Court of Justice of the European Union
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Press and Information

Advocate General's Opinion in Joined Cases C-924/19 PPU and C-925/19 PPU
FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság et Országos Idegenrendészeti Főigazgatóság

According to Advocate General Pikamäe, the accommodation of asylum seekers in the Röszke transit zone at the Hungarian-Serbian border must be classified as 'detention'

The Advocate General calls on the Court to offer, on the basis of EU law, a higher level of protection than that guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms to asylum seekers accommodated in the transit zone

In late 2018 and early 2019, two Iranian nationals and two Afghan nationals, who arrived in Hungary after crossing Serbia, submitted asylum applications to the Hungarian authorities. The Hungarian authorities designated the Röszke transit zone, located at the Hungarian-Serbian border, as their place of accommodation, where they have been staying ever since.

The asylum applications of the four nationals were rejected as inadmissible on the basis of a provision of Hungarian law, according to which applications for international protection made by persons who arrived in Hungary after having passed through a 'safe transit country' are to be rejected as such, without an examination of the merits of such applications.

However, Serbia refused to readmit those persons on the ground that they had not illegally entered the territory of Hungary, with the result that the conditions for the application of the readmission agreement concluded between the European Union and Serbia were not met. Following Serbia's refusal to readmit the persons in question, the Hungarian authorities ordered their removal to Iran and Afghanistan respectively.

The Iranian and Afghan nationals concerned then brought an action before the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court of Szeged, Hungary) seeking a declaration that, following Serbia's refusal to readmit them, the Hungarian authorities should have resumed the procedure to examine the substance of their initial asylum application. They also consider that the conditions of their accommodation in the Röszke transit zone constitute unlawful 'detention' within the meaning of the Reception Directive[1]

That court asks the Court of Justice to clarify in particular the points raised by the four nationals in their actions.

In today's Opinion, Advocate General Priit Pikamäe first points out that **the Asylum Procedure Directive**[2], which lists, exhaustively, the grounds of inadmissibility for applications for international protection, **precludes Hungarian legislation providing for a 'safe transit country' ground for inadmissibility**, in so far as such a ground is not included in that directive.[3]

Secondly, the Advocate General considers that the concept of 'safe transit country' is similar to that of 'safe third country' set out in the Asylum Procedure Directive, although it cannot be regarded as

[1] 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 (OJ 2013 L 180, p. 96).
[2] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).
[3] Case C-564/18 LH

equivalent to it. It follows that the legal effects of the failure of the Serbian authorities to readmit asylum seekers must be considered to be covered by the provision of this Directive which, in the event of refusal by a 'safe third country' to readmit the applicant, requires Member States to ensure that the asylum application is examined. [4] The Advocate General points out that, in such a case, the competent national authorities are obliged to take over the file relating to the application for international protection originally submitted by the person concerned.

Thirdly, the Advocate General notes that, in its judgment in the case of Ilias and *Ahmed v. Hungary*, [5] the European Court of Human Rights ('the ECtHR') recently held that the accommodation of two third-country nationals in the Röszke transit zone did not constitute a deprivation of the 'right to liberty and security' for the purposes of the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'). In that regard, the Advocate General notes that **the Court is empowered to interpret the provisions of the Charter of Fundamental Rights of the European Union** ('the Charter'), relating to the above-mentioned rights, **independently,** specifying that those provisions are already incorporated in the definition of 'detention' set out in the Reception Directive. Thus, while the Charter requires that the rights enshrined therein and corresponding to the rights guaranteed by the ECHR should be interpreted as having the same meaning and scope as those conferred by the ECHR, **the Court may give an interpretation to rights contained in the Charter which are similar in content to those enshrined in the ECHR resulting in a higher level of protection than that guaranteed by the latter.** The Advocate General proposes that the Court follow this approach in the present cases.

Fourthly, as regards the question whether the accommodation of the asylum seekers in question constitutes detention under the Reception Directive, the Advocate General refers in particular to the following circumstances:

- The Röszke transit zone is surrounded by a high fence and barbed wire, within which various sectors have been set up. Each of those sectors is separated from the others by fences and it is only very rarely possible to leave one sector to go to the others and only for the purpose of, inter alia, carrying out procedural acts, checks or medical treatment. Thus, confined to a specific area of the transit zone, **asylum-seekers accommodated there are physically cut off from the outside world and forced to live in a situation of isolation**.

- Asylum seekers are deprived of their freedom of movement. They may have contact with persons from outside, including their lawyers, only after prior authorisation and only in a special area of the transit zone where they are brought under police escort. The movements of asylum-seekers are monitored within the transit zone, as well as in the immediate vicinity of the fence.

- A departure from the transit zone would, for asylum seekers, entail renunciation of the possibility of obtaining the international protection sought. Moreover, in the absence of a permit to enter and reside on Hungarian territory, asylum seekers cannot leave the transit zone in the direction of Hungary. Similarly, legal departure from the transit zone to Serbia is practically excluded, as Serbia is not willing to receive migrants from the Hungarian transit zones.

In the view of the Advocate General, **that body of evidence shows a situation of isolation and a high degree of restriction of the freedom of movement of asylum seekers to such an extent that it constitutes detention in the sector of the Röszke transit zone.** Accordingly, the Advocate General concludes that the asylum seekers in question **are in 'detention' in the sector of the Röszke transit zone**. In that context, the Advocate General notes that, since the legal regime laid down by the Reception Directive for the detention of asylum seekers has not been

[4] Article 38(4).
[5] European Court of Human Rights, *Ilias and Ahmed v. Hungary* of 21 November 2019, EC:ECHR:2019:1121JUD004728715.

complied with by the Hungarian authorities**, the detention of the asylum seekers in question must be classified as unlawful.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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