



Multiple violations concerning Afghan family whose daughter died at Croatian border

In today's **Chamber judgment**¹ in the case of [M.H. and Others v. Croatia](#) (applications nos. 15670/18 and 43115/18) the European Court of Human Rights held that there had been:

unanimously, a **violation of Article 2 (right to life)** of the European Convention on Human Rights as concerned the investigation into the death of the Afghan family's daughter

by six votes to one, a **violation of Article 3 (prohibition on inhuman and degrading treatment)** in respect of the applicant children

unanimously, **no violation of Article 3** in respect of the adult applicants

unanimously, a **violation of Article 5 § 1 (right to security and liberty)** in respect of all the applicants

unanimously, a **violation of Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsions of aliens)** in respect of the applicant mother and her five children, and

unanimously, a **violation of Article 34 (right of individual petition)** in respect of all the applicants.

The case concerned the death of a six-year-old Afghan child, MAD.H., who was hit by a train after allegedly having been denied the opportunity to seek asylum by the Croatian authorities and ordered to return to Serbia via the tracks. It also concerned, in particular, the applicants' detention while seeking international protection. The Court found in particular that the investigation into the death had been ineffective, that the applicant children's detention had amounted to ill-treatment, and that the decisions around the applicants' detention had not been dealt with diligently. It also held that some of the applicants had suffered a collective expulsion from Croatia, and that the State had hindered the effective exercise of the applicants' right of individual application by restricting access to their lawyer among other things.

Principal facts

The applicants are a family of 14 Afghan citizens. They are a man, his two wives, and their 11 children.

In 2016 the family left Afghanistan, travelling through Pakistan, Iran, Turkey, Bulgaria and Serbia before arriving at the Croatian border.

On the night of 21 November 2017, the first and second applicants' six-year-old daughter, MAD.H., died after being hit by a train in Serbia near the Croatian-Serbian border.

Investigation

In December 2017 the applicants lodged a criminal complaint against unidentified Croatian border police officers, stating that after encountering them on Croatian territory, the officers had denied the first applicant and her six children any possibility of seeking asylum, and had ordered them to return to Serbia by the train tracks. En route, MAD.H. had been hit by a train and died.

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.

A criminal investigation concluded that the applicants had not crossed the border and entered Croatia, talked to the Croatian police officers or sought asylum. It found that the police officers' conduct had been unrelated to the accident.

The applicants lodged a constitutional complaint, with the Constitutional Court deeming the investigation into the death to have been effective. The minority opinion did state that there had been several serious deficiencies in the investigation.

Entry into Croatia and placement in the Tovarnik centre

On 21 March 2018 the Croatian police caught the applicants as they were entering Croatia clandestinely from Serbia and took them to a police station. The applicants did not have any identification documents with them. They asked to apply for international protection.

The police placed them in a transit immigration centre in Tovarnik in order to verify their identities. On 10 May the police submitted that they had still not managed to establish the applicants' identities. They deemed that the applicants' placement in Tovarnik had also been justified by the flight risk, in that it was possible that the applicants would leave Croatia for other countries.

In May 2018 the Administrative Court partly allowed the third applicant's administrative action and ordered that she and her two children (the seventh and eighth applicants) be released from the Tovarnik centre. The remaining applicants' administrative actions were dismissed in that their placement in Tovarnik was still justified. On 4 June 2018 all the applicants were transferred to an open-type centre in Kutina.

The Constitutional Court found that the conditions of the applicants' placement in the Tovarnik centre had not been in breach of Article 3 of the Convention and that the applicants had been deprived of their liberty in accordance with Article 5 § 1 (f) of the Convention.

International Protection

On 23 March 2018 the applicants submitted applications for international protection. Later that month the Ministry of the Interior dismissed their applications on the grounds that they should be returned to Serbia, which was considered a safe third country. That decision was upheld by the administrative courts at two levels. In March 2021 the Constitutional Court quashed the administrative courts' judgments finding that they had failed to properly examine whether Serbia could be considered a safe third country.

