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

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Hungary violated the rights of two asylum-seekers by expelling them to Serbia but their stay in a border transit zone was not deprivation of liberty

The case of **Ilias and Ahmed v. Hungary** (application no. 47287/15) concerned two asylum-seekers from Bangladesh who spent 23 days in a Hungarian border transit zone before being removed to Serbia after their asylum applications were rejected.

In today's **Grand Chamber** judgment[1] the European Court of Human Rights held,

unanimously, that there had been **a violation of Article 3 (prohibition of torture or inhuman or degrading treatment)** of the European Convention on Human Rights owing to the applicants' removal to Serbia**,** and,

no violation of Article 3 as regards the conditions in the transit zone, and,

by a majority, that the applicants' complaints under **Article 5 §§ 1 and 4 (right to liberty and security)** had to be rejected as inadmissible.

The Court found in particular that the Hungarian authorities had failed in their duty under Article 3 to assess the risks of the applicants not having proper access to asylum proceedings in Serbia or being subjected to chain-*refoulement*, which could have seen them being sent to Greece, where conditions in refugee camps had already been found to be in violation of Article 3.

In a development of its case-law, it held that Article 5 was not applicable to the applicants' case as there had been no *de facto* deprivation of liberty in the transit zone. Among other things, the Court found that the applicants had entered the transit zone of their own initiative and it had been possible in practice for them to return to Serbia, where they had not faced any danger to their life or health.

Their fears of a lack of access to Serbia's asylum system or of refoulement to Greece, as expressed under Article 3, had not been enough to make their stay in the transit zone involuntary.

Principal facts

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

The applicants arrived in Hungary on 15 September 2015 after transiting through various countries, including Serbia. They immediately applied for asylum in Hungary and for the next 23 days stayed in the Röszke transit zone, which is on Hungarian territory next to Serbia; they could not leave for Hungary as the zone had a fence and was guarded.

Their applications for asylum were rejected and in October 2015 their expulsion was ordered. The removal decision referred to 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 found in particular that the applicants had not 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.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

They were immediately escorted to the Serbian border, leaving the transit zone without physical coercion.

Complaints, procedure and composition of the Court

The applicants complained in particular that, contrary to Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, the Hungarian authorities had failed to adequately examine their allegation that they faced a real risk of ill-treatment by being expelled to Serbia. Under the same provision they complained about the conditions of detention in the transit zone. In the same context, the applicants also relied on Article 13 (right to an effective remedy) in conjunction with Article 3.

The applicants alleged that they had been confined to the transit zone in violation of Article 5 § 1 (right to liberty and security) and Article 5 § 4 (right to have lawfulness of detention decided speedily by a court).

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

In a Chamber judgment of 14 March 2017, the European Court of Human Rights held, unanimously, that there had been a violation of Article 5 §§ 1 and 4, finding that 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.

The Chamber further held, unanimously, that there had been no violation of Article 3 as concerned the conditions of the applicants' detention in the transit zone, but that there had been a violation of Article 13 owing to the lack of an effective remedy to complain about those conditions.

Lastly, the Chamber held, unanimously, that there had been a violation of Article 3 on account of the applicants' expulsion to Serbia 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 Chamber 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; had schematically referred to the Government's list of safe third countries; had disregarded the country reports and other evidence submitted by the applicants; and had 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.

On 18 September 2017 the Grand Chamber Panel accepted a request from the Hungarian Government that the case be referred to the Grand Chamber. A hearing was held on 18 April 2018.

The following persons and organisations were granted leave to intervene in the written proceedings as third parties: the Governments of Bulgaria, Poland and Russia, the UN Refugee Agency (UNCHR), the Dutch Council for Refugees (DRC), the International Commission of Jurists (ICJ), the European Council on Refugees and Exiles (ECRE), and five Italian scholars.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Linos-Alexandre **Sicilianos** (Greece), *President*,
Angelika **Nußberger** (Germany),
Robert **Spano** (Iceland),
Jon Fridrik **Kjølbro** (Denmark),
Ksenija **Turković** (Croatia),
Paul **Lemmens** (Belgium),
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),

André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Dmitry **Dedov** (Russia),
Yonko **Grozev** (Bulgaria),
Mārtiņš **Mits** (Latvia),
Georges **Ravarani** (Luxembourg),
Jolien **Schukking** (the Netherlands),
Péter **Paczolay** (Hungary),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

The Court first held that the applicants' complaint under Article 13 in conjunction with Article 3 about an alleged lack of remedies for the issue of the living conditions in the border zone had to be declared as inadmissible after being submitted outside the six-month time-limit.

Article 3

Expulsion to Serbia

The Court found that it was not called on to examine the substance of the applicants' asylum application in Hungary – that they faced ill-treatment in Bangladesh – as it was not its job to act as a first-instance court where a defendant State had opted not to deal with an asylum request itself but had relied on the safe country principle to expel someone to another country.

The Court thus had to look at whether the Hungarian authorities had fulfilled their procedural duty under Article 3 to assess properly the conditions for asylum-seekers in Serbia. That included access to effective asylum procedures and the risk of chain-*refoulement* to Greece, where the conditions in refugee camps had already been found to be in violation of Article 3.

It noted that Hungary had begun to classify Serbia as a safe third country from July 2015. The Hungarian Government had appeared to confirm in its submissions to the Grand Chamber that the change in classification had been due to the fact that Serbia was bound by international conventions; that as a European Union entry candidate it had been aided to improve its asylum system; and that there had been an unprecedented wave of migration at the time and measures had had to be taken. However, the Government had not provided any evidence that its authorities had examined the risk of a lack of effective access to asylum proceedings or the risk of *refoulement.*

As to the applicants' individual circumstances, the Court noted that the authorities had had access to reports on conditions in Serbia, particularly those produced by the UNHCR. However, the authorities had not given sufficient weight to concerns in such reports, such as people being denied access to asylum procedures in Serbia, being summarily removed and eventually arriving in Greece.

