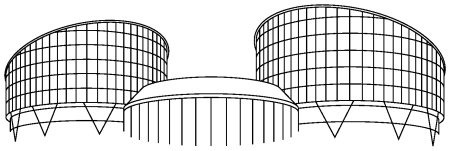

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ILIAS AND AHMED v. HUNGARY

(Application no. 47287/15)

JUDGMENT

STRASBOURG

14 Mars 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ilias and Ahmed v. Hungary,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
András Sajó,
Nona Tsotsoria,
Krzysztof Wojtyczek,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 28 February 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 47287/15) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Bangladeshi nationals, Mr Md Ilias Ilias and Mr Ali Ahmed ("the applicants"), on 25 September 2015.

2. The applicants were represented by Ms Barbara Pohárnok, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Tallódi, Agent, Ministry of Justice.

3. On 25 September 2015 the applicants submitted a request for an interim measure under Rule 39 of the Rules of Court. In that request, they sought to be released from the transit zone and that their impending expulsion to Serbia be halted. They submitted that the conditions of their allegedly unlawful detention at the transit zone were inadequate given their vulnerable status and that no legal remedy was available to them. Furthermore, they argued that the expulsion exposed them to a real risk of inhuman and degrading treatment resulting from the risk of chain-*refoulement*. They relied on Articles 3, 5 and 13 of the Convention.

4. On 7 October 2015 the Acting President of the Section decided not to indicate to the Government, under Rules 39 of the Rules of Court, the interim measures sought. At the same time, he decided to give priority to the application under Rule 41 and, under Rule 54 § 2 (b) of the Rules of Court, to give notice of the application to the Government and invite them to submit written observations on the admissibility and merits of the case.

5. In their full submissions of 20 October 2015, the applicants alleged that the authorities' conclusion that Serbia would be a "safe third country" in their respect, without a thorough and individualised assessment of their

cases, had resulted in a breach of Articles 3 and 13 of the Convention. Moreover, they submitted that their protracted confinement in the transit zone, given their vulnerable status and the prevailing conditions, amounted to inhuman treatment in breach of Article 3. Lastly, their deprivation of liberty in the transit zone had been unlawful and had not been remedied by appropriate judicial review, in breach of Article 5 §§ 1 and 4 of the Convention.

6. The Government submitted their observations on 8 July 2016. The applicants submitted their observations in reply on 29 August 2016.

7. On 17 October 2016 the Vice-President of the Section invited the parties, under Rules 54 § 2 (c) of the Rules of Court, to submit further observations on the admissibility and the merits of the application.

8. The Government submitted further observations on 4 November 2016. The applicants submitted further observations in reply on 28 November 2016.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born on 1 January 1983 and 3 June 1980 respectively. Having left their home country, Bangladesh, they travelled through Pakistan, Iran, and Turkey, and entered the territory of the European Union in Greece. From there, they transited through the former Yugoslav Republic of Macedonia to Serbia. Mr Ilias spent some 20 hours on Serbian territory; whereas Mr Ahmed two days. At last, on 15 September 2015 they arrived in the Röszke transit zone situated on the border between Hungary and Serbia. On the same day, they submitted applications for asylum.

10. From that moment on, the applicants stayed inside the transit zone, which they could not leave in the direction of Hungary. They alleged that the transit zone was, in their view, unsuitable for a stay longer than a day, especially in the face of their severe psychological condition. They were effectively locked in a confined area of some 110 square metres, part of the transit zone, surrounded by fence and guarded by officers; and were not allowed to leave it for Hungary. They claimed that they had no access to legal, social or medical assistance while in the zone. Moreover, there was no access to television or the Internet, landline telephone or any recreational facilities. They submitted that they stayed in a room of some 9 square metres containing beds for five.

11. The Government submitted that the containers measured 15 square metres. There were five beds in each container and an electric heater. The

number of asylum-seekers never exceeded thirty in the material period. Hot and cold running water and electricity were supplied. Three pork-free meals were available daily to the applicants in a dining-container. Medical care was available for two hours daily by doctors of the Hungarian Defence Force.

12. According to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") (see paragraphs 36 below), asylum seekers in the Röszke zone were accommodated in rooms of some 13 square metres in ground surface that were equipped with two to five beds fitted with clean mattresses, pillows and bedding. The accommodation containers had good access to natural light and artificial lighting, as well as to electric heating. Further, there was a narrow designated area in front of the containers to which foreign nationals had unrestricted access during the day. The sanitary facilities were satisfactory. The CPT delegation had a good impression of the health-care facilities and the general health care that was provided to foreign nationals in the establishment.

13. The applicants, both illiterate, were interviewed at once by the Citizenship and Immigration Authority ("the asylum authority"). By mistake, the first applicant was interviewed with the assistance of an interpreter in Dari, which he does not speak. Both applicants' mother tongue was Urdu. According to the record of the meeting, the asylum authority gave the first applicant an information leaflet on asylum proceedings, which was also in Dari. The interview lasted two hours. An Urdu interpreter was present for the second applicant's interview, which lasted 22 minutes.

14. According to the notes taken during the interviews Hungary was the first country where both applicants had applied for asylum.

15. By a decision delivered on the very same day of 15 September 2015, the asylum authority rejected the applicants' asylum applications, finding them inadmissible on the grounds that Serbia was to be considered a "safe third country" according to Government Decree no. 191/2015. (VII.21.) on safe countries of origin and safe third countries ("the Government Decree", see paragraph 33 below). The asylum authority ordered the applicants' expulsion from Hungary.

16. The applicants challenged the decision before the Szeged Administrative and Labour Court. On 20 September 2015 the applicants, through representatives of the Office of the United Nations High Commissioner for Refugees ("UNHCR") who had access to the transit zone, authorised two lawyers acting on behalf of the Hungarian Helsinki Committee to represent them in the judicial review procedure. However, the authorities did not allow the lawyers to enter the transit zone to consult with their clients until the evening of 21 September 2015, that is, after the court hearing.

17. On 21 September 2015 the court held a hearing regarding both applicants with the assistance of an Urdu interpreter. Both applicants stated that they had received a document from the Serbian authorities written in Serbian, which they could not understand, and that they had been ordered to leave Serbian territory. At the hearing, the second applicant submitted that he had applied for asylum in Serbia, but his application had not been examined.

18. The court annulled the asylum authority's decisions and remitted the case to it for fresh consideration. It relied on section 3(2) of the Government Decree and argued that the asylum authority should have analysed the actual situation in Serbia regarding asylum proceedings more thoroughly. It should also have informed the applicants of its conclusions on that point and afforded them three days to rebut the presumption of Serbia being a "safe third country" with the assistance of legal counsel.

19. On 23 September 2015, at the request of their lawyers, a psychiatrist commissioned by the Hungarian Helsinki Committee visited the applicants in the transit zone and interviewed them with the assistance of an interpreter attending by telephone. Her opinion stated that the first applicant (Mr Ilias) had left Bangladesh in 2010 partly because of a flood and partly because two political parties had been trying to recruit him. When he refused, he was attacked and suffered injuries. The psychiatrist observed that he was well oriented, able to focus and recall memories, but showed signs of anxiety, fear and despair. He was diagnosed with post-traumatic stress disorder ("PTSD"[1]).

20. With regard to the second applicant (Mr Ahmed), the medical report stated that he had fled his country five years before. He had previously worked abroad, during which time his whole family had died in a flood. He had then left Bangladesh and migrated through several countries in order to restart his life. He was found to be well oriented with no memory loss but with signs of depression, anxiety and despair. He was diagnosed with PTSD and as having an episode of depression.

21. Neither of the reports contained any indication of urgent medical or psychological treatment. However, the psychiatrist was of the opinion that the applicants' mental state was liable to deteriorate due to the confinement.

22. According to the documents in the case file, on 23 September 2015 the asylum authority informed the applicants' legal representatives by

[1] The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM–5, 2013) is the leading authority on the standard classification of mental disorders used by mental health professionals, devised by the American Psychiatric Association. According to its definition, PTSD is a disorder that is connected to an external event. It can be diagnosed if the following cumulative criteria are all met: directly or indirectly experienced traumatic event, intrusion or re-experiencing, avoidant symptoms, negative alterations in mood or cognitions, and increased arousal symptoms. These symptoms must have lasted for at least one month, must seriously affect one's ability to function and cannot be due to substance use, medical illness or anything except the event itself.

telephone that a hearing would be held two days later. However, the applicants submitted that no such precise information had been given to their representatives.

