EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Border-zone detention of two asylum-seekers was unlawful and their removal from Hungary to Serbia exposed them to the risk of inhuman and degrading reception conditions in Greece

The case of **Ilias and Ahmed v. Hungary** (application no. 47287/15) concerned the border-zone detention for 23 days of two Bangladeshi asylum-seekers as well as their removal from Hungary to Serbia. In today's **Chamber** judgment[1] in the case the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 5 §§ 1 and 4 (right to liberty and security) of the European Convention on Human Rights because the applicants' confinement in the Röszke border-zone had amounted to detention, meaning they had effectively been deprived of their liberty without any formal, reasoned decision and without appropriate judicial review;

no violation of Article 3 (prohibition of inhuman or degrading treatment) as concerned the conditions of their detention in the transit zone, but **a violation of Article 13 (right to an effective remedy)** as concerned the lack of an effective remedy with which they could have complained about their conditions of detention; and,

a violation of Article 3 on account of the applicants' expulsion to Serbia insofar as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman or degrading treatment.

The Court found in particular that, in the applicants' asylum proceedings, the Hungarian authorities had: failed to carry out an individual assessment of each applicant's case; schematically referred to the Government's list of safe third countries; disregarded the country reports and other evidence submitted by the applicants; and imposed an unfair and excessive burden on them to prove that they were at real risk of a chain-*refoulement* situation, whereby they could eventually be driven to Greece to face inhuman and degrading reception conditions.

Principal facts

The applicants, Md Ilias Ilias and Ali Ahmed, are Bangladeshi nationals who were born in 1983 and 1980.

Having left Bangladesh, the applicants transited through Greece, "the former Yugoslav Republic of Macedonia" and Serbia, eventually arriving in Hungary on 15 September 2015. They immediately applied for asylum. For the next 23 days they stayed inside the Röszke transit zone situated on the border between Hungary and Serbia; they could not leave in the direction of Hungary as the zone was surrounded by a fence and guarded.

Following two sets of asylum proceedings, they were removed from Hungary essentially on the strength of a Government Decree, introduced in 2015, listing Serbia – the last country through which the applicants had transited – as a safe third country. The asylum authorities notably found that psychiatrist reports, following their visits with the applicants, had not shown that the applicants had

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

special needs which could not be met in the transit zone. Nor had the applicants referred to any pressing individual circumstances to substantiate their assertion that Serbia was not a safe country for them. The domestic court upheld this decision which was served on the applicants on 8 October 2015. They were immediately escorted to the Serbian border, leaving the transit zone without physical coercion being applied.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security) and Article 5 § 4 (right to have lawfulness of detention decided speedily by a court), the applicants alleged that the 23 days they had spent in the transit zone amounted to a deprivation of liberty which had no legal basis and which could not be remedied by appropriate judicial review.

Further relying on Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy), they alleged that their protracted confinement in the transit zone in substandard conditions, especially given that they had been suffering from posttraumatic stress disorder, had been inhuman. Further relying on Article 3, they alleged that their expulsion to Serbia, without a thorough and individualised assessment of their cases, had exposed them to possible chain-*refoulement* – via Serbia and FYROM – to Greece, where they had been at risk of inhuman reception conditions. They further claimed that the inadequacy of the asylum proceedings had been aggravated by the fact that the only legal information the authorities had given the applicants, who were illiterate, had been written, and that one of them had been interviewed in a language he did not speak.

The application was lodged with the European Court of Human Rights on 25 September 2015.

Judgment was given by a Chamber of seven judges, composed as follows:

Ganna **Yudkivska** (Ukraine), *President*,
Vincent A. **De Gaetano** (Malta),
András **Sajó** (Hungary),
Nona **Tsotsoria** (Georgia),
Krzysztof **Wojtyczek** (Poland),
Gabriele **Kucsko-Stadlmayer** (Austria),
Marko **Bošnjak** (Slovenia),

and also Marialena **Tsirli**, *Section Registrar.*

Decision of the Court

Article 5 §§ 1 and 4 (unlawfulness of applicants' detention in the transit zone, without judicial review)

The Court found that the applicants' confinement for more than three weeks in the Röszke transit zone, in a guarded compound which could not be accessed from the outside (even by their lawyer), had amounted to a *de facto* deprivation of their liberty. It doubted that the applicants would have voluntarily left the transit zone in the direction of Serbia, as suggested by the Government, as they would have run the risk of forfeiting their asylum claim and *refoulement*.