The Hungarian authorities had contributed to the risks faced by the applicants by inducing them to return to Serbia in an illegal manner without obtaining any guarantees from the Serbian authorities.

The Court thus found that Hungary had failed to comply with its procedural obligation to assess the risk of the applicants facing treatment contrary to Article 3 before removing them to Serbia and there had been a violation of that provision of the Convention.

Given its conclusion of a violation of Article 3 in relation to the procedures for the applicants' expulsion, the Court did not consider it necessary to carry out a separate examination of their related complaint on domestic remedies under Article 13 in conjunction with Article 3.

Conditions in the transit zone

The Grand Chamber, endorsing the Chamber's findings, held that the living conditions in the zone, the length of the applicants' stay there, and the possibilities for human contact with other asylum-seekers, UNHCR representatives, NGOs and a lawyer, meant that their situation had not reached the minimum level of severity necessary to be considered as inhuman treatment within the meaning of Article 3. There had therefore been no violation of that provision.

Article 5 §§ 1 and 4

The key issue was whether there had been *de facto* deprivation of liberty, even if the Hungarian authorities did not consider that the applicants had been detained in the transit zone.

The Court also observed that this was apparently the first time that it had had to deal with a case of a land border transit zone between two States who were members of the Council of Europe and where asylum-seekers had to stay during the examination of their asylum claims.

The Court took account of the following factors: the applicants' individual situation and choices; the applicable legal regime and its purpose; the duration of the measure and procedural protection; and the nature and degree of the actual restrictions involved.

On the first point, the Court noted that the applicants had entered the transit zone on their own initiative in order to seek asylum in Hungary and had not faced an immediate threat to their life or health in Serbia which had forced them to leave that country.

Considering the legal regime, the Court observed that the transit zone's express purpose was to serve as a waiting area while asylum applications were processed and that the applicants had had to wait there pending the completion of their appeal. Having to wait for a short time during such a process could not be considered deprivation of liberty.

The domestic law also had procedural guarantees on waiting times, which had been applied in the applicants' case. It had taken 23 days to examine their claims, at a time of a mass influx of asylum-seekers and migrants, and the Court found that the applicants' situation had not been influenced by any official inaction or by actions that had not been linked to their asylum claims.

As to the actual restrictions which the applicants had faced in the transit zone, the Court concluded that their freedom of movement had been restricted to a very significant degree given the small area of the zone and the fact that it was heavily guarded. However, it had not been restricted unnecessarily or for reasons unconnected with their asylum applications.

The remaining question was whether the applicants had been able to leave the zone for any other country than Hungary.

The Court first noted that other people in similar situations had returned to Serbia from the transit zone. A further significant consideration was that, in contrast to people confined to an airport transit zone, people in a land border zone, like the applicants, did not have to board an aeroplane to return to the country whence they had come. Serbia was adjacent to the Röszke zone and the possibility for the applicants to leave for that country had thus not only been theoretical but realistic.

The Court reiterated its findings in *Amuur v. France* that asylum-seekers being able voluntarily to leave a country where they had wished to take refuge did not exclude a restriction on liberty.

However, it distinguished that case from Mr Ilias's and Mr Ahmed's as the applicants in *Amuur* had been confined to an airport transit zone which they had not been able to leave of their own volition and would have had to return to Syria, which was not bound by the Geneva Convention Relating to the Status of Refugees. Serbia was bound by that Convention and Mr Ilias and Mr Ahmed had had the real possibility of being able to return there of their own will.

The Court noted the applicants' fears, as set down under Article 3, of a lack of access to asylum procedures in Serbia and of further removal to other countries. However, it found that such fears could not make Article 5 applicable to their case, where all the other circumstances pointed to it not being applicable and with the circumstances being different from airport transit zone cases. Such an interpretation of the applicability of Article 5 would stretch the concept of deprivation of liberty beyond its meaning intended by the Convention.

The Court found that where all other relevant factors did not point to *de facto* deprivation of liberty, and where asylum-seekers could return to a third country without danger to their life or health, then a lack of compliance with a State's duties under Article 3 could not be called on to make Article 5 applicable to a situation in a land border zone where people were waiting for an asylum decision. The Convention could not be read as linking in such a manner the applicability of Article 5 to a separate issue concerning the authorities' compliance with Article 3.

That was the case even if the applicants had risked losing the right to have their asylum claims considered in Hungary if they returned to Serbia. That factor, along with their other fears, had not made the possibility of leaving the transit zone in the direction of Serbia merely theoretical. It therefore had not had the effect of making their stay in the transit zone involuntary from the standpoint of Article 5 and could not by itself trigger the applicability of that provision.

The Court concluded that the applicants had not been deprived of their liberty within the meaning of Article 5, which therefore did not apply to their case and their complaint under this provision had to be rejected as inadmissible.

Just satisfaction (Article 41)

The Court held by 16 votes to one that Hungary was to pay the applicants 5,000 euros (EUR) each in respect of non-pecuniary damage. It held unanimously that Hungary was to pay the applicants EUR 18,000 jointly in respect of all costs and expenses.

Separate opinion

Judge Bianku, joined by Judge Vučinić, expressed a partly dissenting opinion which is annexed to the judgment.

The judgment is available in English and French.

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