23. Since their legal representatives were not present at the hearing, the applicants decided not to make any statement. With the assistance of an Urdu interpreter, the asylum authority informed the applicants that they had three days to rebut the presumption of Serbia being a safe third country.

24. On 28 September 2015 the applicants' legal representatives made submissions to the asylum authority and requested that a new hearing be held, which they would attend.

25. On 30 September 2015 the asylum authority again rejected the applications for asylum. It found that the reports prepared by the psychiatrist had not provided enough grounds to grant the applicants the status of "persons deserving special treatment" since they had not revealed any special need that could not be met in the transit zone. As to the status of Serbia being classed as a "safe third country", the asylum authority noted that the applicants had not referred to any pressing individual circumstances substantiating the assertion that Serbia was not a safe third country in their case, thus they had not managed to rebut the presumption. As a consequence, the applicants' expulsion from Hungary was ordered.

26. The applicants sought judicial review by the Szeged Administrative and Labour Court. On 5 October 2015 the court upheld the asylum authority's decision. It observed in particular that, in the resumed proceedings, the asylum authority had examined, in accordance with the guidance of the court, whether Serbia could be regarded generally as a safe third country for refugees and had found on the basis of the relevant law and the country information obtained that it was so. It had considered the report of the Belgrade Centre for Human Rights published in 2015, the reports of August 2012 and June 2015 issued by the UNHCR concerning Serbia together with other documents submitted by the applicants. It had established on the basis of those documents that Serbia satisfied the requirements of section 2 (i) of the Asylum Act. The court was satisfied that the asylum authority had established the facts properly and observed the procedural rules, and because the reasons for its decision were clearly stated and were reasonable.

27. The court further emphasised that the applicants' statements given at the hearings were contradictory and incoherent. The first applicant had given various reasons for leaving his country and made confusing statements on whether he had received any documents from the Serbian authorities. The document he had finally produced was not in his name, and therefore it could not be taken into account as evidence. Never in the course of the administrative proceedings had he referred to the conduct of human traffickers before his hearing by the court. The second applicant's statements were incoherent on the issue of the duration of his stay in Serbia

and the submission of a request for asylum. The applicants had not relied on any specific fact that could have led the authority to consider Serbia non-safe in their respect. They had contested the safety of Serbia only in general which was not sufficient to rebut the presumption.

28. Lastly, the court was satisfied that the authority's procedure had been in compliance with the law.

29. The final decision was served on the applicants on 8 October 2015. It was written in Hungarian but explained to them in Urdu. Escorted to the Serbian border by officers, the applicants subsequently left the transit zone for Serbia without physical coercion being applied.

30. On 22 October 2015 the transcript of the court hearing held on 5 October 2015 was sent to the applicants' lawyer. On 10 December 2015 the lawyer received the Urdu translation of the court's decision taken at the hearing. On 9 March 2016 the applicants' petitions for review were dismissed on procedural grounds, since the *Kúria* held that it had no jurisdiction to review such cases.

II. RELEVANT DOMESTIC LAW AS IN FORCE AT THE MATERIAL TIME

31. Act no. LXXX of 2007 on Asylum ("the Asylum Act") provides as follows:

Section 2

"For the purposes of this Act:

i) "safe third country" means a country in respect of which the asylum authority is satisfied that the applicant is treated according to the following principles:

...

ib) in accordance with the Geneva Convention, the principle of non-refoulement is respected;

...

id) the possibility exists to apply for recognition as a refugee; and persons recognised as refugees receive protection in accordance with the Geneva Convention ...

...

k) persons deserving special treatment: unaccompanied minors or vulnerable persons – in particular minors, elderly or disabled persons, pregnant women, single parents raising minors and persons who were subjected to torture, rape or any other grave form of psychological, physical or sexual violence – who have been found, after an individual assessment, to deserve special treatment."

Section 5

"(1) A person seeking recognition shall be entitled to:

a) stay in the territory of Hungary according to the conditions set out in the present Act ...

...

c) stay ... at a place of accommodation designated by the asylum authority ...”

Asylum detention

Section 31/A

“(1) The refugee authority can, in order to conduct the asylum procedure and to secure the Dublin transfer – taking the restriction laid down in Section 31/B into account – take the person seeking recognition into asylum detention if his/her entitlement to stay is exclusively based on the submission of an application for recognition where

a) the identity or citizenship of the person seeking recognition is unclear, in order to establish them,

b) a procedure is ongoing for the expulsion of a person seeking recognition and it can be proven on the basis of objective criteria – inclusive of the fact that the applicant has had the opportunity beforehand to submit application of asylum - or there is a well-founded reason to presume that the person seeking recognition is applying for asylum exclusively to delay or frustrate the performance of the expulsion,

c) facts and circumstances underpinning the application for asylum need to be established and where these facts or circumstances cannot be established in the absence of detention, in particular when there is a risk of escape by the applicant,

d) the detention of the person seeking recognition is necessary for the protection of national security or public order,

e) the application was submitted in an airport procedure, or

f) it is necessary to carry out a Dublin transfer and there is a serious risk of escape.”

Section 45

“(1) The principle of *non-refoulement* prevails if in his or her country of origin, the person requesting recognition would be subject to persecution based on race, religion, nationality, membership of a certain social group or political opinion or would be subject to treatment proscribed by Article XIV (2) of the Fundamental Law of Hungary...

(3) In the case of a rejection of an application for recognition, or in the case of the withdrawal of recognition, the asylum authority states whether or not the principle of *non-refoulement* is applicable.”

Section 51

“(1) If the conditions for the application of the Dublin Regulations are not present, the asylum authority shall decide on the admissibility of the application for refugee status ...

(2) An application is not admissible if ...

e) there is a country that shall be considered a safe third country with respect to the applicant ...

(4) An application may be considered inadmissible pursuant to subsection (1) e) only if:

a) the applicant resided in a safe third country and he or she had the opportunity in that country to request effective protection in line with section (2) i);

b) the applicant travelled through a safe third country and he or she could have requested effective protection in line with section (2) i);

c) the applicant has a family member in that [safe third] country and is allowed to enter the territory thereof; or

d) the safe third country submitted a request for the extradition of the applicant.

(5) In the case of a situation falling under subsection (4) a) or b), it is for the applicant to prove that he or she did not have an opportunity to request effective protection in line with section (2) i) ... .

(11) If section (2) e) ... applies to the applicant, he or she may, immediately after being notified of this, or at the latest three days after the notification, provide evidence that the country in question cannot be considered a safe country of origin or a safe third country in his or her individual case."

Section 66

"(2) The asylum authority shall base its decision on the information at its disposal or discontinue the proceedings if the person requesting recognition ...

...

d) has left the designated accommodation or place of residence for more than 48 hours for an unknown destination and does not properly justify his or her absence ..."

Section 71/A

"(1) If an applicant lodges his or her application before admission to the territory of Hungary, in the transit zone defined by the Act on State Borders, the provisions of this chapter shall be applied [accordingly] ...

(2) In the border proceedings, the applicant does not have the rights guaranteed under section 5(1) a) and c).

...

(7) The rules on proceedings in the transit zone shall not be applied to persons deserving special treatment."

32. Act no. II of 2007 on the Admission and Right of Residence of Third Country Nationals ("the Immigration Act") provides as follows:

Section 51

"(1) The removal or expulsion shall not be ordered or executed to the territory of a country that fails to satisfy the criteria of a safe country of origin or a safe third country regarding the person in question, in particular where the third-country national is likely to be subjected to persecution on the grounds of his or her race,

religion, nationality, social affiliation or political conviction, or to the territory of a country or to the frontier of a territory where there is substantial reason to believe that the removed or expelled third-country national is likely to be subjected to the death penalty, torture or any other form of cruel, inhuman or degrading treatment or punishment (*non-refoulement*).

(2) The removal or expulsion of a third-country national whose application for refugee status is pending may only be executed if his or her application has been refused by a final and binding decision of the asylum authority."

Section 52

"(1) The immigration authority shall take into account the principle of *non-refoulement* in proceedings relating to the ordering and enforcement of expulsion."

33. Government Decree no. 191/2015. (VII. 21.) on the definition of safe countries of origin and safe third countries provides as follows:

Section 2

"Member States of the European Union and candidates for EU membership[2] (except Turkey), member states of the European Economic Area, all the states of the United States which do not apply the death penalty, and the following countries shall be regarded as 'safe third countries' within the meaning of section 2 i) of Act no. LXXX of 2007 on Asylum:

1. Switzerland,
2. Bosnia-Herzegovina,
3. Kosovo,
4. Canada,
5. Australia,
6. New Zealand."

Section 3

"(2) If, before arriving in Hungary, the person requesting recognition resided in or travelled through one of the third countries classified as safe by the EU list or by section 2 above, he or she may demonstrate, in the course of the asylum proceedings based on the Asylum Act, that in his or her particular case, he or she could not have access to effective protection in that country within the meaning of section (2) i) of the Asylum Act."

