning Serbia as a "safe third country", adopted in 2015 without a thorough assessment of the risk that effective access to asylum proceedings would be lacking in Serbia, and would include the risk of (chain)refoulement, is still in force. Shortcomings in the application of the above legislative presumption by the asylum authority continue. Even though this inadmissibility ground has not been systematically applied since the second half of 2017, there are still sporadic examples when the NDGAP invoked it.[116] In addition, the new "embassy system" raises similar concerns regarding the discharge of the procedural limb of Art. 3. Finally, forced removal of the applicants without orderly procedure (pushbacks) intensified.[117]

108 Minister of Justice, Case X / 00477 /2021, https://bit.ly/2QHXeDw, see also https://helsinki.hu/en/appearances-are-deceiving-the-constitutional-conflict-is-not-about-migrants/.

109 X/477/2021, https://hunconcourt.hu/uploads/sites/3/2021/12/x_477_2021_eng.pdf.

110 Euronews, Hungarian Constitutional Court ruling is a migration milestone, 15 December 2021, https://www.euronews.com/2021/12/15/hungarian-constitutional-court-ruling-is-a-migration-milestone-view and HHC's response: https://www.euronews.com/2021/12/16/don-t-be-fooled-hungarian-court-ruling-didn-t-allow-pushbacks-view.

111 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5801.

112 Shahzad v. Hungary, appl. no. 12625/17, 8 October 2021.

113 See also: https://helsinki.hu/en/before-having-been-pushed-back-to-serbia-he-was-beaten-up/.

114 https://hudoc.exec.coe.int/ENG#{%22fulltext%22:[%22ilias%20and%20ahmed%22],%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECIdentifier%22:[%22004-54279%22]}.

115 Ilias and Ahmed v. Hungary [GC], appl. no. 47287/15, 21 November 2019.

116 AIDA Country Report: Hungary, https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU_2020update.pdf, p. 64.

117 See HHC Rule 9 submissions: https://helsinki.hu/en/submission-by-the-hhc-on-the-execution-of-the-european-court-of-human-rights-judgment-in-the-ilias-and-ahmed-v-hungary-case/.

Poland

1. Entry refusal of asylum seekers on the Eastern Polish border

At the national level, the Supreme Administrative Court (SAC) issued a judgment[118] in 2018 in a case concerning the widespread practice of refugees being refused entry at Poland's eastern border.[119] A Chechen asylum seeker, who appeared on the border crossing in Terespol in September 2016, claimed that during border controls, she had declared her intention to apply for international protection, however her declaration has been ignored by the Border Guards and she was immediately returned to Belarus. According to the Border Guards, she had only declared an economic purpose of entry, therefore, an entry refusal decision was issued and immediately executed. The entry refusal decision was based on the official memos drafted by the Border Guard officers. It was not signed by the applicant.

The SAC revoked the entry refusal decision and held that the proceeding had not been carried out in a sufficient manner and could not be limited to a mere inspection of the applicant's documents. It also stated that an official memo prepared and signed by the Border Guard officer could not be treated as proper evidence of the interview conducted at the border crossing and the reason for entry declared by the applicant. The SAC held that the interviews would have to be recorded in the form of an official protocol (*protokół*) signed by all persons taking part in the interview, including the foreigner herself. It should be pointed out that this was the first of a series of similar judgments issued in entry refusal cases of foreigners declaring their intention to seek international protection at the eastern border of Poland. In all these cases, the Court overruled these decisions on similar grounds.

In October 2018, the Polish Commissioner for Human Rights urged the Ministry of the Interior and Administration to implement this judgment. However, the Ministry replied that the practice of drafting official memos would remain unchanged as the case law of the SAC is legally binding only in the particular cases examined by the Court.[120] Indeed, from a formal point of view, an Administrative Court judgment is binding only in a particular case. However, the relevant circumstances of other cases involving refusals of entry for refugees are identical, and therefore, the principles contained in this judgment should apply to all other such cases. Moreover, in all other similar cases, the SAC has overturned entry refusal decisions on the same grounds.[121]

In September 2019, a Ministry of Interior representative stated in the Polish parliament that at the border, the law had not been violated, and that if a foreigner declared their intention to apply for asylum, their application would be accepted. If they declared only economic reasons for entry, a decision to refuse entry would be issued. In this respect, the Minister referred to the practice of drawing up official memos. According to the Minister, the decision taken at the border is based on a detailed verification of the entry conditions existing at a given moment.[122] This means that the Government representative completely ignored the SAC case law.

The situation regarding border crossings on Poland's eastern border has remained unchanged since the judgment. Moreover, in connection with the Covid-19 outbreak, restrictions on crossing external borders were introduced and the railway border crossing point in Terespol was closed. Asylum seekers could not cross, except as other foreigners (e.g. persons holding a work permit).[123]

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118 Supreme Administrative Court, II OSK 2766/17, 17 May 2018, https://orzeczenia.nsa.gov.pl/doc/342A4C3FC1.

119 Human Rights Commissioner writes to the Commander of the Border Guard on practices applied to foreigners at border crossings in Terespol and Medyka (Rzecznik Praw Obywatelskich, RPO pisze do Komendanta Staży Granicznej w sprawie praktyk stosowanych wobec cudzoziemców na przejściach granicznych w Terespolu i w Medyce), https://bip.brpo.gov.pl/pl/content/rpo-pisze-do-komendanta-stazy-granicznej-w-sprawie-praktyk-stosowanych-wobec-cudzoziemcow; HFHR, "Road to nowhere" – report from Brest-Terespol border crossing, https://www.hfhr.pl/en/road-to-nowhere-report-from-brest-terespol-border-crossing/.

120 Commissioner for Human Rights letter and response of the Ministry of Interior and Administration, https://bip.brpo.gov.pl/pl/content/rozmowy-strazy-granicznej-z-cudzoziemcami-na-granicy-nie-b%C4%99d%C4%85-protokolowane-odpowied%C5%BA-mswia-dla-RPO.

121 For example: No II OSK 345/18, 20 September 2018; see also: HFHR report: access to asylum procedure at Poland's external borders. Current state of affairs and future challenges, https://www.hfhr.pl/en/hfhr-report-access-to-asylum-procedure-at-polands-external-borders-current-state-of-affairs-and-future-challenges/.

122 Reply to MP's question No. 9352 on violation of the ECHR by not accepting applications for international protection from foreigners seeking protection in Poland, answered by: Undersecretary of State Bartosz Grodecki *(Odpowiedź na interpelację nr 9352 w sprawie naruszania Europejskiej Konwencji Praw Człowieka poprzez nieprzyjmowanie wniosków o udzielenie ochrony międzynarodowej od cudzoziemców poszukujących w Polsce ochrony, odpowiadający: podsekretarz stanu w Ministerstwie Spraw Wewnętrznych i Administracji Bartosz Grodecki)*, http://www.sejm.gov.pl/sejm9.nsf/InterpelacjaTresc.xsp?key=BT8J9B.

123 Regulation of the Minister of the Interior and Administration of 13 March 2020 on temporary suspension or limitation of border traffic at specific border crossing points, Journal of Laws of The Republic of Poland of 2020, Item 435; see also Border Guards, Outbreak of coronavirus - rules of entry and stay on the territory of the Republic of Poland, https://www.strazgraniczna.pl/pl/cudzoziemcy/covid-epidemia-koronawi/8578,Outbreak-of-coronavirus-rules-of-entry-and-stay-on-the-territory-of-the-Republic.html.

At the ECtHR level, *M.K.*[124] is the leading case.[125] It concerns entry refusal decisions issued to Chechen asylum seekers who appeared at the Polish-Belarusian border crossing point in Terespol in 2016 and 2017. Their intention to seek asylum was ignored by the Border Guards officers, who sent them back to Belarus. The return took place despite the fact that the ECtHR instructed the Polish authorities not to remove applicants to Belarus (interim measure granted under Art. 39 of the Rules of the Court).

In the judgment, the ECtHR held that Poland violated Art. 3 of the Convention for refusing to receive asylum applications and removing applicants to Belarus, thereby creating risk of chain-refoulement and potential ill-treatment in the applicant's country of origin. The ECtHR also found a violation of Art. 4 of Protocol 4, as the applicants were returned without an individual assessment of their situation. The ECtHR pointed out that this was an example of a wider state policy of refusing entry of foreigners trying to enter Poland from Belarus. The ECtHR also established a violation of Art. 13 in conjunction with Art. 3 and Art. 4 of Protocol 4, as the applicants had no opportunity to exercise effective remedy with suspensive effect to challenge their removal to Belarus. A violation of Art. 34 of the Convention was also found, due to the non-compliance with interim measures granted by the Court.

On 8 December 2021, the Polish government presented an Action Plan to the Committee of Ministers, aiming at the execution of the *M.K.* judgment.[126] The Government referred to the New Pact on Migration and Asylum, proposing provisions on border proceedings. The Government also referred to the draft amendment of the Act on granting protection to foreigners on the territory of Poland. The draft contains provisions allowing for considering applications for international protection under the so-called border procedure. According to the Polish government, such a procedure would eliminate the risk of removing a foreigner in breach of Art. 3 of the Convention.

In its comments to the Action Plan, a number of NGOs indicated that the policy of not accepting asylum applications on the eastern Polish border had not changed since the delivery of the judgment. Interveners have brought attention to the situation that has unfolded since August 2021, as a large number of asylum seekers have been trying to apply for asylum and - if apprehended – have been returned to Belarus.[127] As a result of their removal, they have often been exposed to violence from Belarussian officers, forcing them to return to Poland. Due to this treatment, they were left in the border forest in extreme weather conditions, without warm clothes, food, medical assistance, etc. NGOs also pointed to the amendments to the Polish law on the removal of third-country nationals apprehended at the external EU border, according to which a removal decision would be issued without an individual assessment of the removal's consequences. Appealing the removal decision has no suspensive effect. NGOs moreover highlighted that the introduction of border procedures would not bring a proper execution of the *M.K.* judgment unless the broader state policy of pushbacks and receiving applications for international protection was amended.

In its reply to these comments, the Government has stated that since the middle of 2021, Poland has been dealing with massive illegal migration on the Polish-Belarussian border, which is the result of the instrumentalisation of migration by the Belarussian authorities. According to the Government, it was necessary to take urgent actions to counteract this phenomenon, including preventing attempts at irregular border crossing.

The CM, when examining the *M.K. case*, held that the situation on the Polish-Belarussian border had worsened, especially after August 2021. The general measures presented by the authorities have so far not solved the main problem of this case - the policy of not accepting asylum applications and refusing entry to foreigners coming from Belarus. The Committee invited the Polish government to provide further information on measures aimed at putting an end to the policy of summary removals of foreigners to Belarus and to ensure the acceptance of asylum applications made. The Committee also stated that recent legislative amendments allowing for the immediate removal of persons apprehended after unauthorised entry created obstacles in making an application for international protection and for the respect of the rights protected by Art. 3 and Art. 4 of Protocol 4.[128]

The position of the Government as well as the continuing practice of returning foreigners to Belarus show that there is no prospect for the proper execution of *M.K* judgment. A comprehensive change in government policy would be needed.

