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MIGRATION POLICY IS HEADING DOWN A BEATEN TRACK. COMMENT ON THE JUDGMENT OF THE EUROPEAN OF HUMAN RIGHTS IN THE R.R. AND OTHERS V. HUNGARY CASE OF 5 JULY 2021

Abstract: In July 2021, the Grand Chamber of the European Court of Human Rights(ECHR) delivered a judgment in the *R.R. v. Hungary* case which perpetuates previous case law on obligations in providing migrants with international protection. The judgment is also of critical importance in view of the Common European Asylum System. The ECHR has confirmed that Hungary had failed to full its obligations in providing migrants with international protection especially when it comes to the length of time applicants were deprived of their liberty and the extent of the protection afforded to the pregnant applicant and her minors.

Keywords: asylum law, international protection, migration law, prohibition of torture, transit zone, asylum procedures.

1. Introduction

The prohibition of inhuman or degrading treatment under Article 3 of the Convention on Human Rights and Fundamental Freedoms[1] (Convention) is one of the most fundamental values underlying democratic

1 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.11.1950.

societies. It is also a value of civilization closely linked to respect for human dignity, inherent in the very essence of the Convention.[2] Violations of Article 3 of the Convention are most often the basis of complaints filed by asylum seekers, among others.[3]

This case concerns the confinement of an Iranian-Afghan family, including three minors, to the Röszke transit zone at the border of Hungary and Serbia between 19 April and 15 August 2017. The applicants alleged violations of the following provisions of the Convention: Article 3 (prohibition of torture), taken alone and in conjunction with Article 13 (right to effective remedy), Article 5(1) and 5(4) (right to liberty and security) and Article 34 (individual applications).

States are entitled, in light of well-established international law and subject to their obligations under international agreements, including the Convention, to control the entry, stay and expulsion of foreigners. Assessing whether there are serious grounds for believing that a complainant faces a real risk of being subjected to treatment in violation of Article 3 is, by definition, a rigorous assessment, and absolutely requires the competent national authorities, and then the ECHR, to analyse the conditions existing in the host country in light of the standards set forth in Article 3 of the Convention. These standards stipulate that the ill-treatment allegedly suffered by the complainant must reach a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative and depends on all the circumstances of the case.[4]

2. Facts of the Case

The applicants are an Iranian-Afghan family of five. S.H. ("the applicant mother") claims that she was a victim of torture in Afghanistan; she was allegedly captured, burned and raped by the Taliban, who killed her first husband. On an unknown date between 2012 and 2014 she fled Afghanistan to Iran together with her two daughters from her first marriage, M.H. and R.H.

2 *Khlaifia and Others v. Italy*, no. 16483/12, judgment of 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312, paras. 158-69.

3 Michałowska, *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej*, 97.

4 *Chahal v. United Kingdom*, no. 22414/93, judgment of 15 November 1996, ECLI:CE:ECHR:1996:1115JUD002241493; *Mamatkulov and Askarov v. Turkey*, no. 46827/99, judgment of 4 February 2005.

There she met R.R. ("the first applicant") and entered into a religious marriage with him. R.R., S.H. and her two children left Iran in the beginning of 2016, allegedly escaping reprisals because R.R. had deserted the Iranian army. Having left Iran, they travelled together through Turkey to Greece, where they were separated. R.R. made it to Austria, but allegedly decided to join his family, who were returned to Greece after being arrested in North Macedonia. On 11 March 2016 R.R. was apprehended at Sopron railway station in Hungary. He applied for asylum. On 21 March 2016 he withdrew his asylum application, and the asylum proceedings were terminated. Pending enforcement of his expulsion to Iran, the first applicant was held in immigrant detention, where he submitted his second asylum application. On 3 August 2016 he left for an unknown destination and the asylum proceedings were terminated.

Subsequently, the applicant family was reunited in Serbia. They spent several months in different camps around the country. On 16 October 2016 A.R., the first biological child of R.R. and S.H., was born.