III. INTERNATIONAL DOCUMENTS

34. The 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) contains the following passages:

[2] Including Serbia and the former Yugoslav Republic of Macedonia.

"(38) Many applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant. Member States should be able to provide for admissibility and/or substantive examination procedures which would make it possible for such applications to be decided upon at those locations in well-defined circumstances.

(39) In determining whether a situation of uncertainty prevails in the country of origin of an applicant, Member States should ensure that they obtain precise and up-to-date information from relevant sources such as EASO, UNHCR, the Council of Europe and other relevant international organisations. Member States should ensure that any postponement of conclusion of the procedure fully complies with their obligations under Directive 2011/95/EU and Article 41 of the Charter, without prejudice to the efficiency and fairness of the procedures under this Directive.

...

(43) Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies for international protection in accordance with Directive 2011/95/EU, except where this Directive provides otherwise, in particular where it can reasonably be assumed that another country would do the examination or provide sufficient protection. In particular, Member States should not be obliged to assess the substance of an application for international protection where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to that country.

(44) Member States should not be obliged to assess the substance of an application for international protection where the applicant, due to a sufficient connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country, and there are grounds for considering that the applicant will be admitted or readmitted to that country. Member States should only proceed on that basis where that particular applicant would be safe in the third country concerned. In order to avoid secondary movements of applicants, common principles should be established for the consideration or designation by Member States of third countries as safe.

(45) Furthermore, with respect to certain European third countries, which observe particularly high human rights and refugee protection standards, Member States should be allowed to not carry out, or not to carry out full examination of, applications for international protection regarding applicants who enter their territory from such European third countries.

(46) Where Member States apply safe country concepts on a case-by-case basis or designate countries as safe by adopting lists to that effect, they should take into account, inter alia, the guidelines and operating manuals and the information on countries of origin and activities, including EASO Country of Origin Information report methodology, referred to in Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (6), as well as relevant UNHCR guidelines.

(47) In order to facilitate the regular exchange of information about the national application of the concepts of safe country of origin, safe third country and European safe third country as well as a regular review by the Commission of the use of those concepts by Member States, and to prepare for a potential further harmonisation in the future, Member States should notify or periodically inform the Commission about the third countries to which the concepts are applied. The Commission should regularly inform the European Parliament on the result of its reviews.

(48) In order to ensure the correct application of the safe country concepts based on up-to-date information, Member States should conduct regular reviews of the situation in those countries based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations. When Member States become aware of a significant change in the human rights situation in a country designated by them as safe, they should ensure that a review of that situation is conducted as soon as possible and, where necessary, review the designation of that country as safe. ...”

Article 31

Examination procedure

“...

8. Member States may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated and/or conducted at the border or in transit zones in accordance with Article 43 if:

...

(b) the applicant is from a safe country of origin within the meaning of this Directive ...”

Article 33

Inadmissible applications

“1. In addition to cases in which an application is not examined in accordance with Regulation (EU) No 604/2013, Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive 2011/95/EU where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for international protection as inadmissible only if:

(a) another Member State has granted international protection;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; or

(e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant’s situation which justify a separate application.”

Article 35

The concept of first country of asylum

"A country can be considered to be a first country of asylum for a particular applicant if:

(a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or

(b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-*refoulement*,

provided that he or she will be readmitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant, Member States may take into account Article 38(1). The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances."

Article 36

The concept of safe country of origin

"1. A third country designated as a safe country of origin in accordance with this Directive may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if:

(a) he or she has the nationality of that country; or

(b) he or she is a stateless person and was formerly habitually resident in that country, and he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with Directive 2011/95/EU.

2. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept."

Article 38

The concept of safe third country

"1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) there is no risk of serious harm as defined in Directive 2011/95/EU;

(c) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. The application of the safe third country concept shall be subject to rules laid down in national law, including:

(a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

3. When implementing a decision solely based on this Article, Member States shall:

(a) inform the applicant accordingly; and

(b) provide him or her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

4. Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II...”

Article 39

The concept of European safe third country

“1. Member States may provide that no, or no full, examination of the application for international protection and of the safety of the applicant in his or her particular circumstances as described in Chapter II shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.

2. A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;

(b) it has in place an asylum procedure prescribed by law; and

(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.

3. The applicant shall be allowed to challenge the application of the concept of European safe third country on the grounds that the third country concerned is not safe in his or her particular circumstances.

4. The Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of non-*refoulement*, including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law.

5. When implementing a decision solely based on this Article, the Member States concerned shall:

(a) inform the applicant accordingly; and

(b) provide him or her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

6. Where the safe third country does not readmit the applicant, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

7. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with this Article...”

Article 43

Border procedures

“1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on:

(a) the admissibility of an application, pursuant to Article 33, made at such locations; and/or

(b) the substance of an application in a procedure pursuant to Article 31(8).

2. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 1 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive.

3. In the event of arrivals involving a large number of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practice to apply there the provisions of paragraph 1, those procedures 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.”

35. The 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) provides as follows:

Article 8

Detention

"1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with 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.

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

(a) in order to determine or verify his or her identity or nationality;

(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;

(d) when he or she is detained subject to a return procedure under 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, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

(e) when protection of national security or public order so requires;

(f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law."

36. The Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") from 21 to 27 October 2015 contains the following passages:

"The CPT notes the efforts made to provide information and legal assistance to foreign nationals in immigration and asylum detention. However, a lack of information on their legal situation, on the future steps in their respective proceedings and the length of their detention was perceived by foreign nationals as a major problem in most of the establishments visited ...

As regards the safeguards to protect foreign nationals against refoulement, the CPT expresses doubts, in view of the relevant legislative framework and its practical operation, whether border asylum procedures are in practice accompanied by appropriate safeguards, whether they provide a real opportunity for foreign nationals to present their case and whether they involve an individual assessment of the risk of ill-treatment in the case of removal.

...

"The two transit zones visited by the delegation at Röszke and Tompa were located on Hungarian territory ... Different containers served as offices, waiting rooms, a dining room and sanitary facilities (with toilets, wash basins, showers and hot-water boilers), and approximately ten of them were used for the accommodation of foreign nationals. (In footnote: The sanitary facilities were in a good state and call for no particular comment.)

...

All accommodation containers measured some 13 m² and were equipped with two to five beds fitted with clean mattresses, pillows and bedding. They were clean and had good access to natural light and artificial lighting, as well as to electric heating. Further, in both transit zones visited, there was a narrow designated area in front of the containers which was fenced off from the rest of the compound of the transit zone and to which foreign nationals had unrestricted access during the day.

As far as the delegation could ascertain, foreign nationals had usually only been held in the transit zones for short periods (up to 13 hours) and hardly ever overnight. That said, if foreign nationals were to be held in a transit zone for longer periods, the maximum capacity of the accommodation containers should be reduced and they should be equipped with some basic furniture.

...

On the whole, the delegation gained a generally favourable impression of the health-care facilities and the general health care provided to foreign nationals in all the establishments visited.

...

Further, some detained foreign nationals met by the delegation were unaware of their right of access to a lawyer, let alone one appointed ex officio. A few foreign nationals claimed that they had been told by police officers that such a right did not exist in Hungary. Moreover, the majority of those foreign nationals who did have an ex officio lawyer appointed complained that they did not have an opportunity to consult the lawyer before being questioned by the police or before a court hearing and that the lawyer remained totally passive throughout the police questioning or court hearing. In this context, it is also noteworthy that several foreign nationals stated that they were not sure whether they had a lawyer appointed as somebody unknown to them was simply present during the official proceedings without talking to them and without saying anything in their interest.

...

However, the majority of foreign nationals interviewed by the delegation claimed that they had not been informed of their rights upon their apprehension by the police (let alone in a language they could understand) and that all the documents they had received since their entry into the country were in Hungarian.

...

> ... many foreign nationals (including unaccompanied juveniles) complained about the quality of interpretation services and in particular that they were made to sign documents in Hungarian, the contents of which were not translated to them and which they consequently did not understand.
>
> ...
>
> ... the CPT has serious doubts whether border asylum procedures are in practice accompanied by appropriate safeguards, whether they provide a real opportunity for foreign nationals to present their case and involve an individual assessment of the risk of ill-treatment in case of removal and thus provide an effective protection against refoulement, bearing also in mind that, according to UNHCR, Serbia cannot be considered a safe country of asylum due to the shortcomings in its asylum system, notably its inability to cope with the increasing numbers of asylum applications..."

