



Hungarian Helsinki Committee

Findings of the Grand Chamber Judgment of the European Court of Human Rights in the Ilias and Ahmed v. Hungary case in light of the current legal framework

Information update by the Hungarian Helsinki Committee (HHC)

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The Grand Chamber of the European Court of Human Rights (GC) delivered its judgment in the case of Ilias and Ahmed v. Hungary on 21 November 2019. In its judgment the GC affirmed the Chamber's judgment of 2017¹ in relation to the violation of Article 3 regarding the return of the applicants to Serbia. However, the majority of the GC did not agree with the Chamber's unanimous decision concerning the nature of the placement in the transit zone and ruled that the applicants were not deprived of their liberty within the meaning of Article 5.²

In light of the radical differences between the legal framework applicable in 2015 and in 2019, the arguments and findings of the GC judgment would not allow the Court to arrive to the same conclusion on the nature of the placement in the transit zone in cases that concern applicants held in the transit zones after 28 March 2017. This paper briefly contrasts the GC's newly established criteria with the current legislative context of the transit zones in Hungary.

The factors put forward in the GC judgment that are fundamentally different today can be summarised under the following categories:

- a. The applicants' individual situation and their choices, and the broader migration context in which regard the following arguments must be highlighted:
 - "[...] asylum-seekers had to stay pending the examination of the admissibility of their asylum requests"³
 - "While this fact [that the applicants entered the transit zone of their own initiative] does not exclude the possibility of the applicants finding themselves in a situation of de facto deprivation of liberty", the Court found this a relevant consideration to be looked at in the light of all other circumstances of the case⁴
 - "[...] the Court observes that the Hungarian authorities were working in conditions of a mass influx of asylum-seekers and migrants at the border [...]"⁵
- b. The domestic legal regime, its purpose, the duration, and procedural safeguards, in which the following conclusions were reached:
 - [...] the rationale and purpose of the domestic legal regime applicable to the Röszke transit zone was to put in place a waiting area while the authorities decided whether to formally admit the asylum-seeker to Hungary. Albeit not decisive in itself, it is relevant to note that the Hungarian authorities did not seek to deprive the applicants of their liberty [...]"⁶
 - [...] the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter cannot be described as deprivation of liberty [...]"⁷

¹ *Ilias and Ahmed v. Hungary [Chamber]*, app. no. 47287/15, available online: <http://hudoc.echr.coe.int/eng?i=001-172091>

² *Ilias and Ahmed v. Hungary [GC]*, app. no. 47287/15, available online: <http://hudoc.echr.coe.int/eng?i=001-198760>

³ §219

⁴ §220

⁵ §228

⁶ §224

⁷ §225

- [...] in line with the purpose of the domestic legal regime, procedural guarantees concerning the processing of asylum claims and provisions fixing the maximum duration of asylum seekers' stay in the transit zone applied to the applicants' case."⁸
- c. The nature and degree of the actual restrictions imposed on or experienced by the applicants:
 - As regards to the possibility to leave the transit zone in the direction of Serbia, the Court noted that although "it is probable that the applicants had no legal right to enter Serbia"⁹, it was nonetheless a practical (albeit unlawful) possibility¹⁰ and that Serbia is a party to the Geneva Convention Relating to the Status of Refugees.
 - Regarding the physical conditions in the facility at the time, "the Court finds that, overall, the size of the area and the manner in which it was controlled were such that the applicants' freedom of movement was restricted to a very significant degree, in a manner similar to that characteristic of certain types of light-regime detention facilities."¹¹

	15 September 2015 – 28 March 2017	Since 28 March 2017
Where asylum applications could be lodged (<i>cf factor a) above</i>)	Anywhere in Hungary	People without the right to stay can only apply for asylum in the transit zone, ¹² except if the applicant is in detention in which case the person can apply for asylum in the detention facility. ¹³
Type of procedure conducted in the transit zone (<i>cf factor b) above</i>)	Only border procedure in line with the Procedures Directive ¹⁴ with an aim to decide on the admissibility of the application ¹⁵	Both regular asylum procedure ¹⁶ and alien policing procedure. ¹⁷
Maximum time limit on placement in the transit zone (<i>cf factor b) above</i>)	28 days ¹⁸	No time limit, applicants must remain in the transit zone until a decision in their asylum procedure becomes final. ¹⁹ In practice in a number of cases asylum-seekers have been and still are waiting in the transit zones for over 6 months. There is no time limit set for alien policing procedure conducted in the transit zone. In practice in a number of cases rejected asylum-seekers have been and/or still are waiting in the transit zones for 1 year. There is no separate remedy available against the placement decision.
Exemptions from the procedure conducted in the transit zone (<i>cf factor b) above</i>)	Border procedure cannot be applied in asylum procedures initiated by vulnerable applicants ²⁰ ; those deemed vulnerable by the authorities are immediately	Unaccompanied children under the age of 14 cannot be placed in the transit zone, ²¹ they are immediately transferred to the Children's Home in Fót. All other applicants having special needs and would be deemed vulnerable by the authorities according

