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The ECtHR Ruling in Ilias and Ahmed: ?safe third country? concept put to the test

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On 14 March 2017 the Fourth Section of the European Court of Human Rights (ECtHR) delivered its judgement in the case of *Ilias and Ahmed v. Hungary* [1] concerning two asylum seekers of Bangladeshi nationality who were detained at the border zone in Hungary and then subject to removal to Serbia. Although the judgement is not final yet (as Hungary could ask for a referral [2] to the Grand Chamber), its findings appear highly relevant and timely. On the one hand, the present case deserves attention in the wake of Hungary?s newly-adopted asylum law [3]. On the other hand, it might also have far-reaching implications for any agreement with third-countries that the European Union (EU) or its Member States may put in place given that the judgment deals with the concept of ?safe third-country? and its compliance with Article 3 of the European Convention on Human Rights (ECHR).

This contribution is aimed at providing an analysis of the ruling by focusing in particular on the procedural guarantees that, in the Court?s view, States must respect when resorting to the application of the safe third-country concept, in light of the principle of *non-refoulement* enshrined in Article 3 ECHR.

Detention of asylum seekers: a warning bound to fall on deaf ears?

The Court found that the applicants? detention in the transit zone for 23 days was unlawful and therefore in violation of Article 5(1) ECHR. The Court considered that the applicants? confinement amounted to a *de facto* deprivation of liberty, put in place ?*as a matter of practical arrangement [?] not incarnated by a formal decision of legal relevance, complete with reasoning*? (para. 67). Recalling its well-established jurisprudence on immigration-related detention, the Court observed that the deprivation of liberty had no legal basis and occurred ?*solely by virtue of an elastically interpreted general provision of the law*? (para. 68), since domestic law ? and EU asylum law ? did not provide for the possibility of detaining asylum seekers at the transit zone. In addition, the Court also found a violation of Art. 5(4), thus confirming the worrying lack of an appropriate judicial review that has been highlighted previously in this blog [4].

The ECtHR?s decision tackles what appears to be a systematic use of detention [4], that will be further exacerbated as the new Hungarian asylum law, which foresees the possibility to automatically detain [5] all adult asylum seekers (including families with children and unaccompanied children as of 14 year old [6]) in transit zones without any individual assessment, has just entered into force. However, the fact that the new legislation seems to provide a legal basis for detention does not make such deprivation of liberty any less arbitrary. In *Ilias and Ahmed*, the Court observed that the EU Reception Conditions Directive [7] (2013/33/EU, Art. 8) prohibits

the detention of a person for the sole reason that he or she is an asylum applicant. It follows that the automatic detention of asylum seekers in transit zones, without any effective remedy, is not ?in accordance with the law? and therefore at odds with Art. 5(1) ECHR, since legal obligations ?*may clearly also stem from European Union Law*?, which Hungary is bound by (para. 63).

Detention conditions: consolidating the*Khlaifia*?s benchmark

The Court is very clear from the outset (para. 82) in stating that the core principles applicable to migrants held in detention have been articulated in the recent Grand Chamber?s ruling in *Khlaifia and Others v. Italy* [8]. Therefore the Court reiterated that, although a ?crisis? can never justify Art. 3 violations, it is not possible to overlook the ?*situation of extreme difficulty*? the authorities are faced with when confronted with high numbers of migrants (para. 83). The Court maintained a strictly realistic approach to the material aspects of Art. 3 and, on this account, did not find that the conditions of detention reached the threshold of severity required by that provision (para. 89).

The Court came to this conclusion notwithstanding the post-traumatic stress disorder the applicants were diagnosed with (para. 86). In this respect, the Court seems to narrow down the ?vulnerability approach? elaborated in *M.S.S. v. Belgium and Greece* [9] ? according to which asylum seekers are to be considered particularly vulnerable because of everything they have been through ? to affirm that Mr. Ilias and Mr. Ahmed ?*were not more vulnerable than any other adult asylum-seeker detained at that time*? (para. 87). In the Court?s view, this is due to the circumstance that the events in Bangladesh, which gave rise to the applicants? flights, had happened several years before their arrival to Hungary. It remains to be seen whether, and to what extent, the Court would be willing to reverse this position when confronted with asylum seekers who have recently fled from persecution and/or suffered violence throughout their journey to Europe. As for the moment, it appears as if the ECtHR is departing from the concept of a ?group? vulnerability as elaborated in *M.S.S. v. Belgium and Greece* to shift towards a more *ad hoc*-based approach, which actually grants States considerable room to decide, case by case, who is entitled to (a wider degree of) protection by virtue of their (heightened) vulnerability.