37. In a report entitled "Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016", published in May 2016, the UNHCR made the following observations:

> "19. Additionally, as noted above in Paragraph 15, the Act on the State Border refers to asylum-seekers being "temporarily accommodated" in the transit zone. The Hungarian authorities claim that such individuals are not "detained" since they are free to leave the transit zone at any time in the direction from which they came. However, as outlined above in Paragraph 16, they are not allowed to enter Hungary. In UNHCR's view, this severely restricts the freedom of movement and can be qualified as detention. As such, it should be governed *inter alia* by the safeguards on detention in the EU's recast Reception Conditions Directive (RCD). ...
>
> 71. In any event, UNHCR maintains the position taken in its observations on the Serbian asylum system in August 2012 that asylum-seekers should not be returned to Serbia.[141] While the number of asylum-seekers passing through that country has since greatly increased, leaving its asylum system with even less capacity to respond in accordance with international standards than before, many of UNHCR's findings and conclusions of August 2012 remain valid. For example, between 1 January and 31 August 2015, the Misdemeanour Court in Kanjiža penalized 3,150 third country nationals readmitted to Serbia from Hungary for illegal stay or illegal border crossing, and sentenced most of them to a monetary fine. Such individuals are denied the right to (re) apply for asylum in Serbia."

38. A report entitled "Crossing Boundaries: The new asylum procedure at the border and restrictions to accessing protection in Hungary" by the European Council for Refugees and Exiles (ECRE) prepared on 1 October 2015 contains the following passages:

> "... transfers to Hungary are liable to expose applicants to a real risk of chain deportation to Serbia, which may trigger a practice of indirect *refoulement* sanctioned by human rights law. On that very basis, a number of Dublin transfers to Hungary have been suspended by German and Austrian courts.
>
> In view of the (retroactive) automatic applicability of the '*safe third country*' concept in respect of persons entering through Serbia and the risk of *refoulement* stemming from their return to Hungary, ECRE calls on Member States to refrain from transferring applicants for international protection to Hungary under the Dublin Regulation."

39. The ECRE's "Case Law Fact Sheet: Prevention of Dublin Transfers to Hungary" prepared in January 2016 contains the following passages:

> "An overwhelming amount of recent case law has cited the August and September legislative amendments to the Hungarian Asylum Act when preventing transfers to the country. Moreover, the Hungarian legislative revisions have impacted upon policy changes elsewhere, as evidenced by the Danish Refugee Appeals Board decision in October 2015 to suspend all Dublin transfers to Hungary ...
>
> The entry into force in August and September 2015 of legislation creating a legal basis for the construction of a fence on the border between Hungary and Serbia in conjunction with further legislative amendments criminalising irregular entry and damage to the fence has resulted in an extremely hostile environment towards those seeking asylum, violating the right to asylum, the right to effective access to procedures and the non-criminalisation of refugees ...
>
> It is the imposition of an admissibility procedure at the transit zones, and in particular the inadmissibility ground relating to the Safe Third Country concept, which has been at the forefront of most jurisprudence. Government Decree 191/2015 designates countries such as Serbia as safe, leading Hungarian authorities to declare all applications of asylum seekers coming through Serbia as inadmissible. Given the location of the transit zones at the Hungarian-Serbian border over 99% of asylum applications, without an in-merit consideration of the protection claims, have been rejected on this basis by the Office of Immigration and Nationality (OIN). Moreover, the clear EU procedural violations that this process gives rise to have been documented by the Hungarian Helsinki Committee as well as ECRE. From the latest statistics this process is still in full swing with the Commissioner for Human Rights submitting that between mid-September and the end of November 2015, 311 out of the 372 inadmissible decisions taken at both the border and in accelerated procedures were found as such on the safe third country concept ground. With a clear lack of an effective remedy against such a decision available and an immediate accompanying entry ban for 1 or 2 years, various actors as well as the judiciary have argued that Hungary is in breach of its *non-refoulement* obligations."

40. A report entitled "Serbia As a Country of Asylum; Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia" prepared in August 2012 by the UNHCR contains the following passages:

> "4. UNHCR concludes that there are areas for improvement in Serbia's asylum system, noting that it presently lacks the resources and performance necessary to provide sufficient protection against refoulement, as it does not provide asylum-seekers an adequate opportunity to have their claims considered in a fair and efficient procedure. Furthermore, given the state of Serbia's asylum system, Serbia should not be considered a safe third country, and in this respect, UNHCR urges States not to return asylum-seekers to Serbia on this basis.
>
> ...
>
> 76. However, UNHCR received reports in November 2011 and again in February 2012 that migrants transferred from Hungary to Serbia were being put in buses and taken directly to the former Yugoslav Republic of Macedonia. ... There have been other reports that the Serbian police have rounded up irregular migrants in Serbia and were similarly sent back to the former Yugoslav Republic of Macedonia.
>
> ...

> 79. ... The current system is manifestly not capable of processing the increasing numbers of asylum- seekers in a manner consistent with international and EU norms. These shortcomings, viewed in combination with the fact that there has not been a single recognition of refugee status since April 2008, strongly suggest that the asylum system as a whole is not adequately recognizing those in need of international protection."

41. A report entitled "Country Report: Serbia", up-to-date as of 31 December 2016, prepared by AIDA, Asylum Information Database, published by ECRE stated that the "adoption of the new Asylum Act, initially foreseen for 2016, has been postponed".

42. A report entitled "The former Yugoslav Republic of Macedonia As a Country of Asylum" prepared in August 2015 by the UNHCR contains the following passage:

> "5. The former Yugoslav Republic of Macedonia has a national asylum law, the Law on Asylum and Temporary Protection. This was substantially amended in 2012, with the amended version having come into force in 2013. UNHCR participated in the drafting process, in an effort to ensure that the legislation is in line with international standards. The law currently incorporates many key provisions of the 1951 Convention. Furthermore, the provisions on subsidiary protection in the law are in conformity with relevant EU standards. The law also provides for certain rights up to the standard of nationals for those who benefit from international protection, as well as free legal aid during all stages of the asylum procedure. Nevertheless, some key provisions are still not in line with international standards. In response to a sharp increase in irregular migration, the Law on Asylum and Temporary Protection was recently further amended to change the previously restrictive regulations for applying for asylum in the former Yugoslav Republic of Macedonia, which exposed asylum-seekers to a risk of arbitrary detention and push-backs at the border. The new amendments, which were adopted on 18 June 2015, introduce a procedure for registration of the intention to submit an asylum application at the border, protect asylum-seekers from the risk of *refoulement* and allow them to enter and be in the country legally for a short timeframe of 72 hours, before formally registering their asylum application.
>
> ...
>
> 46. Despite these positive developments, UNHCR considers that significant weaknesses persist in the asylum system in practice. At the time of writing, the former Yugoslav Republic of Macedonia has not been able to ensure that asylum-seekers have access to a fair and efficient asylum procedure. ... Inadequate asylum procedures result in low recognition rates, even for the minority of asylum-seekers who stay in the former Yugoslav Republic of Macedonia to wait for the outcome of their asylum claim."

43. The European Commission's Recommendation of 8.12.2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013 contains the following passages:

> "(1) The transfer of applicants for international protection to Greece under Regulation (EU) No. 604/2013 (hereafter 'the Dublin Regulation') has been suspended by Member States since 2011, following two judgments of the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU)1, which identified systemic deficiencies in the Greek asylum system,

resulting in a violation of the fundamental rights of applicants for international protection transferred from other Member States to Greece under Regulation (EC) No. 343/2003. ...

(8) In its previous Recommendations, the Commission has noted the improvements that Greece has made to its legislative framework to ensure that the new legal provisions of the recast Asylum Procedures Directive 2013/32/EU and some of the recast Reception Conditions Directive 2013/33/EU have been transposed into the national legislation. A new law (Law 4375/2016) was adopted by the Greek Parliament on 3 April 201614. On 22 June 2016, the Parliament approved an amendment to Law 4375/2016 which, inter alia, modified the composition of the Appeals Committees and the right of asylum seekers to an oral hearing before them. On 31 August 2016, the Greek Parliament also adopted a law regarding school-aged refugee children residing in Greece. ...

(33) The Commission acknowledges the important progress made by Greece, assisted by the Commission, EASO, Member States and international and non-governmental organisations, to improve the functioning of the Greek asylum system since the M.S.S. judgement in 2011. However, Greece is still facing a challenging situation in dealing with a large number of new asylum applicants, notably arising from the implementation of the pre-registration exercise, the continuing irregular arrivals of migrants, albeit at lower levels than before March 2016, and from its responsibilities under the implementation of the EU-Turkey Statement. ...

