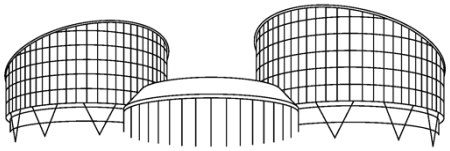

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF ILIAS AND AHMED v. HUNGARY

(Application no. 47287/15)

JUDGMENT

STRASBOURG

21 November 2019

This judgment is final but it may be subject to editorial revision.

In the case of Ilias and Ahmed v. Hungary,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Angelika Nußberger,
Robert Spano,
Jon Fridrik Kjølbro,
Ksenija Turković,
Paul Lemmens,
Ledi Bianku,
Işıl Karakaş,
Nebojša Vučinić,
André Potocki,
Aleš Pejchal,
Dmitry Dedov,
Yonko Grozev,
Mārtiņš Mits,
Georges Ravarani,
Jolien Schukking,
Péter Paczolay, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 18 and 19 April 2018 and on 13 March and 3 October 2019,

Delivers the following judgment, which was adopted on the last mentioned 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 Ilias Ilias and Mr Ali Ahmed ("the applicants"), on 25 September 2015.

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

3. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 14 March 2017 a Chamber of that Section composed of Ganna Yudkivska, President, Vincent A. De Gaetano, András Sajó, Nona Tsotsoria, Krzysztof Wojtyczek, Gabriele Kucsko-Stadlmayer and Marko Bošnjak, judges and also of Marialena Tsirli, Section Registrar unanimously declared the application partly admissible and gave judgment. On 14 June 2017 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43

of the Convention. On 18 September 2017 the panel of the Grand Chamber granted that request.

4. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. The President of the Grand Chamber decided that in the interests of the proper administration of justice, the case should be assigned to the same Grand Chamber as the case of *Z.A. and Others v. the Russian Federation* (applications nos. 61411/15 and 3 others, 28 March 2017) (Rules 24, 42 § 2 and 71).

5. The applicants and the Government each filed further written observations (Rule 59 § 1) on the merits. In addition, third-party comments were received from the Governments of Bulgaria, Poland and the Russian Federation and, also, from the UNHCR, jointly from the Dutch Council for Refugees, the International Commission of Jurists and the European Commission on Refugees and Exiles and, separately, from five Italian scholars, all of whom had been given leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 18 April 2018 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*
Mr Z. TALLÓDI, *Agent*,
Mrs A. LŐRINCZ, Director, Office for Immigration and Asylum,
Mrs M. WELLER, Government Co-Agent, *Advisers;*

(b) *for the applicants*
Mrs B. POHÁRNOK, *Counsel*,
Mrs G. MATEVZIC,
Mrs N. MOLE, *Advisers*.

The Court heard addresses and replies to the questions put by the judges by Mr. Tallódi, Mrs Pohárnok and Mrs Matevzic.

THE FACTS

I. THE APPLICANTS' BACKGROUND AND THEIR TRAVEL TO HUNGARY

7. Both applicants are nationals of Bangladesh. According to information dating from December 2017, the first applicant, Mr Ilias Ilias, lives in Uedem, Germany, and the second applicant, Mr Ali Ahmed, in Barcelona, Spain.

8. On 15 September 2015 the applicants arrived in Hungary from Serbia and entered the Röszke transit zone, situated on Hungarian territory at the border between the two countries. Their asylum requests submitted on the same day were rejected as being inadmissible within several hours and the applicants' expulsion was ordered. Following the applicants' appeal, they spent 23 days in the transit zone while the proceedings unfolded. On 8 October 2015, after the final decision rejecting their applications for asylum and ordering their expulsion, they were escorted out of the transit zone and crossed the border back into Serbia.

9. The following summary of the applicants' background is based on all their submissions to the Court. It appears that certain elements were not present in the allegations made to the Hungarian authorities or were only made in the second of the domestic sets of judicial proceedings or were presented with variations.

10. The first applicant was born in Bangladesh in 1983. At the age of eight he found himself alone in Pakistan, without his family. He lived there until the age of twenty four or twenty five (with the exception of three months at the age of fourteen when he was allegedly expelled to Afghanistan, detained there and then returned to Pakistan). As a child, he worked illegally in a restaurant and later as a fisherman and a tailor. He claims that he suffered abuse in Pakistan, including by the police, and tried to flee to Iran but was repeatedly abused there and returned to Pakistan. In 2009 or 2010 the first applicant went to Bangladesh and stayed there for a year or slightly longer, living homeless and often abused by the police because he had no documents. During this period he distributed pamphlets for the BNP, a political party, and started to receive threats from supporters of another political party. In 2010 or 2011, he was expelled by the police to India, stayed there two weeks and then crossed into Pakistan. After four months in Pakistan he went to Iran, where he lived and worked for 18 months. From there he went to Turkey, worked there for another 18 months and then paid smugglers to bring him to Greece, where he spent two and a half months. In 2015 he crossed on foot into the Former Yugoslav Republic of Macedonia and then on to Serbia by train. He was in Serbia for an unspecified but apparently very short period before entering Hungary.

11. The second applicant, born in 1980, lived in Bangladesh until 2010. He left because the floods of 2008 had destroyed his home and he had become destitute, surviving as a beggar. In 2010 he decided to go to India in search of better opportunities. His family who stayed in Bangladesh were killed in floods in 2010. The second applicant stayed in India for two months and then went to Pakistan, where he spent six months as captive of smugglers. The gang of smugglers eventually flew him to Dubai, made him work there for two years and then transferred him by boat to Iran. In Iran he worked for the same smugglers for two months before being taken by them to Turkey on foot. In Turkey, he was held captive by the smugglers for two

weeks, then transferred to Greece. In Greece, the second applicant worked for two years. He there met the first applicant and they left together for the Former Yugoslav Republic of Macedonia, Serbia and Hungary.

12. Both applicants' mother tongue is the Sylheti dialect of Bengali, the official language of Bangladesh.

13. Both applicants understand spoken Urdu and the first applicant speaks this language. It appears that the applicants declared before the Hungarian asylum authority that they also understood Turkish and English.

14. The first applicant never went to school. The second applicant finished only the first three years of school and can read and write in Sylheti and Bengali at a basic level.

II. THE APPLICANTS' STAY IN THE TRANSIT ZONE

15. The Röszke transit zone, as it was at the relevant time, was a compound with mobile containers and a narrow open-air area surrounded by approximately four-metre high fencing with barbed wire on the top. The entire zone was guarded by police officers and armed security guards. At the material time, applicants for asylum were held in the designated accommodation area consisting of approximately ten mobile containers (each measuring some 2.5 metres x 5.5 metres) furnished with three to five beds and an electric heater. There was a separate container for sanitary purposes and a bigger container used as a common room furnished with tables and chairs. The accommodation area was surrounded by a narrow open-air strip (approximately 2.5 metres wide and 40-50 metres long). Hot and cold running water and electricity were supplied. Three pork-free meals were available daily to the applicants in a dining-container.

16. According to the applicants, they had no access to social or medical assistance while in the zone. There was no access to television or the Internet, landline telephone or any recreational facilities.

17. According to the Government, medical care was available for two hours daily from doctors of the Hungarian Defence Force.

18. According to the Council of Europe's Committee for the Prevention of Torture ("the CPT"), beds in the Röszke zone were fitted with clean mattresses, pillows and bedding. The accommodation containers had good access to natural light and artificial lighting. 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 and health care was provided (see paragraph 65 below).

19. The applicants could not leave the zone for the remaining territory of Hungary. It appears that they could leave it for Serbia, but the parties are in dispute as to the legal and practical consequences of such a move.

III. THE APPLICANTS' ASYLUM REQUESTS AND THEIR EXAMINATION

A. The first decision of the asylum authority and the appeal against it

20. The applicants were interviewed by the Citizenship and Immigration Authority ("the asylum authority") shortly after their arrival, with the assistance of an interpreter who spoke Urdu as a foreign language. The first applicant's interview lasted two hours and the second applicant's twenty-two minutes. During the interviews they explained the background to their departure from Bangladesh, and gave some details concerning their journey. The first applicant was provided with a two-page information leaflet in Urdu on asylum procedure.

21. According to the notes taken by the Hungarian authorities during the interviews, Hungary was the first country where both applicants had applied for asylum. In Serbia, the first applicant had not met any official or representative of the authorities, nor had he even envisaged seeking protection in that country. The second applicant had once come across police officers while in Serbia but had not submitted an asylum request. He had insisted on continuing his journey, and the Serbian police had allegedly let him go after having issued him with a document ordering him to leave the country.

22. During the interview, the first applicant was informed that he had three days to provide reasons for his decision not to request protection in Serbia and to explain why he had considered the possibility of seeking asylum in Serbia as non-existent or ineffective. The second applicant was also invited, albeit as an immediate obligation, to explain why he thought that he could not have obtained protection in Serbia. According to the notes of the interview, he answered that he had not asked for asylum there because he wanted to continue his journey.

23. By two separate decisions delivered on the same day, 15 September 2015, the asylum authority (without, in the first applicant's case, waiting for the three-day period given to him for rebutting the presumption about Serbia as a "safe third country") rejected both applicants' asylum applications, declaring them inadmissible on the grounds that Serbia was to be considered a "safe third country" according to Government Decree no. 191/2015(VII.21.) and the applicants had not rebutted that presumption as they had not even considered the possibility of submitting an asylum claim in Serbia. The asylum authority ordered the applicants' expulsion from Hungary.

24. The applicants challenged the decisions before the Szeged Administrative and Labour Court. The court listed a hearing in both the applicants' cases for 21 September 2015.

25. The applicants, through UNHCR representatives who had access to the transit zone, authorised two lawyers of the Hungarian Helsinki Committee to represent them in the judicial review proceedings. It appears that the authorities did not allow the applicants' lawyers to enter the transit zone to consult with their clients until the evening of 21 September 2015, that is, after the court hearing.

26. Nevertheless, on 21 September 2015, the day of the hearing, the applicants' lawyers made written submissions, running to several pages, and also pleaded their case orally. The lawyers were present in the courtroom in Szeged, whereas the applicants communicated with the court via video link, with the help of an interpreter in Urdu.

27. 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. Both applicants showed the documents which they had received from the Serbian authorities; in the first applicant's case, that document did not comprise his name, as it had been issued for another person. At the hearing, the second applicant submitted that he had applied for asylum in Serbia, but his application had not been examined.

28. In their written and oral submissions, the applicants' lawyers argued, in essence, that the asylum authority had violated the provisions of the Asylum Procedures Directive (Directive 2013/32/EU) by failing genuinely to examine the question whether Serbia could be considered a "safe third country" in the applicants' particular situation. In their view, the decisions had been formalistic and lacked any individualised assessment. The applicants further complained that they had not been allowed to avail themselves of the statutory three-day time-limit to contest the application of the "safe third country" principle, as the asylum authority had adopted its decisions on the very day of the first interviews. They also argued that the decisions had not properly taken into account the relevant country information, in particular the reports of the UNHCR and a statement of the Serbian Minister of Labour and Social Affairs, dated 14 September 2015, according to which Serbia would not take back asylum-seekers from Hungary.

29. On the same day 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 procedure 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.

B. The second decision of the asylum authority and the appeals against it

30. In the renewed procedure before the asylum authority, the applicants submitted a written opinion by a psychiatrist, who had visited them in the transit zone on 23 September 2015 and interviewed them with the assistance of an interpreter attending by telephone. The psychiatrist intervened at the request of the applicants' lawyers and was commissioned by the Hungarian Helsinki Committee. In her opinion the psychiatrist stated that the first applicant had left Bangladesh in 2010 partly because of a flood and partly because two political parties had been trying to recruit him. He had been attacked and suffered injuries because of his refusal to do so. The psychiatrist observed that the first applicant 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"). With regard to the second applicant, the psychiatrist noted that he had fled his country five years earlier and had worked abroad, during which time his whole family had died in a flood. He had then 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. The psychiatrist did not mention any need for medical or psychological treatment. However, she was of the opinion that the applicants' mental state was liable to deteriorate due to the confinement.

31. On 23 September 2015 the asylum authority informed the applicants' legal representatives by telephone that a hearing would be held two days later. However, the representatives apparently considered that this was not a valid summons and did not attend.

32. At the hearing before the asylum authority on 25 September 2015, the applicants decided not to make any statement since their legal representatives were not present. With the assistance of an Urdu interpreter, the asylum authority informed the applicants that they had three days to rebut the safe-third-country presumption.

33. On 28 September 2015 the applicants' legal representatives made submissions to the asylum authority protesting against the manner in which they were summoned and requested that a new hearing be held, which they would attend. They also stated that the applicants should be given a proper opportunity to comment on the material on the basis of which Serbia was deemed safe.

34. On 30 September 2015 the asylum authority 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

classified as a "safe third country", the asylum authority had regard to relevant reports by the UNHCR and a non-governmental organisation. It further 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, and therefore that they had been unable to rebut the presumption. The applicants' expulsion from Hungary was consequently ordered.

35. The applicants sought judicial review by the Szeged Administrative and Labour Court. They argued, in particular, that the asylum authority had based its decisions on selectively chosen and incorrectly interpreted country information. They also submitted that, in their view, the burden of proof was on the asylum authority first of all to show that Serbia was a safe third country for the applicants and to substantiate this finding with relevant country information and other evidence. The applicants argued that the three-day time-limit for their rebuttal of the application of the safe third country principle could not even lawfully begin to run because the asylum authority had failed to meet its obligation to prove its assertions convincingly. The applicants further contended that the asylum authority had failed to verify whether the Serbian authorities would readmit them, this also being a condition for the application of the "safe third country" principle. They also referred to various alleged procedural shortcomings.

36. On 5 October 2015 the court, in separate decisions concerning the first and second applicant respectively, upheld the asylum authority's decisions. It observed, in particular, that in the resumed procedure 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. 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, and also 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 that the reasons for its decision were clearly stated and were reasonable. The court further emphasised that the statements given by the applicants at the hearings had been 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 could not be admitted as evidence. At no point during the administrative procedure had he referred to the conduct of the 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 unsafe in their regard. They had only contested the safety of Serbia in general, which was insufficient to rebut the presumption.

37. The final decisions were served on the applicants on 8 October 2015. They were written in Hungarian but explained to them in Urdu. During the afternoon of the same day the applicants were escorted by police officers out of the transit zone and then entered Serbia.

38. 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 Bengali translation of the court's decisions 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.