?Safe third-country?: procedural guarantees stemming from Art. 3 ECHR

The Court?s pronouncement that the applicants? removal to Serbia was in breach of Art. 3 is probably the most-awaited finding of the present judgement. Since the ECHR does not contain an explicit right to asylum, the Court cannot but scrutinise the use of the safe third-country concept against the benchmark of Art. 3 and the prohibition of *non-refoulement* enshrined therein (paras. 112-113).

The Court?s reasoning is entirely focused on the procedural guarantees that must necessarily underpin the safe third-country concept for it to be in compliance with Art. 3. There are three aspects according to which the Court conducted its analysis: the burden of proof, the right to information, and whether Serbia can actually be considered a safe third-country.

i) *Burden of proof*

The applicants? removal to Hungary had been ordered on the basis of the inclusion of Serbia in the national list of safe third-countries by a 2015 Government Decree [10]. In the Hungarian Government?s view, that constituted a rebuttable presumption and, as such, was in line with the ECtHR?s jurisprudence (para. 110).

With regard to the burden of proof in non-*refoulement* cases, the ECtHR has constantly affirmed that it is in principle for international protection seekers to substantiate their claim and adduce evidence capable of proving a real risk of an Art. 3 violation in case of an expulsion. Nevertheless,

it has likewise steadily established that, with regard to asylum claims based on a well-known general risk, States have a duty to carry out an assessment of such risk of their own motion (see e.g. *R.C. v. Sweden* [11]; *F.G. v. Sweden* [12]).

Moreover, the ECtHR has been at the forefront in rejecting the absolute presumption of a country?s safety [13], especially in the context of the Dublin Regulation. From *K.R.S. v. the United Kingdom* [14] to *M.S.S. v. Belgium and Greece* [9], the principle that the applicant shall be able to challenge ? and rebut ? the presumption that a country is safe for her or him, is well entrenched in the Court?s jurisprudence. Nonetheless, the Court is sensible to ensure that such possibility is effective and applicants have an actual chance to put forward their arguments, in order to avoid placing the entire burden of proof on them (*M.S.S. v. Belgium and Greece*, paras. 351-352).

However, that was not the case in the present judgement, where the Court affirmed that the burden of proof placed on the applicants in the present case was excessive and unfair (para. 124). It contested the legal effects that the presumption of safety entailed for the applicants, namely a reversal of the burden to prove a real risk of direct *refoulement* to Serbia and indirect *refoulement* to the Former Yugoslav Republic of Macedonia (FYROM) and Greece. According to the Court the burden of proof was detrimental to the applicants since the Government remained inactive, omitting to do its share in the assessment of a risk of Art. 3 violation. Indeed, such inequality of arms meant that the applicants were in no position to rebut the presumption of safety, since the Government?s arguments remained confined to the ?*schematic reference*? to the inclusion of Serbia in the national list of safe countries (para. 124). This circumstance, in the Court?s opinion, precluded any consideration of the merits (para. 118).

ii) Lack of information

Closely related to the considerations on the burden of proof is the provision of the right to information, a right which was found to be entirely lacking for the applicants. In effect, when applicants are not properly informed on the procedure they find themselves in, they will be unable to adequately circumstantiate their claims, because they will not be in a position to know which elements are needed; whom they should refer to throughout the asylum procedure; and, more generally, which steps they are supposed to undertake to navigate the asylum procedure.

The right to access and receive information is an essential procedural safeguard that, as such, is functional to the enjoyment of a whole series of rights; it is at the core of the right to an effective remedy (Art. 13 ECHR; Art. 47 EU Charter on Fundamental Rights) and it is fundamental to the right to personal liberty (Art. 5(2) ECHR).