(34) However, significant progress has been attained by Greece in putting in place the essential institutional and legal structures for a properly functioning asylum system and, there is a good prospect for a fully functioning asylum system being in place in the near future, once all the remaining shortcomings have been remedied, in particular as regards reception conditions and the treatment of vulnerable persons, including unaccompanied minors. It is, therefore, appropriate to recommend that transfers should resume gradually and on the basis of individual assurances, taking account of the capacities for reception and treatment of applications in conformity with relevant EU legislation, and taking account of the currently inadequate treatment of certain categories of persons, in particular vulnerable applicants, including unaccompanied minors. The resumption should, moreover, not be applied retroactively but concern asylum applicants for whom Greece is responsible starting from a specific date in order to avoid that an unsustainable burden is placed on Greece. It should be recommended that this date is set at 15 March 2017."

IV. EVOLUTION OF THE RELEVANT DOMESTIC LAW BETWEEN 2012 AND 2015 AS REFLECTED BY THE COURT'S CASE-LAW AND FURTHER DEVELOPMENTS

44. The Court has delivered several judgments regarding the issue of *refoulement* to Serbia by Contracting States in recent years. In the case of *Mohammed v. Austria* (no. 2283/12, 6 June 2013) the Court acknowledged the alarming nature of the reports published in 2011 and 2012 in respect of Hungary as a country of asylum and in particular as regards transferees. In that period, the Hungarian authorities considered Serbia a safe third country. However, taking into account the changes in the Hungarian legislation as of January 2013, according to which deportation could no longer be imposed

on asylum-seekers during the asylum procedure, the Court concluded that, by a transfer to Hungary, Austria would not violate Article 3 of the Convention.

45. In *Mohammadi v. Austria* (no. 71932/12, 3 July 2014) the Court noted that reports by the UNHCR and the Hungarian Helsinki Committee consistently had confirmed that Hungary no longer denied an examination of asylum claims on the merits where asylum-seekers had transited via Serbia or Ukraine prior to their arrival in Hungary. The Court was satisfied that the relevant country reports (that is, those prepared after legislative changes in 2013) on the situation in Hungary for asylum-seekers, and Dublin returnees in particular, did not indicate systematic deficiencies in the Hungarian asylum system and that Hungary no longer relied on the safe third country concept regarding Serbia (see §§ 73 and 74 of the judgment).

46. Therefore, it can be concluded that between the legislative changes of January 2013 and the enactment of the Government Decree in 2015, Serbia was not considered automatically a safe third country by the Hungarian authorities. The presumption to that effect was introduced by the Government Decree.

47. On 10 December 2015 the European Commission addressed a letter of formal notice to Hungary, opening infringement procedure concerning the Hungarian asylum legislation adopted a short period before. The Commission found the Hungarian legislation in some instances to be incompatible with EU law (specifically, the recast Asylum Procedures Directive (Directive 2013/32/EU) and the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

48. The applicants complained that their committal to the transit zone amounted to deprivation of liberty which was devoid of any legal basis, in breach of Article 5 § 1 of the Convention, the relevant part of which 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."

A. Admissibility

49. The Government were of the view that since the applicants had been free to leave the territory of the transit zone in the direction of Serbia, they in fact had not been deprived of their personal liberty. Article 5 of the Convention was therefore inapplicable.

50. The applicants contested this view, pointing it out that departure from the transit zone would have resulted in the forfeiture of their asylum applications, a very serious consequence.

51. For the Court, the Government's objection must be understood to suggest the incompatibility *ratione materiae* of the complaint with the provisions of the Convention.

52. It must be determined in the first place whether the placing of the applicants in the transit zone constituted a deprivation of liberty within the meaning of Article 5 of the Convention. The Court has already found that holding aliens in an international zone involves a restriction upon liberty which is not in every respect comparable to that obtained in detention centres. However, such confinement is acceptable only if it is accompanied by safeguards for the persons concerned and is not prolonged excessively. Otherwise, a mere restriction on liberty is turned into a deprivation of liberty (see *Amuur v. France*, 25 June 1996, § 43, *Reports of Judgments and Decisions* 1996-III, and *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, § 68, 24 January 2008).

53. Article 5 § 1 is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his or her specific situation and account must be taken of a whole range of factors (see *De Tommaso v. Italy* [GC], no. 43395/09, § 80, 23 February 2017). The notion of deprivation of liberty within the meaning of Article 5 § 1 contains both an objective element of a person's confinement in a particular restricted space for a not negligible length of time, and an additional subjective element in that the person has not validly consented to the confinement in question (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 117, ECHR 2012). The objective elements include the type, duration, effects, and manner of implementation of the measure in question, the possibility to leave the restricted area, the degree of supervision and control over the person's movements and the extent of isolation (see, for example, *Guzzardi v. Italy*, 6 November 1980, § 95, Series A no. 39; *H.M. v. Switzerland*, no. 39187/98, § 45, ECHR 2002 II; *H.L. v. the United Kingdom*, no. 45508/99, § 91, ECHR 2004 IX; and *Storck v. Germany*, no. 61603/00, § 73, ECHR 2005‑V). The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance (see *Creangă v. Romania* [GC],

no. 29226/03, § 91, 23 February 2012, *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 57, ECHR 2012 and the references contained therein). The mere fact that it was possible for the applicants to leave voluntarily cannot rule out an infringement of the right to liberty (see *Riad and Idiab*, cited above, § 68).

54. The applicants in the present case were confined for over three weeks to the border zone – a facility which, for the Court, bears a strong resemblance to an international zone, both being under the State's effective control irrespective of the domestic legal qualification. They were confined in a guarded compound which could not be accessed from the outside, even by their lawyer. Unlike the applicants in the case of *Mogoş v. Romania* ((dec.), no. 20420/02, 6 May 2004), who were free to enter Romanian territory at any time but chose to stay in an airport transit zone, the applicants in the present case – similarly to those in the cases of *Amuur*, and *Riad and Idiab* (cited above) and *Shamsa v. Poland*, nos. 45355/99 and 45357/99, § 47, 27 November 2003 – did not have the opportunity to enter Hungarian territory beyond the zone. Accordingly, the Court considers that the applicants did not choose to stay in the transit zone and thus cannot be said to have validly consented to being deprived of their liberty (see, *mutatis mutandis*, *Austin and Others*, cited above, § 58).

55. The mere fact that it was possible for them to leave voluntarily returning to Serbia which never consented to their readmission cannot rule out an infringement of the right to liberty (see *Riad and Idiab*, cited above, § 68). The Court notes in particular that pursuant to section 66 (2) d) of the Asylum Act (see paragraph 31 above) if the applicants had left Hungarian territory, their applications for refugee status would have been terminated without any chance of being examined on the merits. Consequently, the Court cannot accept at face value the Government's argument concerning the possibility of leaving the transit zone voluntarily. Owing to the circumstances, the applicants could not have left the transit zone in the direction of Serbia without unwanted and grave consequences, that is, without forfeiting their asylum claims and running the risk of *refoulement*.

56. Having regard to the above considerations, the Court concludes that the applicants' confinement to the transit zone amounted to a *de facto* deprivation of liberty (see, *mutatis mutandis*, *Riad and Idiab*, *ibidem*). Article 5 § 1 of the Convention therefore applies. To hold otherwise would void the protection afforded by Article 5 of the Convention by compelling the applicants to choose between liberty and the pursuit of a procedure ultimately aimed to shelter them from the risk of exposure to treatment in breach of Article 3 of the Convention.

57. It follows that this part of the application is not incompatible *ratione materiae* with the provisions of the Convention. Moreover, it is not manifestly ill-founded within the meaning of the same provision. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

58. The Court must next examine the compatibility of the deprivation of liberty found in the present case with paragraph 1 of Article 5 of the Convention.

59. The applicants alleged that the impugned measure lacked any basis in the domestic law. They further submitted that Hungary, a Member State of the European Union, was under an obligation to act in accordance with Article 8 § 1 of Directive 2013/33/EU (see paragraph 35 above) according to which Member States should not hold a person in detention for the sole reason that he or she was an asylum-seeker. Subparagraph 3 of Article 8 contained an exhaustive list of grounds for the detention of asylum-seekers, and none of those was applicable in the present case. The applicants stressed that detention was subject to individual assessment and had to be necessary and proportionate. A Member State could only have recourse to it if non-coercive alternatives to detention could not be applied.

