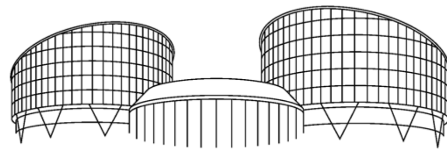

Information Note on the Court's case-law 234

November 2019

Ilias and Ahmed v. Hungary [GC] - 47287/15

Judgment 21.11.2019 [GC]

Article 3

Expulsion

Respondent State's failure to assess the risk of denial of access to asylum proceedings in a presumed safe third country, including *refoulement*: *violation*

Inhuman treatment

Conditions of confinement in transit zone: *no violation*

Facts – The applicants, Bangladeshi nationals, arrived in the transit zone situated on the border between Hungary and Serbia and submitted applications for asylum. Their applications were rejected and they were escorted back to Serbia.

In the Convention proceedings, they complained, *inter alia*, that their deprivation of liberty in the transit zone had been unlawful, that the conditions of their allegedly unlawful detention had been inadequate, and that their expulsion to Serbia had exposed them to a real risk of inhuman and degrading treatment.

In a judgment of 14 March 2017 (Information Note 205) a Chamber of the Court held, unanimously, that there had been a violation of Article 3 as regards the applicants' expulsion to Serbia and a violation of Article 5 § 1. In the Court's view the Hungarian authorities had, in breach of Article 3, disregarded country reports and other evidence submitted by the applicants, imposed an unfair and excessive burden of proof, and had failed to provide them with sufficient information. As regards Article 5 § 1, the applicants had been deprived of their liberty without any formal decision of the authorities solely by virtue of an elastically interpreted general provision of the law.

The Court also held, unanimously, that there had been no violation of Article 3 as regards the conditions of detention in the transit zone, but violations of Article 5 § 4 and Article 13 taken together with Article 3.

On 18 September 2017 the case was referred to the Grand Chamber at the Government's request.

Law – Article 3:

(a) *Expulsion to Serbia*

The applicants had left the transit zone of their own free will. The applicants' removal from Hungary was therefore imputable to the respondent State.

The content of the expelling State's duties under Article 3 differed depending on whether the receiving country was the asylum-seeker's country of origin or a third country and, in the latter situation, on whether the expelling State had dealt with the merits of the asylum application or not.

The Court added that in all cases of removal of an asylum-seeker from a Contracting State to a third intermediary country without examination of the asylum requests on the merits, regardless of whether the receiving third country is an EU member State or not or whether it is a State Party to the Convention or not, it was the duty of the removing State to examine thoroughly the question whether or not there was a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against *refoulement*, that is, being removed, directly or indirectly, to his or her country of origin without a proper evaluation of the risks he or she faced from the standpoint of Article 3. If it was established that the existing guarantees in this regard were insufficient, Article 3 implied a duty that the asylum-seekers should not be removed to the third country concerned.

In addition to this main question, where the alleged risk of being subjected to treatment contrary to Article 3 concerned, for example, conditions of detention or living conditions for asylum-seekers in a receiving third country, that risk was also to be assessed by the expelling State.

A *post-factum* finding that the asylum-seeker did not run a risk in his or her country of origin, if made in national or international proceedings, could not serve to absolve the State retrospectively of the procedural duty described above. If it were otherwise, asylum-seekers who faced deadly danger in their country of origin could be lawfully and summarily removed to "unsafe" third countries. Such an approach would in practice render meaningless the prohibition of ill-treatment in cases of expulsion of asylum-seekers.

With regard to asylum-seekers whose claims were unfounded or, even more so, who had no arguable claim about any relevant risk necessitating protection, Contracting States were free, subject to their international obligations, to dismiss their claims on the merits and return them to their country of origin or a third country which accepted them. The form of such examination on the merits would naturally depend on the seriousness of the claims made and the evidence presented.

In the present case, based on the Hungarian Asylum Act which provided for the inadmissibility of asylum requests in a number of circumstances and reflected the choices made by Hungary in transposing the relevant EU law, the Hungarian authorities had not examined the applicants' asylum requests on the merits – that is to say, whether the applicants risked ill-treatment in their country of origin, Bangladesh. Instead, the Hungarian authorities had declared the asylum requests inadmissible on the basis that the applicants had come from Serbia, which, according to the Hungarian authorities had been a safe third country and, therefore, could take in charge the examination of the applicants' asylum claims on the merits.

As a consequence, the thrust of the applicants' complaints under Article 3 is that they had been removed despite clear indications that they would not have access in Serbia to an adequate asylum procedure capable of protecting them against *refoulement*.