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124 M.K. and Others v. Poland, appl. nos. 40503/17, 42902/17 and 43643/17, 23 July 2020.
125 D.A. and Others v. Poland, appl. no. 51246/17, 22 November 2021 is a repetitive case.
126 https://hudoc.exec.coe.int/eng?i=004-56535.
127 For more information about situation on the Polish-Belarusian border see: Human Rights Watch "Die Here or Go to Poland", Belarus' and Poland's Shared Responsibility for Border Abuses", https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses; Grupa Granica, Humanitarian crisis at the Polish-Belarusian border, https://www.grupagranica.pl/files/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf.
128 CoE Committee of Ministers, 1436th meeting, 8-10 June 2022, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a6859f.

However, it is also important to point to some positive developments with regard to interim measures. In connection with the situation on the Polish-Belarusian border, between 20 August 2021 and 18 February 2022, the ECtHR granted interim measures in 61 cases. The Court indicated to the Polish authorities that the applicants could not be returned to Belarus, and if necessary, they had to be provided with medical assistance.[129] The Government has implemented all decisions concerning applicants apprehended on Polish territory. There is only one case in which the interim measure has not been implemented. In *R.A. and Others v. Poland*,[130] the Government did not provide humanitarian assistance to the applicants stranded on the Polish-Belarussian border. The Government also denied lawyers' access to the applicants and did not allow the applicants to access Polish territory. As a justification, the Government stated that the applicants were not present on Polish territory.[131]

It seems that the issues related to the entry refusal and removal to Belarus of persons declaring their intent to seek asylum in Poland are the clearest examples of the non-execution of Court judgments in migration cases. The jurisprudence in these cases is clear and uniform, yet the authorities explicitly ignore it or fail to acknowledge that there has been a violation in these cases.

Slovenia

1. Amendments to the Foreigners Act restricting access to the asylum procedure re-introduced despite being ruled unconstitutional

In early 2017, Slovenia adopted amendments to the Foreigners Act, which allowed restrictions on access to the asylum procedure. Pursuant to the amendments, the National Assembly can vote on suspending the right to asylum if migration poses "a threat to public order and internal safety in the Republic of Slovenia". If the parliamentary measure is adopted, the Police are instructed by law to reject all statements of intention to apply for international protection as inadmissible, as long as the person wishing to apply entered Slovenia from a neighbouring EU Member State, in which there are no systemic deficiencies of asylum procedure or reception conditions possibly leading to torture, inhuman or degrading treatment. The Police then return the person to the neighbouring country in question. An appeal against the Police order does not have a suspensive effect.[132]

The adopted amendments were reviewed by the Constitutional Court at the initiative of the Human Rights Ombudsman, prepared with the support of civil society organisations. The Constitutional Court ruled that the amendments were in breach of Art. 18 of the Constitution (prohibition of torture).[133] It noted that any legislative restrictions that limit the type and number of circumstances forming the basis of the individual's claim regarding the existence of serious harm in case of a return and limiting the individual's ability to access the procedure in which such a claim would be assessed, are in violation of the principle of non-refoulement enshrined in Art. 18 of the Constitution. The Court also highlighted that the determination of "a threat to public order and internal safety in the Republic of Slovenia" under the Foreigners Act did not imply the existence of a state of emergency pursuant to Art. 92 of the Constitution, which could justify the limitation of rights.

Nonetheless, the Ministry of Interior proposed a new amendment to the Foreigners Act in 2020, which was adopted by the Parliament in March 2021.[134] According to the amendment, the Ministry of Interior regularly monitors the situation in the field of migration in Slovenia. If it detects that the situation regarding migration in Slovenia has changed, creating a "complex crisis", the Ministry of Interior can propose that the Government activates the articles of the Foreigners Act allowing the National Assembly to close the border for six months and restrict access to the asylum procedure. The Police would have the authority to determine whether a person could apply for international protection after they express the intention. If the Police determine that an individual can be returned to another country, they can return the individual regardless of the provisions of the International Protection Act. Exceptions would apply to unaccompanied minors and individuals whose health conditions prevent return. The assessment of whether someone is an unaccompanied minor would be made by the Police based on the person's appearance, behaviour and other circumstances. An appeal against the Police order would not have a suspensive effect.

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129 ECtHR, Update on interim decisions concerning member States' borders with Belarus, https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7264687-9892524&filename=Update%20on%20interim%20decisions%20concerning%20member%20States%E2%80%99%20borders%20with%20Belarus.pdf.

130 ECtHR, Court gives notice of "R.A. v. Poland" case and applies interim measures, https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7134761-9667819&filename=Notification%20and%20application%20of%20interim%20measures%20in%20the%20case%20R.A.%20and%20Others%20v.%20Poland%20lodged%20by%2032%20Afghans.pdf.

131 Ministry of the Interior and Administration, Poland provided the ECHR with its position on the order for interim measures, https://www.gov.pl/web/mswia-en/poland-provided-the-echr-with-its-position-on-the-order-for-interim-measures.

132 Art. 10, 10a and 10b Aliens Act, Official Gazette of RS, No. 50/11 and subsequent amendments.

133 U-I-59/17, 18.9.2019.

134 Art. 10a and 10b of the Foreigners Act.

Although these articles had previously been annulled by the Constitutional Court, the new, amended articles again allow the National Assembly to close the border in case of a "complex migration crisis". The Human Rights Ombudsman notified the European Commission of the newly adopted provisions and his position with regard to them. He noted that as the Government had failed to respect the decision of the Constitution Court by proceeding with the adoption of the amended provisions, there was the possibility that another procedure before the Constitutional Court would not be effective, as the Government could once again fail to respect the decision.[135] In February 2022, members of the opposition parties submitted the provisions of the Foreigners Act to the Constitutional Court for constitutional review,[136] which, at the time of writing, is still pending.

2. Collective expulsion

In December 2020, the Administrative Court issued a second judgment in a case concerning a Cameroonian national who crossed the Slovenian border in August 2019 with the intention of applying for asylum in Slovenia.[137] The applicant claimed that he had expressed his intention several times during the Police procedure. The Police did not register his intention but returned him to Croatia on the basis of the readmission agreement. The Croatian Police then returned him to Bosnia and Herzegovina. The Administrative Court found that the Police had violated the prohibition of *non-refoulement,* the prohibition of collective expulsion, and the right to access the asylum procedure. It also decided that Slovenia had to allow the applicant to enter its territory and apply for international protection.[138] The Ministry of Interior appealed the decision.

In the second review procedure, the Supreme Court confirmed the decision of the Administrative Court, which thus became final.[139] The Ministry of Interior's position, that the imposed obligation to allow entry is not enforceable, because there is no legal basis, was rejected. The Supreme Court further called upon the legislator to adopt adequate regulations that would in such cases enable the rapid elimination of the consequences of illegal interference with human rights and fundamental freedoms, and the re-establishment of a lawful situation.

The ruling ordered the Ministry of Interior to allow the applicant to re-enter the country, however, the Police interpreted it in the sense that they were only obliged to allow him entry to Slovenia once he appeared at the border, without assisting him to reach the Slovenian border from Bosnia and Herzegovina. Despite the ruling, the Police failed to implement the judgment for months, and the individual concerned was forced to undertake another uncertain and dangerous irregular journey to re-enter the country.[140] The judgment was not implemented on a general level either, as the Police procedures did not change until recently and pushbacks continued long after the judgment was adopted.

The Ombudsman also criticised the non-implementation of the judgment in its annual report. He believes that the non-execution of final decisions of the judiciary is unacceptable considering the principles of the rule of law, and even more so in a specific case where there has been a violation of the absolute prohibition of torture and similar treatment. The Ombudsman therefore called on the Ministry of Interior to prepare a legislative proposal that would contain a legal basis for an immediate remedy for the consequences of illegal interference with human rights, and to submit it to the legislative procedure. The Ombudsman considered the response of the Police, according to which the applicant had to reach the border on his own and without the Slovenian authorities having issued him with an appropriate document in order to make travelling possible in a safe and legal manner, to be worrying, as the final judgment clearly required the state to actively facilitate the applicant's entry to the country. In addition, the judgment emphasises that this requirement covers all aspects of the legality of the arrival. The Ombudsman considered that the position of the Police was not entirely in the spirit of the execution in a good faith of an obligation imposed on the state by a final court decision.[141]

IV.4. Access to classified data in national security cases

135 Varuh človekovih pravic, Varuh Evropsko komisijo seznanil s svojimi pogledi na novelirano tujsko zakonodajo, 16.8.2021, https://bit.ly/3wEsAwk.

136 N1, Stranke KUL zahtevajo presojo ustavnosti določb zakona o tujcih, https://bit.ly/39ACEP9.

137 The first such judgment was successfully challenged by the Ministry of the Interior and therefore annulled by the Supreme Court, mainly due to the issues around the financial compensation for damages.

138 I U 1686/2020, 7.12.2020.

139 I Up 23/2021, 9.4.2021.

140 ENNHRI, Gaps in Human Rights Accountability at Borders, December 2021, https://ennhri.org/wp-content/uploads/2021/12/Gaps-in-Human-Rights-Accountability-at-Borders.pdf, pp. 15, 16.

141 Letno poročilo Varuha človekovih pravic Republike Slovenije Za leto 2021, https://www.varuh-rs.si/fileadmin/user_upload/pdf/lp/LP_2021/Letno_porocilo_VCP_RS_za_leto_2021.pdf, pp. 576, 577.

Poland

According to Polish law and practice, in migration cases, neither the foreigner nor their lawyer have a right to know the reasons for the decision as to why the foreigner is considered a threat to national security if the data are classified. Although courts have access to classified information, this is not sufficient to secure a foreigner's rights of defence. The case law of administrative courts remains firm in considering that the limitations provided by the Polish law do not violate constitutional or international human rights standards. As the courts have access to, and an obligation to examine, all case files, including classified files, the right to defence is guaranteed and secured by the appeal and judicial oversight of the decision.[142] According to the SAC, the courts also have the possibility of requesting that the relevant authority declassify case documents, if, in their opinion, such material does not meet the conditions for being classified.[143]

However, in one of the recent cases, the SAC ruled differently. The case concerns a third country national against whom a return decision was issued by the Minister of Interior and Administration on the grounds that the individual posed a security risk. The decision was based on the Internal Security Agency's opinion, which stated that the foreigner might carry out terrorist activities. Relevant information and evidence for the case were classified. Accordingly, decisions and judgments did not contain any factual reasons. In the judgment of 6 February 2019, the SAC stated that in such cases, standards based on Art. 47 of the Charter and the CJEU judgment C-300/11, *ZZ*, should be applied directly.[144] Therefore, the foreigner should be informed of the essence of the grounds on which a decision is based to secure his rights of defence. However, the SAC stated that the court has wide discretion to decide what constitutes the "essence of the grounds", and accepted that the foreigner was only informed in a very general way of his stay posing a threat to national security in Poland. The SAC referred to the same standard in another judgment,[145] but held that mere information about the legal basis for the decision and a general statement that the foreigner poses a risk met the standard of Art. 47 of the Charter.