60. The Government submitted that, even if Article 5 of the Convention was applicable to the case, the deprivation of liberty was justified under the first limb of Article 5 § 1 (f). They further offered section 71/A (1) and (2) of the Asylum Act (see paragraph 31 above) as legal basis in domestic law for the detention.

61. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which individuals may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds (see, for example *O.M. v. Hungary*, no. 9912/15, § 40, 5 July 2016, and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008). It considers that in the present case the only provision that is capable of producing justification for the measure complained is Article 5 § 1 (f) of the Convention.

62. The first limb of Article 5 § 1 (f) permits the detention of an asylum-seeker or other immigrant prior to the State's grant of authorisation to enter. Such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion (see *Saadi v. the United Kingdom*, cited above, § 66).

63. The Court reiterates that in relation to whether a detention was "lawful", including whether it was in accordance with "a procedure prescribed by law", Article 5 § 1 of the Convention refers not only to national law but also, where appropriate, to other applicable legal norms, including those which have their source in international law (see *Medvedyev and Others v. France* [GC], no. 3394/03, § 79, ECHR 2010;

Takush v. Greece, no. 2853/09, § 40, 17 January 2012; and *Kholmurodov v. Russia*, no. 58923/14, § 84, 1 March 2016). Those norms may clearly also stem from European Union law. In this respect, the Court reiterates that it is primarily for the national authorities, especially the courts, to interpret and apply domestic legislation, if necessary in conformity with the law of the European Union. Unless the interpretation is arbitrary or manifestly unreasonable (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 86, ECHR 2007-I), the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I, and *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015; see also, specifically in respect of EU law, *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, § 54, 20 September 2011, and *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 110, 3 October 2014). Furthermore, the Convention also requires that any deprivation of liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see *Riad and Idiab*, cited above, § 71 and the authorities cited therein).

64. As to the notion of arbitrariness in this field, the Court refers to the principles enounced in its case-law (see in particular *Saadi v. the United Kingdom*, cited above, §§ 67 to 73) and emphasises that to avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued (see *Lokpo and Touré v. Hungary*, no. 10816/10, § 22, 20 September 2011). The Court further notes that Member States of the European Union should not hold a person in detention for the sole reason that he or she is an applicant in accordance with 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 (see paragraph 34 above).

65. The applicants' detention in the transit zone lasted from 15 September 2015 to 8 October 2015, that is, 23 days. According to the Government, section 71/A (1) and (2) of the Asylum Act provided sufficent legal basis for the measure. In turn, these rules refer back to section 5 of the same Act, under which provision asylum-seekers subjected to the border procedure were not entitled to stay in the territory of Hungary or seek accommodation at a designated facility.

66. The Court is not persuaded that these rules circumscribe with sufficient precision and foreseeability the prospect that asylum-seekers such

as the applicants were liable to be committed to the transit zone – a measure which, under the circumstances, amounts to deprivation of liberty irrespective of its domestic characterisation. Indeed, it finds it quite difficult to identify in the provisions at hand any reference to the possibility of detention at the transit zone. The Government's submissions, according to which the applicants' stay at the transit zone, although it did not amount to detention, had nevertheless a compelling basis in national law (see paragraph 60 above) only cast doubt on the clarity and the foreseeability of the domestic provisions in question.

67. At any rate, the Court notes that the applicants' detention apparently occurred *de facto*, that is, as a matter of practical arrangement. This arrangement was not incarnated by a formal decision of legal relevance, complete with reasoning.

68. The motives underlying the applicants' detention may well be those referred to by the Government in the context of Article 5 § 1 (f) of the Convention, that is to counter abuses of the asylum procedure. However, for the Court the fact remains that the applicants were deprived of their liberty without any formal decision of the authorities and solely by virtue of an elastically interpreted general provision of the law – a procedure which in the Court's view falls short of the requirements enounced in the Court's case-law. The conditions of Article 31/A of the Asylum Act were not met and no formal decision was taken; furthermore no special grounds for detention in the transit zone were provided for in Article 71/A. In this connection the Court would reiterate that it has considered the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time, as in the present case to be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1 (see *Stašaitis v. Lithuania*, no. 47679/99, § 67, 21 March 2002; *Nakhmanovich v. Russia*, no. 55669/00, § 70, 2 March 2006; *Belevitskiy v. Russia*, no. 72967/01, § 91, 1 March 2007, and *Mooren v. Germany* [GC], nº 11364/03, § 79, 9 July 2009).

69. It follows that the applicants' detention cannot be considered "lawful" for the purposes of Article 5 § 1 of the Convention. Consequently, there has been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

70. The applicants further complained that their deprivation of liberty in the transit zone could not be remedied by appropriate judicial review, in breach of Articles 5 § 4 and 13 of the Convention.

71. The Court considers that this complaint falls to be examined under Article 5 § 4 of the Convention alone, this provision being *lex specialis* in this field. It provides:

"4. 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 court and his release ordered if the detention is not lawful."

A. Admissibility

72. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

73. The applicants submitted that, for want of a formal decision on their detention, they could not possibly challenge the lawfulness of the measure in any kind of procedure.

74. The Government submitted that the asylum authorities' decision on the applicability of the rules of border proceedings, including the applicants' ineligibility to preferential treatment, had been subject to judicial review which had taken place only six days after their arrival in the transit zone.

75. The Court observes that the applicants' detention consisted in a *de facto* measure, not supported by any decision specifically addressing the issue of deprivation of liberty (see paragraph 67 above). Moreover, the proceedings suggested by the Government concerned the applicants' asylum applications rather than the question of personal liberty. In these circumstances, it is quite inconceivable how the applicants could have pursued any judicial review of their committal to, and detention in, the transit zone – which itself had not been ordered in any formal proceedings or taken the shape of a decision.

76. The Court therefore must conclude that the applicants did not have at their disposal any "proceedings by which the lawfulness of [their] detention [could have been] decided speedily by a court".

77. It follows that there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BASED ON THE CONDITIONS AT THE RÖSZKE BORDER TRANSIT ZONE

78. The applicants alleged that the conditions of their confinement in the Röszke transit zone amounted to inhuman and degrading treatment. They relied on Article 3 of the Convention, which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

79. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

80. In the applicants' view, the substandard conditions of reception in the transit zone, as described by them in paragraph 10 above, amounted to inhuman and degrading treatment contrary to Article 3 of the Convention.

81. The Government argued that any discomfort allegedly suffered by the applicants at the transit zone did not attain the minimum level of severity prompting the applicability of Article 3 of the Conventions. To support this argument, they submitted a description of the circumstances as outlined in paragraph 11 above.

2. The Court's assessment

(a) General principles

82. The Court has recently summarised the general principles applicable to the treatment of migrants in detention in the judgment of *Khlaifia and Others v. Italy* ([GC], no. 16483/12, §§ 158-167, 15 December 2016).

83. The Court has already had occasion to note that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 223, ECHR 2011). That being said, the Court can only reiterate its well-established case-law to the effect that, having regard to the absolute character of Article 3, an increasing influx of migrants cannot absolve a State of its obligations under that provision, which requires that persons deprived of their liberty must be guaranteed conditions that are compatible with respect for their human dignity. However, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the authorities at the relevant time (see *Khlaifia and Others*, cited above, §§ 184-185).

(b) Application of these principles in the present case

84. In its Report to the Hungarian Government on the visit to Hungary carried out from 21 to 27 October 2015, that is, soon after the applicants had left the transit zone, the CPT described acceptable conditions regarding the accommodation containers in use in Röszke. It nevertheless suggested that that if foreign nationals were to be held in a transit zone for longer periods, the maximum capacity of the accommodation containers should be reduced and they should be equipped with some basic furniture (see paragraph 36 above).

85. For 23 days, the applicants were confined to an enclosed area of some 110 square metres and, adjacent to that area, they were provided a room in one of the several dedicated containers. According to the CPT, the ground surface of these rooms was 13 square metres. The applicants' room contained beds for five but it appears that at the material time they were the only occupants. Sanitary facilities were provided in separate containers; and the CPT found that their standard did not call for any particular comment. The applicants submitted that no medical services were available; however, a psychiatrist was granted access to them; and the CPT gained a generally favourable impression of the health-care facilities. The applicants were provided three meals daily. Although they complained of the absence of recreational and communication facilities, there is no indication that the material conditions were poor, in particular that there was a lack of adequate personal space, privacy, ventilation, natural light or outdoor stays.