Contact with lawyer

Upon the applicants' entry to Croatia in March 2018, their lawyer asked the authorities to allow her to meet the applicants and to represent them. The authorities denied this request on the grounds that she did not have a valid power of attorney. They also initiated an investigation, suspecting that the applicants' signatures on the power of attorney had been forged.

On 31 March 2018 the first and second applicants confirmed to the investigating judge that they had signed the impugned power of attorney. The investigation nevertheless continued. The police arrived at the lawyer's law firm and asked for the original power of attorney. They questioned the lawyer and other lawyers at the firm. The Court had no information about the subsequent steps taken in this investigation.

On 2 May 2018 the Croatian Children's Ombudswoman visited the applicants in the Tovarnik centre and they confirmed to her that they understood their lawyer had instituted proceedings before the Court on their behalf, and that they wished to meet her and be represented by her. On 7 May she met the applicants.

Rule 39

On 4 April 2018 the applicants' lawyer submitted a request under Rule 39 of the Rules of Court, asking the Court to allow the applicants to contact her, to order their release from the Tovarnik centre, and to prevent their removal to Serbia. An interim measure stating that the applicants should be placed "in such an environment which complied with requirements of Article 3 of the Convention, taking into account the presence of minors" was granted and later extended. The decision on the interim measure in respect of the lack of access to their lawyer was adjourned pending the receipt of factual information from the parties.

Noting that the applicants had been allowed to meet their lawyer and that therefore the matter had been resolved, on 11 May 2018 the Court rejected the Rule 39 request as regards the issue of the applicants' legal representation.

On 3 July 2018 the Court granted an interim measure indicating to the Government that the applicants should not be removed to Serbia.

After the applicants were transferred to an open-type centre in Kutina they tried to leave Croatia for Slovenia on several occasions, ultimately managing to do so. Their subsequent whereabouts were unknown to the Court.

On 14 March 2019 the Court lifted the two interim measures because the applicants had left Croatia.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life), the applicants complained that the State had been responsible for the death of their daughter and sister MAD.H., and that the investigation into her death had been ineffective. They complained that their placement in the Tovarnik centre had been in breach of Articles 3 (prohibition on inhuman and degrading treatment), 5 (right to liberty and security) and 8 (right to respect for private and family life). Under Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsions of aliens), they complained that they had been subject to summary removals from Croatia to Serbia. Under Article 34 (right of individual petition), they complained of the authorities' failure to comply with a Rule 39 decision of the Court, and hindrance of the effective exercise of their right of individual application. They also complained of discrimination under Article 14 (prohibition of discrimination) taken in conjunction with Articles 3, 5 and 8 and Article 4 of Protocol No. 4, and Article 1 of Protocol No. 12 (general prohibition on discrimination).

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

Péter **Paczolay** (Hungary), *President*,
Ksenija **Turković** (Croatia),
Krzysztof **Wojtyczek** (Poland),
Alena **Poláčková** (Slovakia),
Gilberto **Felici** (San Marino),
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),

and also Liv **Tigerstedt**, *Deputy Section Registrar*.

Decision of the Court

[Article 2](#)

The Court noted, in particular, that the investigating authorities had failed to look into the discrepancies between the police officers' statements and had never verified their allegation that there had been no recordings of the impugned events. Proposals by the applicants and the Croatian

Ombudswoman to establish contacts between the applicants and the police by inspecting the signals from their mobile telephones and the police car GPS had been ignored, and the statement by the Serbian authorities that the applicants had been forced back into Serbia had not been addressed. Lastly, the authorities had refused to provide the applicants' lawyer with information regarding the investigation and the applicants had been allowed to meet her only belatedly.

