GIURISPRUDENZA PENALE

The confinement of asylum-seekers in transit zones amounts to unlawful detention. Hungary condemned by the ECtHR for multiple violations of the Convention

by ***Stefania Carrer***

EUROPEAN COURT OF HUMAN RIGHTS (ECTHR), FOURTH SECTION, CASE OF ILIAS AND AHMED V. HUNGARY,
APPLICATION NO. 47287/15, 14 MARCH 2017

SUMMARY: **1.** Factual and legal background: Hungarian Asylum law reforms of 2015. - **2.** The circumstances of the case. - **3.** The procedure before the Court. - **4.** The assessment of the Court. - **5.** Final considerations.

On 14 March 2017 the Fourth Section of the European Court of Human Rights (hereinafter: the Court) ruled unanimously against Hungary upon application of two Bangladeshi asylum seekers who had been confined in a transit zone situated on the border between Hungary and Serbian in 2015.

1. Factual and legal background: Hungarian Asylum law reforms of 2015[1]

In order to understand the factual circumstances of the case, it is necessary to clarify what a transit zone actually is. The procedure for dealing with aliens' requests for admission in a certain country is known as "border procedure". In Hungary there are two kinds of border procedures: the so called "airport procedure" and the procedure in transit zones. The latter was introduced in 2015, in the frame of a general reform of the asylum system aimed at hindering immigration and at deterring migrants from coming to the country.
Among other restrictive measures, including the physical erection of fences, the Hungarian Asylum Act was amended in order to provided a legal basis, together with the Act on State border, for the creation of transit zones on the Hungarian border. On 15 September 2015, the procedure entered into force in the first transit zones set up in Röszke and Tompa along the Serbian border.
The Hungarian Helsinki Committee (HHC) defines transit zones as border sections "*where immigration and asylum procedures are conducted and where buildings required for conducting such procedures and housing migrants and asylum-seekers are located*."[2] One of the most controversial issue concerns the legal status of the transit zones, as the Hungarian governmental authorities consider them as "no

[1] Data available at this link.

[2] Report available at this link.

man's land". As a consequence, according the Government, the entry of immigrants in such zones does not imply their entry into the Hungarian territory. However, the concept of "extraterritoriality" of such zone is challenged under international law. The Court itself, in a case involving the definition of "international zone" provided by the French Government, had stated that "*[d]espite its name, the international zone does not have extraterritorial status*"[3] and that it is subject to the French legislation.
It also important to mention that the 2015 amendments to the Asylum Act authorised the Hungarian government to adopt a list of "safe third countries". If the asylum seeker, before entering the transit zone, had travelled over one of the listed countries, his application is deemed inadmissible and dismissed without further examination, on the assumption that he had a genuine opportunity of seeking and obtaining protection there. "Safe third countries" are all EU Member States, together with Serbia, Kosovo, the Former Yugoslav Republic of Macedonia (FYROM), Albania, Bosnia-Herzegovina and Montenegro. The inclusion of Serbia is of particular interest in the present case, also considering that in 2012 both the Hungarian Supreme Court and the UN Refugee Agency UNHCR had expressed a divergent position on its qualification as "safe country", questioning its ability to offer effective protection to immigrants.
Another relevant aspect of border procedure, is that it cannot be applied to vulnerable asylum seekers, according to Article 24 (3) of the amended Asylum Act. Such exemption, allowing the designed people to enter the Hungarian territory and ask for protection from one of the local reception centres, would include children, elderly and disabled persons, pregnant women, single parents with children, as well as victims of torture, sexual or other forms of violence, if deemed to have special needs following an individual assessment. However, since a proper identification mechanism is not in place, generally the special needs considered are the most visible ones: only families with children, unaccompanied minors, pregnant women, elderly and disabled are usually assessed as vulnerable and therefore entitled to access the special procedure.