On 19 April 2017 the applicants arrived in Hungary from Serbia and entered the Röszke transit zone, which is situated on Hungarian territory at the border between the two countries. They applied for asylum on the same date.

On 19 April 2017 the Office for Immigration and Asylum (hereinafter "the IAO") issued a ruling ordering that the applicants be accommodated in the Röszke transit zone under section 80/J(5) of the Asylum Act.[5]

The applicants initially stayed in the section of the Röszke transit zone designated for families. They were placed together in a 13squaremetre living container, which had three bunk beds without child safety rails and five lockable cabinets. According to the Government, a cot bed was provided to families with small children. According to the applicants, the containers were extremely hot in summer and without air conditioning; for ventilation they had to open the window and door, which made the room draughty and allowed insects in. An awning over the front door (to offer shade) and fans were provided in August 2017.

In the middle of the family section there was a communal courtyard with a small playground for children, ping-pong table, badminton net, basketball ECHR and goals for football. According to the applicants, there was no shade or greenery in the outdoor area. The section also had a playroom, study room, room for religious worship and common room

5 Act no. LXXX of 2007 on Asylum ("Asylum Act"), 28.03.2017.

equipped with a television. The NGOs working within the zone organised activities for children, such as drawing and crafts, once or twice a week for one to two hours. From September 2017 an education programme for children in the transit zone was provided.

On 29 June 2017 the applicants were moved to an isolation section within the transit zone because the applicant mother and children had hepatitis B. The isolation section consisted of approximately ten mobile containers placed in a row and a narrow open-air area surrounded by fencing (approximately 2.5 metres wide and 40 to 50 metres long). Their living container, which was equipped with air conditioning, was furnished with one bunk bed, two single beds (no cot bed for A.R.) and a chest of drawers. There was no refrigerator, microwave or washing machine in the section. The applicants were given sand for the children to play with. There was no playground and no activities were organised for the children in the isolation section. The applicants had access to a television in the common area container and a ping-pong table.

The applicants submitted that the police officers/guards had often raided their living containers to perform security checks.

According to the applicants, the free wireless internet connection was poor and could only be used for messaging. Also, the applicants submitted that the children had been given chocolate bars for snacks and that fruit had only been provided occasionally. They submitted that the food provided to the children had been inadequate for their age and that the applicant mother had not been provided with maternity clothes, so she had had to sew a dress for herself using bed linen.

The applicants received medical treatment on several occasions during their stay in the transit zone. The Government submitted that asylum-seekers were entitled to basic and emergency medical care, including specialist medical treatment, according to their needs. If justified by their health condition, the resident medical staff could transfer them to hospitals or clinics to obtain urgent or specialist care. On 24 April 2017 the applicant mother was examined by a gynaecologist of a Szeged hospital. On 25 April 2017 she was referred to the emergency department of the hospital because of sickness. On 28 April 2017 she was taken to the hospital to have her pregnancy determined. She underwent blood and laboratory tests in relation to her hepatitis B and was prescribed medication for a urinary tract infection. On the same date she was taken to the emergency department of the hospital because of vomiting and cramps. She spent the night there. On 26 May 2017 she attended a prenatal checkup in the hospital and was found to have a high-risk pregnancy. On

13 and 14 June 2017 she was taken to the hospital and prescribed medication for epigastric (abdominal) pain. On 3 July 2017 she had another check-up in the hospital and a consultation took place in relation to her hepatitis B. On 9 August 2017 she attended an ultrasound appointment and was taken to the emergency department of the hospital. She was recommended a high fluid intake and adequate nutrition (fruit), and was prescribed medication for anaemia. Following the family's release from the transit zone, the applicant mother attended two more medical check-ups. On 24 April and 6 July 2017 the two eldest applicant children were taken to the paediatrics department of the hospital in Szeged. Their hepatitis B was confirmed following blood tests taken during their second visit to the hospital and the doctor suggested a further examination at the hepatology department. On 29 June 2017 the eldest applicant child, M.H., was examined at the ear, nose and throat department of the hospital in Szeged because of frequent nosebleeds. On 16 August 2017 she was taken to the emergency department of a hospital in Győr by ambulance and was subsequently treated at the ear, nose and throat department. The applicants submitted that, although requested, the youngest applicant child had not been given the vaccines recommended at six months. It appears from the case file that she had received some vaccines in Serbia and that the next vaccination appointment was scheduled for 8 April 2017.