IV. THE APPLICANTS' REMOVAL TO SERBIA ON 8 OCTOBER 2015

39. The applicants submitted descriptions of the removal in a note from the UNHCR and a letter from a Serbian non-governmental organisation whose representatives were present, as well as in a video interview with the applicants conducted on the evening of their return to Serbia with the assistance of a lawyer of another Serbian non-governmental organisation via an Urdu interpreter. The respondent Government did not contest the descriptions but maintained that the applicants had left Hungary voluntarily.

40. It transpires from those descriptions that on the morning of 8 October 2015 UNHCR staff met the applicants at the transit zone and explained to them that following the judgment in their case they could return to Serbia voluntarily or appeal, in which case they would be detained for two months. The applicants expressed their wish to appeal and remain in Hungary and signed an appeal. The UNHCR staff left. In the early afternoon the police and the asylum authorities told the applicants, with the help of an Afghan man who could speak some Urdu, that the court had decided that they should go back to Serbia. The applicants replied that they did not want to go to Serbia and that the UN staff had told them that they might be able to stay for two months in Hungary. They handed a copy of the appeal they had signed but the authorities refused to take it. The police insisted and said that the applicants could choose between voluntary departure or detention and forceful handing over to the Serbian police. The applicants felt threatened and thought that they risked violence. They decided to leave. The police told them to cross into Serbia via the forest and not through the official checkpoint. As they were being led out of the transit zone the UNHCR staff arrived and conversed with the police who told them that the applicants had decided to leave Hungary voluntarily and also that they would not be escorted all the way and across to the Serbian side of the

border. Serbian border police had informed the UNHCR staff and the Hungarian police officer that the applicants would not be allowed to enter Serbia through the official checkpoint without documents and that the only possibility would be to try to enter through the "green border". The UNHCR representative made telephone calls to arrange for the applicants to be met at the other side of the border. The applicants were escorted only to the exit of the transit zone and given directions by the Hungarian police to go alone to the right, along the fence. No force was used. The UNHCR staff insisted and were eventually allowed to tell the two applicants that they would be met at the Serbian side of the border for which they had to go in another direction – to the left towards the highway and the Horgos border crossing on the Serbian side. This was communicated to the applicants. The applicants crossed the border as directed by the UNHCR and not through the forest. Serbian police officers were present when they crossed and only told them to wait for the UNHCR staff coming to meet them. The applicants were met by UNHCR staff who helped them.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. Domestic law as in force at the relevant time

41. The relevant provisions of Act no. LXXX of 2007 on Asylum ("the Asylum Act") provided 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[1], the principle of non-refoulement is respected;

ic) the rule of international law prohibiting removal to a country where the person in question would be subjected to conduct defined in Article XIV(2) of the Fundamental Law [that is to say, where would risk to face death penalty, torture or any other form of inhuman treatment or punishment], is respected and applied; and

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

...

1. The United Nations Convention Relating to the Status of Refugees, adopted in 1951 in Geneva ("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 have special needs."

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) work ... at a place of accommodation [designated by the asylum authority] ..."

Section 31/A, entitled "Asylum detention"

"(1) The asylum authority can, in order to conduct the asylum procedure or to secure the Dublin transfer – taking the restrictions 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 ...

...

(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

...

d) the application is repeated and there is no appearance of any new circumstances or facts that would warrant the applicant's recognition as a refugee or a beneficiary of subsidiary protection;

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 sub-section (2) 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 sub-section (4) a) or b), it is for the applicant to prove that he or she did not have an opportunity to obtain effective protection in that country 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 51/A

"If the safe country of origin or the safe third country refuses to admit or to take back the applicant, the asylum authority shall withdraw its decision and shall continue the procedure."

Section 53

"...

(2) The decision declaring the application inadmissible ... may be challenged in court. Except for a decision based on section 51 (2) e) ... the request for court review shall not have a suspensive effect on the decision's execution.

...

(4) The court shall deliver its decision within eight days from the time of receipt of the request for review, in non-contentious proceedings, on the basis of the documents available. The review of the court shall cover the examination of both the facts and the whole range of legal issues, as they stood at the time of the administrative authority's decision. If necessary, [the court may hear the parties in person].

(5) The court cannot amend the asylum authority's decision; the unlawful administrative decision ... shall be quashed and, if necessary, the court shall remit the case to the asylum authority for new proceedings. There shall be no remedy against the court's decision to close the proceedings."

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;

...

(4) The decision terminating the proceedings on one of the grounds enumerated in sub-section (2) points a) to d) above cannot be challenged in court.

...

(6) The applicant may, within nine months from the notification of the discontinuance order, request the continuation of the proceedings terminated under sub-section (2) points b) to d). The applicant may only submit such request in person, before the asylum authority. Upon such request for continuation, submitted in due time, the asylum authority shall continue the proceedings from the procedural stage that preceded the discontinuance. The applicant may request the continuation of the proceedings once."

Section 71/A

"(1) If an applicant lodges his or her application before admission to the territory of Hungary, in a transit zone defined by the Act on State Borders, the provisions of this chapter [on the procedure for recognition as a refugee or a beneficiary of subsidiary protection] shall be applied [accordingly, with the differences specified in this section].

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

(3) The asylum authority shall decide as to the admissibility of an application in accelerated proceedings, at the latest within eight days from the time of submission thereof. The asylum authority shall promptly communicate the decision adopted in the procedure.

(4) When a decision has not been taken within four weeks, the immigration authority shall grant entry in accordance with the provisions of law.

(5) If the application is not inadmissible, the immigration authority shall grant entry in accordance with the provisions of law.

(6) If the applicant has been granted entry to the territory of Hungary, the asylum authority shall conduct the proceedings applying the general rules.

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

..."

Section 80/A, entitled "Crisis caused by mass immigration"

"(1) A state of crisis caused by mass immigration may be declared if:

a) the number of people arriving in Hungary and seeking recognition exceeds

aa) five hundred per day as an average in a month, or

ab) seven hundred and fifty per day as an average in two successive weeks, or

ac) eight hundred as an average in a week;

b) the number of people staying in a transit zone in Hungary – excluding the persons who contribute to looking after such foreigners – exceeds

ba) a thousand per day as an average in a month, or

bb) one thousand and five hundred per day as an average over two weeks, or

bc) one thousand and six hundred per day as an average in a week;

c) in addition to the cases specified in points a) and b), any condition evolves in relation to a migration situation that directly jeopardises public safety, public order or public health in a village, town or city, especially if a disturbance breaks out or violent acts are committed at a receiving station or other institution providing accommodation for such foreigners and located at such a place or in its outskirts.

(2) The state of crisis caused by mass immigration may be declared by a Government decree, at the request of the national Chief of Police and the head of the asylum authority, and at the proposal of the minister in charge. The state of crisis caused by mass immigration may be declared in respect of the whole territory of Hungary or a specified part thereof.

..."

42. The Government declared a state of crisis caused by mass immigration as of noon on 15 September 2015 in respect of the territory of Bács-Kiskun and Csongrád counties, where the Röszke transit zone was located. On 18 September 2015 the scope of the state of crisis was extended to the territory of Baranya, Somogy, Zala and Vas counties. On 9 March 2016 the state of crisis was maintained and extended to the whole territory of Hungary, until 7 September 2018.

43. The relevant provisions of Act no. II of 2007 on the Admission and Right of Residence of Third Country Nationals ("the Immigration Act") provide as follows:

Section 51

"(1) The refoulement 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 refouled or expelled third-country national is likely to be subjected to a treatment proscribed by Article XIV (2) of the Fundamental Law[, notably to death penalty, torture or any other form of inhuman treatment or punishment] (non-refoulement).

(2) If there is a pending asylum procedure in respect of the third-country national, his or her refoulement or expulsion cannot be ordered or executed, provided that he or she is entitled, pursuant to a separate law, to reside on the territory of Hungary.

...”

Section 52

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

...”

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

Section 2

“Member States of the European Union and candidates for EU membership (except Turkey)[2], member states of the European Economic Area, all the states of the United States of America 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

2. Serbia has been a candidate country since March 2012 and the Republic of North Macedonia since December 2005. The exception concerning Turkey, still in force at the material time, was abrogated as of 1st April 2016.

access to effective protection in that country within the meaning of section (2) i) of the Asylum Act."

B. Changes in domestic law in force since 28 March 2017

45. As of 28 March 2017 the Asylum Act was amended, in particular as regards the rules to be applied when a state of crisis caused by mass immigration is declared. According to the new rules, in such circumstances applications for recognition can only be submitted, with some limited exceptions, in the transit zone and asylum-seekers are required to wait there until the decision is taken after the examination of the merits of their applications (unlike in the situation regulated by section 71/A (5), they are not allowed to leave the transit zone even if the application is not found to be inadmissible). The time-limit for the court appeal against an inadmissibility decision adopted by the asylum authority is three days (as opposed to seven days under the ordinary rules). Unlike in the ordinary border procedure, section 66 (6) of the Asylum Act does not apply and the applicant cannot request the continuation of the procedure if it was discontinued upon his or her leaving the transit zone.

46. In January 2018 the relevant laws were further amended in connection with the entry into force of the new Act on General Public Administration Procedures (Act no. CL of 2016) and the new Code of Administrative Justice (Act no. I of 2017). Another amendment was introduced in July 2018.

II. EUROPEAN UNION LAW

A. 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) ("the Asylum Procedures Directive")

47. The Preamble of this Directive, insofar as relevant, reads:

"...

(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, 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. ...”

48. Article 31, entitled “Examination procedure” reads, insofar as relevant:

“...

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 ...”

49. Article 33, entitled “Inadmissible applications” reads as follows:

“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.”

50. Article 34, entitled “Special rules on an admissibility interview”, reads, insofar as relevant:

“1. Member States shall allow applicants to present their views with regard to the application of the grounds referred to in Article 33 in their particular circumstances before the determining authority decides on the admissibility of an application for international protection. To that end, Member States shall conduct a personal interview on the admissibility of the application. Member States may make an exception only in accordance with Article 42 in the case of a subsequent application. ...”

51. Article 35, entitled “The concept of first country of asylum”, reads as follows:

“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."

52. Article 36, entitled: "The concept of safe country of origin", reads as follows:

"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."

53. Article 38, entitled "The concept of safe third country", insofar as relevant, reads as follows:

"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[3];

3. As regards the connection between the applicant and the third country and whether it is therefore reasonable for the applicant to go to that country, the European Commission has stated that factors such as whether the applicant has transited through the safe third country in question, or whether the third country is geographically close to the country of origin of the applicant, can be taken into account (Communication from the Commission to the

(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 ...”

54. Article 39, entitled “The concept of European safe third country”, insofar as relevant, reads as follows:

“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

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European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, 10 February 2016, COM(2016) 85 final, p. 18). However, in the UNHCR’s view, transit alone is not a ‘sufficient connection’ within the meaning of Article 38(2) of Directive 2013/32/EU, unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with the comparable asylum systems and standards (UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016, p. 6: “Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection.”)

(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 ..."

55. Article 43, entitled "Border procedures", reads as follows:

"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."

56. Article 46, entitled "The right to an effective remedy", insofar as relevant, reads as follows:

"1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision: ...

(ii) considering an application to be inadmissible pursuant to Article 33(2);

(iii) taken at the border or in the transit zones of a Member State as described in Article 43(1) ...

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance."

57. In its judgment of 21 December 2011 in the case of *N. S. and M.E.* (C-411/10 and C-493/10), the ECJ ruled *inter alia* on the concept of European safe third countries. It found that EU law precludes the application of a conclusive presumption that the Member State, which the Dublin II Regulation indicates as responsible, observes the fundamental rights of the European Union. In particular, the ECJ stated:

"103. ... [T]he mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions. [...]

104. In those circumstances, the presumption [...] that asylum seekers will be treated in a way which complies with fundamental rights [...] must be regarded as rebuttable."

In paragraph 103 of its judgment, the ECJ explicitly underlined that these findings are applicable to both Member States and third countries.

B. 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) ("the Reception Conditions Directive")

58. Article 8, entitled "Detention", reads as follows:

"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."

C. Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation

59. This agreement, approved by Council Decision 2007/819/EC of 8 November 2007, provides, in so far as relevant:

"Article 3

Readmission of third-country nationals and stateless persons

1. Serbia shall readmit, upon application by a Member State and without further formalities other than those provided for in this Agreement, all third-country nationals or stateless persons who do not, or who no longer, fulfil the legal conditions in force for entry to, presence in, or residence on, the territory of the Requesting Member State provided that it is proved, or may be validly assumed on the basis of prima facie evidence furnished, that such persons:

...

(b) illegally and directly entered the territory of the Member States after having stayed on, or transited through, the territory of Serbia.

...

4. After Serbia has given a positive reply to the readmission application, the Requesting Member State issues the person whose readmission has been accepted the EU standard travel document for expulsion purposes."

D. European Commission Recommendation (EU) 2016/2256 of 8 December 2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013

60. The relevant passages of this recommendation read as follows:

"(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), 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 2016. 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."

III. COUNCIL OF EUROPE RECOMMENDATIONS AND GUIDELINES

61. In 1997 the Committee of Ministers of the Council of Europe issued Guidelines on the Application of the Safe Third Country Concept[4] to asylum-seekers. The Guidelines provide that, in order to assess whether a country is a safe third country to which an asylum-seeker can be sent, all the criteria indicated below should be met in each case:

> "a) observance by the third country of international human rights standards relevant to asylum as established in universal and regional instruments including compliance with the prohibition of torture, inhuman or degrading treatment or punishment;
>
> b) observance by the third country of international principles relating to the protection of refugees as embodied in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, with special regard to the principle of non-*refoulement*;
>
> c) the third country will provide effective protection against *refoulement* and the possibility to seek and enjoy asylum;
>
> d) the asylum-seeker has already been granted effective protection in the third country or has had the opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek protection there before moving on to the member State where the asylum request is lodged or, that as a result of personal circumstances of the asylum-seeker, including his or her prior relations with the third country, there is clear evidence of the admissibility of the asylum-seeker to the third country."

62. In addition, the Guidelines indicate that:

> "States should adopt modalities to provide for informing the asylum-seeker and, as far as necessary and in accordance with existing data protection legislation or, in absence of such legislation, with the consent of the asylum-seeker, the authorities of the third country that, when a country is considered safe in the above stated manner, applications for asylum are generally not examined in substance."

63. In 2009 the Committee of Ministers, in its Guidelines on human rights protection in the context of accelerated asylum procedures[5], required that all asylum seekers have an effective opportunity to rebut the presumption of safety of the third country, underlining that the application of this concept did not relieve a State of its obligations under Article 3 of the Convention. It also stated that the criteria mentioned below must be satisfied when applying the safe-third-country concept:

> *"a.* the third country has ratified and implemented the Geneva Convention and the 1967 Protocol relating to the Status of Refugees or equivalent legal standards and other relevant international treaties in the human rights field;

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4. Recommendation No. R (97) 22 of the Committee of Ministers to Member States containing Guidelines on the Application of the Safe Third Country Concept, 25 November 1997.

5. Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009, section VI. See also the Explanatory Memorandum, 28 May 2009, CM(2009)51 add3.

b. the principle of *non-refoulement* is effectively respected;

c. the asylum seeker concerned has access, in law and in practice, to a full and fair asylum procedure in the third country with a view to determining his/her need for international protection; and

d. the third country will admit the asylum seeker."

64. In its Resolution 1471 (2005) on Accelerated Asylum Procedure in Council of Europe Member States, the Council of Europe's Parliamentary Assembly stated, *inter alia*:

"... [T]he Parliamentary Assembly invites the governments of the member states of the Council of Europe:

...

8.2. as regards the concept of safe country of origin, to:

8.2.1. ensure that clear and demonstrable safeguards are adopted to guarantee an effective access to an asylum determination procedure which can lead to the granting of refugee status or other forms of international protection;

8.2.2. ensure that the burden of proof does not switch to the applicant to prove that a country is unsafe and that the applicant has an effective opportunity to rebut the presumption of safety;

8.2.3. take great caution in adopting, in the context of the proposal for a European Council directive, a list of safe countries of origin which may lead to a lowering of standards of protection for asylum seekers from the countries concerned and could undermine the underlying concept of refugee protection, which is based on the individual situation of the asylum seeker rather than a general analysis and judgment on the country ..."

IV. REPORTS OF VISITS AND RESEARCH BY INTERNATIONAL BODIES AND NON-GOVERNMENTAL ORGANISATIONS

A. As regards Hungary

65. 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 ..."

66. The CPT revisited the Röszke transit zone in October 2017. In its report of that visit, the CPT noted that the zone had been enlarged but that asylum-seekers remained free to move only within the sector where their container was located. The premises were maintained in a good state of hygiene, and efforts were being made to allow for activities. However, almost all the containers were used at full capacity, which meant that five persons had to sleep in a 13 m² container.

67. In the 13 October 2017 report (SG/Inf(2017)33) on his fact-finding mission of June 2017, Ambassador Tomáš Boček, Special Representative of the Secretary General of the Council of Europe on migration and refugees, made, *inter alia*, the following observations concerning the Röszke transit zone. He noted that the area of the zone was surrounded by barbed wire fence and was guarded at all times. It was divided into sections, one of them designated for families and another for single men. The section for single men comprised one row of containers placed adjacent to each other, sharing an approximately 2-metre-wide corridor. Persons who stayed in one section could go to other parts of the zone only to visit the doctor or to attend interviews with the asylum authorities, and were always escorted by guards, even inside the transit zone. Also, at the time of the visit in June 2017 the Hungarian authorities had informed the Special Representative that the average duration of a stay in the zone had been 33 days, but he had spoken with individuals who had mentioned periods of confinement of two and more months. The Special Representative also described the living conditions in the zone and noted that hygiene was good, three meals a day, including one hot meal, were distributed, and there was a doctor's room where basic medical care was provided.

68. 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. 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."

69. 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:

"In case of expulsion to Serbia [from Hungary], those returned are in practice barred from accessing the asylum procedure and reception conditions in Serbia. Upon return, they are prosecuted for irregular border-crossing, which is a criminal offence punishable by a fine or imprisonment. In practice, most persons are issued a warning and are given no further sentence after conviction. However, the court decision is accompanied by a decision of the Ministry which terminates the asylum seeker's right to reside on the Serbian territory. Following that decision, asylum seekers are not allowed in one of the refugee camps in the country and, for want of a registered residence, to formally lodge an asylum application in Serbia.

...

... [T]ransfers 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."

70. The ECRE's "Case Law Fact Sheet: Prevention of Dublin Transfers to Hungary" published 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."

71. Amnesty International stated the following in its report of 2015, entitled "Fenced Out, Hungary's Violations of the Rights of Refugees and Migrants":

"People who had been stranded at the border crossing Röszke/Horgoš as of 15 September had in theory the option of applying for asylum ... Once or twice an hour, a police officer accompanied by a translator speaking Arabic, Farsi and Urdu opened the door of the container and randomly allowed groups of two to five persons to enter the "transit zone". People were entering assuming that they would be allowed to proceed to Hungary this way. ... [H]owever, the majority of these were returned straight back to Serbia. The rest was stuck in the border area's makeshift camp hoping that the border would be opened at some point. Some gave up and left the area immediately, others remained a few days longer before moving on to the Croatia as it became apparent that the border would remain closed indefinitely. A man in a group of 50 Syrians travelling together who left the makeshift camp in Röszke/Horgoš on 16 September 2015 [apparently in the direction of Serbia] told Amnesty International: 'We did not try [to enter] the "transit zones". We heard that everyone who tried failed and we feared we could not try anywhere else after [because of getting registered in the Schengen Information System].'"

B. As regards Serbia

72. Since 2001, Serbia is a party to the 1951 Convention relating to the Status of Refugees and to its 1967 Protocol.

73. 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:

"37. The list of safe third countries adopted by the Government of Serbia is, in UNHCR's view, excessively inclusive and broadly applied ...

38. The Asylum Office applies the "safe third country concept" to all asylum-seekers who have transited through countries on the list, without ensuring adequate safeguards in the individual case, such as a guarantee of readmission and access to the asylum process in the so-called safe third country.

...

75. The risk of deportation to countries of origin is relatively small for persons transferred to Serbia under readmission agreements. To UNHCR's knowledge, even though Serbia has readmission agreements with the European Community and a number of bilateral agreements with EU and other States, foreign citizens are transferred to Serbia only from Hungary, Croatia and Bosnia and Herzegovina. Upon reception by the border police in Serbia on their return, third-country nationals are routinely taken to the local courts and sentenced for irregular border crossing with either a short term prison term (10 to 15 days) or a fine (usually equivalent of 50 Euros). They are usually issued an order to leave the territory of Serbia within three days, but this is not enforced. As there is no removal procedure in place, they are generally left to depart on their own, and many resume their journey towards Western Europe.

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. ... Despite some incremental improvements notably with regard to reception standards, Serbia's asylum system has been unable to cope with the recent increases in the numbers of asylum applicants. This has exposed significant shortcomings in numbers of personnel, expertise, infrastructure, implementation of the legislation and government support. .... 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.

80. There is a need to set up a fair and efficient asylum procedure that is not only consistent with the existing legislative framework, but is also capable of adequately processing the claims of the increasing number of asylum-seekers in a manner consistent with international standards. ...

81. Until such a system is fully established in Serbia, for the reasons stated above, UNHCR recommends that Serbia not be considered a safe third country of asylum, and that countries therefore refrain from sending asylum-seekers back to Serbia on this basis."

74. 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 [Serb] Asylum Act, initially foreseen for 2016, has been postponed".

75. In his report (SG/Inf(2017)33) of 13 October 2017 of his fact-finding mission of June 2017, Ambassador Tomáš Boček, Special Representative of

the Secretary General of the Council of Europe on migration and refugees, made, *inter alia*, the following observations concerning Serbia:

> "NGOs' reports ... suggest that in 2016 there were summary and collective expulsions of foreigners from Serbia to "the former Yugoslav Republic of Macedonia" and to Bulgaria. During our mission, the Serbian authorities confirmed that there had been instances of pushbacks of refugees and migrants from Serbia to the above-mentioned neighbouring countries ...
>
> It should be underlined that the overwhelming majority of those who have expressed an intention to seek asylum in Serbia do not wish to stay in the country, as their end-goal is to reach other European countries. Consequently, they do not lodge asylum applications in Serbia or abandon the asylum procedures whenever they have done so. In the first six months of 2017, 3 251 persons registered their intention to seek asylum, of whom only 151 applied for asylum. ..."

76. According to the Belgrade Centre for Human Rights, a non-governmental organisation, during the period 1 April 2008 – 31 December 2014 Serbia's authorities granted refugee status to six and subsidiary protection to twelve people altogether (BCHR, *Right to Asylum in the Republic of Serbia 2014*, p. 20).

77. Pursuant to the Serbian Government's "Decision Determining the List of Safe Countries of Origin and Safe Third Countries", Official Gazette of the Republic of Serbia, no. 67/2009, which was applicable in 2015, the Former Yugoslav Republic of Macedonia, Greece and Turkey, among others, are considered safe third countries.

C. As regards the Republic of North Macedonia

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

> "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."

THE LAW

I. THE RESPONDENT GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Objection concerning the six-month time limit under Article 35 § 1 of the Convention

79. As they did before the Chamber, the respondent Government reiterated their objection that the complaint under Article 13 in conjunction with Article 3 regarding the alleged lack of remedies in respect of the living conditions in the Röszke border transit zone was submitted outside the six-month time limit laid down in Article 35 § 1 of the Convention. The applicants invited the Grand Chamber to adopt the Chamber's conclusion that the complaint had been submitted in time and was admissible.

80. Under Article 35 § 4 of the Convention, the Court may dismiss applications which it considers inadmissible "at any stage of the proceedings". Therefore, even at the merits stage and subject to Rule 55 of the Rules of Court, the Grand Chamber may reconsider a decision to declare an application admissible (see, for example, *Fábián v. Hungary* [GC], no. 78117/13, § 89, 5 September 2017, with the references therein).

81. The Court notes that in the present case the six-month time limit under Article 35 § 1 of the Convention started running in respect of the complaint at issue on 9 October 2015, the day after the applicants left the zone (see paragraph 8 above), and expired on 8 April 2016 (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 44, 29 June 2012).

82. The decisive issue is whether the complaint in question was made out in submissions introduced in time. Before the Chamber the applicants had referred to several passages from their letter of 25 September 2015 and their application form of 13 October 2015, maintaining that they contained the complaint at issue. The Chamber considered that the complaint was formulated in the applicants' letter of 25 September 2015, and therefore in time (see paragraphs 3 and 92-95 of the Chamber judgment).

83. In particular, the applicants had referred to the following passage from the letter of 25 September 2015 (original in English):

> "The domestic provisions of Hungarian law in force do not allow the courts to review the lawfulness of the deprivation of liberty, the conditions under which the applicants/third country nationals are held in the transit zone or to impose a limit on the duration of detention."

84. The Court notes that this passage appears in a sub-section relating solely to the question whether the stay in the transit zone amounted to deprivation of liberty within the meaning of Article 5 of the Convention. The same letter of 25 September 2015, which runs to 15 pages, contains a separate sub-section about the physical conditions in the transit zone and the alleged violation of Article 3 in that respect but no mention of a complaint about lack of effective remedy can be found there. In these circumstances, it appears that the mention of "conditions under which the applicants ... are held in the transit zone" in the relevant passage cited above meant conditions affecting the question whether there was deprivation of liberty within the meaning of Article 5 and its lawfulness. A reference to Article 13 can only be found in the letter of 25 September 2015 in relation to the remedies against the expulsion order concerning the applicants.

85. Under the Court's case-law, some indication of the factual basis of the complaint and the nature of the alleged violation of the Convention is required to introduce a complaint and interrupt the running of the six-month period (see *Fábián*, cited above, § 94; *Abuyeva and Others v. Russia*, no. 27065/05, § 222, 2 December 2010; and *Allan v. the United Kingdom* (dec.), no. 48539/99, 28 August 2001). Under paragraph 7 of the Practice directions on institutions of proceedings, issued by the President of the Court in accordance with Rule 32 of the Rules of Court, as in force at the time the applicants submitted their application form dated 13 October 2015, applicants must set out the complaints and provide information that "should be enough to enable the Court to determine the nature and scope of the application". Ambiguous phrases or isolated words do not suffice to accept that a particular complaint has been raised.

86. In the present case the Grand Chamber considers that the above cited passage is too ambiguous to be interpreted as raising the complaint at issue.

87. The Grand Chamber has also examined the remainder of the applicants' submissions of 25 September and 13 October 2015 but is unable to find therein a complaint under Article 13 in conjunction with Article 3 regarding the alleged lack of remedies in respect of the living conditions in the Röszke transit zone. It is significant in this respect that these submissions were made by a lawyer and contained detailed reasoning, organised in separate sub-sections on each complaint made. It is highly unlikely that if the applicants had intended to raise the complaint in question they would have done so without devoting a separate point or sub-section to

it. The Court finds, therefore, that this complaint was not introduced by the applicants in September or October 2015.

88. The complaint was mentioned for the first time in the applicants' observations in reply dated 29 August 2016, well after the expiry of the six-month time limit. It was formulated again later, in the applicants' additional submissions of 28 November 2016.

89. It follows that the Government's preliminary objection must be upheld and that the complaint under Article 13 in conjunction with Article 3 regarding the alleged lack of remedies in respect of the living conditions in the Röszke transit zone, must be declared inadmissible under Article 35 § 4 of the Convention as having been submitted after the expiry of the six-month time limit under its Article 35 § 1.

B. Objection as to the applicants' victim status

90. The respondent Government reiterated before the Grand Chamber their objection concerning the applicants' victim status in relation to their complaint under Article 3 of the Convention about their removal to Serbia. Noting that the applicants had at no stage complained to the Serbian authorities or to the Court about refoulement from or ill-treatment in Serbia, the Government submitted that this fact was conclusive proof that the applicants had not been at risk at the time of the asylum procedure in Hungary, and therefore concluded that they could not have claimed, at any relevant time, to have been victims, within the meaning of Article 34 of the Convention, of the alleged violation of Article 3.

91. The applicants disagreed, as they had done before the Chamber. The Chamber dismissed the Government's objection and declared the complaint under Article 3 admissible (see paragraphs 103-07 of the Chamber judgment).

92. The Court considers that the issue raised in the Government's objection – whether or not there was a real risk of ill-treatment in the event of removal to Serbia – potentially concerns the substance of the applicants' complaint under Article 3 but not the victim-status requirement of Article 34 of the Convention.

93. With regard to that requirement, it is sufficient to observe that the applicants were directly affected by the acts and actions complained of in that the expulsion decision was binding and enforceable and was followed by their removal from Hungary to Serbia. In those circumstances, the applicants could claim that they were the victims of the alleged violation of the Convention in relation to their removal (see the Court's approach in, for example, *Vijayanathan and Pusparajah v. France*, 27 August 1992, §§ 43-47, Series A no. 241-B).

94. Noting, in addition, that the Government have not claimed that there were any other events, such as measures taken by the Hungarian authorities

in the applicants' favour and the acknowledgment of a violation removing their victim status (see *Murray v. the Netherlands* [GC], no. 10511/10, § 83, 26 April 2016), the Court rejects the Government's preliminary objection concerning the victim requirement of Article 34 of the Convention.