2. The circumstances of the case

In the present case, the applicants are two Bangladeshi nationals, Mr Md Ilias Ilias and Mr Ali Ahmed, who submitted applications for asylum in Hungary once arrived in the Röszke transit zone (on the border between Hungary and Serbia) on 15 September 2015. Before reaching the Hungarian border, the men had entered the EU territory in Greece, transited through the FYROM and reached Serbia, where they spent two days or less.
On the basis of the aforementioned newly introduced provisions on "safe third countries", their asylum applications were rejected as Serbia was in the list of designated countries: accordingly, they should have sought protection once entered its territory. Through the mediation of UNHCR they received the assistance of two lawyers, who challenged the decision of the asylum authority and managed to have their cases reviewed. The applicants were interviewed by a psychiatrist, who diagnosed both of them with post-traumatic stress disorder. However, this was not enough for them to be identified as "vulnerable people" in view of the border procedure's exemption, nor they satisfied the asylum authority's requirement to prove that Serbia was not to be considered a safe third country. Consequently, their

[3] ECtHR, Amuur v France, Application No 19776/92, Judgment of 25 June 1996, para 52.

asylum applications were rejected again and their expulsion from Hungary was ordered. A further judicial review was carried out in vain, and on 8 October 2015 the applicants left the transit zone for Serbia, escorted by Hungarian officers.

3. The procedure before the Court

On 25 September 2015, as the applicants were staying in the transit zone, they submitted to the Court a motion for an interim measure under Rule 39, which authorises the European judges to "*indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings*." More specifically, with their requests the asylum seekers aimed at being released from the transit zone, where the living conditions were poor and inadequate to their special needs, and at not being expelled to Serbia, with the risk of a chain-*refoulement*. Legal basis for the motion were Articles 3 (Prohibition of torture), 5 (Right to liberty and security) and 13 (Right to an effective remedy) of the Convention.
The Court did not grant them the interim measures, but decided to treat their case with priority. On their full submissions, the applicants alleged that Hungary had violated the Convention under:

- Artt. 3 and 13, by considering Serbia a "safe third country" without any individual assessment of their special needs;
- Art. 3, as their protracted permanence in the transit zone amounted to inhuman treatment in view of their special needs and the inadequate conditions of the living facilities;
- Artt. 5 § § 1 and 4, as their deprivation of liberty in the transit zone had been unlawful any had not access to judicial remedy of a review.

4. **The assessment of the Court**

(*i.*) Alleged violation of Art. 5 §1 of the Convention (paras. 48-69 of the Judgment)

In order to assess the admissibility of this challenge, the Court had to verify whether the case of the applicants, who had been confined in the territory of the transit zone, could fall within the scope of Art. 5 §1 of the Convention stating, inter alia, that:

"*1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

In order words, did the placing of the applicants in the transit zone constitute a deprivation of liberty under Art. 5? In order to answer this question the judges had to evaluate a range of factors concerning the specific situation of the applicants.

The Court considered that Mr Md Ilias and Mr Ali Ahmed were confined for over three weeks in a transit zone (similar to an international zone, being under effective control of the State) that could not be accessed from the outside. They were not allowed to reach the Hungarian soil beyond it and, should they have voluntary returned to Serbia, their applications for refugee status in Hungary would have been dismissed without any further examination and they would have subsequently run the risk of *refoulement*.
In light of such factual circumstances, the Court concluded that "*the applicants' confinement to the transit zone amounted to a de facto deprivation of liberty*"(para. 56) and considered the argument to be admissible.
With respect to merits of the alleged violation, the Courts noted the applicants' detention in the transit zone would be in compliance with the Convention only if "lawful" and "in accordance with a procedure prescribed by law", which includes international and EU law, besides domestic legislation. The detention should anyway not conflict with the general purpose of Art. 5, i.e. to protect the individual from arbitrariness.
The court recalled its jurisprudence on the notion of arbitrariness (case *Saadi v. The United Kingdom*) and noted that a person should not be held in detention by EU Member States only for being an applicant according to the "*Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) contains the following passages*".
In view of such considerations, the Court was not satisfied with the argument of the Government that the detention of the applicants in the transit zone (lasted 23 days) found its legal basis on section 71A (1) and (2) of the Asylum Act, deemed not be to be sufficiently clear and foreseeable.
For this reason, the Court stated that "*the applicants' detention apparently occurred de facto, that is, as a matter of practical arrangement. This arrangement was not incarnated by a formal decision of legal relevance, complete with reasoning."* The failure of the judicial authorities to provide justification for the authorisation of the long detention is considered by the Court "*to be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1"* (paras. 68-69). In conclusion, the Court stated that the applicants' detention could not be considered "lawful" and that the Stated committed a violation of Art. 5 § 1 of the Convention.

(*ii.*) Alleged violation of Art. 5 § 4 of the Convention (paras. 70-77 of the Judgment)

Art. 5 § 4 of the Convention provides that:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Court, in consideration of the aforementioned finding that the detention of the applicants consisted in a *de facto* measure, and that the judicial reviews of their positions carried out by the domestic courts concerned their applications for asylum only, stated that the applicants were not entitled to "*take proceedings by which the lawfulness of his detention shall be decided speedily by a court*". Consequently, it declared that there has been a violation of the provision in object.

