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

FOURTH SECTION

DECISION

Application no. 64194/16
M.S.
against Hungary

The European Court of Human Rights (Fourth Section), sitting on 26 September 2017 as a Committee composed of:

Faris Vehabović, *President,*
Carlo Ranzoni,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above application lodged on 9 November 2016,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr M.S., is a Somali national who was born in 1997. The President granted the applicant's request for his identity not to be disclosed to the public (Rule 47 § 4). He was represented before the Court by Ms B. Pohárnok, a lawyer practising in Budapest.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. The applicant left Somalia on 7 December 2015 fearing forced recruitment by the Islamist militant group al-Shabab. Travelling through Turkey, he entered the territory of the European Union in Greece where he

was registered in the EURODAC system. After a short stay in Greece, he continued his journey through the former Yugoslav Republic of Macedonia and Serbia to Hungary.

4. In Hungary, the applicant was apprehended by the police on 8 April 2016. He requested asylum on the next day.

5. On 12 August 2016 the Citizenship and Immigration Authority ("the asylum authority") ordered the applicant's transfer back to Greece under EU Regulation no. 604/2013 of the European Parliament and of the Council of 26 June 2013 ("the Dublin III Regulation"; see paragraph 11 below). Pending the transfer, he was assigned to the Bicske reception centre.

6. On 18 October 2016 the Budapest Administrative and Labour Court dismissed an application lodged by the applicant for a review of the decision of 12 August 2016.

7. On 9 November 2016 the applicant applied for an interim measure under Rule 39 of the Rules of Court. On 10 November 2016 the Court decided, in the interest of the parties and the proper conduct of the proceedings before it, to indicate to the respondent Government that the applicant should not be removed to Greece for the duration of the proceedings before the Court.

8. On 6 January 2017 the respondent Government informed the Court that the applicant had left the reception centre to which he had been assigned. As a consequence, the asylum proceedings were discontinued pursuant to section 66(2)(d) of the Act no. LXXX of 2007 on Asylum ("the Asylum Act"; see paragraph 10 below).

9. On 24 January 2017 the applicant's lawyer informed the Court that the applicant was in Austria, seeking asylum in that country, and that he would like to maintain the application.

B. Relevant domestic and European Union law and international information

10. In so far as relevant, the Asylum Act provides as follows:

Section 66

"(2) The asylum authority shall base its decision on the information at its disposal or discontinue the proceedings if the person requesting recognition ...

...

d) has left the designated accommodation or place of residence for more than 48 hours for an unknown destination and does not properly justify his or her absence ..."

11. In so far as relevant, the Dublin III Regulation provides as follows:

Article 13
Entry and/or stay

"1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to in Regulation (EU) No 603/2013, that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place.

2. When a Member State cannot or can no longer be held responsible in accordance with paragraph 1 of this Article and where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3), that the applicant - who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established - has been living for a continuous period of at least five months in a Member State before lodging the application for international protection, that Member State shall be responsible for examining the application for international protection.

If the applicant has been living for periods of time of at least five months in several Member States, the Member State where he or she has been living most recently shall be responsible for examining the application for international protection."

12. The Recommendation of the European Commission addressed to the Member States on the resumption of transfers to Greece under the Dublin III Regulation (Recommendation C(2016)8525 adopted on 8 December 2016) contains the following passages:

Modalities of resumption of transfers

"(8) It is recommended that the transfer of asylum applicants to Greece under Regulation (EU) No 604/2013 should be resumed under the conditions and following the modalities set out in points 9 and 10.

Scope

(9) The resumption of transfers should apply to asylum applicants who have entered Greece irregularly at external borders from 15 March 2017 onwards or to other persons for whom Greece is responsible under criteria other than Article 13 in Chapter III of Regulation (EU) No 604/2013 from that date gradually, following the capacities of reception and treatment of applicants in Greece [in] conformity with Directives 2013/32/EU and 2013/33/EU. Vulnerable asylum applicants, including unaccompanied minors, should not be transferred to Greece for the time being.

Co-operation and individual assurances

(10) Before transferring an applicant to Greece, Member State authorities are invited to cooperate closely with the Greek authorities in order to ensure that the conditions indicated in point 9 are met and in particular that the applicant will be received in a reception facility meeting the standards set out in EU law, in particular in the Reception Conditions Directive 2013/33/EU, that his or her application will be examined within the deadlines specified in the Asylum Procedures Directive

2013/32/EU, and that he or she will be treated in line with EU legislation in every other relevant respect. The Greek authorities are invited to fully co-operate in providing such assurances to the other Member States."

13. A statistical update on the Dublin system ("The Dublin system in 2016 – Key figures from selected European countries"), published in March 2017 in the Asylum Information Database managed by the European Council on Refugees and Exiles, contains the following passages:

> "[A] sizeable drop has occurred in the number of Dublin transfers to Hungary, from 1,402 in 2015 to 513 in 2016, even though the country remains among the top recipients of Dublin requests. As many as 26,698 requests were made to Hungary, namely by Germany (11,843), Austria (9,044) and France (2,283). The decline in Dublin transfers to Hungary could be related to increasing pronouncements by national courts and appeal bodies on risks of ill-treatment contrary to the fundamental rights of the individuals concerned. Since the enactment of restrictive amendments to the Hungarian Asylum Act in the summer of 2015, administrative authorities and courts in at least 15 countries have ruled against Dublin transfers to Hungary.
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> ...
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> Dublin returns to Greece have remained minimal in 2016, with no more than 3 incoming transfers. However, following a Commission Recommendation in favour of the resumption of Dublin returns to Greece, starting from 15 March 2017, 6 countries including Germany, Austria and Belgium have indicated an intention to restart transfers."