The applicants submitted that no interpreter had been present in the course of S.H.'s medical examinations and that no anamnesis (medical history) could be collected from her due to the language constraints (she spoke only in her mother tongue). At her hospital visit of 9 August 2017 a "heteroanamnesis" was taken by questioning an interpreter using English and Dari at the doctor's request. The applicants also submitted that they had always been taken to the hospital in an unsuitable police van and escorted by armed police officers, who had remained present during the medical examinations. In particular, (male) armed police officers had been present (standing by her side) during the second applicant's gynaecological examination.

As regards psychological assistance in the transit zone, the applicants submitted that there had been no assistance for traumatised asylum-seekers. They drew the ECHR's attention to their lawyer's submissions in the asylum procedure of 26 and 27 July 2017. With respect to the applicant mother, the lawyer submitted, amongst others, that she had been subjected to serious ill-treatment in Afghanistan, the consequences of which she was still suffering, and that she was in need of specialist treatment. To this end, the lawyer also submitted that, given her mental health problems,

the applicant mother had been under psychiatric treatment (medication and psychotherapy) during her stay in Serbia and requested that she be examined by a psychiatrist. In their application form, the applicants submitted that S.H. had had to stop taking that medication because of her pregnancy. The Government submitted that during the period in question, the Hungarian Calvinist Charity Service and specialists from Sirius Help had provided psychosocial assistance in the transit zone, the latter specifically for children. On 24 August 2017, at the request of the applicants' lawyer for the purposes of their legal (asylum) procedures, the applicant mother was examined by a psychiatrist, who diagnosed her with major depressive disorder and post-traumatic stress disorder ("PTSD"). The psychiatrist recommended that the applicant mother undergo medical, psychiatric and psychotherapeutic treatment, as otherwise suicidal urges and impulsive reactions were likely to occur. On the same date the two eldest applicant children were examined, at their lawyer's request, by a psychologist, who observed that they showed signs of PTSD related to their experience in the transit zone and opined that psychological support should be made available to them.

As R.R. had already applied for asylum in Hungary before entering the transit zone with his family (see paragraph 6 above), he was considered by the IAO not to be entitled to material reception conditions under the Asylum Act. He was assigned accommodation together with his family but was not given free meals.

The applicants were represented by a lawyer of their choice in the asylum proceedings. The adult applicants were heard by the IAO on 19 April 2017 (both), on 8 June 2017 (only S.H.) and on 10 May and 6 June 2017 (only R.R.). In the course of the asylum proceedings, the IAO, amongst others, requested an expert opinion on their marriage certificate, which was delivered on 3 July 2017. On 20 June 2017 the IAO also requested a DNA test to verify that R.R. was the father of S.H.'s third child. The results of the test, which confirmed his paternity, were received on 14 August 2017.

On 15 August 2017 the applicants were granted leave to enter and temporarily stay in the territory of Hungary (admitted alien status, *befogadott*). They were accommodated in the Vámosszabadi Reception Centre the same day. The IAO however refused to recognise them as refugees or persons in need of subsidiary protection. The applicants requested a judicial review of the part of the decision rejecting their applications. Subsequently, on 23 August 2017 the IAO issued a ruling withdrawing the decision on the merits. On 8 September 2017 it issued a new decision on the merits, recognising the applicants as persons in need of subsidiary protection. In

the meantime, on 25 August 2017 the applicants left for Germany, where they were later granted international protection.