The standards contained in the above-mentioned judgments are generally not implemented in Poland, and there seems to be no other judgment in which the court would directly apply the standards resulting from the CJEU judgment C-300/11, *ZZ*. In the vast majority of cases, Polish administration bodies and courts find that Polish regulations allowing for total secrecy regarding the grounds for decisions meet international standards and that the judicial control of all case files is a sufficient guarantee.

It should be pointed out that the Polish authorities do not intend to introduce any changes in this respect, although the Human Right Commissioner,[146] as well as other non-governmental organisations, have proposed legislative changes.[147] The HFHR has also filed a complaint with the European Commission in this regard,[148] which is still under consideration. Similar cases have also been the subject of a public debate in Poland on several occasions, highlighting the unfairness of national legal solutions.[149]

142 For more information see: HHC, The Right to know, Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland, September 2021, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/03/Advocacy-Report-Right-To-Know.pdf.

143 For example: II OSK 2586/148, 29 June 2016; II OSK 3615/189, 30 May 2019.

144 II OSK 3002/18, 6 February 2019.

145 II OSK 3210/18, 5 April 2019, https://orzeczenia.nsa.gov.pl/doc/0E89ACF4D2.

146 Commissioner for Human Rights, Letter to the Minister of Foreign Affairs and Administration, 19 August 2016, (Rzecznik Praw Obywatelskich, Wystąpienie do Ministra Spraw Wewnętrznych i Administracji w sprawie dostępu do informacji niejawnych w toku postępowań prowadzonych na podstawie ustawy o cudzoziemcach), https://www.rpo.gov.pl/pl/content/wystapienie-do-ministra-spraw-wewnetrznych-i-administracji-w-sprawie-dostepu-do-informacji.

147 HFHR, Amendments to the Foreigners Act – HFHR comments, https://www.hfhr.pl/en/amendments-to-the-foreigners-act-hfhr-comments.

148 The HFHR has filed a complaint with the European Commission regarding the regulations providing for secret materials in foreign cases (Helsińska Fundacja Praw Człowieka złożyła skargę do KE ws. przepisów przewidujących tajne materiały w sprawach cudzoziemskich), 14 September 2018, https://www.hfhr.pl/helsinska-fundacja-praw-czlowieka-zlozyla-skarge-do-ke-ws-przepisow-przewidujacych-tajne-materialy-w-sprawach-cudzoziemskich/.

149 Politicalcritique.org, *"I want to know why I'm here. Why do I pose a danger?"* Ameer Alkhawlany, Iraqi Ph.D. Student, Remains in Polish Detention Facility, 9 March 2017, http://politicalcritique.org/cee/poland/2017/ameer-alkhawlany-still-detained/.

Slovakia

The Constitutional Court received two motions from the Supreme Court[150] which questioned the constitutional and international legal conformity[151] of the provisions of the Act on Stay of Foreigners and the Act on Asylum, based on which the Police/Migration Office may issue decisions without any reasoning, simply by referring to national security interests, without the person concerned being acquainted even with the essence of the information on the basis of which the decision was issued.[152]

The Supreme Court claimed that these provisions denied the principle of the equality of parties, the right to comment on all the evidence taken, and the principle of proportionality. The Court moreover stated that the provisions were contrary to the adversarial principle and the principle of equality of arms, which are essential elements in the right to a fair trial. Moreover, the motion suggested that the legislator did not balance the interest of the state (protection of classified information/security) with the interest to protect the fundamental rights of the third-country nationals. This conflict is addressed in such a way that the State's interest is prioritised and the applicant's fundamental rights are infringed upon.

On 12 December 2018, the Constitutional Court concluded that the challenged provision are not compliant with the Constitution[153] and Art. 47 of the Charter.[154] According to Art. 125/3 of the Constitution, if the Constitutional Court declares a discrepancy, the authorities are obliged to bring the concerned regulations into compliance with the Constitution, constitutional laws and international treaties within six months of the Constitutional Court's announcement of the decision. Should they fail to do so, the contested provisions shall cease to be in force.

The authorities under the Ministry of Interior were awaiting such a finding from the Constitutional Court and prepared new legislation to replace the original version, enabling the authorities to use the statements of the Slovak Information Service or the Military Intelligence, without providing reasons why the person concerned is considered to be a threat to national security.[155] As early as 1 May 2018, Act No. 108/2018 Coll., amending the Act on Stay of Foreigners, entered into force. The new law did not bring a different approach as to the access to classified data by the individuals concerned: the foreigners are still not informed at least about the primary reasons for which they are considered a threat to national security.[156] Regrettably, the Asylum Act was amended in the same manner on 20 July 2018.[157]

As the Government amended the laws prior to the judgment, the judgment lost all importance, as it was based on the previous laws, which were no longer in force. While *de jure* the Police authority and Migration Office act according to the law, it is apparent that *de facto* they avoid implementing the findings of the Constitutional Court.

150 Motions of the Supreme Court of the Slovak Republic dated 30 May 2016 and 28 August 2017.
151 Compliance with Art. 6, 8 and 13 of the ECHR and Art. 47 of the Charter.
152 According to the Art. 120/2 of the Act on Stay of Foreigners, *"The Police authority shall state in the justification of the decision only the fact that it is in the security reasons of the Slovak Republic."* According to the Art. 52/2 of the Act on Asylum, *"In the justification of the decision of the Ministry not to grant asylum, failure to provide subsidiary protection, cancellation of the subsidiary protection … only the fact that it is in the security interest of the Slovak Republic shall be stated."*
153 Art. 46/1,2, 47/3, 48/2 in conjunction with Art. 1 par. 1, Art. 12/1,2 and with Art. 13/4 of the Constitution.
154 Constitutional Court of the Slovak Republic, PL. ÚS 8/2016-131, 12 December 2018, https://www.epi.sk/vyhladavaniers/pravne_instituty~inst1670623.
155 The reasoning of the Slovak Information Service and the Military Intelligence is not part of the file and is placed separately as the information is considered confidential.
156 The Police department for the assessment of applications for the granting of temporary and permanent residence of a third-country national over the age of 14 will request the opinion of the Slovak Information Service and the Military Intelligence Service, who, if they disagree with the granting of residence, will send an opposing opinion to the police department within fifteen days of receiving the request for an opinion. The Police department will reject the application for granting permanent residence if the statement contains disagreement with the granting of permanent residence.
157 A new Art. 19a/9 was added: *"To assess the application for granting asylum to an applicant older than 14 years, the Ministry requested the opinion of the Slovak Information Service and Military Intelligence, which agrees or disagrees with the issuance of the application or the provision of subsidiary protection by sending the application to the Ministry within 20 days of receiving the opinion."*

IV.5. Statelessness

Czechia

Since 2017, applicants for stateless status in Czechia have become increasingly successful in litigating for their rights. Until then, however, there was no formal procedure for recognising statelessness in domestic law. Stateless people were finding themselves in situations where they could not obtain any identification documents, let alone employment, or stable housing. They were routinely detained for the absence of any legal status. There was altogether only one reference to statelessness in domestic legislation.[158] With the help of the OPU, several individuals attempted to apply for stateless status and alleged the corresponding procedural and substantive rights when referring to this provision. The main argument in these proceedings was that the existing protection gap in the domestic legislation should be resolved by applying relevant provisions of the Asylum Act by analogy to applicants for stateless status.
In *V. P. v. the Ministry of Interior,* the applicant launched an inaction complaint,[159] alleging that although he applied for stateless status with a letter to the MoI in 2017, he never obtained any identification document, any invitation for an interview, or any answer whatsoever from the authorities. Meanwhile, the six-month time limit, which would otherwise apply to asylum applications under the Asylum Act, had already passed. He considered that the MoI should have decided on his application within that same time limit. The Prague Municipal Court acknowledged that the statelessness determination procedure should be analogous to the asylum procedure,[160] otherwise applicants for stateless status would face significant legal uncertainties. As in the asylum procedure, the deadline for issuing a decision on statelessness is six months. Considering that in this specific case the deadline had already passed, the MoI was ordered to issue a decision within 60 days. The Court further stated that it was not permissible to leave the applicant in a legal vacuum pending the application, and suggested that he was to be issued an identification document until a decision on his application is taken.

Similarly, *H. A. A. v. Ministry of Interior* also dealt with the absence of identification documents for applicants for stateless status. In a judgment of 12 March 2019, the SA Court held that the absence of any identification document during a procedure amounts to a violation of the right to private and family life, as applicants for stateless status were unable to contact any official authorities, rent accommodation, find official employment, or access any other services.[161] The Court reiterated that the statelessness determination procedure had to be analogous to the asylum procedure. This includes the right of applicants to obtain temporary identification documents.[162]

In *A. K. and E. K. v. Ministry of Interior,* the applicants were an elderly couple with pre-existing health issues, who were at risk of becoming homeless. On 26 October 2020, the Prague Municipal Court found that by refusing to house them in a refugee reception facility, the Refugee Facilities Administration (RFA) had violated their right to housing.[163] The Court reiterated that in the absence of more precise domestic legislation, the rights of applicants for stateless status had to be constructed analogously to the rights of applicants for international protection. The cassation complaint submitted by the MoI against this decision was rejected by the SA Court.[164]

In *X v. the General Health Insurance Company*, the applicant claimed that his right to be admitted under the general health insurance scheme while awaiting the results of his statelessness application. On 13 July 2021, the Prague Municipal Court found that the refusal of the General Health Insurance Company to admit a person who applied for statelessness status into the public health insurance scheme and to cover the costs of their treatment while in the procedure was unlawful.[165] The company submitted a cassation complaint, which has not been decided to date.

Accordingly, OPU's litigation efforts opened the pathway towards closing a systemic protection gap in terms of procedural and substantive rights of applicants for stateless status. However, as a response to implementing the above jurisprudence, a clear pattern emerged. The authorities would usually take the steps requested in respect of the individual applicants, yet they refused to properly address the underlying systemic issues or afford the same rights to other applicants in similar situations.