The Court concluded that the investigation into MAD.H.'s death had been ineffective, leading to a **violation of the procedural limb of Article 2.**

Article 3

The Court found that the material conditions in the Tovarnik centre had been satisfactory and that the applicants had been provided with medical and psychological assistance. However, some aspects did resemble a prison, such as the presence of police officers, barriers in the hallways and bars on the windows. The Court took note of the comments made by the Croatian Ombudswoman and the Croatian Children's Ombudswoman regarding, in particular, the inadequacy of the centre for housing children. It also noted the fact that the children had been in a particularly vulnerable condition, as most of them had witnessed the death of their sister near the border. Furthermore, the children had spent almost two months without any organised activities to occupy their time. As their detention had lasted for a protracted period, namely two months and fourteen days, caused by the domestic authorities' failure to act with the required expedition, it must have been perceived by the applicant children as a never-ending situation, and could thus be sufficiently severe to engage Article 3 of the Convention.

The Court thus found a **violation of this Article in respect of the applicant children.**

Regarding the adults, the Court was mindful of the fact that they had been mourning the death of their daughter, but noted that the authorities had provided them with psychological support. They had not been separated from their children and had been aware of the progress of their asylum case. The Court was unable to conclude that the otherwise acceptable conditions at the Tovarnik centre for adult applicants were particularly ill-suited to their individual circumstances and found that there had been **no violation of their rights under this Article.**

Article 5

The Court had serious doubts as to whether the authorities had carried out an assessment as to whether, in view of the number of children involved, a less coercive alternative measure to detention had been possible.

It further questioned whether the authorities had acted in good faith, given that they had detained the applicants on 21 March 2018 for the purpose of verifying their identities, but had started checking their identity only on 10 April 2018, after an inquiry by the Croatian Ombudswoman. By then, the applicants' application for international protection had already been dismissed by the Ministry of the Interior ten days before.

The Court further criticised the protracted length of the proceedings before the Administrative Courts concerning the applicants' asylum application and review of the lawfulness of their detention, during which time the applicants had languished in detention. The Court questioned the diligence of the authorities in this case and found that they had failed to take all the necessary steps to limit, as far as possible, the detention of the applicant family.

The detention of the applicants had therefore **not been compliant with this Article, resulting in a violation.**

Article 4 of Protocol No. 4 to the Convention

The Court considered it to be truthful that on 21 November 2017 the Croatian police officers had returned the first applicant and her children to Serbia without considering their individual situation.

The Government argued that the applicants had engaged in “culpable conduct” by circumventing the legal procedures that existed for entry into Croatia. However, the Court was unable to establish, on the basis of the information before it, whether at the material time the respondent State had provided the applicants with genuine and effective access to procedures for legal entry into Croatia, in particular with a view to claiming protection under Article 3.

It thus held that the removal to Serbia of the first applicant and her children on 21 November 2017 was of a collective nature, **in breach of Article 4 of Protocol No. 4 to the Convention.**

Article 34

The Court took note of, in particular, the denial of contact with the applicants’ lawyer, even after a Rule 39 request in that connection, and the undue criminal-law pressure put on the lawyer over the power of attorney, despite the applicants’ confirmation of that agreement before the courts. The Court concluded that the evidence before it was sufficient to deduce that the restriction of contact between the applicants and their lawyer and the criminal investigation and pressure to which that lawyer was subjected were aimed at discouraging them from taking their case to Strasbourg.

There had been a **violation of the applicants’ right of individual petition.**

Other articles

The Court held that it was not necessary to examine complaints under Article 2 in its substantive aspect, the complaint under Article 5 § 4, and the complaints under Articles 8 and 14 and Article 1 of Protocol No. 12. It also held that it was not necessary to examine the complaint under 34 of the Convention regarding the alleged failure to comply with the interim measure indicated by the Court.

Just satisfaction (Article 41)

The Court held that Croatia was to pay the applicants 40,000 euros (EUR) non-pecuniary damage and EUR 16,700 in respect of costs and expenses.

Separate opinions

Judge Turković expressed a concurring opinion. Judge Wojtyczek expressed a dissenting and partly concurring opinion. These opinions are annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.