3. Complaints Raised by Applicants

The applicants raised 5 main objections. The first concerned the conditions of their confinement in the Röszke transit zone had been incompatible with the guarantees of Article 3 of the Convention, which reads as follows: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

The Government argued that any discomfort allegedly suffered by the applicants in the transit zone did not attain the minimum level of severity prompting the applicability of Article 3 of the Convention. As regards the first applicant, they submitted that he had not been entitled to material conditions and that the arrangements in place in the transit zone had satisfied his basic needs. They invited the ECHR to declare this complaint inadmissible as incompatible *ratione materiae* with the Convention provisions or as manifestly ill-founded.

The applicants maintained that the reception conditions in the transit zone had amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

Besides the applicants argued that there had been no effective remedy at their disposal to complain about the living conditions in the transit zone. They also claimed that the denial of reception conditions in the first applicant's case had been automatic, without any decision being made in that regard or remedies to challenge the denial. They relied on Article 13 read in conjunction with Article 3 of the Convention, which reads as follows: 'Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

The third allegation concerned a violation of Article 5(1) of the Convention in connection with the complaint that they had been confined to the transit zone. The content of the referred provision reads as follows:

> 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.

Another alleged concerned infringement of article 5(4) of the convention which states:

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 ECHR and his release ordered if the detention is not lawful.

The applicants alleged that their deprivation of liberty in the transit zone could not be remedied by appropriate judicial review, in violation of Article 5(4) of the Convention.

In the last one, the applicants alleged under Article 34 of the Convention that the authorities failed to comply with the interim measure indicated by the ECHR on 19 May 2017.

The ECHR may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

4. Judgment of the ECHR

In response to the first allegation according to the ECHR's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of that level is relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[6]

However, the ECHR pointed out in different judgments that State responsibility under Article 3 could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found him or herself

6 The Court summarised the relevant general principles in the case of *Khlaifia and Others v. Italy*, no. 16483/12, judgment of 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312, paras 158-69.

faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity. In many cases the ECHR has found a violation of Article 3 in particular on account of a combination of three factors: the child's young age, the length of the detention and the unsuitability of the premises for the accommodation of children[7]. In the ECHR's opinion, the confinement of minors raises particular issues in that regard, since children, whether accompanied or not, are considered extremely vulnerable and have specific needs related in particular to their age and lack of independence, but also to their asylumseeker status. Both international and European legal norms encourage states to take certain measures for children who apply for refugee status to provide adequate protection and humanitarian assistance.

In the case of *Ilias and Ahmed*,[8] the living conditions experienced by applicants as adult asylum-seekers in the Röszke transit zone. In that case, the ECHR – noting, in particular, the satisfactory material conditions in the zone, the relatively short length of the applicants' stay there (23 days), and the possibility for human contact with other asylumseekers, UNHCR representatives, NGOs and a lawyer – concluded that the conditions in which the applicants had spent twenty-three days in the Röszke transit zone did not reach the Article 3 threshold. The ECHR considers that the living conditions in the transit zone, in terms of accommodation, hygiene and access to food and medical care, were generally acceptable for holding asylum-seekers for a limited period of time.

However, the situation is not identical in the case at hand, as the plaintiffs are not all adults. They include children and a pregnant woman. The complaining children and their mother indicated that their living conditions were inadequate due to their vulnerability. In contrast, the first complainant alleged a lack of food in the zone.

As regards the first applicant, the ECHR notes that the applicant in the present case was at the material time an asylum-seeker. It confirms that the situation in which he found himself was extremely difficult as he was

7 See more: *Khlaifia and Others v. Italy*,no. 16483/12, judgment of 15 December 2016, ECLI:CE:ECHR:2016:1215JUD001648312, paras. 158-69, *Popov v. France*, nos. 39472/07 and 39474/07, judgment of 19 January 2012, ECLI:CE:ECHR:2012:0119JUD003947207, para. 91, *A.B. and Others v. France*, no. 11593/12, judgment of 12 July 2016, ECLI:CE:ECHR:2016:0712JUD001159312, para. 109, *Müslim v. Turkey*, no. 53566/99, judgment of 26 April 2005, para. 85, *M.S.S. v. Belgium and Greece*, no. 30696/09, judgment of 21 January 2011, ECLI:CE:ECHR:2011:0121JUD003069609, para. 249.