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158 Then Art. 8 lit. d) of the Asylum Act established the competence of the Ministry of Interior ("MoI") to also decide on applications made under the Convention relating to the Status of Stateless Persons, which Czechia ratified in 2004.
159 With any procedure for determining statelessness completely lacking in domestic law, most of these actions were conceived of either as so-called inaction lawsuits (lawsuits for protection against failure to act by an administrative authority under Art. 79-80 Act No. 150/2002 Coll., Administrative Procedure Code) or interference lawsuits (lawsuits for protection against unlawful interference by an administrative authority under Art. 82-85 of the Administrative Procedure Code).
160 10 A 155/2017-40, 29 November 2017.
161 4 Azs 365/2018-74, 12 March 2019.
162 These findings were later reconfirmed in the Supreme Administrative Court, J. N. S. v Ministry of Interior, 7 Azs 488/2018-53, 9 April 2019.
163 5 A 168/2019, 26 October 2020.
164 10 Azs 347/2020-25, 10 March 2021.
165 14 A 131/2020-37, 13 July 2021.

For example, following the *V. P.* judgment, the applicant received a decision on his application. Yet in later cases, statutory deadlines have again been disregarded and applicants have continued to be left without any response for long periods.

Following the *H. A. A.* and *J. N. S.* judgments, the applicants were issued with identification documents. Since then, other stateless applicants have also been issued with identification documents. However, these documents were substandard. They were a plain A4 paper without any lamination, included a low-quality picture, and were valid for only three months. Moreover, the applicants could not prolong these documents in person at the MoI, but had to wait for a new document to be sent to them by post, which often entailed significant delays. In most cases, applicants faced a range of practical problems when presenting these documents to other authorities, i.e. they were not able to pick up their post as the documents were not recognized by the post as official ID, and sometimes they were detained by the Police, who did not recognize these documents as being official.

As a result of *A. K. and E. K.*, the RFA agreed to house the applicants, but requested that other applicants for stateless status wishing to be accommodated file a similar lawsuit first.

In *X. v. the General Health Insurance Company*, the company continued to refuse to cover the cost of the treatment of the applicant during a stay in hospital. The company also continued to deny the right of other applicants for stateless status to be admitted to the public health insurance scheme.

In 2021, the MoI deleted the only reference to statelessness in the Asylum Act and amended the Act on Residence of Foreigners by including a quasi-procedure for stateless status under Art. 170d.[166] The new procedure provides very few procedural or substantive guarantees for the applicants. For example, it contains no provision on temporary identification documents, accommodation or health insurance.[167] Moreover, the MoI argues that the previous jurisprudence is no longer applicable, as the analogy with the Asylum Act no longer holds. This position has recently been refuted by the findings of the Office of the Public Defender of Rights,[168] as well as the judgment of the Prague Municipal Court.[169] However, whether and how these findings will be implemented in practice remains to be seen.

The issue of statelessness thereby presents an example of the authorities evading the implementation of domestic jurisprudence by enacting new legislation. This reluctance to take the required steps stems from an alleged "misuse" of the procedure by applicants.[170] However, no evidence of such misuse has ever been presented by the authorities. Meanwhile, the number of applicants for the statelessness procedure remains extremely low. According to the Ombudsperson, about 20 to 30 individuals in total have applied for stateless status to date.[171] Considering that in the context of the Russian invasion of Ukraine, Czechia has been able to welcome over 417,500 refugees,[172] the reluctance to afford protection to just a handful of individuals appears striking. It can hardly be explained except by a profound lack of will to act when no one is applauding.

166 Act No. 274/2021 Coll. amending Act No. 326/1999 Coll. on the Residence of Foreigners on the territory of Czech Republic.
167 It merely guarantees the right to an interpreter during interviews with the MoI, and the right to obtain a decision within six months of launching the application.
168 Office of the Public Defender of Rights, Report on the inquiry concerning the failure to issue an applicant's identity card in proceedings for the recognition of statelessness, no. 5379/2021/VOP/VVO, KVOP-26997/2022, 26 April 2022.
169 10 A 98/2021-45, 26 January 2022.
170 Amendment to the Government Bill amending Act No. 326/1999 Coll. on the Residence of Foreigners on the territory of the Czech Republic, Parliamentary Print No. 1091, https://www.psp.cz/sqw/historie.sqw?o=8&t=1091.
171 Office of the Public Defender of Rights, Report on the inquiry concerning the failure to issue an applicant's identity card in proceedings for the recognition of statelessness, no. 5379/2021/VOP/VVO, KVOP-26997/2022, 26 April 2022, p. 9.
172 MoI, Statistics related to the war in Ukraine – archive, https://www.mvcr.cz/clanek/statistika-v-souvislosti-s-valkou-na-ukrajine-archiv.aspx.

Hungary

One of the issues in Hungary with regard to stateless status is that the Immigration authority does not inform people of the possibility to apply for such status, even when it would clearly be relevant for them. The ECtHR has already ruled on this issue in the *Sudita Keita case*.[173]

The applicant of Nigerian-Somali descent was expelled from Hungary in 2003, but the expulsion could not be executed. In 2006, the Nigerian Embassy refused to recognize him as a Nigerian citizen and he could not be returned to Somalia either, therefore he was granted tolerated status ("*befogadott*"). He was not informed by the Immigration authority about the possibility of applying for stateless status as recognized by Hungarian law. He applied for stateless status only in 2010, after being informed by his lawyer. During these years, his access to healthcare and employment was hindered by his legal status. His application was rejected by the Immigration authority and the decision was upheld by the Supreme Court of Hungary, as applicable law required "lawful stay in the country" as a precondition for stateless status. Having recognized that this requirement was in breach of international law, the Constitutional Court abolished it from Act II of 2007 on the Entry and Stay of Third Country Nationals. The applicant was granted stateless status by the court in October 2017, thereby once again entitling him to basic healthcare and employment, and meaning that there were no longer any impediments to his getting married.

The Court concluded that there was a violation of Art. 8 of the Convention, as the applicant's legal status in Hungary had been uncertain for 15 years, which had had adverse consequences on his private life. The Hungarian authorities failed to inform him about the possibility of applying for stateless status in 2006, although the Nigerian Embassy clearly declared that the applicant had no Nigerian nationality. Despite the contested provision having been abolished by the Constitutional Court in 2015, it took an additional two years to grant the applicant stateless status.

The CM called on Hungary to raise the attention of the competent authorities (*i.e.* the NDGAP) to the legislative obligation to provide information about the statelessness determination procedure and to the fact that failing to do so in a thorough and timely manner is a violation of ECtHR case law. The authorities were requested to reflect on the implementation of this measure in the revised action report.[174]

As per the experience of the HHC, the NDGAP systematically fails to fulfil their information provision obligation with regard to the statelessness procedure.[175] Only one recent case is known to the HHC in which the applicant submitted her statelessness application upon the information received from the NDGAP.[176] In this case, the applicant was likely to have Hungarian nationality but no proof thereof, therefore, the authorities should have rather channelled her case to a procedure aimed at confirming the applicant's Hungarian nationality, rather than statelessness determination. In all other cases, in spite of having long-term residence in Hungary and lacking valid travel documents on account of the lack of reaction by the embassy of the presumed countries of origin, stateless persons are not informed about the procedure. For instance, after ten years of unsuccessfully attempting to execute an expulsion decision against an individual who had been living in Hungary for two decades, the NDGAP established that none of the contacted embassies had confirmed the nationality of the person concerned.[177] Yet, this person was never informed by the NDGAP about the possibility of initiating a statelessness procedure. In another case, a Palestinian man who had been living in Hungary for 30 years had trouble renewing his residence permit or obtaining a new one in 2019. Finally, an alien policing procedure was initiated against him in 2022, to execute his expulsion to Jordan, a country of which he is not a citizen. Based on the files available, the NDGAP did not inform the client about the statelessness procedure at all, although the client, on multiple occasions, communicated that he was not from Jordan but from Palestine. Documentary evidence supporting his claim was also at the authority's disposal.

173 Sudita Keita v. Hungary, appl. no. 42321/15, 12 August 2020.
174 https://hudoc.exec.coe.int/eng#{%22fulltext%22:[%22sudita%22],%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECIdentifier%22:[%22004-55805%22]}.
175 The obligation to inform in case there is any indication that statelessness might be established is stated in the Gov. Decree No. 114/2007, Section 160(1).
176 Case no. 106-2-12141/22-Ho, procedure initiated in July 2022.
177 Letter of the Department on Return and Forced measures of the NDGAP to the Aliens Policing Department of the NDGAP, 21 April 2015, no. 106-K-8011/37/2011.

IV.6. Effective remedies against expulsion

Czechia

Positive examples of the implementation of ECtHR judgments have been reported from Czechia. In the *Diallo case*,[178] the Guinean applicants arrived in 2006 by plane, having transferred in Lisbon. Their asylum applications were dismissed as manifestly ill-founded on the basis that they had arrived from Portugal, a safe third country. The judicial review did not have automatic suspensive effect at that time. Following the dismissal of their asylum applications, the Police initiated expulsion proceedings. As required by law, the Police requested a MoI opinion as to whether there were any obstacles to the applicant's removal. The MoI replied in the negative, stating that the applicants were facing expulsion to Portugal, which was a safe country. The administrative appeals against the expulsion decisions were dismissed and a judicial review of the decisions was ruled out under domestic law. Both of the applicants were subsequently removed to Guinea.

In its judgment of 23 June 2011, the ECtHR held that there was no close and rigorous scrutiny of their claim by the MoI, or, in fact, any scrutiny at all. Moreover, in expulsion proceedings, no judicial review was available, and in asylum proceedings, the review did not have automatic suspensive effect. Accordingly, the Court found a violation of Art. 13 in conjunction with Art. 3.

As early as December 2008, long before the ECtHR rendered its judgment, the Constitutional Court repealed Art. 171(1) lit. c) of the Act on Residence of Foreigners, preventing judicial review of expulsion decisions. The Act was amended to allow for judicial review with an automatic suspensive effect. The issuance of so-called binding opinions by the MoI during the deportation procedure was adjusted, and the risk of ill-treatment is now analysed in relation to all countries that can be destination countries in case of expulsion. The CM considered the judgment implemented.[179]

The *Budrevich case*[180] considered the question of effective remedies against expulsion in a situation of parallel asylum, expulsion and extradition proceedings. The Belarusian applicant applied for asylum in Czechia in 2006, stating he feared imprisonment in Belarus due to his prior political activities. His application was rejected, as his testimony was not considered credible. Following his conviction for several offences, two courts sentenced him to expulsion from Czech territory in 2009. The same year, Belarus requested his extradition for alleged criminal offences. Two subsequent requests for asylum were also rejected. Although a domestic court stopped his extradition due to the political environment in Belarus and the treatment of prisoners, he continued to be at risk for his criminal expulsion, as there was no new remedy with automatic suspensive effect. In the third asylum proceedings, his application was dismissed within one day based on a very short reasoning, which completely omitted the extradition judgment.

