On 19 December 2019 the Administrative and Labour Court of Szeged in Hungary referred a case for a preliminary ruling to the Court of Justice (CJEU). The case raises important questions regarding the conformity with EU law of the asylum and return procedures that the Hungarian authorities conduct at the border transit zone between Hungary and Serbia, at Röszke. In this blog I will explain some of the legal intricacies surrounding border procedures in transit zones under EU law. I will not deal with all of these complexities, but focus on the way in which these procedures relate to the fundamental right to personal liberty. My claim is that EU law sets clear and unambiguous constraints to the use of border procedures and accompanying measures of detention, much more so than general human rights law (see also Galina Cornelisse, (2016) ?Territory, Procedures and Rights: Border Procedures in European Asylum Law? Refugee Survey Quarterly, 35(1): 74?90). These constraints however are not well understood, let alone implemented, by all of the Member States, notably Hungary as the case at hand shows. Before I delve into border procedures and detention under EU law, I set out the facts of the case and explain the five questions referred.

Legal and Factual Background

On 5 February 2019, a married couple filed an application for asylum at the Röszke transit zone. They had left Afghanistan three years previously, and had reached Hungary via Serbia. On 25 April 2019, their applications for asylum were rejected as inadmissible by Hungary, on the basis of national legislation according to which an application is inadmissible when an applicant has arrived in Hungary via a country where he is not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed. They were served with a return decision, an entry ban and a decision ordering their removal.

The first question referred by the national court pertains to the conformity of the ground for inadmissibility in Hungarian legislation as mentioned above with Article 33 of the recast Procedures Directive. In the meantime it has been answered by the Court of Justice: a little over two weeks ago, on 19 March, it ruled in Case C-564/18 [1], that national legislation which provides for inadmissibility of an application on the grounds that an applicant has arrived in a Member State via a country where he is not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed, is precluded by Article 33 of the recast Procedures Directive.
On 17 May 2019 the applicants were ordered to remain in the Röszke transit zone. Obligatory residence in the transit zone is provided for by Hungarian law in a case of crisis caused by mass immigration. The authorities do not regard obligatory residence in the transit zone as a deprivation of liberty, because, they claim, applicants whose applications for asylum have been rejected can leave the transit zone if they wish to do so in the direction of Serbia. As such, there is no judicial remedy available to contest their placement in the transit zone. In the case at hand, the Hungarian aliens? police were in contact with the Serbian authorities to arrange the removal of the applicants to Serbia. They were however informed that Serbia did not agree to take over the applicants as they had entered Hungary lawfully; therefore, Serbia was not obliged to readmit them on the basis of the EU readmission agreement. Even so, the Hungarian authorities did not reopen the asylum procedure, but after an examination of the risk of non-refoulement in view of the general situation and without taking individual circumstances into consideration, they merely changed the country of return in the return decision from Serbia to Afghanistan on 6 June 2019. No judicial remedy was possible against the change of the country of return in the return decision. The last question by the national court concerns the right to appeal such a decision in light of Article 13 Return Directive and 47 Charter, an issue that I will not cover in this blog. Similarly, I will not delve into the second question referred to the CJEU, relating to the refusal of the authorities to examine the substance of the asylum application even when confronted with the impossibility of removal to Serbia.

Does accommodation in the Röszke transit zone amount to a deprivation of liberty?

The remaining two questions of the national court relate to the accommodation of the applicants in the transit zone under the recast Procedures Directive, the recast Reception Conditions Directive and the Return Directive. Both these questions are divided in quite a few sub-questions, but central to these is whether such accommodation amounts to detention, either under the asylum acquis or under the Return Directive. This is an especially salient question in light of the recent Grand Chamber ruling of the European Court of Human Rights in Ilias and Ahmed v Hungary [2]. In this much criticised [3] judgment, overturning an unanimous Chamber judgment, the Grand Chamber ruled that the restrictions imposed upon Ilias and Ahmed as asylum seekers in the Röszke transit zone did not qualify as a deprivation of liberty that would merit the protection of Article 5 ECtHR. It should be highlighted that the facts of the case at hand differ significantly from those in Ilias and Ahmed, most notable as regards the applicable domestic legal framework in 2015, the time spent in detention and last but not least, the situation in 2015: a crisis situation that “necessitated rapidly putting in place measures?” in the eyes of the ECtHR (para 228).

The scope of this blog does not permit me to elaborate in detail on the ruling in Ilias and Ahmed. Elsewhere I have critically assessed [4] the approach of the ECtHR to immigration detention as a whole, qualifying it as “proportionality light”. As we will see below, the very characteristics of EU law make it difficult if not impossible to replicate the Strasbourg approach in Luxembourg in any case, i.e. even without necessarily having to rely on the differences between the circumstances in the case at hand and those in Ilias and Ahmed.