C. Objection based on the fact that Hungary applied EU law in the present case

95. The respondent Government argued that Hungary had acted in accordance with EU law, which limited the competence of the Court.

96. The Court recalls that even when applying European Union law, the Contracting States remain bound by the obligations they freely entered into on acceding to the Convention. However, when two conditions are met – the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by European Union law – those obligations must be assessed in the light of the presumption of Convention conformity as established in the Court's case-law (see *Avotiņš v. Latvia* [GC], no. 17502/07, § 105, 23 May 2016, with the references therein). The State remains fully responsible under the Convention for all acts falling outside its strict international legal obligations (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 157, ECHR 2005−VI).

97. In the present case the relevant EU law (see paragraphs 47-58 above) consists of directives which do not impose on Hungary an obligation to act as they did, including holding the applicants in the transit area, forbidding them to enter Hungary, deciding not to assess the merits of their asylum request, relying on there being a safe third country, and declaring Serbia to be a safe third country. The Hungarian authorities exercised a discretion granted under EU law, and the impugned measures taken by them did not fall within Hungary's strict international legal obligations. Accordingly, the presumption of equivalent protection by the legal system of the EU does not apply in this case and Hungary is fully responsible under the Convention for the impugned acts (see, for a similar outcome, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 340, ECHR 2011).

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION CONCERNING THE APPLICANTS' REMOVAL TO SERBIA

98. The applicants alleged that their expulsion to Serbia had exposed them to a real risk of treatment contrary to 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. The Chamber judgment

99. The Chamber observed that between January 2013 and July 2015 Hungary had not considered Serbia as a safe third country, and no convincing explanation or reasons had been adduced by the Government for the reversal of that attitude, especially in the light of the reservations of the UNHCR and highly respected international human rights organisations. The Chamber further noted that the Hungarian authorities had not sought to rule out that if the applicants were removed to Serbia, they might further be expelled to Greece, where the reception conditions for asylum seekers were in breach of Convention standards. Also taking issue with other procedural shortcomings, the Chamber found that the applicants had not enjoyed any effective guarantees to protect them from a real risk of being subjected to inhuman or degrading treatment in breach of Article 3.

B. The parties' submissions

1. The applicants

100. The applicants alleged that their removal to Serbia exposed them to a real risk of treatment contrary to Article 3, because (a) there was a risk that they would not be admitted to Serbia or would not be allowed access to an asylum procedure, (b) there was a risk of chain-refoulement, and (c) there was no prospect of access to adequate reception facilities or to adequate protection taking account of their vulnerability.

101. In particular, the Hungarian authorities knew that the applicants would not be allowed to enter and stay in Serbia, but nevertheless removed them in breach of the procedures under the applicable readmission agreement and without obtaining assurances from the Serbian authorities. On the day of the applicants' removal the Hungarian authorities left them alone in Hungarian territory, just outside the transit zone, and obliged them to cross into Serbia illegally. There was furthermore a known practice on the part of the Serbian authorities, documented by the Ombudsperson of Serbia in October 2014 and by the UNHCR in 2016, not to allow returnees from Hungary to apply for asylum or have access to reception conditions. Other practices in Serbia noted by the UN bodies and NGOs included penalising readmitted third-country nationals for illegal border crossing despite their asylum-seeker status, and a risk of harassment and abuse. Moreover, the Serbian asylum procedure suffered from serious deficiencies.

102. The applicants, referring to reports by UN bodies and NGOs, submitted that the risk of chain-refoulement and push-backs from Serbia to the Republic of North Macedonia and then to Greece was well-documented. The Asylum Office of Serbia had confirmed in a letter of October 2016 that the concept of safe third countries was applied without seeking guarantees of access to their territory and asylum procedures. The Serbian list of safe

third countries included the Former Yugoslav Republic of Macedonia, Greece and Turkey, and asylum-seekers were routinely, indeed automatically, returned there.

103. The applicants further stated that the Hungarian authorities must have known that persons in their situation would not be given access to reception facilities in Serbia, and that in any event those facilities and conditions were deficient.

104. In the applicants' view, the relevant Hungarian law and the decision-making process in their case were inadequate, did not provide the requisite safeguards and did not ensure effective remedies in practice.

105. In particular, both the initial and the renewed asylum procedure in the applicants' case were hastily carried out, and the time-limit for appeals was only seven days, which deprived the applicants of their right to rebut the presumption that Serbia was a safe third country in their case. Furthermore, each applicant was interviewed once in the first procedure, with no opportunity to receive prior information or legal assistance. They were unable to confer with a lawyer before the first hearing took place, and their lawyer was not properly notified of the time of the interview in the second, renewed procedure. The interpretation was not provided in the applicants' mother tongue and was of a poor quality. The applicants at no stage received adequate procedural information in a language which they understood or information about the evidence that had been used as the basis for applying the safe third country rule to their case. Moreover, both the asylum authority and the Szeged court disregarded the country information and legal arguments submitted to them. In its decision of 5 October 2015, the Szeged court limited its review to the question whether the asylum authority had complied with the previous court ruling. Finally, the applicants were removed from the transit zone without proper notification of the relevant decisions, after their right to file a judicial review request against their potential deportation and expulsion decisions had been denied.

106. In the applicants' view, their asylum requests were rejected on the sole basis of the automatic application of the Government's list of safe third countries. The authorities failed to consider widely available reports from reliable sources on the deficiencies of the Serbian asylum system and the realities on the ground and the applicants' individual circumstances. Although there was a reference to three reports in the asylum authority's second decision, the conclusions made were at odds with the reports' findings. Moreover, instead of looking at the risks in the event of a future return to Serbia, the authorities merely noted that the applicants had not provided evidence of past ill-treatment or denial of effective protection during their transit through Serbia. In view of the medical report on the applicants' mental health the authorities should have examined the information on inadequate reception conditions, in particular for those

returned to Serbia, who were known to be treated differently from new arrivals there.

107. Finally, the applicants submitted that since the authorities' assessment did not meet Convention standards, the respondent Government could not argue in the present case that there had been no Article 3 risks. They were also estopped from claiming that the applicants had had no arguable claim under Article 3 in relation to their country of origin: this was an unacceptable speculation since the inadmissibility procedure in the applicants' case had excluded any assessment of the risks in relation to the country of origin.

2. The respondent Government

108. The Government emphasised the importance of the distinction between the right to seek asylum, recognised in international law, and a purported right to be admitted to a preferred country for the purpose of seeking asylum. To avoid feeding the false perception that there was a right to asylum in the country offering the best protection, it was necessary to adopt a careful and realistic interpretation of any alleged risk of refoulement and of the threshold of severity triggering the application of Article 3.

109. In the Government's view, the UNHCR tried to mitigate the consequences of humanitarian catastrophes by advocating a right to asylum-shopping and pushing States towards ever higher standards of protection. This was approved by the NGOs and humanitarian organisations, as well as by those seeking cheap labour in Europe. However, in an era of globalisation the perception that everyone had a right to move to the EU to enjoy the benefits of a welfare State spread quickly, and it was becoming impossible to stop fake refugees from entering the EU while observing the standards advocated by the UNHCR. The practical impossibility of removing undocumented migrants who were not entitled to international protection had rendered immigration uncontrollable. This was causing social tension, a feeling of powerlessness and a sense of loss of sovereignty in affected States. Asylum-shopping diverted resources from the search for collective solutions by the international community to the resettlement of refugees or improving their situation in the first safe country. In this respect, asylum-shopping was contrary to Article 17 of the Convention.

110. The Government considered that only a return to the rules of "well-established international law" could prevent escalation of the European migration crisis. A solution to the global issues of migration could only be found in the collective action of sovereign States if the ability to prevent abuses effectively was restored to them.

111. The Government emphasised that the applicants did not face any danger in their country of origin, Bangladesh. Their accounts of their personal circumstances and their journeys to Western Europe had been

contradictory and periodically readapted to suit their claims. Since the applicants had failed to establish a prima facie case of persecution in their country of origin, there was no risk of refoulement from Serbia.

112. The Government stated that the Hungarian legislation adopted in 2015 was based on a possibility provided for under EU law. Hungary regarded Serbia, an EU candidate country, as a safe third country since it had agreed to be bound by all the relevant international treaties and EU requirements and benefited from EU support for reforms and upgraded asylum facilities. In any event, Hungarian law only established a presumption, rebuttable in individual cases. An applicant could only be sent back to a third country if the authorities were satisfied that the return would not lead to direct or indirect refoulement. The 2015 legislative amendment adding Serbia to the list of safe third countries was needed in the face of an unprecedented wave of migration aggravated by ever-increasing abuse of the right to asylum, including fake asylum-seekers and asylum-shopping by genuine asylum-seekers. It served to render the asylum procedures faster and more effective while maintaining the applicable guarantees.

113. The low rate of successful asylum applications in Serbia is not the result of a deficient asylum system but of asylum-seekers leaving Serbia before the conclusion of the procedures. In 2015 (up to 31 July) 66,428 persons had requested asylum in Serbia at the borders and been directed to refugee reception centres, but only 486 of them had reported to those centres. The rest of them had left Serbia before the asylum procedure could be completed, or even started. A similar phenomenon had existed in Hungary until March 2017, when the authorities had begun to initiate the in-merit stage of the asylum procedure in the transit zones at the border: whereas the recognition rate in Hungary had previously been 0.5%, it had soared to 46% since then.

114. Furthermore, there had been no UNHCR reports and no cases before the Court indicating that Serbia had violated the principle of non-refoulement. The UNHCR report of August 2012, cited in the Chamber judgment, did not state that Serbia had failed to observe the principle of non-refoulement. On the contrary: paragraph 75 of the report stated that the risk of deportation was relatively small and that asylum-seekers, even readmitted ones, were generally allowed to continue their journey towards Western Europe. The Chamber had ignored that finding. The Chamber had wrongly cited paragraph 76 of the same report, according to which in 2011-2012 irregular migrants returned to Serbia by the Hungarian authorities had on occasion been returned by the Serbian authorities to the Former Yugoslav Republic of Macedonia: the report did not specify whether those irregular migrants were asylum-seekers or economic migrants or whether they had applied for asylum in Serbia at all. In addition, the UNHCR report had been drawn up in 2012, whereas in 2014 Serbian asylum law had been amended and the asylum system and facilities had

been upgraded with the financial support of the EU. Furthermore, the Hungarian asylum authorities had given ample reasoning where they disagreed with some of the findings of the reports relied upon by the applicants, with special regard to the 2012 Report of the UNHCR.

115. The applicants had had an opportunity to rebut the safe third country presumption applied in their case but had only made blanket general objections without invoking an individual risk. This was unsurprising having regard to their contradictory statements on the question whether the first applicant had received any documents from the Serbian authorities, as regards human traffickers mentioned by him for the first time at the last hearing and as regards the length of the second applicant's stay in Serbia and whether or not he had requested asylum there. Contrary to their allegations, the burden of proof had not been reversed as they had not been required to prove the deficiencies of the asylum situation in Serbia in general. The relevant facts of general knowledge had been taken into account by the Hungarian authorities of their own motion without the applicants having to prove them. The applicants had merely been required to state how they had personally been affected by the alleged deficiencies.

116. The fact that the applicants had not been handed over to the Serbian authorities under a readmission procedure but had simply re-entered Serbia had not prevented them from requesting asylum in Serbia had they so wished: they had been in the same legal position as those asylum-seekers who entered illegally from other States. Moreover, the applicants had made it clear that they had not intended at all to seek asylum in Serbia, which had rendered irrelevant the alleged deficiencies of the Serbian asylum system.

117. Finally, as to the risk of treatment contrary to Article 3 on account of the reception conditions in Serbia, there was nothing to suggest that the applicants would have been left without food, hygiene or shelter. The UNHCR had not observed any serious cases of neglect such as have been noted in Greece.

C. Third-party interveners

118. The Bulgarian Government submitted that in expulsion and removal cases, in order to engage the indirect responsibility of the expelling State, the Court had first to analyse the existence of a real risk of ill-treatment in the country of origin. If asylum-seekers were returned to a third "intermediate" country, the Court should analyse, in addition, whether the living and detention conditions for asylum-seekers there reached the threshold of severity under Article 3. Finding a violation without a rigorous examination of the above aspects opened the door to an influx of complaints and risked blocking the asylum system. The Bulgarian Government considered that in cases of expulsion to a State party to the Convention, the responsibility of the expelling State should be engaged only in highly

exceptional circumstances, such as in *M.S.S. v. Belgium and Greece*, as far as Greece is concerned.

119. The Polish Government considered, *inter alia*, that, as regards claims of a risk of ill-treatment in a country of destination, it was, in principle, for the foreigner to adduce the relevant evidence and to submit proof to the national authorities. The national authorities should not be held liable for a breach of their international obligations if they conducted a diligent assessment of the potential risks, with due regard to the principle of *non-refoulement*. The Polish Government further submitted that EU Member States were entitled under the Asylum Procedures Directive to enact lists of safe third countries and stressed, in that regard, that the EU legal order secured respect for fundamental rights, including through supervision and control by the EU institutions.

120. The Russian Government stressed that by failing to examine the grounds on which asylum is claimed, the Court was blurring the distinction between migrants and refugees, undermining the protection needed by the latter.

121. The UNHCR provided a summary of the relevant international and EU law regarding the safe third country concept. They submitted, in particular, that that concept could apply where a person could have sought international protection in a "previous" State but had not done so. The removing State had to assess the appropriateness of the removal for each person individually and with full respect for the applicable procedural safeguards, regardless of any general designation of the third country as safe. Such assessment should include questions such as whether the third State would readmit the person, grant him or her access to a fair and efficient procedure for determination of any need of international protection, permit the person to remain and accord him or her treatment in conformity with international law, including the principle of protection from refoulement.

122. In their joint intervention, the Dutch Council for Refugees, the European Council on Refugees and the International Commission of Jurists, offered an overview of the relevant EU and international law on the principle of non-refoulement, the concept of safe third country and deprivation of liberty in the asylum context.

D. The Court's assessment

1. Hungary's responsibility for the applicants' removal

123. In so far as the Government submitted that the applicants had left the transit zone voluntarily, which can be understood as an objection to the effect that Hungary was not responsible for their expulsion, the Court observes that there was a binding decision ordering the applicants' expulsion, and also considers that the manner in which the applicants

returned to Serbia indicates that they did not do so of their own free will (see paragraph 40 above). The applicants' removal from Hungary is therefore imputable to the respondent State.

2. Relevant principles

(a) General principles in expulsion cases

124. The prohibition of inhuman or degrading treatment, enshrined in Article 3 of the Convention, is one of the most fundamental values of democratic societies. It is also a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 158, 15 December 2016).