In its judgment of 17 October 2013, the Court found a violation of Art. 13 in conjunction with Art. 3 of the Convention on account of the lack of an effective domestic remedy available to the applicant in respect of his allegations regarding the risks of torture and inhuman or degrading treatment or punishment. The applicant was finally granted subsidiary protection in his fourth asylum procedure. As a result of the judgment, the subsidiary protection of the applicant was repeatedly extended. The domestic authorities also informed the CM that all asylum case officers were instructed to follow the ECtHR conclusions. Moreover, a new provision was added to the Asylum Act, including the prohibition of forced return based on other administrative or judicial decisions, if a new asylum request has been filed.[181] The CM considered the judgment as implemented.

178 Diallo v. the Czech Republic, appl. no. 20493/07, 23 June 2011.
179 https://hudoc.exec.coe.int/ENG#{%22fulltext%22:[%22diallo%22],%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECIdentifier%22:[%22004-6340%22]}.
180 Budrevich v. the Czech Republic, appl. no. 65303/10, 17 October 2013.
181 See Action reports: https://hudoc.exec.coe.int/ENG#{%22fulltext%22:[%22Budrevich%22],%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECIdentifier%22:[%22004-6368%22]}.

Hungary

The aforementioned CJEU judgment *FMS*[182] is also relevant to the topic of effective remedies against expulsion. Asylum seekers' applications for international protection were rejected as inadmissible on the "safe transit country" basis, and an expulsion decision to Serbia was issued. Due to the refusal of Serbia to take back the applicants, the NDGAP changed the destination of expulsion to their country of origin - Afghanistan and Iran respectively - without ever examining their asylum applications in terms of their countries of origin. No judicial review was possible according to the law against such a modification of the destination country in the expulsion decision, but the applicants nevertheless submitted a request for judicial review based on the direct application of EU law. As a result, the Szeged Court referred a preliminary reference.

The CJEU ruled that a change of the destination country in a return decision by an administrative authority was to be regarded as a new return decision requiring an effective remedy in compliance with Art. 47 of the Charter. The CJEU also stated that in such a situation, the principle of the primacy of EU law and the right to effective judicial protection had to be interpreted as requiring that the national court dealing with an action contesting the legality, under EU law, of such a return decision declare that it had jurisdiction to hear that action.

Despite the *FMS* judgment, Act II of 2007 on the Entry and Stay of Third Country Nationals has not been amended and still does not provide a judicial remedy against the modification of the destination country of expulsion. In practice, however, such modifications of expulsion decisions are no longer performed by the NDGAP, but the legal uncertainty remains.

Another non-implementation incident related to deportation procedures must be mentioned. In 2016, the HHC lawyers obtained two interim measures from the United Nations Human Rights Committee (UNHRC) regarding returns of persons with PTSD to Bulgaria.[183] These measures were respected and the return was stopped. However, in 2017, another interim measure was granted by the UNHRC, but the Government did not respect the granted interim measure and deported the applicant to Bulgaria. The case is still pending at the UNHRC.[184]

Poland

In Poland, in cases where a return decision based on national security considerations is issued by the Minister of Interior, it can be directly appealed to the court, omitting the second instance administrative authority review. According to national law provisions, such a decision is to be executed immediately[185] and according to the authorities, a return decision, which is immediately enforceable, cannot be suspended by the court.

However, the Supreme Administrative Court, in the decision of 19 January 2021[186] held that in return cases involving national security, such a decision might be suspended by the court. The court referred to general provisions of the proceedings before the administrative courts and to Art. 13 of the Return Directive providing the right to an effective remedy in return cases, which also include the possibility of suspending the execution of the decision.

It appears that the position of the Polish authorities with regard to the possibility of suspending the enforcement of a return decision in a situation where it is immediately enforceable remains unchanged. However, from the HFHR's observation of its cases, the jurisprudence of the Administrative Courts indicates that they recognize their right to suspend such decisions. It can therefore be concluded that the standard contained in the decision mentioned above is being implemented by the courts.

182 C-924/19 PPU and C-925/19 PPU, FMS, 14 May 2020.
183 CCPR/C/125/D/2901/2016, 22 May 2019 and CCPR/C/125/D/2923/2016, 3 June 2019.
184 Communication No. 2963/2017.
185 Art. 329a(2) of the Act of 13 December 2013 on Foreigners.
186 II OZ 1152/20, 19 January 2021, https://orzeczenia.nsa.gov.pl/doc/A1455D03A8.

Slovakia

Slovakia did not respect the interim measure ordered by the **ECtHR** in the *Labsi case*.[187] The case concerned the administrative expulsion of an Algerian national to Algeria. He arrived in Slovakia in April 2006, married a Slovak national and the couple had a child together. His asylum applications were rejected and he was issued an expulsion decision, as well as an extradition order. In June 2008, the Constitutional Court annulled the decision of the Supreme Court regarding extradition.[188] In a repeated procedure, the Supreme Court found that he could not be extradited to Algeria, as there were valid reasons to fear that he would be exposed to ill-treatment there. Still, since he could be expelled to Algeria, based on the final decision on expulsion issued by the Bureau of Border and Foreigners Police in July 2006, he turned to the ECtHR. On 18 July 2008, the Court ordered an interim measure, indicating that the applicant was not to be expelled to Algeria. Regardless of the fact that the interim measure was still in force, on 19 April 2010, Mr. Labsi was expelled to Algeria. The Court found a breach of Art. 3, 13 and 34 of the Convention.

This was the first and only time that the Slovak government did not comply with an interim measure of the ECtHR. When examining the execution of the judgment, the CM "*took note of the declaration by the authorities that they will respect any other interim measure issued in the future by the European Court and that information about the remedies available against decisions refusing to grant asylum will be provided in an updated Action plan*."[189] The CM closed the case as it was considered an isolated instance of disrespect towards an interim measure, and the Act on Residence of Foreigners was amended.[190]

Unfortunately, there was no public discussion on the disregarding of the Court's interim measure. This might be because of the public discourse on the threat of terrorism and the prevalence of a view that is more in line with the MoI's approach.

While the failure to respect the interim measure ordered by the ECtHR was of an "isolated nature", Slovakia did not respect an interim measure ordered by the **Committee of the Rights of the Child** (CRC) either. The case concerned an Afghan national and mother of four minors.[191] Their father has been living in Slovakia since 2010. In 2016, the Taliban started to search for the father and threatened their family. As there had been a real risk that the oldest son might be kidnapped and forcibly recruited by the Taliban, the mother of four decided to leave Afghanistan. They applied for asylum in Slovakia in September 2018, but they were issued a Dublin transfer decision to the Netherlands. They appealed and requested a suspensive effect, based on the claim "*that the child victims would be at risk of being separated from their father, and of being subjected to a chain refoulement to Afghanistan, as the Kingdom of the Netherlands has already rejected their mother's asylum applications in the past*." The Regional Court rejected the request and since the mother and her four children were at risk of transfer to the Netherlands, the mother turned to the CRC in the name of her children. On 19 August 2019, the CRC granted an interim measure and requested that the Slovak government refrain from deporting the children to the Netherlands pending the consideration of their case by the Committee.

The legal representative of the applicants again requested that the Regional Court in Bratislava grant a suspensive effect. On 23 August 2019, the Regional Court denied the request with the reasoning that the applicants "*misleadingly referred to the 'ordinary administrative letter' of the Office of the United Nations High Commissioner for Human Rights*[192] *on granting the interim measure.*" In addition, the Regional Court in Bratislava considered the applicants' actions as "*impermissible influence of the decision of the Court by communicating to the other authorities and attributing the power of a preliminary nature to the ordinary administrative letter, while submission itself distorts the facts and some essential information in the matter.*" The Police officers visited the applicants to transfer them to the Netherlands, regardless of the interim measure imposed by the CRC, as the Bureau of Border and Foreigners office had not been officially informed about the interim measure via state channels. The Permanent Representation of the Slovak Republic in Geneva sent the information to the Ministry of Foreigner Affairs, however, the Ministry of Foreigner Affairs did not inform the Ministry of Interior. The two Ministers only communicated with each other after the intervention of the legal representative, who personally made the transfer impossible, showing the Police officers the interim measure.

Subsequently, the legal representative objected to the narrative of the Regional Court and informed the Court about the communication between the Ministry of Foreign Affairs and the Ministry of Interior, according to which the Slovak

187 Labsi v. Slovakia, appl. no. 33809/08, 15 May 2012.
188 II. ÚS 111/08, 26 June 2008.
189 Sixth Annual report of the Committee of Ministers, https://rm.coe.int/1680592ac8, p. 107.
190 https://hudoc.exec.coe.int/eng#{%22fulltext%22:[%22labsi%22],%22EXECIdentifier%22:[%22004-7703%22],%22EXECDocumentTypeCollection%22:[%22CEC%22]}.
191 CRC/C/90/D/93/2019, 9 June 2022.
192 The Regional Court mistakenly referred to the Office of the UN High Commissioner instead of the Committee on the Rights of the Child.

Republic would not initiate the transfer of the mother and child victims. At the same time, the Court was informed that according to the Dublin III. Regulation,[193] the transfer of the mother and child victims was supposed to be carried out within six months from accepting the request, which did not take place within this timeframe, thus the responsibility was transferred to the Slovak Republic. The Court did not have any other possibility than to annul the Migration Office's decision and return it for further proceedings. In 2020, the asylum procedure on the merits started and the applicants were granted international protection. Based on this development, they agreed to discontinue the case before the CRC.

Given that this case is considered the very first case from Slovakia submitted to the CRC, it may be concluded that the respective state authorities, including the court, did not know the mechanism which they had to comply with.

IV.7. Not following the court's instructions in repeated asylum procedures on the merits

Hungary

Since 2015, Hungarian courts have no power to alter the decision of the asylum office and grant international protection to the applicant.[194] The *Torubarov case*[195] concerns the violation of the right to an effective remedy of an asylum seeker, on account of the non-reformatory power of the courts in cases where the NDGAP keeps rejecting an asylum application provided that no new circumstances have been established. Mr. Torubarov's asylum application was rejected three times between 2013 and 2017, despite the clear instruction given by the court to grant him refugee status on account of his well-founded fear of persecution on the grounds of his political opinions. The CJEU ruled that in order to ensure the right to an effective judicial remedy for asylum seekers, a national court is required to alter the decision of the administrative body that did not comply with its previous judgment, and to substitute is own decision by dis-applying, if necessary, the national law that prohibits it from proceeding with such a step.