8 *Ilias and Ahmed v. Hungary*, no. 47287/15, judgment of 21 November 2019, ECLI:CE:ECHR:2017:0314JUD004728715, paras. 186-94.

unable to meet the basic need of life which is food. It must be stressed that the Hungarian authorities refused to provide him with free meals throughout his stay in the zone. The ECHR notes that Hungary according to the Reception Conditions Directive was in principle allowed to decide to reduce or even withdraw material reception conditions from the first applicant as a repeat asylumseeker. However, any such decision should in view of the obligation's incumbent on the Hungarian authorities under the Directive have contained reasons for the withdrawal or reduction and should have taken into account the principle of proportionality. The ECHRECHR was not informed of any such decision of the IAO concerning the withdrawal or reduction of material reception conditions, in particular food, in respect of the first applicant. The ECHR considers that the applicant's allegations concerning food availability in the transit zone must be regarded as sufficiently substantiated. Besides, the ECHR also argued that the domestic authorities did not provide the first applicant with food during his four-month stay in the transit zone without duly assessing his circumstances and giving a reasoned decision in that regard. In short, they failed to have due regard to the state of dependency in which he lived there. The foregoing considerations are sufficient to enable the ECHR to conclude that, because of the failings of the Hungarian authorities in securing his basic subsistence in the transit zone, the first applicant found himself for several months in a situation incompatible with Article 3 of the Convention. There has accordingly been a violation of this provision with respect to the first applicant.

Regarding the rest of the group of child and pregnant applicants, the ECHR found that the authorities were generally obliged to take into account the special situation of both categories as particularly vulnerable, as well as to assess and monitor any special reception needs related to their status throughout their asylum procedures. However, it notes that in the present case, the Hungarian authorities do not appear to have conducted any individualized assessment of the special needs of the children of the applicants or the second applicant, all of whom are considered vulnerable under European Union legislation.

The ECHR further notes that the applicant children, who were seven months, six years and seven years old, respectively, were accompanied by their parents throughout their stay in the Röszke transit zone. It finds, however, that this fact cannot absolve the Hungarian State of its obligation to protect them and to take appropriate measures within the framework of its positive obligations under Article 3 of the Convention.

The ECHR is concerned by the applicants' allegation that they were forced to suffer from the heat in a residential container in the family section and that there was no adequate ventilation. It reiterates that suffering from heat cannot be taken lightly, as such conditions can affect one's well-being and, in extreme circumstances, one's physical health. Accordingly, this is a factor that cannot be ignored in the overall assessment of conditions in the transit zone. With regard to the provision of medical services, the ECHR notes that the applicant children and mother received medical treatment (including specialized treatment) on several occasions during their stay in the transit zone. It does not consider it established that the arrangements in place in the zone, such as the medical referral system to the local hospital and the transportation arrangements (see paragraph 19 above), were of such a nature as to constitute a violation under Article 3 of the Convention. With regard to the lack of translation during the applicant mother's medical examination, the ECHR notes that the possibility for a patient to be treated by staff who speak his language is not a condition under Article 3 of the Convention.[9]

Of particular concern to the complainants was the fact that at the time of the facts of the case there was no professional psychological assistance available for traumatized asylum seekers in the transit zone. The ECHR takes note of the applicants' argument that the second applicant (the applicant's mother) had long-standing mental health problems due to the trauma in Afghanistan and received assistance in Serbia, but did not receive any psychological or psychiatric treatment in the transit zone. The ECHR notes the length of the applicants' stay; they were held for three months and twenty-seven days in the Röszke transit zone. In its report, the CPT raised the issue of families with children in the transit zone, noting that the living conditions there were not suitable for holding them for an extended period of time and that their stay should be as short as possible. Accordingly, taking into account the young age of the applicant children, the pregnancy and health situation of the applicants' mother, and the length of the applicants' stay in the transit zone under the conditions set forth above, the ECHR finds that the situation complained of subjected the applicant children and the applicant mother to treatment that exceeded the threshold of severity required to engage Article 3 of the Convention. In the Tribunal's opinion there

9 *Rooman v. Belgium*, no. 18052/11, judgment of 31 January 2019, ECLI:CE:ECHR:2019:0131 JUD001805211, para. 151.

has been a violation of that provision in respect of the applicant children and the applicant mother.