125. 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, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Mohammadi v. Austria*, no. 71932/12, § 58, 3 July 2014). A right to political asylum is not contained in either the Convention or its Protocols (see *Sharifi v. Austria*, no. 60104/08, § 28, 5 December 2013).

126. Deportation, extradition or any other measure to remove an alien may give rise to an issue under Article 3, however, and hence engage the responsibility of the Contracting State under the Convention, where substantial grounds have been shown for believing that the person in question, if removed, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to remove the individual to that country (see *Soering v. the United Kingdom*, 7 July 1989, §§ 90-91, Series A no. 161; *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 103, Series A no. 215; *H.L.R. v. France*, 29 April 1997, § 34, *Reports of Judgments and Decisions* 1997-III; *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 114, ECHR 2012).

127. The assessment of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment in breach of Article 3 must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, 15 November 1996, § 96, *Reports* 1996-V) and inevitably involves an examination by the competent national authorities and later by the Court of the conditions in the receiving country against the standards of Article 3 (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he or she will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment

of this is relative, depending on all the circumstances of the case (see *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II).

(b) The expelling State's duty in cases of removal of an asylum seeker to a third country without examination of the asylum claim on the merits

128. In the context of complaints about expulsion of asylum seekers, the Court has dealt with cases concerning a variety of situations, including expulsions to and alleged risks in the applicant's country of origin (see, for example, *F.G. v. Sweden* [GC], no. 43611/11, 23 March 2016) and removals to third countries and risks related to such third countries (see, for example, *M.S.S. v. Belgium and Greece*, cited above, and *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts)). While the basic principles mentioned in the three preceding paragraphs apply in all circumstances, the underlying issues and, consequently, the content of the expelling State's duties under the Convention, may differ.

129. In cases where the authorities choose to remove asylum seekers to a third country, the Court has stated that this leaves the responsibility of the Contracting State intact with regard to its duty not to deport them if substantial grounds have been shown for believing that such action would expose them, directly (i.e., in that third country) or indirectly (for example, in the country of origin or another country), to treatment contrary to, in particular, Article 3 (see *M.S.S. v. Belgium and Greece*, cited above, §§ 342, 343 and 362-68, with the references therein).

130. However, where a Contracting State seeks to remove the asylum seeker to a third country without examining the asylum request on the merits, the State's duty not to expose the individual to a real risk of treatment contrary to Article 3 is discharged in a manner different from that in cases of return to the country of origin.

131. While in the latter situation the expelling authorities examine whether the asylum claim is well founded and, accordingly, deal with the alleged risks in the country of origin, in the former situation the main issue before them is whether or not the individual will have access to an adequate asylum procedure in the receiving third country. That is so because the removing country acts on the basis that it would be for the receiving third country to examine the asylum request on the merits, if such a request is made to the relevant authorities of that country. In addition to this main question, where the alleged risk of being subjected to treatment contrary to Article 3 concerns, for example, conditions of detention or living conditions for asylum seekers in a receiving third country, that risk is also to be assessed by the expelling State.

132. In respect of Contracting Parties to which the EU Asylum procedures directive applies, its Articles 33, 38 and 43, in the light of recitals 38-48 (see paragraphs 47, 49, 53 and 55 above), provide for a possibility to enact national legislation that allows, under certain conditions,

to forego an examination of requests for international protection on the merits (i.e., to refrain from examining whether the person qualifies for international protection, and therefore to refrain from dealing with risks in the country of origin) and to undertake instead an examination of admissibility, in the sense of the above-mentioned EU directive (in particular, whether it can reasonably be assumed that another country would conduct the examination on the merits or provide protection). Where the latter option has been chosen and the asylum request has been found to be inadmissible, no examination on the merits takes place in the country which has so decided.

133. As the Court stated in *Mohammadi* (cited above, § 60), a case concerning removal between two EU Member States and the application of the EU Dublin II Regulation, the expelling State has to make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 3 of the Convention (see also *M.S.S. v. Belgium and Greece*, cited above, § 358; *Sharifi*, cited above, § 30; *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III; and *K.R.S. v. the United Kingdom* (dec.), no. 32733/08, 2 December 2008).

134. The Court would add that in all cases of removal of an asylum seeker from a Contracting State to a third intermediary country without examination of the asylum requests on the merits, regardless of whether the receiving third country is an EU Member State or not or whether it is a State Party to the Convention or not, it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum seekers should not be removed to the third country concerned.

135. The respondent Government, supported by the intervening Bulgarian and Russian Governments, was apparently of the view that the above-mentioned obligation did not arise where – allegedly as here – the individuals concerned were not genuine asylum-seekers but migrants who did not risk ill-treatment in their country of origin (see paragraphs 108-111, 118 and 120 above).

136. The Court observes that, with regard to asylum seekers whose claims are unfounded or, even more so, who have no arguable claim about any relevant risk necessitating protection, Contracting States are free, subject to their international obligations, to dismiss their claims on the merits and return them to their country of origin or a third country which accepts them. The form of such examination on the merits will naturally depend on the seriousness of the claims made and the evidence presented.

137. Where a Contracting State removes asylum seekers to a third country without examining the merits of their asylum applications, however, it is important not to lose sight of the fact that in such a situation it cannot be known whether the persons to be expelled risk treatment contrary to Article 3 in their country of origin or are simply economic migrants. It is only by means of a legal procedure resulting in a legal decision that a finding on this issue can be made and relied upon. In the absence of such a finding, removal to a third country must be preceded by thorough examination of the question whether the receiving third country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 3 of the Convention. Contrary to the position of the respondent Government, a post-factum finding that the asylum seeker did not run a risk in his or her country of origin, if made in national or international proceedings, cannot serve to absolve the State retrospectively of the procedural duty described above. If it were otherwise, asylum-seekers facing deadly danger in their country of origin could be lawfully and summarily removed to "unsafe" third countries. Such an approach would in practice render meaningless the prohibition of ill-treatment in cases of expulsion of asylum seekers.

138. While the Court acknowledges the respondent Government's contention that there are cases of abuse by persons who are not in need of protection in their country of origin, it considers that States can deal with this problem without dismantling the guarantees against ill-treatment enshrined in Article 3. It suffices in that regard, if they opt for removal to a third safe country without examination of the asylum claims on the merits, to examine thoroughly whether that country's asylum system could deal adequately with those claims. In the alternative, as stated above, the authorities can also opt for dismissing unfounded asylum requests after examination on the merits, where no relevant risks in the country of origin are established.

(c) Nature and content of the duty to ensure that the third country is "safe"

139. On the basis of the well-established principles underlying its case-law under Article 3 of the Convention in relation to expulsion of asylum-seekers, the Court considers that the above-mentioned duty requires from the national authorities applying the "safe third country" concept to conduct a thorough examination of the relevant conditions in the third country concerned and, in particular, the accessibility and reliability of its asylum system (see *M.S.S. v. Belgium and Greece*, cited above, §§ 344-59 and §§ 365-68). The Recommendations of the Committee of Ministers of the Council of Europe and its Guidelines cited in paragraphs 61-63 above, as well as Resolution 1471 (2005) of the Council of Europe's Parliamentary Assembly (see paragraph 64 above), can be relevant in that regard.

140. Furthermore, a number of the principles developed in the Court's case-law regarding the assessment of risks in the asylum seeker's country of origin also apply, *mutatis mutandis*, to the national authorities' examination of the question whether a third country from which the asylum seeker came is "safe" (see the approach followed in *M.S.S. v. Belgium and Greece*, cited above, §§ 346-52 and 358-59).

141. In particular, while it is for the persons seeking asylum to rely on and to substantiate their individual circumstances that the national authorities cannot be aware of, those authorities must carry out of their own motion an up-to-date assessment, notably, of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice. The assessment must be conducted primarily with reference to the facts which were known to the national authorities at the time of expulsion but it is the duty of those authorities to seek all relevant generally available information to that effect (*Sharifi*, cited above, §§ 31 and 32). General deficiencies well documented in authoritative reports, notably of the UNHCR, Council of Europe and EU bodies are in principle considered to have been known (see, *M.S.S. v. Belgium and Greece*, cited above, §§ 346-50, see also, *mutatis mutandis, F.G. v. Sweden*, cited above, §§ 125-27). The expelling State cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the Convention standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice (see *M.S.S. v. Belgium and Greece*, cited above, § 359).

3. The Court's task in the light of these principles and the facts of the case

142. As noted above, the content of the expelling State's duties under Article 3 differs depending on whether the receiving country is the asylum seeker's country of origin or a third country and, in the latter situation, on whether the expelling State has dealt with the merits of the asylum application or not. As a consequence, the Court's task is in principle different in all of the above-mentioned categories of cases, subject to the complaints raised by the applicant involved.

143. In the present case, based on section 51 of the Hungarian Asylum Act (see paragraph 41 above), which provided for the inadmissibility of asylum requests in a number of circumstances and reflected the choices made by Hungary in transposing the relevant EU law, the Hungarian authorities did not examine the applicants' asylum requests on the merits, that is to say, whether the applicants risked ill-treatment in their country of origin, Bangladesh, but declared them inadmissible on the basis that they had come from Serbia, which, according to the Hungarian authorities was a safe third country and, therefore, could take in charge the examination of the

applicants' asylum claims on the merits (see paragraphs 23, 34 and 36 above).

144. As a consequence, the thrust of the applicants' complaints under Article 3 (see paragraph 100 above) is that they were removed despite clear indications that they would not have access in Serbia to an adequate asylum procedure capable of protecting them against refoulement. The Court's task in the present case is, above all, to deal with this main complaint (see, for a similar approach, *Babajanov v. Turkey*, no. 49867/08, § 43 *in fine*, 10 May 2016, and *Sharifi*, cited above, § 33).

145. Since the Hungarian authorities' impugned decision to remove the applicants to Serbia was unrelated to the situation in Bangladesh and the merits of the applicants' asylum claims, it is not the Court's task to examine whether the applicants risked ill-treatment in Bangladesh. Such analysis would be unrelated to the question whether the respondent State discharged its procedural obligations under Article 3 in the present case.

146. In this regard, the Court is not oblivious of the fact that in some cases of removal of asylum seekers to third intermediary countries without examination of the merits of the asylum claim by the removing State, it has included text mentioning that the applicants' claim about risks in their countries of origin were arguable, which could be seen as the Court taking a stand, in the context of Article 3 of the Convention, on whether or not the risks invoked in respect of the country of origin were arguable (see, among several others, *T.I. v. the United Kingdom* (dec.), cited above and *M.S.S. v. Belgium and Greece*, cited above, § 344; but see also the opposite approach in *Mohammadi*, cited above, §§ 64-75, *Sharifi*, cited above, §§ 26-39; *Tarakhel*, cited above, §§ 93-122; and *Mohammed Hussein and Others v. the Netherlands and Italy* (dec.), no. 27725/10, §§ 62-79, 2 April 2013).

147. In the present case the Grand Chamber, having had the benefit of the parties' submissions devoted specifically to this question, considers that it is not for the Court to act as a court of first instance and deal with aspects of the asylum claims' merits in a situation where the defendant State has opted – legitimately so – for not dealing with those and at the same time the impugned expulsion is based on the application of the "safe third country" concept. The question whether there was an arguable claim about Article 3 risks in the country of origin is relevant in cases where the expelling State dealt with these risks.

148. It follows that, having regard to the facts of the case and the applicants' complaints regarding the allegedly deficient approach of the Hungarian authorities, the Court must examine: 1) whether these authorities took into account the available general information about Serbia and its asylum system in an adequate manner and of their own initiative and, 2) whether the applicants were given sufficient opportunity to demonstrate that Serbia was not a safe third country in their particular case.

149. Finally, the Court may also have to address the applicants' complaint that the Hungarian authorities failed to take into consideration the allegedly inadequate reception conditions for asylum seekers in Serbia (see, for example, *Tarakhel*, cited above, § 105).

150. The Court's approach in examining these questions must be guided by the principle, stemming from Article 1 of the Convention, according to which the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. It is not the Court's task to substitute its own assessment of the facts for that of the domestic courts. 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 (see, *mutatis mutandis*, *F.G. v. Sweden*, cited above, §§ 117 and 118).

4. Whether the Hungarian authorities complied with their procedural duty under Article 3

151. The Court observes that in the applicants' case the Hungarian authorities relied on a list of "safe third countries" established by Government decree no. 191/2015. (VII.21.) (see paragraph 44 above). The effect of this list was to put in place a presumption that the listed countries were safe.

152. The Convention does not prevent Contracting States from establishing lists of countries which are presumed safe for asylum seekers. Member States of the EU do so, in particular, under the conditions laid down by Articles 38 and 39 of the Asylum Procedures Directive (see paragraphs 53 et seq. above). The Court considers, however, that any presumption that a particular country is "safe", if it has been relied upon in decisions concerning an individual asylum seeker, must be sufficiently supported at the outset by an analysis of the relevant conditions in that country and, in particular, of its asylum system.

153. The presumption at issue in the present case was put in place in July 2015, when Hungary changed its previous position and declared Serbia to be a safe third country. The Government's submissions before the Grand Chamber appear to confirm that the grounds for this change consisted exclusively of the following: Serbia was bound by the relevant international conventions; as a candidate to become EU Member State it benefitted from assistance in improving its asylum system; and there was an unprecedented wave of migration and measures had to be taken (see paragraph 112 above).

154. The Court notes, however, that in their submissions to the Court the respondent Government have not mentioned any facts demonstrating that the decision-making process leading to the adoption of the presumption in

2015 involved a thorough assessment of the risk of lack of effective access to asylum proceedings in Serbia, including the risk of refoulement.

155. The Court is mindful of the challenge faced by the Hungarian authorities during the relevant period in 2015, when a very large number of foreigners were seeking international protection or passage to western Europe at Hungary's borders. However, the absolute nature of the prohibition of ill-treatment enshrined in Article 3 of the Convention mandates an adequate examination of the risks in the third country concerned.

156. Turning to the individual assessment made by the asylum authority and the national court in the applicants' cases, the Court observes that their decisions referred to the above mentioned presumption but also to widely available information about certain alleged risks in Serbia. They further dealt with the question whether there were any specific individual risks for the applicants (see paragraphs 34 and 36 above).

157. The Court also observes that the applicants, who were legally represented, had an opportunity to make submissions in the proceedings against both the first and the second decisions of the asylum authority. The applicants' lawyers made detailed written and oral submissions to the national court. Throughout the asylum proceedings, the applicants could communicate with the authorities and the court via an interpreter in Urdu, a language they understood (see paragraphs 26-28 and 30-35 above). In those circumstances the Court is not prepared to attach significant weight to the applicants' arguments regarding time-limits and alleged shortcomings of a technical nature.