Following the CJEU judgment, Mr. Torubarov was granted refugee status by the Hungarian court.[196] Nonetheless, the Torubarov judgment has not been uniformly implemented by the courts. The HHC is aware of a recent case in which the court should have granted international protection based on the principles laid down by the CJEU. Nevertheless, it simply annulled the decision and referred the case back to the NDGAP, without referring to the *Torubarov* judgment at all.[197]

On the other hand, there have also been positive examples in which the court, referencing the *Torubarov* judgment, granted international protection to the asylum seeker.[198] Therefore, it seems unpredictable, and highly dependent on the presiding judge, whether the conclusions of the CJEU in the *Torubarov* judgment will be observed. The general pressure on the independence of the judiciary is thus exposed in these cases.[199] Lack of compliance with the courts' decisions has serious consequences for the applicants, as they are kept in an eternal "ping-pong game" between the court and asylum authority, amounting to a serious infringement on their right to an effective remedy.

A procedure for the enforcement of administrative court decisions should be mentioned at this point.[200] Although this procedure worked in a case, where the applicants were not immediately released from the transit zone despite the court judgment,[201] it cannot be said that the procedure is effective in all "Torubarov-like" scenarios.

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193 Art. 29/1 of the Dublin Regulation III.
194 Sections 1(3)(a) and 14 of the Act no. CXL of 2015 on the amendment of certain laws in the context of mass migration.
195 C–556/17, Torubarov, 29 July 2019.
196 See: https://helsinki.hu/en/the-man-who-defeated-the-hungarian-asylum-system/.
197 11.K.700.169/2022/12, 26 April 2022. More details on the procedure can be found here: https://www.bbc.com/news/world-europe-61808473.
198 For example, judgment no. 17.K.33.123/2019/8 issued by the Metropolitan Administrative and Labour Court on 9 December 2019, granting subsidiary protection to the applicant, after the NDGAP in the fifth subsequent procedure refused to grant him the status despite the clear instruction given by the court in the previous judicial review procedures.
199 See more on the problems of independence of the judiciary in the European Commission's 2022 Rule of Law report on Hungary: https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf.
200 Sections 38(1)(d) and 152(1) of the Code on Administrative Litigation. For detailed description of the procedure see: HHC, Non-Execution of Domestic and International Court Judgments in Hungary, pp. 15-17, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf.
201 Upon the petition of the applicant, submitted on 14 June 2018, the court called on the NDGAP to comply with the judgment, i.e. to place the applicants in another asylum facility (107.K.27.402/2018/3, Administrative and Labour Court of Szeged) and the NDGAP complied with the judgment by relocating the applicants to an open reception facility on 22 June 2018 (106-3-4495/27/2018-M).

In 2018, in the fourth judicial review procedure, the court declared that in the subsequent asylum procedure the applicant had to be recognized as a beneficiary of subsidiary protection.[202] Nevertheless, the NDGAP again refused to grant him protected status. The applicant submitted a judicial review request and initiated a procedure for the enforcement of the judgment. The ordinary courts concluded that the NDGAP had not complied with the court decision and imposed a fine. The NDGAP submitted a constitutional complaint. The Constitutional Court abolished the court rulings,[203] accepting the NDGAP's argument that their right to a fair trial was violated, since the judgment-to-be-enforced was not yet final at the time when the courts ruled about its enforcement. It is interesting to observe that ordinary courts decided in favour of the applicant, but the Constitutional Court, where judges are nominated and elected by the ruling majority, decided against him, protecting the fundamental rights of state bodies. Such decisions are possible, as according to legislative amendments[204] constitutional complaints can be used not only to protect people's rights against state powers, but also to provide constitutional protection to public authorities in their lawsuits vis-à-vis individuals.[205] This enables the state to channel the review of unfavourable court decisions in cases important for the Government out of the ordinary court system to the already packed Constitutional Court, thus enabling politically sensitive court cases to be decided in a way that is favourable to the executive power.[206]

Slovakia

A similar preliminary reference as in the *Torubarov case* (see above) was referred to the CJEU by the Slovak Supreme Court.[207] The case concerned an Iranian asylum seeker who had converted to Christianity and was considered an apostate of the faith. His asylum application was rejected five times by the Migration Office, which did not respect the instructions in court judgments to thoroughly evaluate whether the applicant's conversion to Christianity was to establish a reason for granting international protection. The Supreme Court finally referred a preliminary reference to the CJEU, asking essentially if the court in such a situation could grant international protection, despite no such possibility existing in domestic law. The case never resulted in a CJEU judgment, as the Supreme Court, when being asked by the CJEU, did not consider it necessary to maintain the preliminary reference after the Alheto judgment was delivered.[208]

Even though there was no ruling on preliminary questions, the opinions of the Member States and the European Commission submitted during the preliminary reference procedure gave an "instruction" to the Supreme Court that "*the administrative court is obliged to issue an opinion on whether a particular applicant qualifies for international protection.*" Until then, the Supreme Court had never explicitly provided a legal opinion on granting international protection. Hence, the final reasoning of the Supreme Court's decision actually stated that it was necessary to assess the applicant as credible, and concluded that he had fulfilled the conditions for refugee status.[209] Finally, after almost a decade in the asylum procedure, the Migration Office decided the case in line with the Supreme Court's judgment and granted the applicant refugee status.

Since then, the Supreme Court has been more explicit in the reasoning behind its judgments, and the Migration Office has had less opportunity to use discretion in its decisions on international protection. Nevertheless, cases of not respecting the legal opinions of the courts still occur, despite the Migration Office being bound by the legal opinion of the cassation court.[210] For example, the case of a Turkish asylum seeker had to reach the Supreme Court twice,[211] before the applicant was finally granted refugee status. Or the case of a Ukrainian citizen, in which the Migration Office decision was annulled six times by the courts, stating that the applicant's health status and vulnerability had not been sufficiently assessed.[212]

202 Judgment no. 1.K.27.427/2017/7 of the Administrative and Labour Court of Győr, 8 February 2018.
203 3328/2020 (VIII.5.) AB, 5 August 2020.
204 The constitutional complaint procedure initiated by administrative bodies was made possible in December 2019 by a legislative amendment of the Constitutional Court Act (Act no. CLI of 2011).
205 The critique of the standing of administrative bodies in such procedure can be found here: https://helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf.
206 HHC, Non-Execution of Domestic and International Court Judgments in Hungary, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf, p. 18.
207 C-113/17, request for a preliminary ruling from the Supreme Court of the Slovak Republic, 6 March 2017.
208 C-585/16, Alheto, 25 July 2018. The Supreme Court understood the CJEU judgment in the manner that the Asylum Procedures Directive does not establish a common procedural standard in respect of the courts' power to adopt a decision granting international protection and that Slovakia has to apply the legal system that already exists in which the court may only confirm or annul the decision of the administrative authority.
209 1Sža/20/2016, 19 November 2018.
210 Art. 469 of the Administrative Judicial Order.
211 10Sžak/18/2019, 15 November 2019 and 1Sžak/1/2021, 25 March 2021.
212 One of the judgments annulling the Migration Office decision: Regional Court in Bratislava, Sp. zn.: 4 SaZ/5/2020 – 54, 28 January 2021.

Slovenia

One of the most significant shortcomings of the Slovenian asylum system is the **excessively long duration of procedures**. According to the law, asylum procedures normally need to be concluded within six months, but this is often not respected. When it comes to the appeal, the Administrative Court needs to decide within 30 days, yet court procedures are usually much longer in practice, sometimes lasting up to one year or more. In the vast majority of cases, where the Administrative Court finds faults in the first instance, it annuls the decision and returns the case to the first instance. When the case is returned to the first instance, the Migration Directorate is obliged to issue a new decision within 30 days. However, this is not observed in practice. Instead, the repeated procedure again takes a very long time, which can mean that the entire asylum procedure, from the time of lodging the application to the final decision, may last several years.[213]

In addition, the Migration Directorate often does not respect the decision or the instructions of the Administrative Court, which can further prolong the procedure. For example, despite the court's explicit instructions, the Migration Directorate did not interview the applicant again;[214] or inform the applicant about the particularities of the Dublin procedure, and did not search for relevant country of origin information (COI).[215] The Migration Directorate also disregarded the conclusions of the court by not explaining with concrete examples what inconsistencies it attributed to the applicant, and not performing substantive evidentiary assessment of the applicant's comments on the relevant COI.[216] In other cases, the Migration Directorate did not justify its doubts about the applicant's identity and nationality,[217] or refused to accept that the alleged facts were new facts, contrary to the opinion of the court which had already been expressed twice.[218] Furthermore, the Migration Directorate almost entirely copied the reasoning of the repealed decision,[219] and did not follow the court's legal opinion and its instructions regarding the conduct of the proceedings, thereby committing an absolute violation of the rules of procedure.[220]

213 AIDA Country Report: Slovenia, 2021 update, https://ecre.org/aida-2021-update-slovenia/.
214 I U 617/2019, 23.9.2020.
215 I U 1483/2019-6, 20.9.2019 and I U 653/2019-6, 17.4.2019.
216 I U 1276/2019-19, 13.5.2020, the court granted refugee status, at the time of writing, the application was submitted 2 years and 2 months ago and I U 1224/2017-8, 24.4.2019.
217 I U 1736/2018-8, 20.3.2019.
218 I U 360/2019-9, 8.3.2019; I U 176/2019-11, 30.1.2019.
219 I U 1263/2019-10, 28.1.2021.
220 I U 647/2017, 25. 10. 2017.

V. Conclusions

Czechia

While only a very few leading judgments have been issued by the ECtHR in asylum and migration matters against Czechia, their implementation is almost exemplary. To date, all five leading judgments are considered as having been executed. The cases described above demonstrate that the Czech authorities were ready to amend domestic legislation and practices to satisfy the requirements of the ECtHR. Sometimes the change came about even prior to the ECtHR judgment, as a result of the action of the authorities or the jurisprudence of the Constitutional Court. This is also due to the thorough domestic oversight procedure run by the Czech Expert Committee for the execution of the judgments of the ECtHR and the implementation of the Convention, which includes representatives from civil society, academia, as well as ministries, Parliament, the Ombudsman's Office, the Bar Association and the highest judicial authorities.[221]

Likewise, Czech asylum and migration legislation has not yet been found by the CJEU to be systematically in breach of relevant EU laws. While some of the changes made have been justified with reference to CJEU jurisprudence, these were often not actually required by the jurisprudence, but rather resulted from the compulsory transposition of relevant EU laws in the field of CEAS.

However, most of the above-listed cases and their implementation came about prior to the change in the public discourse on migration in 2015. Considering that since 2015 the domestic authorities continued to apply a more restrictive approach towards asylum and migration, it is questionable whether the pressure from the European level would be sufficient to enforce the implementation of similar judgments today. The 2020 CJEU quota relocation judgment, is a testament to that, illustrating that when asylum and migration become highly politicised, implementation can prove impossible, regardless of how Governments or circumstances change.