86. That being said, the Court takes cognisance of the opinion of the psychiatrist who found that the applicants suffered from posttraumatic stress disorder. In the applicants' submissions, this condition may have qualified as demonstrating that they had undergone "a grave form of psychological, physical ... violence" within the meaning section 2(k) of the Asylum Act which, in turn, should have pre-empted the application of border procedure in their case, pursuant to section 71/A (7) of the same Act (see paragraph 31 above).

87. Independently of the characterisation of the applicants' condition under the domestic law – in regard to which it cannot substitute its own assessment for that of the national authorities – the Court notes that the alleged events in Bangladesh appear to have occurred years before the applicants' arrival in Hungary. They spent only a short time in Serbia (see paragraph 9 above), and did not refer to any incidents in other countries. While it is true that asylum seekers are considered particularly vulnerable because of everything they might have been through during their migration and the traumatic experiences they were likely to have endured previously (see *M.S.S. v. Belgium and Greece,* cited above, § 232), for the Court, the applicants in the present case were not more vulnerable than any other adult asylum-seeker detained at the time (see, *Mahamed Jama v. Malta,*

no. 10290/13, § 100, 26 November 2015, and, *a contrario*, *Aden Ahmed v. Malta*, no. 55352/12, §§ 97-99, 23 July 2013).

88. It is true that there were no proper legal grounds for the applicants' confinement (see paragraphs 49 to 57 above); and that the lack of legal basis for their deprivation of liberty may have contributed to the feeling of inferiority prevailing in the impugned conditions. However, there is an inevitable element of suffering and humiliation involved in custodial measures, and this as such, in itself, will not entail a violation of Article 3 (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 204, ECHR 2012).

89. In view of the satisfactory material conditions and the relatively short time involved, the Court concludes that the treatment complained of did not reach the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3 of the Convention.

90. Having regard to the foregoing considerations, it finds that there has been no violation of Article 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 3 BASED ON THE CONDITIONS AT THE RÖSZKE BORDER TRANSIT ZONE

91. The applicants alleged that there was no effective remedy at their disposal to complain about the conditions of their detention in the transit zone. They relied on Article 13 read in conjunction with Article 3 of the Convention.

Article 13 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."

A. Admissibility

92. The Government claimed that the applicants had not raised this issue in their application, and certainly not within six months counted from their departure from the transit zone. Therefore, in their view, this complaint had been lodged outside the six-month time-limit laid down in Article 35 § 1 of the Convention.

93. The applicants contested that view, arguing that their request made under Rule 39 of the Rules of Court had already contained this complaint.

94. The Court observes that in their request for an interim measure of 25 September 2015, which was brought before the Court in good time, the applicants argued that there was no legal remedy available to them in regard to the conditions of their confinement at the transit zone (see paragraph 3 above). Given that this complaint was brought to the Court's attention

before the applicants' departure from the transit zone on 8 October 2015, the Government's objection must be dismissed.

95. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

96. In the applicants' view, there was no domestic remedy whatsoever at their disposal to complain about the standards of reception prevailing at the transit zone. They argued that the conditions experienced at the transit zone had certainly produced at least an arguable claim, for the purposes of Article 13, of a violation of their rights under Article 3 of the Convention.

97. In the Government's view, the applicants had no arguable claim of a violation of Article 3 of the Convention in this context because the impugned conditions had not attained the requisite minimum level of severity. Therefore, for them, Article 13 was not applicable.

2. The Court's assessment

98. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. However, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 197, ECHR 2012).

99. The Court has declared admissible the applicants' complaint under the substantive head of Article 3 in respect of the conditions of detention (see paragraph 79 above). Although, for the reasons given above, it has not found a violation of that provision, it nevertheless considers that those

complaints raised by the applicants were not manifestly ill-founded and raised serious questions of fact and law requiring examination on the merits. The complaints in question were therefore "arguable" for the purposes of Article 13 of the Convention (see *Khlaifia and Others*, cited above, §§ 268-269).

100. The Court further observes that the Government have not indicated any remedies by which the applicants could have complained about the conditions in which they were held in the transit zone.

101. It follows that there has been a violation of Article 13 taken together with Article 3 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BASED ON THE RISK OF INHUMAN AND DEGRADING TREATMENT

102. The applicants alleged that their expulsion to Serbia, implemented under inadequate procedural safeguards, had exposed them to a real risk of chain-*refoulement* which amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.

A. Admissibility

103. The Government argued that since the applicants had already returned to Serbia but had submitted no complaint against that country in respect of the conditions of reception or of an impending expulsion to yet another country, they could not claim to be victims, for the purposes of Article 34, of a violation of their rights under Article 3 of the Convention on account of their expulsion to Serbia.

104. The applicants contested that view, arguing in particular that the main issue was whether the Hungarian authorities had fulfilled their substantive and procedural obligations in the asylum proceedings concerning the assessment of a risk related to Article 3. The fact that they had not been subjected to treatment contrary to Article 3 in Serbia did not eliminate the respondent State's responsibility for the failure to comply with its obligations.

105. When an applicant has already been expelled, the Court considers whether at the time of removal from the respondent State a real risk existed that the applicant would be subjected to treatment proscribed by Article 3 in the State to which he or she was expelled (see, for example, *Muminov v. Russia*, no. 42502/06, §§ 91-92, 11 December 2008). This is in line with the previous findings of the Court according to which, since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those

facts which were known or ought to have been known to the Contracting State at the time of the applicant's leaving the country. The Court is not precluded, however, from having regard to information which comes to light subsequent to this date. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears (see, for example, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 69, ECHR 2005-I).

106. Furthermore, the Court noted on several occasions that not even a decision or measure favourable to the applicant is in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, *Murray v. the Netherlands* [GC], no. 10511/10, § 83, ECHR 2016). Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see, for example, *Arat v. Turkey*, no. 10309/03, § 46, 10 November 2009).

107. Therefore, the mere fact that the applicants have already been expelled from Hungary does not release the Court from its duty to examine their complaints under Article 3 of the Convention, since neither an acknowledgement of a violation has taken place nor any redress has been afforded to the applicants. The Court thus considers that the applicants have retained their status of victim for the purposes of Article 34 of the Convention. It further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

108. The applicants were of the opinion that the domestic authorities should have considered automatically their "special needs" and consequently the rules on border proceedings should not have been applied in their case (see section 71/A of the Asylum Act, cited in paragraph 31 above). Furthermore, the fact that the Hungarian authorities had regarded Serbia as a "safe third country" without a thorough and individualised assessment had resulted in a breach of Article 3 of the Convention. The cursory examination of their case had not covered the practice in Serbia concerning asylum proceedings. The applicants' right to rebut the presumption of Serbia being a "safe third country" had not been respected at all in the first asylum proceedings and had been seriously hindered in the re-

opened proceedings. The existing domestic jurisprudence on such a rebuttal required overwhelming evidence, the feasibility of whose production was illusory. As a consequence, the authorities had not provided access to the in-merit phase of the asylum procedure. That state of affairs had been aggravated by the fact that the only legal information given by the authorities to one of the applicants on his rights had been in a language he did not speak and written in a leaflet he could not read (see paragraph 13 above).

(b) The Government

109. The Government submitted that as the medical opinions (see paragraphs 19 and 20 above) had not identified the applicants as having any special needs which could not be met in the transit zone, the rules on border proceedings had been applicable to the case.

110. Concerning Serbia as a safe third country, the Government were of the opinion that a presumption that can be rebutted was in line with the Court's jurisprudence, and aimed at the prevention of abuse of the right to asylum. The Dublin III Regulation and Directive 2013/32/EU provided that Member States of the EU were free to determine which countries they regarded as safe third countries and could create their own lists of those countries (as was done by, for example, Germany or France). Hungary had established its list of safe third countries by issuing Government Decree no. 191/2015. (VII.21.) on the definition of safe countries of origin and safe third countries (see paragraph 33 above). Serbia was on that list because it could be considered as a safe third country in general, owing to the fact that it was a party to the Geneva Refugee Convention and a candidate for EU membership. As such, it received financial and technical support from the EU to meet the requirements of membership and to reform its asylum system. Furthermore, to the Government's knowledge, there was no case-law under the Convention indicating that Serbia had failed to maintain a properly functioning asylum system and was thus not a safe third country.

111. Moreover, in the present case, the applicants had submitted incoherent and contradictory statements to the authorities. As a result, they had not been able to rebut the presumption that Serbia was a safe third country. They failed to establish that they faced persecution or a risk of ill-treatment in their country of origin, in the absence of which no valid risk of *refoulement* could possibly arise in Serbia.