(*iii.*) Alleged violation of Art. 3 of the Convention

> **based on the conditions at the Röszke border transit zone** (paras. 78-90 of the Judgment)

To assess whether the condition of the applicant's detention in the transit zone amounted to inhuman and degrading treatment in violation of Art. 3 of the Convention, the Court recalled the case of *Khlaifia and Others v. Italy*[4], enshrining the general principles concerning the treatment of migrants in detention.
The judges noted that the circumstances of the present case had to be analysed in consideration of the "*situation of extreme difficulty confronting the authorities at the relevant time*" (para. 83) deriving from the increasing influx of migrants.
A to the factual conditions of the detention, the Court relied on the Report of the "European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" (CPT). In a visit to Röszke, the CPT had found that, in view of the ground surface of the rooms, of the presence of sanitary and healt-care facilities, of the possibility for the applicants to consult a psychiatrist and of the three meals provided daily, the conditions regarding the accommodation containers were to be considered as acceptable.
According to the Court, the fact that the applicants were diagnosed with a posttraumatic stress disorder did not make them more vulnerable respect to other asylum-seekers detained in the transit zone. Therefore, the Court concluded that "*the treatment complained of did not reach the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3 of the Convention*".

> based on the risk of inhuman and degrading treatment (paras. 102-125)

Object of this analysis is the alleged responsibility of the Hungarian State for the expulsion of the applicants, as it is in the Court's interest to assess whether they had been protected against arbitrary *refoulement* to the country from which they fled.
Violations to Art. 3 may arise in situations where "*substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country*" (para. 112).
As already mentioned, the Hungarian authorities decided to order the expulsion of the applicants and their return to Serbia, on the mere basis of the qualification of the latter as "safe third country" according to the legislative reforms of 2015. The Court noted that such presumption involved a "*reversal of the burden of proof to the applicants'detriment*" (para 118) and that the authorities failed to conduct any *ad-hoc* assessment of their positions.
Moreover, the Government did not provide any convincing justification for the abrupt change in its attitude towards Serbia, also in the light of the divergent opinions and reports of the UNHCR and of other international human rights organisations on the country's security for asylum-seekers. Hungary also failed to considered that the applicants could have been further expelled to Greece, a country which had already been condemned by the Court for the violation of Art. 3 in a case dealing with the treatment of asylum-seekers (case *M.S.S. v. Belgium and Greece)*.

---

[4] See also: M. F. Cucchiara, *Lampedusa, hot-spot e detenzione illegittima dei migranti: Il caso Khlaifia all'esame della Grande Camera EDU*, in *Giurisprudenza Penale Web*, 2016, 7-8

The Court also noted that the applicants were not provided with sufficient and accessible information on asylum procedures: although illiterate, they were given written explanatory leaflets, not to mention the fact that one of them had been interviewed with the assistance of an interpreter speaking a different and unknown language.

In conclusion, the Court found that "*the applicants did not have 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"*(para. 125).

> (*iv.*) Alleged violation of Art. 13 of the Convention read in conjunction with Art. 3 based on the conditions at the Röszke border transit zone (paras. 91-101)

Even though the Court rejected the applicants' complaint under the substantial head of Art. 3, it noted that they had not been granted an "*effective remedy before a national authority*" as provided for in Art. 13 of the Convention, enabling them to bring the issue of their detention's conditions before a Hungarian judge.
By failing to indicate to the applicants any effective remedy to raise their complaints, the Government acted in violation of Art. 13 taken together with Art. 3 of the Convention.

5. **Final considerations**

With this judgment, the Court has *inter alia* declared that the confinement of asylum-seekers in transit zones at the Hungarian borders amounts to an actual detention, and even more alarming, to an unlawful detention in breach of Art. 5 of the Convention.
In light of the fact that the Hungarian Parliament has recently approved a new legislation providing for the automatic detention of all asylum-seekers pending the decision on their applications, the present judgment seems to indicate to Hungary and to all the Contracting States the need of a sea-change in immigration's policies and asylum procedures. The peculiar historical moment should not become a justification for the indiscriminate spread of anti-immigrants practices and the implementation of unlawful restraint measures, nor should fundamental rights of vulnerable individuals be neglected in favour of national political interests.