In response to the second allegation, the ECHR has declared admissible the applicants' complaint under Article 3 in respect of the conditions of detention and found a violation of that provision. The complaints in question were therefore "arguable" for the purposes of Article 13 of the Convention and the complaint under Article 13 of the Convention was admissible.

The third allegation was about violation of article 5(1) of the Convention. In determining the distinction between restriction of freedom of movement and deprivation of liberty in the context of the placement of aliens in transit areas and reception centres for the identification and registration of migrants, the ECHR took into account the individual situation of the applicants and their choices, the applicable legal regime of the country and its purpose, the appropriate duration, especially in light of the purpose and procedural protections enjoyed by the applicants while awaiting events, and the nature and degree of actual restrictions imposed on the applicants or experienced by them.[10]

In the ECHR's view, the fact remains that the applicants entered the Röszke transit zone on their own initiative, in order to seek asylum in Hungary. Having known facts about the applicants and their journey, he notes in particular that they waited in Serbia for several months before crossing the border of their own volition, and not because of an immediate and direct threat to their life or health in that country. It is also clear that, in any case, the Hungarian authorities had the right to conduct the necessary verifications and examine their claims before deciding whether or not to accept them. The reason the applicants remained in the transit zone was because they were awaiting the outcome of their asylum proceedings. And the purpose of the national law applicable to the transit zone was to create a place to wait while the authorities decided whether to formally admit asylum seekers to Hungary. The ECHR reaffirmed that it necessarily follows from the right of States to control the entry of aliens into their territory that permission for admission may be subject to compliance with the relevant requirements. Therefore, the situation of a person applying for entry and waiting for a short period of time for verification of his application cannot be

10 The Grand Chamber considered a comparable complaint and found that the applicants' twenty-three-day stay in the Röszke transit zone did not constitute a de facto deprivation of liberty, and consequently that Article 5 did not apply.

described as a deprivation of liberty. The state authorities did not take any steps against the individual other than verification of the asylum application. The ECHR notes that the provision limiting the maximum stay of an asylum seeker in a transit zone to four weeks did not apply in the present case and processing of the applicants' asylum applications was not at all quick, as the applicants spent almost four months in the transit zone awaiting the outcome of their asylum proceedings. On the premise of the nature and degree of the actual restrictions imposed on or experienced by the applicants, the ECHR confirmed that they were free to leave the transit zone towards Serbia at any time.

Instead, the ECHR emphasized that the size of the applicants' section of the transit zone and the manner in which it was controlled was such that the applicants' freedom of movement was severely restricted, in a manner similar to that characteristic of some type of light regime detention. In this regard, the ECHR cannot ignore the fact that the applicants spent a month and a half in the isolation section of the transit zone, under conditions that were, by their nature, even more restrictive. Bearing in mind the above considerations, in particular the absence of any domestic legal provisions specifying the maximum length of the applicants' stay, the excessive length of that stay and the significant delays in the national processing of the applicants' asylum applications, as well as the conditions under which the applicants were detained during the relevant period, the ECHR finds that in the circumstances of this case, the applicants' stay in the transit zone constituted a *de facto* deprivation of liberty, Article 5 § 1 applies. Besides, according to the ECHR, in the case of deprivation of liberty, it is important that the general principle of legal certainty is met, and therefore that the conditions for deprivation of liberty in national law are clearly defined and that the law itself is predictable in its application. Moreover, the detention of a person constitutes a serious interference with individual liberty and must always be subject to rigorous scrutiny. The ECHR could not find in the provision in question any reference to the possibility of detention in a transit zone, nor any indication of the maximum duration of detention in that zone for asylum seekers. Accordingly, it concludes that in the present case there was no strictly defined statutory basis for the applicants' detention.