My claim is that the regulation of border procedures in EU law shows that the Union legislator has acknowledged that these procedures entail a deprivation of liberty in most cases. This is apparent from the recast Procedures Directive read in conjunction with the recast Reception Conditions Directive and Article 18 of the Charter. Similarly, retaining asylum seekers in the transit zone after their applications have been rejected while they have no possibility to ?return? in the sense of the Return Directive or to be removed constitutes detention under the Return Directive. Recognising that these situations amount to deprivations of liberty does justice to the realities of migration control in a way that the ECtHR judgment in Ilias and Ahmed failed to do. The way in which the Common European Asylum System (CEAS) thus couples exclusion with constitutional guarantees needs to be carefully considered, both by Member States applying EU law, and the CJEU itself.
when adjudicating on issues that might -at least partly- have been addressed previously by a court belonging to a different legal order, such as the ECtHR.

**Border procedures in EU asylum law (nearly) always involve deprivation of liberty**

In order to substantiate my claim that the use of border procedures in EU law imply the use of detention and therefore need to be subject to the guarantees for a lawful deprivation of liberty in the recast Reception Conditions Directive and Article 6 of the Charter, I will briefly set out the legal framework of the border procedure in EU asylum law.

According to Article 9 of the recast Procedures Directive, applicants for asylum are granted a right to remain on the territory of the Member State that examines their application, for the sole purpose of the procedure, until the determining authority has made a decision at first instance (See also Case C-181/16, **Gnandi** [5]). This right to remain may also entail a right to remain at the border or in transit zones, according to Article 2(p). Article 43 permits the use of border procedures in order to decide on the **admissibility** of an application pursuant to the aforementioned Article 33, which allows for a limited number of grounds for non-admissibility. Member States may also use the border procedure to decide on the **substance** of an asylum application in accordance with Article 31(8) of the Directive. This provision provides a limited number of cases to do so, such as when the applicant has misled the authorities by presenting false information or documents? or when he is from a safe country of origin?. According to the Commission at the time of the negotiations on the recast for the Procedures Directive, the list of cases that can be accelerated or examined at the border remains exhaustive? (European Commission, Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast), COM(2011) 319 final, 1 Jun. 2011 Annex [6]). The application of a border procedure thus needs to be individually justified, which is also apparent from Recital 21 in the preamble of the Directive: ?as long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not per se entail an automatic recourse to border or accelerated procedures?.

Thus, although Member States do not need to grant every applicant for asylum entry to their territory as meant in the Schengen Borders Code, they may refrain from doing so only in those cases in which there are indications that the asylum claim can be decided in the border procedure, on the grounds of Articles 31(8) and 33. In all other cases, the asylum-seeker has to be granted entry to national territory. Moreover, according to Article 43(2) of the Directive, if a decision is not taken within four weeks from the submission of the claim, the applicant must also be granted access to the territory. In the case at hand, we have seen that there was no ground under EU law to declare the applications inadmissible, which means the application could not have been decided in the EU border procedure in the first place. What? more, seeing that the applications were only decided on after more than two months, they should have been granted entry into Hungarian territory after a period of four weeks after filing their applications. The argument put forward by the Hungarian government that the procedures conducted at Röszke are not border procedures does not make sense, seeing that applicants for asylum there are not granted entry to its territory. A procedure in which an applicant is not granted entry qualifies as a border procedure in EU law. As we have seen, these procedures may only be used to decide on admissibility, or on substance in a limited number of cases. The legal configuration of EU asylum law is such that there is no remaining national competence to introduce a kind of procedure that is not provided for in the Procedures Directive.

If the border procedure as defined by EU law is carried out with regard to persons who are accommodated at a transit zone (as opposed to a detention centre), the question is raised whether the stay of the applicants there during the procedure amounts to detention. There are two reasons
why under EU law the answer to that question is more straightforward than under the ECHR, therewith making an outcome such as in Ilias and Ahmed under EU law highly unlikely in any case. In the first place this is so because Article 18 of the Charter guarantees the right to request asylum. Leaving the transit zone will result in forfeiting this right. Secondly, we have seen that applicants for asylum have the right to stay on the territory of the Member State. There is a logical inconsistency in arguing that people who are kept in a guarded and barb-wired camp, and are wholly dependent on the authorities (note that those accommodated at Röszke have at times even had to request interim measures in Strasbourg because they did not get food), are not detained, because they can leave the camp to cross a border illegally, therewith forfeiting their right to remain and their right to request asylum. The argument that the restrictions on their liberty are of a fundamentally different character because they ?requested admission to that State?s territory of their own initiative? makes no sense in the EU legal framework, as these persons exercise a right explicitly granted to them by EU law. Of course, there could be situations in which a very short stay in a transit zone does not amount to detention, namely if it is immediately clear that the application for asylum is obviously without any merits and the possibility to leave or to be removed is possible and legal, and can be carried out on a short term, which must be measured in hours rather than in days. As can be seen from the facts, this was not the case for the applicants, who have been in the transit zone since February 2019 and are still there. Many who are detained at Röszke find themselves in a comparable situation.