This presumption is further enhanced by looking at the domestic level, which offers several additional case studies of recent non-implementation. Three areas of systemic deficiencies in complying with domestic jurisprudence were identified: statelessness, age assessment and immigration detention of children. In all these areas, instead of following the courts' instructions, the authorities either ignore the judgments, amend their practices half-way or even adopt new practices and legislation to circumvent the implementation. In some cases, such attitudes are left unchallenged by lower-instance courts.

Contrary to the effective domestic oversight procedure for the execution of ECtHR judgments, there is no separate procedure for the enforcement of domestic judgments, which would address systemic issues. As the example of non-implementation of statelessness jurisprudence in Czechia shows, applicants for stateless status were each advised to individually litigate their right to be accommodated in a refugee reception centre, despite the fact that the relevant jurisprudence made it clear that its conclusions are applicable broadly to everyone in the same position. Accordingly, only informal mechanisms for systemic changes called for by such judgments may remain, such as advocacy, awareness raising or campaigning. If binding court judgments are left at the will of the authorities and reduced to "just" campaigning tools, serious questions as to the rule of law, as well as the relevance of the domestic checks and balances between the executive and the judiciary arise, reaching way beyond the field of asylum and migration.

Hungary

Soon after the announcement of the illiberal turn in Hungary in July 2014 by Prime Minister Viktor Orbán,[222] an increasingly hostile, Government-generated public discourse on asylum and migration has been present.[223] Borders shall remain closed according to the Government, and migration is bad and dangerous.[224] In September 2015, a "state of crisis due to mass migration" was introduced. This had internally authorised the Hungarian authorities to

221 EIN, Holding Governments to Account for their Record in Implementing Judgments of the European Court of Human Rights, 2021, https://bit.ly/3o3k1rz, p. 12.
222 See: https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/.
223 Nagy, B. (2018). From Reluctance to Total Denial. Asylum Policy in Hungary 2015-2018. In Stoyanova, V., & Karageorgiou, E. (Eds.). The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis. Brill., pp. 17-65., p. 2.
224 Ibid., p. 10.

derogate from common rules set out in the CEAS, with the alleged aim of maintaining public order and preserving internal security. Nevertheless, the established regime resulted in the systemic and grave infringement of the human rights of asylum seekers and migrants.

Against this background, several judgments that were delivered by the ECtHR, CJEU and domestic courts declared serious and systemic human rights violations. As a reaction to these judgments, the Government public discourse on the CJEU and the ECtHR became hostile.

Fewer than 30% of the analysed cases can be considered as having been executed, even partially. The non-implementation of ECtHR judgments is particularly striking, as none of the judgments issued in this field has been considered as implemented by the CM. From the governmental statements,[225] as well as from press publications, it can be deduced that there is no general governmental intent to implement these judgments. The Government's lack of willingness with regard to compliance is also suggested by the fact that more than half of the analysed judgments revolve around violations that were triggered by the legislative measures introduced after 2010. Furthermore, the Human Rights Department of the Ministry of Justice, responsible for the implementation of judgments, is understaffed and there is a lack of meaningful parliamentary oversight.[226]

Amongst the five countries involved in the study, Hungary ranks the highest in the non-implementation of judgments. Hungary is also the only of the studied countries that was referred by the European Commission to the CJEU over its failure to comply with a CJEU judgment under Art. 260 of the Treaty on the Functioning of the European Union in 2021.

Non-implementation of court judgments primarily lies in the inactivity of the legislator or the absence of any change in the practice of law enforcement bodies, *i.e.* the NDGAP and the Police. Additionally, it is only in Hungary that two additional non-implementation methods have been observed: (1) using constitutional complaint procedures, initiated by NDGAP, claiming a breach of the authority's right to a fair trial, which prolongs the implementation procedure extensively (2) implementation in practice, without change in legislation, ensuring that the threat that the unlawful provision could again be used in the future remains real.

As per the lawyers interviewed for this study, the usual justification of authorities for not applying international or EU law is that they are bound by the domestic legislation. In addition, there is a general dependency on the Government and its policy choices. Therefore, state bodies will only decide in exceptional cases against the policy of the Government, even if it is clearly not compliant with EU and international law. The same attitude towards EU and international law vis-á-vis Hungarian law can be observed in the judiciary adjudicating asylum cases. The resistance to interpretations in conformity with EU and international law is even more noticeable when a Hungarian norm is enshrined in the Fundamental Law (Constitution). As one of the attorneys noted, the NDGAP positions itself as if it were omnipotent and had exclusive competence to decide asylum cases. At least that was the standpoint of the Hungarian government articulated during the hearing before the CJEU in the *case of Torubarov*. This is also reflected in the modification of the Asylum Act in 2015, which deprived courts of their reformatory power to grant international protection.

Poland

The analysis of the implementation of Polish cases shows that the attitude of the Polish authorities is inconsistent and depends on the nature of a given judgment and the context in which it was issued. It seems that in cases of high political importance, the Government does not comply with the judgment, ignores it or openly questions it. In doing so, the Government either cites security considerations or claims that there has been no breach of the law. This is the case primarily in judgments relating to refugee's access to the territory of Poland – on the border or through the relocation mechanism.

225 Prime Minister of Hungary Viktor Orbán said on a radio show in 2017 after the delivery of the Ilias and Ahmed judgment by the Chamber (1st instance): https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-on-kossuth-radio-s-programme-180-minutes20170331. Similar statements from Minister Lázár and the Head of the Fidesz Parliamentarian fraction, Mr. Halász: https://hvg.hu/itthon/20170330_Kormanyinfo_CEUtol_Orbanig__percrol_percre/2?isPrintView=False&liveReportItemId=0&isPreview=False&ver=1&order=desc, https://444.hu/2017/03/31/a-fidesz-felszolitotta-a-kormanyt-hogy-ne-fizessek-ki-a-helsinki-bizottsagnak-amit-az-europai-birosag-megitelt-a-szamukra. Statement on thinking about quitting ECHR by Vejkey Imre, a party member of KDNP (coalition party of FIDESZ in the Government), https://magyarnarancs.hu/kulpol/mintha-itt-sem-lennenk-128355 and https://bit.ly/3rNWQSw, speeches 35-109. See a comprehensive collection of declarations of public figures in the presentation of Nagy B., https://bit.ly/3ylOWCv.

226 HHC, Non-Execution of Domestic and International Court Judgments in Hungary, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf, pp. 53, 54.

By contrast, in cases of no such political importance, or in technical or procedural matters, the Polish authorities seem to be executing court judgments (see for example CJEU cases in Annex I). However, if a political need emerges, the practice changes, and the Polish government ceases to act in accordance with the relevant case law. The return to the policy of automatically detaining children in connection with the situation on the Polish-Belarusian border, despite the improvements after the *Bistieva* judgment, is a clear example of this approach.

Naturally, the political context in which the Polish authorities almost openly manifest their distrust towards EU institutions and human rights cannot be ignored. In such a situation, judgments on other than migration issues are not executed either. Yet it seems that in a situation where there are effective (financial) sanctions for non-execution, the Polish government takes certain steps to enforce the judgments, even if it does not agree with them.[227] This raises concerns as to the effectiveness of the legal protection system, where the execution of judgments will largely depend on serious sanctions and pressure on the Government, including from international institutions.

Slovakia

In general, the enforcement of judgments receives very little attention in Slovakia. The ECtHR judgments have in most cases been implemented, except the interim measure in the *Labsi case*, which entailed serious consequences for the applicant deported back to his country of origin. The Government's action might be viewed as undermining the Strasbourg Court's authority, but as this case happened 12 years ago, compensation was paid and no similar instances of disrespect by the Slovak government have occurred, it is possible to agree with the conclusions of the CM that the case was isolated in nature.

When it comes to the non-execution of domestic judgments, the example of non-implementation by adopting new legislation overruling a Constitutional Court judgment concerning access to classified data is particularly striking.

Additional shortcomings were identified regarding the non-respect of the courts' legal opinions in repeated asylum proceedings. There is no appointed state authority that supervises the implementation of final judgments within the administrative judicial system. However, the Administrative Procedure Code does foresee the supervision of enforcing judgments: if the administrative authority did not act by the court's legal opinion in further proceedings and the court again annulled the administrative authority's decision, the administrative court may impose a fine on the administrative authority, even without a proposal by the applicant.[228] However, no fine has ever been imposed on the Bureau of Border and Foreigners Police or the Migration Office in any of the non-implemented cases described in this study, despite the request of the Human Rights League lawyers.

Slovenia

Slovenia has no issues with the implementation of regional judgments, as all CJEU judgments can be considered as implemented and no ECtHR judgments have been identified within the scope of this study.

The implementation of domestic judgments, however, does not mirror a similarly forward-looking outcome. The most notable non-implementation issues linked to the anti-migration stance of the previous Government, and harshly criticised by the Ombudsman and civil society, are the re-introduction of amendments to legislation curtailing the right of access to asylum, despite similar provisions having already been ruled unconstitutional, and the non-implementation of the Supreme Court's collective expulsion judgment. Given that there was a change in Government after the April 2022 elections, there is reason to believe that access to asylum and the prohibition of collective expulsion will be more effectively ensured in the future.

Delays in the implementation of judgments should also be mentioned. It took the legislature four years after the Supreme Court judgment to enact the right to an interpreter during consultations with a legal representative. On the other hand, alternatives to detention are still not included in the legislation, and therefore judgments touching upon this issue cannot be considered implemented.

Immigration detention jurisprudence had further compliance issues. The grounds for detention connected to the risk of absconding were misapplied. One Supreme Court judgment was not enough to change the problematic practice, and the Administrative Court had to openly criticise the Migration Directorate for non-compliance with the Supreme

227 See for example planned dissolution of disciplinary chamber of the Supreme Court to execute CJEU decision: https://apnews.com/article/poland-warsaw-andrzej-duda-ursula-von-der-leyen-9b722a30cf08fc760a951e03fe11128f, https://www.politico.eu/article/poland-dissolve-judicial-disciplinary-mechanism-eu-court-justice-pressure/.

228 Art. 191/6 Administrative Procedure Code.

Court judgment in several follow up judgments before the Migration Directorate in fact halted this unlawful practice. It is also important to note that the practice of the Administrative Court is not always uniform, thereby contributing to the failure to implement judgments.

Finally, lengthy procedures are one of the core shortcomings in the Slovenian asylum system. When, on the top of this systemic shortcoming, the Migration Directorate does not respect the court's legal opinion in a re-opened procedure, which unnecessarily (and unlawfully) prolongs already lengthy procedures, the situation becomes critical, leaving asylum seekers in a state of prolonged uncertainty and limbo, negatively affecting their mental wellbeing.