Since the Hungarian authorities' impugned decision to remove the applicants to Serbia had been unrelated to the situation in Bangladesh and the merits of the applicants' asylum claims, it was not the Court's task to examine whether the applicants had risked ill-treatment in Bangladesh. Nor was it for the Court to act as a court of first instance and deal with aspects of the asylum claims' merits in a situation where the defendant State had opted – legitimately so – not to deal with those and at the same time the

impugned expulsion had been based on the application of the "safe third country" concept. The question whether there was an arguable claim about Article 3 risks in the country of origin was relevant in cases where the expelling State had dealt with those risks.

The Court had therefore to examine: (i) whether these authorities had taken into account the available general information about Serbia and its asylum system in an adequate manner and of their own initiative; (ii) whether the applicants had been given a sufficient opportunity to demonstrate that Serbia had not been a safe third country in their particular case; and (iii) whether the Hungarian authorities had failed to take into consideration the allegedly inadequate reception conditions for asylum-seekers in Serbia.

The Hungarian authorities had relied on a list of "safe third countries" established by a government decree which had put in place a presumption that the listed countries were safe.

The Convention did not prevent Contracting States from establishing lists of countries which were presumed safe for asylum-seekers. Member States of the European Union did so, in particular, under the Asylum Procedures Directive. However, any presumption that a particular country was "safe", if it had been relied upon in decisions concerning an individual asylum-seeker, had to be sufficiently supported at the outset by an analysis of the relevant conditions in that country and, in particular, of its asylum system. However, in the instant case, the decision-making process in that respect had not involved a thorough assessment of the risk that was posed by the lack of an effective access to asylum proceedings in Serbia, including the risk of *refoulement*.

Moreover, in the applicants' case the expulsion decisions had disregarded the authoritative findings of the UNHCR as to a real risk of denial of access to an effective asylum procedure in Serbia and summary removal from Serbia to North Macedonia and then to Greece, and, therefore, of being subjected in Greece to conditions incompatible with Article 3.

The Hungarian authorities had exacerbated the risks facing the applicants by inducing them to enter Serbia illegally instead of negotiating an orderly return in an effort to obtain guarantees from the Serbian authorities.

Finally, as regards the Government's argument that all parties to the Convention, including Serbia, North Macedonia and Greece, had the same obligations and that Hungary would not bear an additional burden to compensate for their deficient asylum systems, this was not a sufficient argument to justify a failure by Hungary – which had opted for not examining the merits of the applicants' asylum claims – to discharge its own procedural obligation, stemming from the absolute nature of the prohibition of ill-treatment under Article 3.

In sum, the respondent State had failed to discharge its procedural obligation under Article 3 to assess the risks of treatment contrary to that provision before removing the applicants from Hungary.

Conclusion: violation (unanimously).

(b) *Conditions of detention in the transit zone*

The Grand Chamber endorsed the Chamber's analysis in the present case regarding the physical conditions in which the applicants had lived while confined to the transit zone. The applicants had been confined to an enclosed area of some 110 square metres for 23 days. Adjacent to that area they had been provided with a room in one of several dedicated containers. The room contained five beds but at the material time the

applicants had been the only occupants. The hygienic conditions were good and persons staying at the zone were provided with food of a satisfactory quality and medical care, if needed, and could spend their time outdoors. They had opportunities for human contact with other asylum-seekers, UNHCR representatives, NGOs and a lawyer. The applicants had been no more vulnerable than any other adult asylum-seeker detained at the time. Even if the applicants had surely been affected by the uncertainty of whether they were in detention and if legal safeguards against arbitrary detention applied, the brevity of the relevant period and the fact that the applicants were aware of the procedural developments in the asylum procedure, which unfolded without delays, indicated that the negative effect of any such uncertainty on them must have been limited. In sum, the situation complained of did not reach the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3.

Conclusion: no violation (unanimously).

Article 5 §§ 1 and 4:

Applicability

In drawing the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of asylum-seekers, the Court's approach had tobe practical and realistic, having regard to present-day conditions and challenges. It was important in particular to recognise the States' right, subject to their international obligations, to control their borders and to take measures against foreigners circumventing restrictions on immigration.

In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants, the factors taken into consideration by the Court could be summarised as follows: (i) the applicants' individual situation and their choices; (ii) the applicable legal regime of the respective country and its purpose; (iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events; and (iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants

The present case concerned, apparently for the first time, a transit zone located on the land border between two member States of the Council of Europe, where asylum-seekers had to stay pending the examination of the admissibility of their asylum requests.

The applicants had not crossed the border from Serbia because of a direct and immediate danger to their life or health in that country but did so of their own free will. They had entered the transit zone of their own initiative.