The Court has recognised the paramount importance, for asylum seekers, of obtaining sufficient information in order to effectively access the procedure and substantiate their claims (para 116). For instance, in *M.S.S. v. Belgium and Greece* [9] (para. 304) the Grand Chamber indicated that the lack of access to information ?is clearly a major obstacle? in accessing the asylum procedure. The Court considers the right to information an essential protective device against *refoulement*, namely a way to channel the applicants? claim into the asylum procedure, as well as any other individual circumstance that could exacerbate or heighten the risk under Article 3.

In the case at hand, the Court observed that the applicants were only given a leaflet on the asylum procedure despite them being both illiterate, and Mr. Ilias was interviewed in a language he did not understand. Moreover, the applicants could not meet with their lawyer prior to their hearing. Thus, the Court found that the applicants? active participation to the procedure had not been made possible.

In light of the foregoing, this judgement strengthens the primary role that the right to information

plays in the asylum procedure. As such, it sounds like a call on States to put in place adequate services that would render the right to information effective and accessible, e.g. access to a lawyer and to an interpreter. In effect, not only the presence of these guarantees help protect asylum seekers? rights, but can be a way, for States, to avoid being sanctioned at a later stage for violations that would have not occurred if the applicant had been provided with adequate information and assistance. It is a matter of fostering fair and efficient asylum procedures.

iii) Serbia as a safe country of asylum

The Hungarian Court before which the applicants appealed the asylum rejection for the first time had ruled against Serbia as a safe country (para. 18). This is not an isolated case; already in 2016 the Szeged Administrative and Labour Court [15] stressed the excessive burden posed by the safe third country concept. Furthermore, other EU Member States? courts [16] have ruled against Serbia as a safe country too.

The ECtHR noted that the shortcomings of the Serbian asylum system emerged clearly from relevant and up-to-date reports authored by the UNHCR [17] and ECRE [18] (see also the 2016 AIDA?s Country Report on Serbia [19]; paras. 37-41 of the judgement). The Court reached similar conclusions as to FRYOM and in relation to the risk of *refoulement* to Greece, since there were still risks of a violation of Article 3 and 13 ECHR in Greece (paras. 122-123).

Nonetheless, apart from these observations, the Strasbourg judges did not embark on any thorough analysis on the existence of ill-treatment in Serbia and, by means of chain-*refoulement*, in the FYROM and Greece. In the Court?s words:

?the Court [?] is not called in the present case to determine the existence of a systemic risk of ill-treatment in the above countries as the procedure applied by the Hungarian authorities was not appropriate to provide the necessary protection against a real risk of inhuman and degrading treatment.? (para. 124)

This means that the breach of Article 3 by Hungary occurred at a stage before the one requiring an examination of the risk of ill-treatment in the country of removal. Notably, the Court requires Hungary to provide a sound and facts-grounded motivation as for the ?reversal of attitude? (para. 120) in relation to Serbia. As expressed by the Strasbourg judges:

?[H]owever, the 2015 legislative change produced an abrupt change in the Hungarian stance on Serbia from the perspective of asylum proceedings (see the UNHCR and ECRE reports quoted in paragraphs 37 to 39 above). The altered position of the Hungarian authorities in this matter begs the question whether it reflects a substantive improvement of the guarantees afforded to asylum-seekers in Serbia. However, no convincing explanation or reasons have been adduced by the Government for this reversal of attitude, especially in light of the reservations of the UNHCR and respected international human rights organisations expressed as late as December 2016.? (para. 120)

In this regard, the Court referred to the case of *Mohammadi v. Hungary* [19], where it found that Hungary had no longer relied on the safe third country concept for Serbia (para. 73). Conversely, in the present case the Hungarian authorities limited their arguments to the inclusion of Serbia in the national list of safe countries.

The Court maintained that such *modus operandi* disregarded the procedural safeguards assisting Article 3; therefore, an assessment of the conditions in Serbia became unnecessary, insofar as that provision had been already violated in its procedural aspects.

Potential impact of the judgement

The ruling represents a remarkable step forward for the protection of refugees, at a moment when their rights are threatened by increasingly restrictive stances, both at domestic and European level.