2. The Court's assessment

(a) General principles

112. At the outset, the Court observes that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence

and expulsion of aliens (see, for example, *F.G. v. Sweden* [GC], no. 43611/11, § 111, ECHR 2016; *Hirsi Jamaa and Others*, cited above, § 113; and *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). In addition, neither the Convention nor its Protocols confer the right to political asylum. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to deport the person in question to that country (see, for example, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008).

113. In cases concerning the expulsion of asylum-seekers, the Court has observed that it does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled (see, for example, *M.S.S. v. Belgium and Greece*, cited above, § 286). The Court's assessment of the existence of a real risk must necessarily be a rigorous one (see, for example, *F.G. v. Sweden*, cited above, § 113).

114. The subsidiary character of the machinery of complaint to the Court is articulated in Articles 13 and 35 § 1 of the Convention (see *M.S.S. v. Belgium and Greece*, cited above, § 287). The Court must be satisfied, however, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations (see *N.A. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008). Moreover, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a matter of principle, it is for those courts to assess the evidence before them (see, for example, *Nizomkhon Dzhurayev v. Russia*, no. 31890/11, § 113, 3 October 2013). As a general rule, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned (see, for example, *F.G. v. Sweden*, cited above, § 118, and *R.C. v. Sweden*, no. 41827/07, § 52, 9 March 2010).

115. It is in principle for the person seeking international protection in a Contracting State to submit, as soon as possible, his claim for asylum with the reasons in support of it, and to adduce evidence capable of proving that

there are substantial grounds for believing that deportation to his or her home country would entail a real and concrete risk of treatment in breach of Article 3 (see *F.G. v. Sweden,* cited above, § 125). However, in relation to asylum claims based on a well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on States under Article 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion (see, for example, *M.S.S. v. Belgium and Greece*, cited above, § 366).

116. The Court has previously found that the lack of access to information is a major obstacle in accessing asylum procedures. It reiterates the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints (see *M.S.S. v. Belgium and Greece*, cited above, §§ 301 and 304, and *Hirsi Jamaa and Others*, cited above, § 204).

(b) Application of these principles to the present case

117. The Court has to establish whether at the time of their removal from Hungary on 8 October 2015, the applicants could arguably assert that their removal to Serbia would infringe Article 3 of the Convention.

118. The Court observes that the applicants were removed from Hungary on the strength of the Government Decree listing Serbia as a safe third country and establishing a presumption in this respect. The individualised assessment of their situation with regard to any risk they ran if returned to Serbia took place in these legal circumstances. Indeed, it involved a reversal of the burden of proof to the applicants' detriment including the burden to prove the real risk of inhuman and degrading treatment in a chain-*refoulement* situation to Serbia and then the former Yugoslav Republic of Macedonia, eventually driving them to Greece. However, it is incumbent on the domestic authorities to carry out an assessment of that risk of their own motion when information about such a risk is ascertainable from a wide number of sources. Not only that the Hungarian authorities did not perform this assessment in the determination of the individual risks but they refused even to consider the merits of the information provided by the counsel, limiting their argument to the position of the Government Decree 191/2015.

119. It is of note at this point that Articles 31 § 8 (b), 33, 38 § 1 and 43 of Directive 2013/32/EU (see paragraph 34 above) allow for accelerated/border procedure for asylum-seekers from a "safe country of origin". However, as to the question whether, and to what extent, Hungarian law corresponds to those provisions, the Court cannot embark on a scrutiny on how the domestic authorities implement the law of the European Union.

120. The Court observes that between January 2013 and July 2015 Serbia was not considered a safe third country by Hungary (see paragraph 46 above). This was so in accordance with reports of international institutions on the shortcomings of asylum proceedings in Serbia (see, for example, *Mohammadi*, cited above, § 29). However, 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 (see paragraph 41 above).

121. This is of particular concern to the Court, since the applicants arrived in Hungary through the former Yugoslav Republic of Macedonia, Serbia and Greece (see paragraph 9 above). The Court observes that in 2012 the UNHCR urged States not to return asylum-seekers to Serbia (see paragraph 40 above), notably because the country lacked a fair and efficient asylum procedure and there was a real risk that asylum seekers were summarily returned to the former Yugoslav Republic of Macedonia.

122. In regard to the latter country, in 2015 the UNCHR found that, despite positive developments, significant weaknesses persisted in the asylum system in practice; that the country had not been able to ensure that asylum-seekers have access to a fair and efficient asylum procedure; and that inadequate asylum procedure resulted in low recognition rates, even for the minority of asylum-seekers who stay in the country to wait for the outcome of their asylum claims. Although the UNCHR found that asylum-seekers arriving in the country were protected from the risk of *refoulement* by the introduction, as of June 2015, of a procedure for registration of the intention to submit an asylum application at the border, the Court cannot but notice that the Hungarian authorities did not seek to rule out that the applicants, driven back through Serbia, might further be expelled to Greece, notably given the procedural shortcoming and the very low recognition rate in the former Yugoslav Republic of Macedonia (see paragraph 42 above).

123. In regard to Greece, the Court found that the reception conditions of asylum seekers, including the shortcomings in the asylum procedure, amounted to a violation of Article 3, read alone or in conjunction with Article 13 of the Convention (see *M.S.S. v. Belgium and Greece*, cited above, §§ 62 to 86, 231, 299 to 302 and 321). Although recent developments (see paragraph 43 above) demonstrate an improvement in the treatment of asylum-seekers in Greece conducive to the gradual resumption of transfers to the country, this was not yet the case at the material time.

124. While the Court is concerned about the above shortcomings, it 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. Notably, they relied on a schematic reference to the Government's list of safe third countries (see paragraph 33 above), disregarded the country reports and other evidence submitted by the applicants and imposed an unfair and excessive burden of proof on them. Moreover, the Court observes that, owing to a mistake, the first applicant was interviewed with the assistance of an interpreter in Dari, a language he does not speak, and the asylum authority provided him with an information leaflet on asylum proceedings that was also in Dari (see paragraph 13 above). As a consequence, his chances of actively participating in the proceedings and explaining the details of his flight from his country of origin were extremely limited. The applicants are illiterate, nonetheless all the information they received on the asylum proceedings was contained in a leaflet. It thus appears that the authorities failed to provide the applicants with sufficient information on the procedure – an occurrence aggravated by the fact that they could not meet their lawyer prior to the court hearing in order to discuss their cases in detail (see paragraph 16 above). Moreover, a translation of the decision in their case was produced to their lawyer only two months after the relevant decision had been taken, at a time when they were outside Hungary already for two months (see paragraph 30 above).

125. Having regard to the above considerations, the Court finds that the applicants did not have the benefit of effective guarantees which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment in breach of Article 3 of the Convention. There has accordingly been a violation of that provision in this regard.

VI. OTHER ALLEGED VIOLATION OF THE CONVENTION

126. The applicants also complained that no effective domestic remedy was available to them to challenge their expulsion to Serbia, in breach of Article 13 read in conjunction with Article 3 of the Convention.

127. However, in view of the finding that the applicants' expulsion to Serbia constituted a violation of Article 3 of the Convention, the Court does not consider it necessary to give a separate ruling on the admissibility or the merits of the complaint under Article 13 taken together with Article 3 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

128. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

129. The applicants claimed 15,000 euros (EUR) each in respect of non-pecuniary damage.

130. The Government contested this claim.

131. The Court considers that the applicants must have suffered some non-pecuniary damage and awards them each EUR 10,000.

B. Costs and expenses

132. The applicants also claimed jointly EUR 8,705 for the costs and expenses incurred before the Court. That sum corresponds to 57.5 hours of legal work billable by their lawyer at an hourly rate of EUR 150, plus EUR 80 in clerical costs.

133. The Government contested this claim.

134. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full sum claimed.

C. Default interest

135. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 5 §§ 1 and 4 of the Convention, Articles 3 and 13 of the Convention in respect of the conditions of detention at the Röszke transit zone and Article 3 of the Convention in respect of the applicants' expulsion to Serbia admissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds* that there has been no violation of Article 3 of the Convention in respect of the conditions of detention at the Röszke transit zone;

5. *Holds* that there has been a violation of Article 13 read in conjunction with Article 3 of the Convention in respect of the conditions of detention at the Röszke transit zone;

6. *Holds* that there has been a violation of Article 3 of the Convention in respect of the applicants' expulsion to Serbia;

7. *Holds* that there is no need to examine the admissibility or the merits of the complaint under Article 13 of the Convention taken together with Article 3 in respect of the applicants' expulsion to Serbia;

8. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) to each applicant, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) to the applicants jointly, EUR 8,705 (eight thousand seven hundred and five euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 14 March 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli Registrar	Ganna Yudkivska President