Furthermore, the applicants' detention had been more of a practical arrangement than a formal decision of legal relevance, complete with reasoning. The applicants had thus been deprived of their liberty without any formal decision. The Government's submissions, according to which the applicants' stay at the transit zone had not amounted to detention but nevertheless had a compelling basis in national law, namely section 71/A (1) and (2) of the Asylum Act, only cast doubt

on the clarity and foreseeability of the domestic provisions in question. Indeed, the Court found it difficult to identify in those provisions any reference to the possibility of detention at the transit zone. It followed that the applicants' detention could not be considered "lawful", in violation of Article 5 § 1.

Moreover, it was quite inconceivable how the applicants could have pursued any judicial review of their detention in the transit zone in such circumstances, their detention not having been ordered in any formal proceedings or taken any shape of a decision. The Court therefore concluded that the applicants had not had the possibility of bringing "proceedings by which the lawfulness of [their] detention [could have been] decided speedily by a court", in violation of Article 5 § 4.

Articles 3 and 13 (conditions of detention)

The Court considered that the applicants' conditions of detention had been satisfactory. They had been the only occupants of a container measuring 13 square metres meant to sleep five; they had been provided with sanitary facilities in separate containers; they had been given three meals daily; and the health-care facilities, including their having had access to a psychiatrist, had generally been favourable. Indeed, in a report issued soon after the applicants had left the transit zone, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") had described the conditions in the transit zone as acceptable.

Furthermore, although the Court took into account psychiatric reports which found that the applicants had been suffering from post-traumatic stress disorder, it considered that they had not been more vulnerable than any other adult asylum-seeker detained at the time.

In view of the above as well as the relatively short time involved, the Court concluded that the applicants' conditions of detention had not reached the minimum level of severity necessary to constitute inhuman treatment under Article 3. There had therefore been no violation of Article 3.

Nevertheless, it considered that the applicants' complaints concerning their conditions of detention had raised serious questions of fact and law requiring examination on the merits. Yet the Government had not indicated any remedies by which the applicants could have complained about the conditions in which they had been held in the transit zone. There had therefore been a violation of Article 13.

Article 3 (risk of inhuman and degrading treatment)

First, the Court noted that the Government had not convincingly explained why there had been an abrupt legislative change in July 2015 in the Hungarian stance on Serbia from the perspective of asylum proceedings, Serbia not having been considered a safe country up until that point. This reversal of attitude was of particular concern, especially given the reservations expressed as late as December 2016 by the United Nations High Commissioner for Refugees and respected international human rights organisations about removal to Serbia.

As concerned the applicants' asylum proceedings, the Court found that the procedure applied by the Hungarian authorities had not provided the necessary protection against a real risk of inhuman and degrading treatment. Notably, having failed to carry out an individual assessment of each applicant's case, the authorities had: schematically referred to the Government's list of safe third countries; disregarded the country reports and other evidence submitted by the applicants; and imposed an unfair and excessive burden on them to prove that they were at real risk of a chain-*refoulement* situation, whereby they could eventually be driven to Greece to face inhuman and degrading reception conditions.

Aside from those shortcomings, the Court further observed that, owing to a mistake, the first applicant had been interviewed and given an information leaflet on asylum proceedings in a language he did not understand. As a consequence, his chances of actively participating in the

proceedings and explaining the details of his flight from his country of origin had been extremely limited. In addition, despite the applicants being illiterate, all the information they had received on the asylum proceedings had been contained in a leaflet. The authorities had thus failed to provide the applicants with sufficient information on the procedure. Moreover, a translation of the decision in their case had only been given to their lawyer at a time when they had already been outside Hungary for two months.

The Court therefore concluded that the applicants had not had the benefit of effective guarantees which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment, in breach of Article 3 of the Convention.

Article 41 (just satisfaction)

The Court held that Hungary was to pay each applicant 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 8,705 for costs and expenses.

The judgment is available only in English.

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