As the Administrative Court put it: *"Non-compliance with the final judgment of the Administrative Court is not only a violation of the Act on Administrative Dispute, but with such behaviour the defendant also violates the constitutional principles of the rule of law, the division of powers and the independence of the judiciary and democratic system, which is based, among other things, on the protection of human rights, for which the courts are responsible at the last stage of (administrative) decision-making."*[229]

The findings above show that the non-implementation of judgments in the field of asylum and migration is an issue in each of the five studied countries. While in **Czechia**, **Slovakia** and **Slovenia**, the worrying trends of non-implementation were observed mainly with regard to domestic court judgments, **Hungary** and **Poland** also have very poor records when it comes to the implementation of ECtHR judgments. As for the CJEU judgments, **Hungary** stands out as a striking leader in non-implementation. On a positive note, notwithstanding the stance of **Hungary** and **Poland**, the primacy of EU law has not been ruled upon by the Constitutional Courts in either of these two countries regarding the CJEU cases concerning asylum and migration, despite the submission having been initiated by the Hungarian government.

While the extent and form of the non-implementation of judgments differ in all the studied countries, it seems that the more instrumentalized the issue of migration is in a certain country, the greater the risk of non-compliance with jurisprudence may become. The Governments openly question and intentionally ignore the authority of the courts in politically sensitive questions.
As a recent study on the non-implementation of European courts' judgments showed, it is noteworthy that the majority of the highest non-implementing countries are also those with much broader and more systemic rule-of-law issues, including attacks on the independence of the judiciary and of other oversight institutions.[230] As such, the fact that in this year's Rule of Law Report the European Commission for the first time included an overview of the implementation of rulings of the ECtHR in Member States is welcome.[231]

Leaving the authorities to pick and choose the decisions they implement is thus detrimental to the rule of law and the effective protection of human rights and *"can create a perception in the public that judgments can be disregarded, which undermines general trust in the force of fair adjudication"*.[232] In such an environment, it is important to bear in mind that besides strategic litigation addressing systemic protection gaps, the work cannot stop when a positive judgment has been achieved. A close follow-up on implementation is required, through advocacy, awareness raising and, if necessary, further litigation. This has also been the aim of the present study, to bring to the public's attention the issue of the non-implementation of judgments in the field of asylum and migration in **Czechia**, **Hungary**, **Poland**, **Slovakia** and **Slovenia**, the consequences of which severely affect the rights of a very vulnerable population and leave them without an effective remedy. As Nils Muižnieks puts it, *"non-implementation is also our shared responsibility and we must not turn a blind eye to it any longer"*.[233]

229 I U 1483/2019-6, 20.9.2019.
230 EIN, Justice Delayed and Justice Denied: Non-Implementation of European Courts Judgments and the Rule of Law: https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/625ebfc1e6ed036bcd0dfbdb/1650376644973/dri-ein-publication-final-webpdf-625e8cb9c19e5.pdf, p. 5.
231 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the committee of the regions: 2022 Rule of Law Report - The rule of law situation in the European Union https://ec.europa.eu/info/sites/default/files/1_1_194062_communication_rol_en.pdf.
232 HHC, Non-Execution of Domestic and International Court Judgments in Hungary, 2021, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf.
233 Nils Muižnieks, Human Rights Comment, Non-implementation of the Court's judgments: our shared responsibility, 23.8.2016, https://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility.

Annex I: List of CJEU rulings in the field of asylum and migration

Czechia

Judgment	Subject	Date of the ruling	Implemented*	Non-implemented (or only partially)*
C-534/11, Arslan	RCD I Art. 7+21; APD I Art. 7(1); RD Art. 2(1); detention	30 May 2013	x	
C-528/15, Al-Chodor	Dublin III Art. 28; risk of absconding	15 Mar 2017	x	
Joined cases C-391/16, C-77/17 and C-78/17, M. and Others	QD II Art. 14; Charter Art. 18; revocation status; Art. 78(1)	14 May 2019	x	
Joined cases C-715/17, C-718/17 and C-719/17, Commission v. Poland, Hungary and Czech Republic	failure to comply with relocation decisions	2 Apr 2020		x

Hungary

Judgment	Subject	Date of the ruling	Implemented*	Non-implemented (or only partially)*
C-31/09, Bolbol	QD I Art. 12(1)(a); Palestinian exception	17 June 2010	x	
C-364/11, El Kott	QD I Art. 12(1)(a); Palestinian exception	19 Dec 2012	x	
C-695/15, Mirza	Dublin III Art. 3(3) +18(2); safe third country	17 Mar 2016	x	
C-473/16, F.	QD II Art. 7; homosexuality test	25 Jan 2018	x	
C-369/17, Ahmed	QD II Art. 17(1)(b); exclusion ground	13 Sep 2018		x
C-556/17, Torubarov	APD II Art. 46(3); power to amend decisions of competent authority	29 Jul 2019		x
C-519/18, TB	FRD Art. 10(2) family member dependent on refugee	12 Dec 2019		x
C-564/18, LH	APD II Art. 33; Charter Art. 47; inadmissible applications	19 Mar 2020		x
Joined cases C-715/17, C-718/17 and C-719/17, Commission v. Poland, Hungary and Czech Republic	failure to comply with relocation decisions	2 Apr 2020		x

Joined cases C-924/19 PPU and C-925/19 PPU, FMS	APD II Art. 33(2); Hungarian Border; detention; RD Art. 13+15	14 May 2020		x
C-808/18, EC v. Hungary	APD incorrect application of CEAS measures; RD Art. 5+6+12+13; procedural guarantees	17 Dec 2020		x
C-406/18, PG	APD II Art. 31; Charter Art. 47; effective judicial remedy	19 Mar 2020		x
C-821/19, EC v. Hungary	APD II Art. 8+12+22+33; failure to fulfil obligations; grounds inadmissibility; RCD II Art. 10(4); failure to fulfil obligations; grounds inadmissibility	16 Nov 2021		x

Poland

Judgment	Subject	Date of the ruling	Implemented*	Non-implemented (or only partially)*
C-403/16, El Hassani	Visa Code Art. 32; effective remedy	13 Dec 2017	x	
Joined cases C-715/17, C-718/17 and C-719/17, Commission v. Poland, Hungary and Czech Republic	failure to comply with relocation decisions	2 Apr 2020		x
C-949/19, M.A.	Researchers and Students Directive Art. 34(5); effective remedy; Art. 47 Charter; Schengen Code Art. 21(2); Charter Art. 47; effective remedy	10 Mar 2021	x	

Slovenia

Judgment	Subject	Date of the ruling	Implemented*	Non-implemented (or only partially)*
C-662/17, E.G.	APD II Art. 46(2) subsidiary protection	18 Oct 2018	x	
C-490/16, A.S.	Dublin III Art. 13(1)+27(1); irregular crossing	26 Jul 2017	x	
C-578/16 (PPU), C.K.	Dublin III Art. 17(1); Art. 4 Charter; transfer of mentally ill	16 Feb 2017	x	
C-186/21 PPU, J.A.	Deprivation of liberty of an asylum seeker	3 June 2021	x	

* Based on the opinion of the national researchers for this study

Annex II: List of ECtHR judgments in the field of asylum and migration

Czechia

Name of the case	Leading case	Articles of ECHR violated	Date the judgment became final	Implemented (CM closed the case)	Not yet implemented
Singh v. the Czech Republic, appl. no. 60538/00	x	Art. 5(1)(f), 5(4)	25 January 2005	x	
Rashed v. the Czech Republic, appl. no. 298/07	x	Art. 5(1)(f), 5(4)	27 November 2009	x	
Diallo v. the Czech Republic, appl. no. 20493/07	x	Art. 3, 13	28 November 2011	x	
Buishvili v. the Czech Republic, appl. no. 30241/11		Art. 5(4)	25 January 2013	x	
Budrevich v. the Czech Republic, appl. no. 65303/10	x	Art. 3, 13	23 January 2014	x	

Hungary

Name of the case	Leading case	Articles of ECHR violated	Date the judgment became final	Implemented (CM closed the case)	Not yet implemented
Lokpo and Touré v. Hungary, appl. no. 10816/10	x	Art. 5	8 March 2012		x
Al-Tayyar Abdelhakim v. Hungary, appl. no. 13058/11		Art. 5	23 October 2012		x
Hendrin Ali Said and Aras Ali Said v. Hungary, appl. no. 13457/11		Art. 5	23 October 2012		x
Nabil and others v. Hungary, appl. no. 62116/12		Art. 5	22 September 2015		x
O.M. v. Hungary, appl. no. 9912/15		Art. 5	5 July 2016		x
Ilias and Ahmed v. Hungary [GC], appl. no. 47287/15	x	Art. 3	21 November 2019		x
M.K. v. Hungary, no. 46783/14		Art. 5	9 June 2020		x
Rana v. Hungary, appl. no. 40888/17	x	Art. 8	16 July 2020		x
Sudita Keita v. Hungary, appl. no. 42321/15	x	Art. 8	12 August 2020		x
R.R. and Others v. Hungary, appl. no. 36037/17		Art. 3, Art. 5(1), Art. 5(4)	5 July 2021		x
Shahzad v. Hungary, appl. no. 12625/17		Art. 4 of Protocol 4, Art. 13	8 October 2021		x

M.B.K. and Others v. Hungary, appl. no. 73860/17		Art. 3, Art. 5(1), Art. 5(4)	24 February 2022		x
A.A.A. And Others v. Hungary, appl. no. 37327/17		Art. 3, Art. 5(1), Art. 5(4)	9 June 2022		x
H.M. and Others v. Hungary, appl. no. 38967/17		Art. 3, Art. 5(1), Art. 5(4)	10 October 2022		x

Poland

Name of the case	Leading case	Articles of ECHR violated	Date the judgment became final	Implemented (CM closed the case)	Not yet implemented
Shamsa v. Poland, appl. nos. 45355/99 and 45357/99	x	Art. 5(1)	27 November 2003	x	
Bistieva and Others v. Poland, appl. no. 75157/14	x	Art. 8	10 April 2018		x
A.B. and Others v. Poland, appl. no. 15845/15		Art. 8	4 June 2020		x
M.K. and Others v. Poland, appl. nos. 40503/17, 42902/17 and 43643/17	x	Art. 3, Art. 4 of Protocol 4, Art. 13, Art. 34	23 July 2020		x
Bilalova and Others v. Poland, appl. no. 23685/14		Art. 8	26 July 2020		x
D.A. and Others v. Poland, appl. no. 51246/17		Art. 3, Art. 4 of Protocol 4, Art. 13, Art. 34	22 November 2021		x
Nikoghosyan and Others v. Poland, appl. no. 14743/17		Art. 8	3 June 2022		x

Slovakia

Name of the case	Leading case	Articles of ECHR violated	Date the judgment became final	Implemented (CM closed the case)	Not yet implemented
Labsi v. Slovakia, appl. no. 33809/08	x	Art. 3, Art. 13, Art. 34	15 May 2012	x	
Akhadov v. Slovakia, appl. no. 43009/10	x	Art. 5(4)	28 January 2014	x	

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