⁸ §226

⁹ §237

¹⁰ §§237-238, 241

¹¹ §232

¹² 80/J (1) of Act LXXX of 2007 on Asylum (hereinafter: Asylum Act)

¹³ 80/J (1a) of the Asylum Act

¹⁴ 71/A (1) of the Asylum Act

¹⁵ 71/A (5) of the Asylum Act

¹⁶ 80/I (i) of the Asylum Act

¹⁷ 62 (3a) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals

¹⁸ 71/A (4) of the Asylum Act, transposing the 4 week deadline for placement in a transit zone set out in Article 43(2) 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) (hereinafter: Asylum Procedures Directive)

¹⁹ 80/J (5) of the Asylum Act

²⁰ 71/A (7), transposing the procedural guarantee set out in Article 24(3) of the Asylum Procedures Directive in a more favourable way

²¹ 80/J (6) of the Asylum Act

	transferred to an open reception facility, usually the day on their arrival to the transit zone.	to their previous practice, including families with small children, severely traumatised individuals, single women, must remain in the transit zones.
Possibility to return applicants lawfully to Serbia (<i>cf factor c) above</i>)	At the material time of the stay of the applicants in the transit zone Serbia already announced that it refuses to readmit asylum-seekers from Hungary under the Readmission Agreement. However due to the low number of readmission attempts by the Hungarian authorities, no objective data was available to prove or dismiss that Serbia indeed systematically refuses to readmit asylum-seekers from Hungary.	<p>Between September 2015 and November 2019, ample evidence accumulated to prove that Serbia indeed systematically and consistently refuses to readmit rejected asylum-seekers from Hungary.</p> <p>Additionally, since July 2018 the Hungarian authorities designate the transit zones as the compulsory place of stay during alien policing procedures of rejected asylum applicants. In each case, the rejected applicants are to be deported to Serbia, however in each case Serbia individually refuses to readmit the third-country nationals from Hungary. The authorities then merely change the destination country of the deportation from Serbia to the country of origin. This means in practice that leaving the transit zone towards Serbia would be against the explicit, individualised and official refusal, communicated to the Hungarian authorities by their Serbian counterparts to readmit the applicants. Leaving the transit zone in these circumstances would be in breach of both Serbian and Hungarian law.</p> <p>While the GC regarded the admittance of asylum-seekers to the transit zone to lodge their application a voluntary act, this obviously cannot be applicable to rejected asylum-seekers who are issued a decision on compulsory place of stay in the transit zone for the alien policing procedure.</p> <p>Moreover, relevant country information shows that those leaving the transit zone towards Serbia face serious obstacles, often insurmountable, when attempting to access the Serbian asylum system. In fact, data from 2018 shows that irregular entry at the Hungarian-Serbian border is regularly penalized by the Serbian authorities.²²</p>
Number of asylum-seekers and migrants generally in Hungary and specifically at the border (<i>cf factor a) above</i>)	<p>In September 2015 the Hungarian Police apprehended 138 396 unlawfully staying third-country nationals on the territory of Hungary.²³ The asylum authority registered 30 794 new asylum applications in that month.²⁴</p> <p>In September 2015 no arbitrary daily admittance rate in the transit zones was imposed.</p>	<p>From 1 January 2019 to 30 September 2019, the Hungarian Police apprehended 6 154 unlawfully staying third-country nationals on the territory of Hungary (4,4% of apprehensions during the single month of September 2015).²⁵ The asylum authority registered 420²⁶ new asylum applications in the same period, the first 9 months of 2019 (1,4% of asylum applications registered during the single month of September 2015).</p> <p>Since January 2018, on average 1 person per transit zone per working day is allowed to enter the facility and lodge an asylum application.</p>

²² Belgrade Centre for Human Rights, *Right to Asylum in the Republic of Serbia 2018*, see especially pp. 29-30, available online <http://azil.rs/en/wp-content/uploads/2019/02/Right-to-Asylum-2018.pdf>

²³ Source: Hungarian Police

²⁴ Source: Office of Immigration and Nationality

²⁵ Source: Hungarian Police

²⁶ Source: Eurostat. Please note that this is a rounded data as per the methodology of Eurostat.