158. The Court is not convinced, however, by the respondent Government's argument that the administrative authorities and the national court thoroughly examined the available general information concerning the risk of the applicants' automatic removal from Serbia without effective access to an asylum procedure. In particular, it does not appear that the authorities took sufficient account of consistent general information that at the relevant time asylum-seekers returned to Serbia ran a real risk of summary removal to the Republic of North Macedonia and then to Greece and, therefore, of being subjected to conditions incompatible with Article 3 in Greece.

159. While it is true that, as argued by the respondent Government, statistics about the rate of successful asylum applications in Serbia or similar data are distorted by the fact that many asylum-seekers do not remain in Serbia and seek to reach Western Europe, there was other reliable information which did not seem to have been taken into consideration by the Hungarian authorities. In particular, a significant risk of refoulement from Serbia transpired from the findings of the UNHCR in their report of August 2012 (confirmed in the report of May 2016) (see paragraph 73 above) and other available sources (see paragraphs 69 and 77 above): lack

of administrative capacity and resources in Serbia at the relevant time to assess asylum claims in accordance with international standards and to protect against refoulement; accounts of cases where aliens re-entering Serbia from Hungary were put on buses directly to the border with North Macedonia; accounts of cases of denials of the right to apply for asylum in Serbia to individuals readmitted from Hungary; information about an automatic application of Serbia's list of safe third countries to those who have transited, *inter alia*, through North Macedonia and Greece. The information concerning the above serious risks was confirmed in later sources (see paragraphs 68 and 75 above).

160. In the Court's view the asylum authority and the national court made only passing references to the UNHCR report and other relevant information, without addressing in substance or in sufficient detail the concrete risks pinpointed there and, in particular, the risk of arbitrary removal in the two applicants' specific situation (see paragraphs 34 and 36 above). Although the applicants were able to make detailed submissions in the domestic proceedings and were legally represented, the Court is not convinced that this meant that the national authorities had given sufficient attention to the risks of denial of access to an effective asylum procedure in Serbia.

161. It is significant, furthermore, that the risk of summary removal from Serbia to other countries could have been alleviated in this particular case if the Hungarian authorities had organised the applicants' return to Serbia in an orderly manner or through negotiations with the Serbian authorities. However, the applicants were not returned on the strength of an arrangement with the Serbian authorities but were made to cross the border into Serbia without any effort to obtain guarantees (see paragraph 40 above and criterion "d" of the 2009 Guidelines of the Committee of Ministers of the Council of Europe in paragraph 63 above). This exacerbated the risk of denial of access to an asylum procedure in Serbia and, therefore, of summary removal from that country to North Macedonia and then to Greece (see, for example, *Tarakhel*, cited above, §§ 120-22, where in the individual circumstances of the case the Court considered decisive, regarding the potential violation of Article 3, for the Swiss authorities to obtain guarantees from the Italian authorities).

162. Finally, as regards the Government's argument that all parties to the Convention, including Serbia, North Macedonia and Greece, have the same obligations and that Hungary should not bear an additional burden to compensate for their deficient asylum systems, the Court considers that this is not a sufficient argument to justify a failure by Hungary, which opted for not examining the merits of the applicants' asylum claims, to discharge its own procedural obligation, stemming from the absolute nature of the prohibition of ill-treatment under Article 3 of the Convention (see the Court's approach in *M.S.S. v. Belgium and Greece*, cited above; see also

Tarakhel, cited above, §§ 104 and 105, and *Paposhvili v. Belgium* [GC], no. 41738/10, § 193, 13 December 2016).

163. In sum, having regard, in particular, to the fact that there was an insufficient basis for the Government's decision to establish a general presumption concerning Serbia as a safe third country, that in the applicants' case the expulsion decisions disregarded the authoritative findings of the UNHCR as to a real risk of denial of access to an effective asylum procedure in Serbia and summary removal from Serbia to North Macedonia and then to Greece, and that the Hungarian authorities exacerbated the risks facing the applicants by inducing them to enter Serbia illegally instead of negotiating an orderly return, the Court finds that the respondent State failed to discharge its procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision before removing the applicants from Hungary.

164. These considerations are sufficient for the Court to find that there has been a violation of Article 3 of the Convention.

165. In the light of this finding the Court considers that it is not necessary to examine whether Article 3 was violated on the additional ground (see paragraph 149 above) that the Hungarian authorities allegedly failed to take into consideration the risk of the applicants being subjected to inadequate reception conditions for asylum seekers in Serbia.

III. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 3 CONCERNING THE DOMESTIC REMEDIES AGAINST THE APPLICANTS' REMOVAL TO SERBIA

166. The applicants complained that the domestic remedies concerning their expulsion were ineffective and that therefore there was a violation of Article 13 of the Convention in conjunction with its Article 3. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in this 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."

167. In respect of this complaint, the Chamber decided that it was not necessary to examine its admissibility or merits (see paragraphs 126 and 127 of the Chamber judgment).

168. As a consequence, the parties apparently disagree as to whether the complaint at issue falls within the scope of the case before the Grand Chamber, having regard to the fact that it has not been declared admissible by the Chamber. The applicants consider that there is no obstacle to the Grand Chamber examining this complaint. In their observations, the Government only dealt with the complaints declared admissible by the Chamber. In their oral submissions, they noted that the complaint at issue had never been communicated to them.

169. The situation in the present case is peculiar in that the Chamber did not rule on the admissibility of the complaint at issue. The question arises, therefore, whether a complaint which has neither been rejected as inadmissible, nor declared admissible by the Chamber falls within the scope of the case before the Grand Chamber in proceedings under Article 43 of the Convention.

170. Under the Convention system as it existed prior to the entry into force of Protocol No. 11, when a separate body, the former Commission, examined the admissibility of applications, the Court's approach to the scope of the case before it was expressed in the following terms (see *Guzzardi v. Italy*, 6 November 1980, § 106, Series A no. 39):

> "The compass of the 'case' is delimited ... by the admissibility decision. Subject to Article 29 [as in force at the relevant time] and, possibly, a partial striking out of the list, there is no room under the Convention for a subsequent narrowing of the scope of the dispute which may lead to a judicial decision. Within the framework so traced, the Court may take cognisance of all questions of fact or of law arising in the course of the proceedings instituted before it; the only matter falling outside its jurisdiction is the examination of complaints held by the Commission to be inadmissible."

171. Following the entry into force of Protocol No. 11 to the Convention, the question of the scope of the case before the Grand Chamber in proceedings under Article 43 was dealt with for the first time in *K. and T. v. Finland* [GC] (no. 25702/94, §§ 137-41, ECHR 2001-VII) in the context of the parties' position that the Grand Chamber should only deal with complaints in respect of which referral had been requested. The Grand Chamber found that "the 'case' referred to it under Article 43 of the Convention embraces all aspects of the application previously examined by the Chamber in its judgment, and not only the serious 'question' or 'issue' at the basis of the referral" (ibid., § 140). The Court also added "for the sake of clarification" that the case referred to the Grand Chamber "is the application as it has been declared admissible" (ibid., § 141).

172. This wording has been used in a number of later cases as well (see *Üner v. the Netherlands* [GC], no. 46410/99, § 41, ECHR 2006-XII; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00 § 109, ECHR 2007-IV; and *Kovačić and Others v. Slovenia* [GC], nos. 44574/98 and 2 others, § 194, 3 October 2008). The Court has also stated that the scope of the case referred to the Grand Chamber is "delimited by the Chamber's decision on admissibility" (see *Göç v. Turkey* [GC], no. 36590/97, §§ 35-37, ECHR 2002-V; *Perna v. Italy* [GC], no. 48898/99, §§ 23-24, ECHR 2003-V; and *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III).

173. In a significant number of referral cases, the Grand Chamber has had to deal with requests from applicants to re-examine complaints declared inadmissible by the Chamber. In judgments concerning such cases the Court has often added more specific wording, stating that the Grand Chamber "cannot examine those parts of the case which have been declared

inadmissible" (see *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 234, ECHR 2012 (extracts), and *Murray*, cited above, § 86). In some judgments (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 61, ECHR 2007-I; *Kurić and Others*, cited above, § 235; and *Herrmann v. Germany* [GC], no. 9300/07, § 38, 26 June 2012), the Court has also stated that "the Grand Chamber may examine the case in its entirety *in so far as* it has been declared admissible" or that it "may examine the case *only in so far as* it has been declared admissible" (see *Gillberg v. Sweden* [GC], no. 41723/06, §§ 53-55, 3 April 2012; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 78, 21 June 2016; and *Zubac v. Croatia* [GC], no. 40160/12, § 56, 5 April 2018). It should be noted, however, that this wording has been used in the context of complaints declared inadmissible by the Chamber (almost all such cases) or in relation to a request for the re-examination of the panel's referral decision (see *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 27, 24 October 2002). It appears not to have been used in respect of complaints the admissibility of which had not been examined by the Chamber.

174. The above case-law analysis appears to demonstrate that the fact that the Court has repeatedly mentioned the Chamber's admissibility decision as the act delimiting the scope of the case before the Grand Chamber in referral proceedings is related partly to the Convention system as it existed prior to the entry into force of Protocol No. 11 and partly to the fact that in the vast majority of the relevant judgments the Grand Chamber had to deal with requests to re-examine complaints declared inadmissible. It cannot be said that this wording was intended to mean that the Grand Chamber cannot examine complaints that were neither rejected as inadmissible nor declared admissible by the Chamber.

175. The Court also notes that the exclusion of complaints declared inadmissible from the scope of the case before the Grand Chamber may be seen as flowing from the settled case-law according to which a decision to declare a complaint inadmissible is final (see, for example, *Budrevich v. the Czech Republic*, no. 65303/10, § 73, 17 October 2013). By contrast, where complaints which have not been declared inadmissible are concerned, there is no final decision closing their examination.

176. The Court recalls, in addition, that it is the master of the legal characterisation of the facts in the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports* 1998-I, and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 114, 20 March 2018) and that, furthermore, it may decide not to examine a particular complaint separately, considering that it is subsumed or otherwise closely linked to a complaint that has already been dealt with. Indeed, this was the basis for the Chamber's decision in the present case not to examine the admissibility and merits of the complaint under Article 13 in conjunction with Article 3 concerning the domestic remedies against the applicants' removal to Serbia.

177. In the Court's view, therefore, any excessively rigid approach to delimiting the scope of the case before the Grand Chamber may adversely affect its role as the master of the legal characterisation of the facts of the case with regard to complaints that have not been declared inadmissible. Furthermore, considering that a complaint that has not been declared inadmissible by the Chamber does not fall within the scope of the case before the Grand Chamber would amount to a *de facto* rejection of such a complaint as inadmissible. However, such an outcome cannot be accepted as it would prevent the Grand Chamber, without any reasons given by the Chamber, from assessing the question of admissibility of the complaint at issue in a situation where the Chamber has refrained from doing so.

178. The Court finds, therefore, that the complaint under Article 13 in conjunction with Article 3 regarding the alleged procedural shortcomings in the examination of the applicants' asylum request and the appeals against the asylum authority's decisions falls within the scope of the case before the Grand Chamber.

179. However, in the present case, having found a violation of Article 3 of the Convention (see paragraphs 163 and 164 above), the Grand Chamber agrees with the Chamber that, in view of the fact that the alleged procedural shortcomings in the examination of the applicants' asylum request and the appeals against the asylum authority's decisions have been sufficiently examined under that Article, it is not necessary to examine the admissibility and merits of the complaint under Article 13 regarding those same alleged shortcomings.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION CONCERNING THE CONDITIONS IN THE TRANSIT ZONE

180. The applicants alleged that the conditions in which they spent 23 days in the Röszke transit zone had amounted to inhuman and degrading treatment contrary to Article 3 of the Convention. Before the Grand Chamber, they also relied on Article 8 of the Convention in respect of the same complaint.

181. The Court considers that the above complaint falls to be examined under Article 3 only. This provision reads as follows:

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

A. The Chamber judgment

182. The Chamber, noting, in particular, the findings of the Committee for the Prevention of Torture concerning the satisfactory material conditions at the zone and the relatively short period spent by the applicants there, found that there had been no violation of Article 3.

B. The parties' submissions

183. The applicants considered that the Chamber had attached undue weight to the general material conditions, failed to have regard to the fact that the CPT had found them acceptable for a very short stay only and had not sufficiently taken into consideration the applicants' vulnerability. In respect of the latter, the applicants submitted to the Grand Chamber additional information, alleging, in particular, harsh conditions and ill-treatment endured by the first applicant during the 1990's and until 2010 or 2011 in Pakistan, Afghanistan, Iran and Bangladesh and, as regard the second applicant, in Pakistan, Dubai, Iran and Turkey between 2010 and 2013 (see paragraphs 10 and 11 above). Alternatively, the applicants invited the Grand Chamber to examine under Article 8 their complaint of the conditions in the transit zone and find a violation of that provision.

184. The respondent Government agreed with the Chamber's application of the threshold of severity rule and its finding that the applicants were not more vulnerable than any other adult asylum-seeker. Distinguishing the present case from the situation that led the Court to find violations of Article 3 in *M.S.S. v. Belgium and Greece*, the Hungarian Government pointed out that the applicants' basic needs, such as food, hygiene, shelter and access to medical aid had been taken care of. Even if those conditions were considered to fall short of some of the requirements of the EU's Reception Conditions Directive, that would not constitute a violation of Article 3. The Government warned against elevating the requirements of that provision in the reception context beyond the requisite catering for the most basic human needs, given, in particular, that transit zones provide only temporary accommodation. As regards the applicants' allegations concerning their suffering in a number of Asian countries, the Government observed that they were articulated for the first time before the Grand Chamber and were unverifiable.

185. Some of the intervening third parties also provided relevant comments. The UNHCR submitted factual information about the Röszke transit zone and summaries of relevant law and international standards regarding reception of asylum-seekers. In their joint intervention, the five Italian scholars dealt with the concept of vulnerability with emphasis on international and human rights law. They demonstrated that variants of this concept had been used in different contexts without a definition of vulnerability and urged the Court to develop relevant principles in this regard.

C. The Court's assessment

186. It is undisputed that while at the Röszke transit zone, the applicants were fully dependent on the Hungarian authorities for their most basic human needs and were under their control.

187. In these circumstances, it was the responsibility of the Hungarian authorities not to subject them to such conditions as would constitute inhuman and degrading treatment contrary to Article 3 of the Convention (see *M.S.S. v. Belgium and Greece*, cited above, §§ 216-22 and 263).