Regarding the allegation of violation of article 5(4) of the Convention, the complainants alleged that the deprivation of their liberty in the transit zone could not be remedied by adequate judicial review. The ECHR confirmed that there was a violation of this provision of law, since the applicants' detention consisted of a *de facto* measure, unsupported by any decision specifically

addressing the issue of deprivation of liberty. Moreover, the administrative measure proposed by the Hungarian Government dealt with the applicants' requests for asylum rather than the issue of personal freedom. In these circumstances, the ECHR did not confirm that the complainants could have sought judicial review of their detention in the transit zone. The ECHR found that the complainants had no procedure available to them through which the legality of their detention could be quickly resolved by a ECHR.

The last compliant concerned the violation of Article 34 of the Convention. The applicants alleged under Article 34 of the Convention that the authorities failed to comply with the interim measure indicated by the ECHR on 19 May 2017. The ECHR pointed out that on 19 May 2017, it decided to apply the first measure in the case under Rule 39 of the ECHR's Rules of Procedure, indicating to the Hungarian Government:

> [...] to place the applicants, as soon as possible, in an environment that meets the requirements of Article 3 of the Convention, taking into account the presence of three minors and a pregnant woman and to keep the ECHR informed of developments in the applicants' situation.

The ECHR notes that the above decision did not refer to a specific facility for the accommodation of the complainants, nor did it request that the Government place the complainants in a reception centre outside the transit zone. It notes that the complainants' allegation that conditions in the transit zone worsened after the 19 May 2017 provisional measure remained largely unsubstantiated.

5. Conclusions

In response to the migration crisis and the accompanying arrival of large numbers of applicants seeking international protection, Hungary has adjusted its regulations on the right of asylum and the return of illegally residing third-country nationals. A 2015 national law[11] provided, among other things, for the establishment of transit zones, located on the Serbian-Hungarian

11 Egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról szóló 2015. évi CXL. Törvény (Law No. CXL of 2015 on amending certain laws in the context of managing mass immigration) (Magyar Közlöny 2015/124).

border,[12] where asylum procedures are carried out. The law also introduced the concept of an "emergency situation caused by mass immigration." In 2017, the new Hungarian law[13] expanded the cases in which such an emergency situation can be declared.

It is worth mentioning that in 2015 the European Commission informed Hungary of its doubts about the compatibility of their asylum regulations with EU law. The 2017 law raised additional concerns. In particular, the Commission accused Hungary of disregarding the substantive and procedural guarantees provided by the directives on procedures, reception and return,[14] they restricted access to the international protection procedure, established a system of generalized detention of applicants for such protection and adopted the practice of forcibly bringing illegally residing third-country nationals to a strip of land located at the border, in violation of the guarantees provided by the Return Directive. In this context, it brought an infringement action before the ECHR Member State to declare that a significant part of Hungary's regulations in this area violates certain provisions of those directives.[15]

Finally, as a supplement, we should point out the sentence[16] of the Court of Justice of the European Union ruled, among other things, that the conditions under which asylum seekers who arrived in Hungary via Serbia were held in the Röszke transit zone constituted a deprivation of liberty:

> Directives 2008/115 and 2013/33, which must be interpreted to mean that the obligation imposed on a third-country national to remain permanently in a transit zone whose borders are limited and closed, within which the movement of that national is restricted and monitored, and which he

12 Among others, the Roszke zone.

13 Határőrizeti területen lefolytatott eljárás szigorításával kapcsolatos egyes törvények módosításáról szóló 2017. évi XX. törvény (Law No. XX of 2017 on amending certain laws regarding the tightening of procedures conducted in the guarded border zone) (Magyar Közlöny 2017/39).

14 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 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); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

15 C808/18 *European Commission v Hungary*, ECLI:EU:C:2020:1029.

16 C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, ECLI:EU:C:2020:367.

cannot lawfully leave voluntarily, in any direction, appears to be a deprivation of liberty, characterized by 'detention' within the meaning of those directives.