First of all, the Court made clear that the inclusion in a list of safe third countries does not suffice to conclude that a third country is safe. States cannot merely refer to such inclusion when the safe third country concept is challenged, but they have a duty to put forward arguments that are not solely rhetoric, but based on the analysis of facts and relevant reports. In this sense, the decision bears relevance as for the use of lists of safe third countries by EU Member States, particularly in light of the proposal [20] to create a EU common list of safe third countries. Safe country concepts raise serious concern [21]s especially when they are coupled with the use of accelerated and border procedures [22], since a reduced timeframe for the examination of the asylum application may hinder the possibility to effectively rebut the presumption of safety. The risk of lowering the procedural guarantees emerges clearly from the present case, in which the asylum seekers had only three days to rebut such presumption (para. 23), and the tight time limit was further complicated by the lack of information and the hindered access to a legal representative.

With this pronouncement, the Strasbourg Court curbs the blanket presumption of a country?s safety that derives from its designation by the legislation. Whilst the Court did not rule out completely the possibility for States to resort to safe country concepts, it established core safeguards that, if disregarded, would lead to a violation of Article 3 ECHR. In particular, the Court takes the view that the ratification of the 1951 Refugee Convention is not a sufficient condition to qualify a country as safe (contrary to what the Hungarian government stated; para. 110).

In this regard, the judgment triggers some reflection as to the increasing practice to rely on third countries to manage, control and prevent access to the EU territory for refugees. This pronouncement could provide arguments to challenge the practical application and the lawfulness vis-à-vis the ECHR of the agreements concluded between the EU and third countries.

The immediate reference is to the EU-Turkey statement, as well as to the bilateral agreements concluded by EU Member States. The Court?s reasoning and the principles enshrined in *Ilias and Ahmed* could be potentially used before the ECtHR to challenge cases of asylum seekers who have been denied access to territory/asylum in application of these agreements based on the safe third country concept. The main argument for litigation on the point would thus be constituted by the need to conduct a thorough assessment of the existence of proper safeguards embedded in Article 3 ECHR before taking any decision to deny access or status as a consequence of the application of the safe third country concept. Such assessment predates, and where applicable will preclude, any further examination of the existence of a real risk of ill-treatment in the said third country.

Conclusion

The *Ilias and Ahmed* ruling brings a meaningful contribution to the protection standards of refugees in Europe. To say that the judgment came out in a moment that is crucial for Hungary, and for the European asylum system as a whole, would be an understatement. This judgement reaffirms unequivocally a principle that the Court has already made clear in several judgements [4] ; the use of detention without any prior individual assessment is a flagrant breach of the Convention. It spells out that detaining people merely because they are asylum seekers is prohibited ? no ifs and buts. Article 5 ECHR demands a rigorous interpretation and exceptions to the right enshrined therein are to be narrowly interpreted. Practical arrangements, decisions driven by political objectives and unlawful domestic legislation cannot circumvent the Convention?s guarantees.

Furthermore, it could pave the way to litigation strategies aimed at countering the sweeping use of the safe country concepts, which must pass the test set by the Strasbourg Court with regard to Article 3 ECHR.

However, amid the positive aspects that this decision brings in, a word of caution is due. From a very practical point of view, it may be difficult to bring cases before the ECtHR if asylum seekers are systematically sent back to alleged safe third countries on the basis of a legislative instrument ? or an agreement, a ?statement?, a ?memorandum of understanding? ? especially if they are also denied proper legal assistance. Moreover, the Strasbourg Court could only sanction treatments contrary to the ECHR on a case by case approach, with the inevitable consequence that, notwithstanding basic core principles, the outcome would be highly dependent on the concrete facts of the case and the profile of the applicant. Finally, it should be reminded that the timeframe for a Grand Chamber?s referral is still pending, and thus the Chamber?s conclusions are still to be confirmed once and for all.

In any case, whilst the Court intervened to halt the schematic and arbitrary use of the safe third country concept, the EU and, notably, its Member States, are resorting to such instrument more and more often. The fundamental role that the ECtHR plays in the field of refugee law is manifestly apparent; however, in addition to judges in Strasbourg, there should be more responsible and rights-based policy and legislation making elsewhere in Europe.

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(This journal entry is an expression of the authors' own views, and not those of EDAL or ECRE)

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Procedural rights and safeguards

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[2] http://hungarytoday.hu/news/hungary-reluctant-compensate-bangladeshi-asylum-seekers-appeals-ecthr-ruling-33717
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