An important reason for the Commission to limit the use of border procedures in the proposal for the recast of the Procedures Directive was the circumstance that such procedures ?imply detention? (COM(2013) 411 final [7], p. 4). The link between border procedures and detention in the Procedures Directive is explicitly acknowledged in the provision that addresses the use of border procedures with regard to unaccompanied minors: Article 25(6) stipulates that when Member States identify an applicant as an unaccompanied minor, they may apply or continue to apply Article 43 only in certain cases, ?in accordance with Articles 8 to 11 of Directive 2013/33/EU?. These latter provisions are those that regulate detention in the Reception Conditions Directive. Article 8 of that instrument contains an exhaustive list of the grounds of detention of asylum-seekers, one of which is detention ?in order to decide, in the context of a procedure, on the applicant?s right to enter the territory?. It is obvious that this ground for detention denotes deprivation of liberty in the context of the border procedure as provided for in Article 43 of the Procedures Directive.

**Border procedures in the event of arrivals of large numbers**

The first paragraph of Article 43 thus provides for a limited amount of cases in which a border procedure may be applied, and the second one sets strict time limits to these procedures. A border procedure in the sense of Article 43(1) is ordinarily carried out at the border or a transit zone. However, in the event of large numbers of arrivals of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, Article 43(3) provides that those procedures (i.e. a procedure in which the applicants are not granted entry) may also be applied ?where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.? The way in which this provision deviates from the arrangement in Article 43(1) thus seems to be with regard to the location of the procedure, i.e. if the number of arrivals is so large that not all persons can be held in the transit zone or at the border, individuals can also be accommodated more inland, as long as they are accommodated normally. Obviously, the crucial question here is what is meant with ?accommodated normally?.

Seeing that the asylum acquis needs to be read as a whole, such accommodation has to be in accordance with the recast Reception Conditions Directive, more specifically its Articles 7
(residence and freedom of movement) and 8-11 (detention). The term ?normal? may be taken to signify that such accommodation differs fundamentally from deprivations of liberty. Individual applicants can be detained only if in their case grounds for detention exist under the recast Reception Conditions Directive. In that case, the use of detention needs to be proportionate and individually justified, and rules regarding alternatives should be laid down in national law (see also Case C-601/15, J.N. [8]).

Moreover, if a Member State wants to invoke Article 43(3), it would be required to justify this in accordance with the EU principle of proportionality, showing that the numbers of arrivals are such that it is impossible to apply the border procedure at the border or in a transit zone. If the Hungarian authorities argue that the mass influx of asylum seekers justifies the way they carry out asylum procedures at Röszke, they disregard EU law with regard to all of the points discussed here: In the first place, the applicants are not accommodated ?normally? in proximity of the border, but instead they are held in a camp located in the transit zone, which is guarded and surrounded by barbed wire. As I have set out above, such accommodation amounts to deprivations of liberty in the EU legal order. Secondly, there are no indications that the numbers of arrivals at present are such that it is impossible to apply the border procedure as provided for in Article 43(1). Because there are no circumstances that justify an appeal to Article 43(3), Hungary needs to grant applicants whose applications for asylum cannot be decided in a border procedure access to its territory. Detention may be possible in individual cases, but it can only be applied on the basis of the limited grounds of enumerated in Article 8 of the Reception Conditions Directive, and it needs to be in accordance with all the other requirements in that instrument and with Article 6 of the Charter.

Accommodation in the transit zone after rejection of the asylum claim also amounts to detention in the sense of the Return Directive

We have seen that accommodation in the transit zone during the EU border procedure involves detention. Now what can be said about the situation after the application has been rejected? As long as a Member State has not made use of the possibility to exclude those who have been refused entry from the scope of the Return Directive in line with Article 2(2)a, it is obliged to apply that Directive to these individuals. In the case of applicants, Hungary in first instance designated Serbia as the country of return in the return decision. When it transpired that Serbia did not want to readmit the applicants, the authorities changed the country of return to Afghanistan. Seeing that Serbia refuses to readmit (rejected) applicants for asylum from Hungary that country cannot be designated as a country of ?return? in the sense of Article 3 para 3 of the Return Directive.

Moreover, leaving the transit zone would be in breach of Serbian law, constituting illegal entry, which at times have been penalised by the Serbian authorities. Seeing that there is no possibility to leave the transit zone for applicants, let alone return to Afghanistan, neither practically nor legally, it is obvious that their accommodation there constitutes detention. Such deprivation of liberty has to be in accordance with Article 15 of the Return Directive, which means that it is only allowed if necessary and no other coercive measures are sufficient. The lawfulness of the detention should be reviewed at regular intervals by a judge. Moreover, such detention is bound to a maximum duration of 6 months only to be extended with a further 12 months under specific circumstances (lack of documents). Importantly, detention is only possible if there is a reasonable prospect of removal and the authorities are obliged to work diligently towards such removal. Hungarian law and policy with regard to rejected applicants for asylum who find themselves at Röszke transit zone is failing on all of these counts.
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