The right of States to control the entry of foreigners into their territory necessarily implied that admission authorisation might be conditional on compliance with relevant requirements. Therefore, in the absence of other significant factors, the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter could not be described as deprivation of liberty imputable to the State, since in such cases the State authorities had undertaken *vis-à-vis* the individual no other steps than reacting to his or her wish to enter by carrying out the necessary verifications

As long as the applicant's stay in the transit zone did not exceed significantly the time needed for the examination of an asylum request and there were no exceptional circumstances, the duration in itself could not affect the Court's analysis on the applicability of Article 5 in a decisive manner. That was particularly so where the individuals, while waiting for the processing of their asylum claims, had benefited from procedural rights and safeguards against excessive waiting periods. The fact that

domestic regulations existed limiting the length of stay in the transit zone was of significant importance in this regard.

The size of the area and the manner in which it was controlled were such that the applicants' freedom of movement had been restricted to a very significant degree, in a manner similar to that characteristic of certain types of light-regime detention facilities.

On the other hand, while waiting for the procedural steps made necessary by their application for asylum, the applicants had been living in conditions which, albeit involving a significant restriction on their freedom of movement, had not limited their liberty unnecessarily or to an extent or in a manner unconnected to the examination of their asylum claims. Finally, despite very significant difficulties engendered by a mass influx of asylum-seekers and migrants at the border, the applicants spent only twenty-three days in the zone, a period which did not exceed what was strictly necessary to verify whether the applicants' wish to enter Hungary to seek asylum there could be granted. The applicants' situation was not influenced by any inaction of the Hungarian authorities.

It is further significant that, in contrast to, for example, persons confined to an airport transit zone, those placed in a land border transit zone – as with the applicants in the present case – did not need to board an aeroplane in order to return to the country from which they had come. The applicants had come from Serbia, a country bound by the Geneva Convention relating to the Status of Refugees and the territory of which was immediately adjacent to the transit zone area. In practical terms, therefore, the possibility for them to leave the land border transit zone was not only theoretical but also realistic.

Where – as in the present case – the sum of all other relevant factors did not point to a situation of *de facto* deprivation of liberty and it was possible for the asylum-seekers, without a direct threat to their life or health, known by or brought to the attention of the authorities at the relevant time, to return to the third intermediary country they had come from, Article 5 could not be seen as applicable to their situation in a land border transit zone where they awaited the examination of their asylum claims, on the ground that the authorities had not complied with their separate duties under Article 3. The Convention cannot be read as linking in such a manner the applicability of Article 5 to a separate issue concerning the authorities' compliance with Article 3.

In the circumstances of the present case and in contrast to the situation that obtained in some of the cases concerning airport transit zones, and notably in *Amuur v. France*, the risk of the applicants' forfeiting the examination of their asylum claims in Hungary and their fears about insufficient access to asylum procedures in Serbia, while relevant with regard to Article 3, did not render the applicants' possibility of leaving the transit zone in the direction of Serbia merely theoretical. The Court could not accept that those fears alone, despite all other circumstances in the present case (which were different from those obtaining in the cases concerning airport transit zones), were sufficient to bring Article 5 into application. Such an interpretation of the applicability of Article 5 would stretch the concept of deprivation of liberty beyond its meaning intended by the Convention.

Therefore, the risks in question had not had the effect of making the applicants' stay in the transit zone involuntary from the standpoint of Article 5 and, consequently, could not trigger, of itself, the applicability of that provision: incompatible *ratione materiae*.

Conclusion: inadmissible.

Article 41: EUR 5,000 to each of the two applicants in respect of non-pecuniary damage.

(See also the Factsheet on “Dublin” cases; *T.I. v. the United Kingdom* (dec.), 43844/98, 7 March 2000, Information Note 16; *M.S.S. v. Belgium and Greece* [GC], 30696/09, 21 January 2011, Information Note 137; *Mohammed Hussein and Others v. the Netherlands and Italy* (dec.), 27725/10, 2 April 2013, Information Note 162; *Tarakhel v. Switzerland* [GC], 29217/12, 4 November 2014, Information Note 179; and *Paposhvili v. Belgium* [GC], 41738/10, 13 December 2016, Information Note 202; see also the Factsheet on Detention conditions and treatment of prisoners; *Amuur v. France*, 19776/92, 25 June 1996; *Shamsa v. Poland*, 45355/99 and 45357/99, 27 November 2003, Information Note 58; *Mogoş v. Romania* (dec.), 20420/02, 6 May 2004, Information Note 79; *Mahdid and Haddar v. Austria* (dec.), 74762/01, 8 December 2005, Information Note 81; *Riad and Idiab v. Belgium*, 29787/03 and 29810/03, 24 January 2008, Information Note 104; *Nolan and K. v. Russia*, 2512/04, 12 February 2009, Information Note 116)

Article 5 Article 5 § 1

Deprivation of liberty

Twenty-three days’ de facto confinement in land border transit zone: inadmissible

---

© Council of Europe/European Court of Human Rights
This summary by the Registry does not bind the Court.

Click here for the Case-Law Information Notes