188. According to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of that level is relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. In the context of confinement and living conditions of asylum-seekers, the Court has summarised the relevant general principles in the case of *Khlaifia and Others* (cited above, §§ 158-69).

189. The Grand Chamber endorses the Chamber's analysis in the present case regarding the physical conditions in which the applicants lived while confined to the transit zone. The Chamber stated the following, in particular, in paragraphs 84 and 85 of its judgment:

> "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 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.
>
> ...
>
> 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."

190. The fact that the hygienic conditions were good and that persons staying at the Röszke zone were provided with food of a satisfactory quality and medical care if needed, and could spend their time outdoors was also confirmed at a later date, in the report of 13 October 2017 of the Special

Representative of the Secretary General of the Council of Europe (see paragraph 67 above).

191. Turning to the applicants' vulnerability argument, the Court must examine the available evidence to establish whether, as alleged by them, they could be considered particularly vulnerable and, if so, whether the conditions in which they stayed at the Röszke transit zone in September and October 2015 were incompatible with any such vulnerability to the extent that these conditions constituted inhuman and degrading treatment with specific regard to the applicants.

192. The Grand Chamber endorses the Chamber's view that while it is true that asylum-seekers may be considered 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), there is no indication that the applicants in the present case were more vulnerable than any other adult asylum-seeker confined to the Röszke transit zone in September 2015 (see paragraph 87 of the Chamber judgment). In particular, their allegations about hardship and ill-treatment endured in Pakistan, Afghanistan, Iran, Dubai and Turkey concern a period of time which ended in 2010 or 2011 for the first applicant and in 2013 for the second applicant (see paragraphs 10 and 11 above). Also, the Court does not consider that the psychiatrist's opinion (see paragraph 30 above) submitted by the applicants is decisive: having regard to its context and content, and taking into consideration that the applicants stayed at the Röszke transit zone for the relatively short period of 23 days, the psychiatrist's observations cannot lead to the conclusion that the otherwise acceptable conditions at the Röszke transit zone were particularly ill-suited in the applicants' individual circumstances to such an extent as to amount to ill-treatment contrary to Article 3.

193. The Court also considers that even if the applicants must have been affected by the uncertainty as to whether they were in detention and whether legal safeguards against arbitrary detention applied, the shortness of the relevant period and the fact that the applicants were aware of the procedural developments in the asylum procedure, which unfolded without delays, indicate that the negative effect of any such uncertainty on them must have been limited.

194. In sum, taking into consideration, in particular, the material conditions at the zone, the length of the applicants' stay there, and the possibilities for human contact with other asylum-seekers, UNHCR representatives, NGOs and a lawyer, the Court finds that the situation complained of did not reach the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3 of the Convention. Therefore, there has been no violation of that provision.

V. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 1 AND 4 OF THE CONVENTION

195. The applicants complained that they were confined to the transit zone in violation of those provisions, which provide, in so far as relevant:

> "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.
>
> ...
>
> 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. The Chamber judgment

196. The Chamber held that the applicants' confinement to the transit zone constituted a *de facto* deprivation of liberty. It took into account the fact that the applicants were placed in a guarded compound which could not be accessed from the outside and which they could not leave towards Hungary, nor towards Serbia without forfeiting their asylum claims and running the risk of refoulement. As to the merits of the complaint under Article 5 § 1, the Chamber held that the applicants' detention could not be considered "lawful", as the underlying domestic rules were not sufficiently precise and foreseeable and the detention had occurred *de facto*, as a matter of practical arrangement, without a formal decision and therefore without providing reasons. The Chamber also found a violation of Article 5 § 4 because, in the absence of a decision which they could have challenged, the applicants could not seek any judicial review of their detention.

B. The parties' submissions

1. The applicants

197. In relation to the applicability of Article 5, the applicants emphasised that the fact that they had entered the transit zone of their own free will was not relevant since, once there, they could not return to Serbia, where they were not welcome and risked chain-refoulement without an examination of their asylum requests on the merits.

198. The applicants submitted that the Government's allegation that they were not "genuine" asylum-seekers as they did not risk persecution in Bangladesh should not have any bearing on the question whether they were detained unlawfully in Hungary. As registered asylum-seekers they had the

right to wait for a decision under adequate procedural safeguards, including as regards detention. During the waiting period they were not allowed to leave the transit zone in the direction of Hungary and could not do so in the direction of Serbia as they would have been refused re-entry. The applicants submitted written statements by staff of an NGO who had witnessed the Hungarian authorities' refusal to admit back, through the door they had just passed, asylum-seekers who had received an inadmissibility decision, had been told to leave in the direction of Serbia, then learned of the possibility to appeal and wanted to re-enter and appeal[6].

199. As regards compliance with Article 5 § 1, the applicants submitted that section 71/A of the Asylum Act, invoked by the Government as the legal basis for their detention, did not meet the requirement of quality of the law. The total absence of clear, precise and foreseeable laws on the conditions and procedural safeguards relating to their confinement to the transit zone as a form of detention rendered it devoid of legal basis. They were at no stage served with a decision ordering their deprivation of liberty. However, the authorities had at their disposal legal means to impose detention if they considered it necessary for the proper functioning of the asylum system, including prevention of forum shopping.

200. As regards Article 5 § 4, the applicants disputed the Government's assertion that the Szeged court could examine the lawfulness of the choice to apply the transit zone border procedure and thus secure the requisite review of lawfulness. That court had not examined the issue of the applicability of the border procedure and it could not in any way review the lawfulness of the placement in the transit zone as a measure of deprivation of liberty.

2. The respondent Government

201. According to the respondent Government, the applicants were free to leave in the direction of Serbia and, moreover, had at their disposal alternative routes via Serbia to their preferred destination – Western Europe, as evidenced by the fact that they found such routes. While the applicants were not free to move in Hungary, this was inherent in normal border procedures. The length of the pre-entry waiting period depended on the complexity of the case, the cooperation of the asylum-seekers and the consistency of their statements. For the duration of this process, the applicants were provided with decent waiting conditions in a transit zone. Such zones should not be confused with reception centres for refugees whose entitlement to legal protection has been established.

6. The Court observes that these statements also mention, however, that the Hungarian officers had told the asylum-seekers that they should queue again for entry, which the persons in question did not try.

202. The applicants did not have a "right" to enter Hungary. A right to admission can be inferred in international law only in respect of refugees arriving directly from the State of persecution, or in case of a direct threat to their lives and physical integrity. In the light of Article 1 of the Convention, its Article 5 should be interpreted as meaning that when individuals are not brought within the jurisdiction of the State but voluntarily apply for admission to that jurisdiction, the resulting "confinement" to a waiting zone (that they are free to leave) prior to admission is not a *de facto* detention but an inherent limitation on the freedom of movement. Such a limitation is not arbitrary if the denial of admission is not arbitrary. Therefore, there is no issue under Article 5 separate from the denial of admission, examined in the present case under Article 3.

203. The Government further submitted that border transit zones are fundamentally different from airport transit zones. The latter are an enclave deep into the territory of the State, whereas border transit zones are open towards the territory of the neighbouring State from which the applicants have arrived. In contrast to the case of *Amuur v. France* (25 June 1996, *Reports* 1996-III), the applicants' return to Serbia did not require negotiations with the Serbian authorities, who do not stop aliens from re-entering, and did not involve financial or practical obstacles. Unsuccessful asylum-seekers routinely leave the zone. The fact that the applicants did eventually leave for Serbia without adverse consequences indicates that they were not in detention in Hungary. Unlike in *Amuur*, the applicants' freedom to leave the zone was not theoretical as they could return to a State bound by the Geneva Convention and the ECHR, offering comparable protection.

204. The Government further considered that the applicants did not run the risk of refoulement to a persecuting country because they were not persecuted in their own country of origin or in the transit countries. Moreover, by returning to Serbia they did not waive international protection because such protection under the Geneva Convention was not denied to asylum-seekers having voluntarily returned to Serbia (in case they requested such protection and remained in Serbia until the delivery of the decision). The Chamber had failed to distinguish the present case from *Riad and Idiab v. Belgium* (nos. 29787/03 and 29810/03, § 68, 24 January 2008), where the applicants had been confined to a transit zone not upon their arrival in the country but more than one month later, by decision of the authorities. However, no Hungarian authority compelled the applicants to enter the transit zone.

205. The Government submitted that the applicants' accommodation in the transit zone had a legal basis in Hungarian law, including guarantees against arbitrariness and aimed at preventing an unauthorised entry in accordance with Article 5 § 1(f). In particular, section 71/A of the Asylum Act read together with section 15/A of the Act on State Borders provided for the examination of asylum applications in transit zones for temporary

accommodation. Section 71/A § 2 made clear that in border procedures the applicants did not have the right to freedom of movement in Hungary. As a guarantee against arbitrariness, the law limited border procedure and stay in the transit zone to four weeks: according to § 4 of section 71/A, failing a decision within four weeks, entry to the territory of Hungary was to be granted. As a further guarantee against arbitrariness, border proceedings were not applicable to persons eligible for preferential treatment, such as vulnerable persons.

206. There was no violation of Article 5 § 4 since the restriction of the applicants' liberty was subject to judicial review as part of the judicial review of the asylum authority's decision on the applicability of the rules on border procedures, including on the applicants' ineligibility to preferential treatment. The first judicial review in the applicants' case was carried out within six days of their arrival.

C. Third-party interveners

207. The Polish Government considered that placement in a facility from which a foreigner may freely move should not be automatically treated as *de facto* deprivation of liberty. They also noted that the present case concerned the practice of EU Member States in the difficult times of the migration crisis and stressed, in that regard, that the EU legal order secures respect for fundamental rights, including through supervision and control by the EU institutions.

208. The Russian Government criticised the *Amuur* judgment for having introduced a new criterion in the assessment whether the deprivation of liberty was arbitrary or not: the "place and conditions" of detention. No such a criterion was to be found in Article 5. Only Article 3 was concerned with conditions of detention. Furthermore, the Court's approach wrongly assimilated refusal to allow entry to the State territory to a deprivation of liberty. In the Russian Government's view, by failing to make distinctions based on the grounds on which asylum is claimed, the Court was blurring the distinction between migrants and refugees, undermining the protection the latter need.

209. The UNHCR provided factual information about the Röszke transit zone and summaries of the relevant Hungarian law, EU law and international standards regarding reception of asylum-seekers.

D. The Court's assessment

1. Applicability

210. It is undisputed that under Hungarian law the applicants' stay at the Röszke transit zone was not considered as detention. The parties disagree,

however, on whether it nevertheless constituted a *de facto* deprivation of liberty and, consequently, whether Article 5 of the Convention applied.

(a) Relevant principles

211. In proclaiming the "right to liberty", paragraph 1 of Article 5 contemplates the physical liberty of the person. Accordingly, it is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4, with regard to persons lawfully within the territory of the State. Although the process of classification into one or other of these categories sometimes proves to be no easy task, in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends (see *Khlaifia and Others*, cited above, § 64, with the references therein).

212. 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 in reality and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question (see *Nada v. Switzerland* [GC], no. 10593/08, § 225, ECHR 2012, and *Gahramanov v. Azerbaijan* (dec.), no. 26291/06, § 40, 15 October 2013). The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see *De Tommaso v. Italy* [GC], no. 43395/09, § 80, 23 February 2017, with the references therein; see also *Kasparov v. Russia*, no. 53659/07, § 36, 11 October 2016).

213. The Court considers that in drawing the distinction between a restriction on liberty of movement and deprivation of liberty in the context of the situation of asylum seekers, its approach should be practical and realistic, having regard to the present-day conditions and challenges. It is important in particular to recognise the States' right, subject to their international obligations, to control their borders and to take measures against foreigners circumventing restrictions on immigration.

214. The question whether staying at airport international zones amounts to deprivation of liberty has been dealt with in a number of cases (see, among those: *Amuur*, cited above, § 43; *Shamsa v. Poland*, nos. 45355/99 and 45357/99, § 47, 27 November 2003; *Mogoş v. Romania* (dec.), no. 20420/02, 6 May 2004; *Mahdid and Haddar v. Austria* (dec.), no. 74762/01, ECHR 2005-XIII (extracts); *Riad and Idiab*, cited above, § 68; *Nolan and K. v. Russia*, no. 2512/04, §§ 93-96, 12 February 2009; and *Gahramanov*, cited above, §§ 35-47).

215. The Court stated the following in the case of *Amuur*, at § 43:

> "Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement,

> accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions.
>
> Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty - inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered - into a deprivation of liberty. In that connection account should be taken of the fact 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.
>
> Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status."

216. The applicability of Article 5 has also been examined with regard to stays in reception centres for the identification and registration of migrants, located on islands at the Italian and Greek shores (see *Khlaifia and Others*, cited above, §§ 65-72, which concerns irregular migrants, and *J.R. and Others v. Greece*, no. 22696/16, 25 January 2018, which concerns asylum-seekers). In the latter case, where initially an official detention order had been issued in respect of the applicants, the Court took into consideration, in particular, changes in the applicants' legal situation under domestic law and a change in the regime at the reception centre from "closed" to "semi-open" in order to distinguish between two periods, the first of which attracted the application of Article 5 and the second did not (ibid., §§ 85-87).

217. In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants, the factors taken into consideration by the Court may be summarised as follows: i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants (see the cases cited in the preceding three paragraphs).

218. The Court considers that the factors outlined above are also relevant, *mutatis mutandis*, in the present case.

(b) Application of those principles

219. The present case concerns, apparently for the first time, a transit zone located on the land border between two member States of the Council of Europe, where asylum-seekers had to stay pending the examination of the admissibility of their asylum requests. The specific purpose, as well the physical and legal characteristics of such transit zones will inevitably have an impact on the Court's analysis of the applicability of Article 5.

(i) The applicants' individual situation and choices

220. The Court observes, first, that the applicants entered the Röszke transit zone of their own initiative, with the aim of seeking asylum in Hungary. While this fact in itself does not exclude the possibility of the applicants finding themselves in a situation of *de facto* deprivation of liberty after having entered, the Court considers that it is a relevant consideration, to be looked at in the light of all other circumstances of the case.

221. It is true that in a number of cases the Court stated that detention might violate Article 5 of the Convention even though the person concerned had agreed to it and emphasised that the right to liberty is too important for a person to lose the benefit of the protection of the Convention for the single reason that he gave himself up to be taken into detention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A, no. 12; *I.I. v. Bulgaria*, no. 44082/98, §§ 84-87, 9 June 2005; *Osypenko v. Ukraine*, no. 4634/04, § 48, 9 November 2010; *Venskutė v. Lithuania*, no. 10645/08, § 72, 11 December 2012; and *Buzadji v. Moldova* [GC], no. 23755/07, §§ 106-10, 5 July 2016). The cases cited above, however, concerned situations where the law provided for deprivation of liberty or situations where the applicants had complied with an obligation, such as, among others, to enter a prison or a police station or submit to house arrest. The circumstances are not the same, in the Court's view, where the applicants – as in the present case – had no relevant prior link to the State concerned and no obligation to which they acquiesced but requested admission to that State's territory of their own initiative and sought asylum there. In such cases the starting point regarding the applicants' individual position *vis-à-vis* the authorities is entirely different.