Article 43(1) of Directive 2013/32 gives Member States the option of providing for specific procedures at their borders or transit zones in order to decide on the admissibility, pursuant to Article 33 of that Directive, of an application for international protection lodged in such places or on the substance of that application in one of the cases provided for in Article 31(8) of that Directive, provided that those procedures comply with the basic principles and fundamental guarantees set forth in Chapter II of that Directive. Pursuant to Article 43(2) of Directive 2013/32, these special procedures must be carried out within a reasonable period of time, it being understood that if the decision to reject an application for international protection has not been taken within four weeks, the member state concerned must grant the applicant entry to its territory, and the application must be examined after the expiration of this four-week period in accordance with the usual procedure.

Article 43 of Directive 2013/32 must be interpreted to mean that 'it does not permit the detention of an applicant for international protection in a transit zone for more than four weeks.'

The ECHR has also repeatedly stressed that it is aware of the difficulties currently faced by the European Union's external border states as they try to cope with the increasing influx of migrants and asylum seekers. It is aware of the burdens and pressures on them, especially the difficulties associated with migration to Europe via the sea. As a result, it is becoming all the more complicated for states to control their borders in southern Europe. The absolute nature of the rights guaranteed by Article 3, however, does not exempt the state even in such difficult situations from its obligations under this provision in *Tarakhel v. Turkey*, the ECHR stressed that asylum seekers, as a "particularly underprivileged and vulnerable" population group, require "special protection" in this context.[17]

In the context of the judgment of the ECHR discussed in this study, Hungary has failed to comply with its obligations under international and European Union law regarding procedures for granting international protection and the return of illegally staying third-country nationals. In

17 *Tarakhel v. Switzerland*, no. 29217/12, judgment of 4 November 2014, ECLI:CE:ECHR:2014:1104JUD002921712.

particular, the restriction of access to the international protection procedure, the unlawful detention of applicants for such protection in transit zones, and the removal of illegally residing third-country nationals to the border zone, in violation of guarantees related to the return procedure, are indeed violations of the law.

The Strasbourg ECHR, in the case of Article 3, has issued a significant number of rulings that make it possible to precisely define the scope and concept of freedom from torture and ill-treatment. The rulings cited in this work indicate that the state has an obligation to take special care of persons under its actual authority, including the need to foresee the risk of violations against them of the guarantees of Article 3 on the part of private individuals and to prevent it. Special care should be given to children, who are particularly vulnerable and susceptible to abuse.

Besides, the ECHR affirmed that state responsibility under Article 3 arises when the applicant, in circumstances entirely dependent on state support, was faced with official indifference when he was in a situation of serious deprivation or deprivation incompatible with human dignity.

In the present case, there was a situation in which one of the applicants was deprived of access to food because the Hungarian authorities refused to provide him with free meals throughout his stay in the zone.

With regard to the children, the Hungarian authorities did not conduct any individualized assessment of their needs. And, as confirmed, the children required special care due to their medical condition and previous traumatic events.

The ECHR found that the situation complained of subjected the applicant children and the applicant mother to treatment that exceeded the threshold of severity, and therefore was a violation of Article 3 of the Convention.

In this case, the ECHR, having regard in particular to the absence of any national legislation specifying the maximum length of the applicant's stay, the excessive length of that stay and the significant delays in the national processing of the applicants' asylum applications, as well as the conditions under which the applicants were held during the relevant period, concluded that in the circumstances of this case the applicants' stay in the transit zone constituted a *de facto* deprivation of liberty.

Besides, the ECHR confirmed that the applicants' detention consisted of a measure not supported by any decision specifically addressing the issue of deprivation of liberty. Moreover, the administrative measure proposed by the Government concerned the applicants' applications for asylum rather than issues of personal liberty. In these circumstances, the ECHR did

not confirm that the applicants could have sought judicial review of their detention in the transit zone. Consequently, it found that the complainants had no procedure by which the legality of their detention could be quickly resolved in ECHR.

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