14. In accordance with a recent statistical report of the Hungarian Helsinki Committee ("Hungary: Key Asylum Figures as of 1 June 2017"), between January and May 2017 126 asylum-seekers were returned to Hungary under the Dublin III Regulation, primarily from Austria (seventy-nine) and Germany (thirty).

15. On 10 April 2017 the United Nations High Commissioner for Refugees called for a temporary suspension of all transfers of asylum-seekers to Hungary from other European States under the Dublin Regulation.

COMPLAINTS

16. The applicant complained under Article 3 of the Convention that his transfer to Greece under the Dublin III Regulation would expose him to a risk of inhuman and degrading treatment. Under Article 13 read in conjunction with Article 3, he further complained of the absence of an effective remedy against the transfer order.

THE LAW

17. The applicant argued that his transfer back to Greece under the Dublin III Regulation would constitute a violation of Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

18. He further complained of the absence of an effective domestic remedy in that respect, allegedly in breach of Article 13 of the Convention, which provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

19. The Court notes that the asylum proceedings, in which the applicant's transfer from Hungary to Greece had been ordered, were discontinued (see paragraph 8 above).

20. The Court must therefore ascertain whether the new facts brought to its attention – namely the termination of the asylum proceedings in respect of the applicant – may lead it to conclude that the matter has now been resolved or whether, for any other reason, it is no longer justified to continue the examination of the application, and that the application may consequently be struck out of its list of cases in accordance with Article 37 § 1 of the Convention, which provides:

> "The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
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> (a) the applicant does not intend to pursue his application; or
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> (b) the matter has been resolved; or
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> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
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> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

21. Since the applicant gave clear indication that he intended to pursue his application (see paragraph 9 above), sub-paragraph (a) of Article 37 § 1 is not applicable. That does not, however, rule out the possibility of applying sub-paragraphs (b) and (c), the applicant's consent not being a prerequisite for their application (see *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 41, 24 October 2002).

22. The Court observes that according to its established case-law, once an applicant under threat of expulsion has been granted a residence permit and no longer risks being expelled, it considers the matter to have been resolved within the meaning of Article 37 § 1 (b) of the Convention and strikes the application out of its list of cases, even without the applicant's

agreement. The reason for this is that the Court has consistently approached the issue as one of a potential violation of the Convention, and the threat of a violation is removed by virtue of the decision granting the applicant the right of residence in the respondent State concerned (see *Khan v. Germany* [GC], no. 38030/12, § 33, 21 September 2016).

23. On the other hand, in some cases where the applicant has not been granted a residence permit, the Court has held that it was no longer justified to continue to examine the application, within the meaning of Article 37 § 1 (c) of the Convention, and decided to strike it out of its list of cases because it was clear from the information available that the applicant no longer faced any risk, at that time or for a considerable time to come, of being expelled and subjected to treatment contrary to the Convention (in those particular cases, treatment contrary to Article 8 of the Convention), and that he or she had the opportunity to challenge any new expulsion order before the national authorities and if necessary before the Court (see *Khan*, cited above, § 34, with further references).

24. The Court also reiterates that it has struck out applications after having been informed by the respondent Government that the national authorities no longer intended to expel the applicant to the country of destination in the near future or for some time to come, even though that information had not been accompanied by any formal undertaking by the respondent Government (see, among many other authorities, *Ozbeek v. the Netherlands* (dec.), no. 40938/09, 9 October 2012; *Abdi Mohammed v. the Netherlands* (dec.), no. 2738/11, 4 December 2012; *I.A. v. the Netherlands* (dec.), no. 76660/12, 27 May 2014; and *S.S. v. the Netherlands* (dec.), no. 67743/14, 1 September 2015).

25. In the light of the available international information concerning, on the one hand, the very constrained resumption of Dublin transfers to Greece (see paragraphs 12 and 13 above) and, on the other hand, the cautious treatment of transfers to Hungary (see paragraphs 13 and 14 above) and even their suggested temporary halt (see paragraph 15 above), the Court is not convinced that the applicant would face, in the near future, the risk of being transferred back to Hungary for a resumption of his asylum proceedings there, or to Greece under the Dublin III Regulation.

26. The Court is therefore of the view that the applicant no longer faces, at the present time or in the foreseeable future, any risk of being transferred from Hungary to Greece. Furthermore, in the event of a newly impending transfer to Greece, he would have the opportunity, if necessary, to lodge a fresh application with the Court.

27. The Court further considers that the present case does not involve any special circumstances regarding respect for human rights as guaranteed by the Convention and the Protocols thereto requiring the continued examination of the application (Article 37 § 1 *in fine* of the Convention).

28. Under those circumstances, the Court considers that it is not justified to continue the examination of the application (Article 37 § 1 (c) of the Convention).

29. Accordingly, it is appropriate to lift the interim measure indicated under Rule 39 of the Rules of Court and to strike the application out of the list of cases.

For these reasons, the Court, unanimously,

Decides to lift the interim measure indicated to the Hungarian Government under Rule 39 of the Rules of Court;

Decides to strike the application out of its list of cases.

Done in English and notified in writing on 19 October 2017.

Andrea Tamietti
Deputy Registrar

Faris Vehabović
President