222. In the present case, having regard to the known facts about the applicants and their journey from Bangladesh to Hungary, there is no doubt that they entered the Röszke transit zone of their own initiative. It is also clear that, at all events, the Hungarian authorities were entitled to do the necessary verifications and examine their claims before deciding whether or not to admit them.

223. Finally, the Court also notes that the applicants did not cross the border from Serbia because of a direct and immediate danger for their life or health in that country but did so of their free will.

(ii) The applicable legal regime, its purpose and the relevant duration in the light of that purpose and the attendant procedural protection

224. Second, it is also relevant that the rationale and purpose of the domestic legal regime applicable to the Röszke transit zone was to put in place a waiting area while the authorities decided whether to formally admit the asylum-seekers to Hungary (see paragraph 41 above and, in particular, Section 71/A of the Hungarian Asylum Act). Albeit not decisive in itself, it is relevant to note that the Hungarian authorities did not seek to deprive the applicants of their liberty and that they ordered them to leave Hungary on the very day of their entry (see paragraph 8 above). The applicants remained in the transit zone essentially because they appealed against the expulsion order (see paragraphs 20-37 above).

225. The right of States to control the entry of foreigners into their territory necessarily implies that admission authorisation may be conditional on compliance with relevant requirements. Therefore, absent other significant factors, the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter cannot be described as deprivation of liberty imputable to the State, since in such cases the State authorities have undertaken *vis-à-vis* the individual no other steps than reacting to his or her wish to enter by carrying out the necessary verifications (see, *mutatis mutandis*, *Gahramanov*, cited above, §§ 35-47; see also *Mahdid and Haddar* (dec.), cited above, where the applicants' asylum requests were dismissed in an airport transit zone within three days and the Court found that there had been no deprivation of liberty (taking into consideration additional factors, such as that the applicants were not under constant police control)).

226. It is further relevant that, in line with the purpose of the domestic legal regime, procedural guarantees concerning the processing of asylum claims and provisions fixing the maximum duration of asylum seekers' stay in the transit zone applied to the applicants' case (see paragraphs 41 and 205 above). These guarantees were implemented and the applicants spent twenty-three days at the Röszke transit zone, during which time their asylum requests were processed at administrative and judicial level.

227. In the Court's case-law concerning confinement of aliens in an immigration context, the duration of the relevant restriction on movement and the link between the actions of the authorities and the restricted freedom may be elements affecting the classification of the situation as amounting to deprivation of liberty or not (see, *mutatis mutandis*, *Amuur*, § 43, cited above; *Gahramanov*, cited above, §§ 35-47, and *Mahdid and Haddar*, cited above). However, the Court considers that in situations generally similar to those in the present case, as long as the applicants' stay in the transit zone does not exceed significantly the time needed for the examination of an asylum request and there are no exceptional circumstances, the duration in itself should not affect the Court's analysis on the applicability of Article 5

in a decisive manner. That is particularly so where the individuals, while waiting for the processing of their asylum claims, benefitted from procedural rights and safeguards against excessive waiting periods. The presence of domestic legal regulation limiting the length of stay in the transit zone is of significant importance in this regard.

228. In the present case, the Court observes that the Hungarian authorities were working in conditions of a mass influx of asylum-seekers and migrants at the border, which necessitated rapidly putting in place measures to deal with what was clearly a crisis situation. Despite the ensuing very significant difficulties, the applicants' asylum claims and their judicial appeals were examined within three weeks and two days (see paragraphs 8 and 20-37 above).

229. The Court thus considers that the applicants' situation was not influenced by any inaction of the Hungarian authorities and that no action was imputable to them other than what was strictly necessary to verify whether the applicants' wish to enter Hungary to seek asylum there could be granted.

230. Nonetheless, the Court must also verify whether the actual restrictions imposed on or experienced by the applicants had the effect, despite the above, of placing them in a situation of *de facto* deprivation of liberty.

(iii) The nature and degree of the actual restrictions imposed on or experienced by the applicants

231. The Court notes, on the one hand, that individuals staying at the Röszke transit zone were not permitted to leave in the direction of the remaining territory of Hungary, the country where the zone was located (compare and contrast *Mogoş*, cited above). This is unsurprising having regard to the very purpose of the transit zone as a waiting area while the authorities decided whether to formally admit asylum-seekers to Hungary.

232. At the relevant time the Röszke transit zone covered a very limited surface, was surrounded by a fence and barbed wire and was fully guarded, which excluded free outward or inward movement. Inside the zone, the applicants could communicate with other asylum-seekers and could receive visits, such as by their lawyer, with the authorities' permission. They could spend time outdoors on a narrow strip of land in front of the containers serving as dormitories (see paragraphs 15, 65 and 67 above). The Court finds that, overall, the size of the area and the manner in which it was controlled were such that the applicants' freedom of movement was restricted to a very significant degree, in a manner similar to that characteristic of certain types of light-regime detention facilities.

233. The Court takes account of the fact, on the other hand, that while waiting for the procedural steps made necessary by their application for asylum, the applicants lived in conditions which, albeit involving a

significant restriction on their freedom of movement, did not limit their liberty unnecessarily or to an extent or in a manner unconnected to the examination of their asylum claims. The Court also recalls that it dismissed the applicants' complaint that these conditions were inhuman and degrading (see paragraph 194 above). Finally, the applicants spent only twenty-three days in the zone, a period which – as the Court found – did not exceed what was strictly necessary to verify whether the applicants' wish to enter Hungary to seek asylum there could be granted.

234. The remaining question is whether the applicants could leave the transit zone in a direction other than the territory of Hungary.

235. In this regard, the Court observes, in the first place, that during the relevant period many persons in the applicants' situation returned from the Röszke transit zone to Serbia, at least some of them voluntarily, as confirmed, *inter alia*, by relevant accounts from non-governmental organisations (see paragraph 71 above). This fact does not appear to be disputed by the applicants.

236. It is further significant that, in contrast to, for example, persons confined to an airport transit zone (see § 214 above), those placed in a land border transit zone, as the applicants in the present case, do not need to board an airplane in order to return to the country from which they came. The applicants came from Serbia, the territory of which was immediately adjacent to the transit zone area. In practical terms, therefore, the possibility for them to leave the Röszke land border transit zone was not only theoretical but realistic. Indeed, unlike the case of *Amuur* (cited above), where the French courts described the applicants' confinement as an "arbitrary deprivation of liberty" (ibid., § 45), in the present case the Hungarian authorities were apparently convinced that the applicants could realistically leave in the direction of Serbia.

237. It is probable that the applicants had no legal right to enter Serbia. The Court notes, however, that Serbia was bound at the relevant time by a readmission agreement concluded with the European Union (see paragraph 59 above). While it is not for the Court to interpret this agreement and decide whether or not the applicants' case was covered by its provisions, it considers that the *de facto* possibility of them leaving the transit zone for Serbia existed, not only in theory but also in practice. This is confirmed by the fact that the applicants and, during the same period, many other persons in a similar situation, did eventually leave the zone and entered Serbia.

238. The applicants argued, in addition, that they were unable to return to the country they came from, in this case Serbia, because of a real risk of grave consequences. The respondent Government disputed this claim, emphasising that Serbia was a safe country and in any event the applicants were not persecuted in their country of origin, Bangladesh.

239. The Court recalls its reasoning in the case of *Amuur* (cited above), where it stated that "the mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty" and noted that the possibility to leave "becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in" (ibid., § 48).

240. In the Court's view this reasoning in *Amuur* must be read in close relation to the factual and legal context in that case, which concerned a situation where the applicants could not leave the airport zone, neither in theory nor in practice, without authorisation to board an airplane and without diplomatic assurances concerning their only possible destination, Syria, a country "not bound by the Geneva Convention Relating to the Status of Refugees" (*ibid*). Overcoming these obstacles or mitigating the consequences related thereto was only possible, if at all, through actions of the authorities and did not depend on the applicants' will. Similarly, in *J.R. and Others v. Greece* (cited above), the applicants could not leave to the direction of Turkey, the country from which they came, otherwise than by boarding a vessel.

241. In the present case, in contrast, it was practically possible for the applicants to walk to the border and cross into Serbia, a country bound by the Geneva Convention relating to the Status of Refugees (see paragraph 72 above).

242. It is further of relevance that what the applicants feared in case of return to Serbia, as explained in their submissions to the Court regarding Article 3 (see paragraphs 100-107 above), was not a direct threat to their life or health but deficiencies in the functioning of Serbia's asylum system and the ensuing risk of their removal from Serbia to two other Contracting States, the Republic of North Macedonia or Greece, without a proper examination of their asylum claims.

243. The Court cannot accept that these fears alone, despite all other circumstances in the present case (which, as explained above, are different from those obtaining in the cases concerning airport transit zones), were sufficient to bring Article 5 into application. Such an interpretation of the applicability of Article 5 would stretch the concept of deprivation of liberty beyond its meaning intended by the Convention.

244. The prohibition of ill-treatment in case of removal of an asylum seeker is an issue under Article 3 of the Convention which imposes on the Contracting States stringent substantive and procedural duties, some of which form part of the subject-matter of the present case (see paragraphs 100-165 above). In particular, asylum seekers cannot be removed to a country where they run a real risk of being subjected to treatment contrary to Article 3. Failing to abide by this provision, including

by the procedural obligation to examine thoroughly all potential risks, entails the responsibility of the relevant Contracting State for its violation.

245. It is true that there is a link between the rights under Article 3 and those under Article 5 of the Convention, in that, in particular, independent judicial scrutiny of deprivation of liberty, required by Article 5 §§ 3 and 4, is essential to the prevention of life-threatening acts or serious ill-treatment in detention (see, *Kurt v. Turkey*, 25 May 1998, § 123, *Reports* 1998-III). This link concerns, however, a very different context.

246. In the Court's view, where – as in the present case – the sum of all other relevant factors did not point to a situation of *de facto* deprivation of liberty and it was possible for the asylum seekers, without a direct threat for their life or health, known by or brought to the attention of the authorities at the relevant time, to return to the third intermediary country they had come from, Article 5 could not be seen as applicable to their situation in a land border transit zone where they awaited the examination of their asylum claims, on the ground that the authorities had not complied with their separate duties under Article 3. The Convention cannot be read as linking in such a manner the applicability of Article 5 to a separate issue concerning the authorities' compliance with Article 3.

247. It is true that, pursuant to section 66 (2) d) of the Asylum Act (see paragraph 41 above), the applicants would have forfeited the examination of their asylum claims in Hungary if they left prior to the final decision on their asylum requests. In this regard the Court finds unconvincing the Government's argument, based on section 66(6) of the same law, that the applicants were free to spend time in Serbia and then have the asylum proceedings in Hungary resumed if they came back to the transit zone within nine months. No such example has been cited by the respondent Government and there is nothing to indicate that the applicants were informed of such a possibility when they were at the Röszke transit zone. To the contrary, as confirmed by the respondent Government in their written observations to the Grand Chamber, the applicants had to remain at the disposal of the Hungarian asylum authorities and, therefore, in the transit zone, pending examination of the admissibility of their asylum requests, which, moreover, depended on an assessment of whether they could safely be returned to Serbia.

248. The Court reiterates however that, in the absence of a direct threat to the applicants' life or health, known by or brought to the attention of the Hungarian authorities at the relevant time, the discontinuation of the applicants' asylum proceedings in Hungary was a legal issue which did not affect their physical liberty to move out of the transit zone by walking into Serbian territory. In the circumstances of the present case and in contrast to the situation that obtained in some of the cases concerning airport transit zones, and notably in *Amuur* (cited above), the risk of the applicants' forfeiting the examination of their asylum claims in Hungary and their fears

about insufficient access to asylum procedures in Serbia, while relevant with regard to Article 3, did not render the applicants' possibility of leaving the transit zone in the direction of Serbia merely theoretical. Therefore, it did not have the effect of making the applicants' stay in the transit zone involuntary from the standpoint of Article 5 and, consequently, could not trigger, of itself, the applicability of that provision.

(iv) Conclusion as regards the applicability of Article 5

249. The Court thus finds that, having regard to all the circumstances of the present case analysed above, the applicants were not deprived of their liberty within the meaning of Article 5. Therefore, this provision did not apply.

2. The Court's conclusion on the complaints under Article 5

250. It follows that the applicants' complaints under Article 5 §§ 1 and 4 of the Convention are incompatible *ratione materiae* with its provisions. The Court also reiterates that under Article 35 § 4 of the Convention, it may dismiss applications which it considers inadmissible "at any stage of the proceedings" and that, therefore, subject to Rule 55 of the Rules of Court, the Grand Chamber may reconsider a decision to declare an application admissible (see the case-law cited in paragraph 80 above).

251. The Court thus holds that this part of the application must be declared inadmissible in accordance with Article 35 § 3 (a) and 4.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

252. 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

253. The Chamber awarded 10,000 euros (EUR) to each applicant on account of non-pecuniary damage.

254. Before the Grand Chamber the applicants claimed, as they did before the Chamber, EUR 15,000 each in respect of non-pecuniary damage. The Government invited the Court to reject the applicants' claim as being excessive.

255. The Court considers that the applicants must have suffered non-pecuniary damage as a result of the procedural violation of Article 3 of the Convention found in the present case. Having regard to the relevant

circumstances of the case, it awards EUR 5,000 to each applicant in respect of non-pecuniary damage.

B. Costs and expenses

256. Before the Chamber the applicants claimed EUR 8,705 for 57.5 hours of legal work at the hourly rate of EUR 150 plus EUR 80 in clerical expenses. The Chamber awarded this claim in full.

257. Before the Grand Chamber the applicants reiterated the above claim and also claimed, in respect of the Grand Chamber proceedings, an additional EUR 17,625 for 117.5 hours of legal work at the hourly rate of EUR 150. They submitted a time sheet indicating the sum of hours without further detail. The applicants' claim in respect of cost and expenses thus amounted to EUR 26,330 in total.

258. The Government submitted that the expenses claimed were neither necessarily incurred nor reasonable as to quantum having regard to the number of irrelevant submissions made by the applicants.

259. 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 and taking into consideration that most of the applicants' complaints have been rejected, the Court considers it reasonable to award EUR 18,000 in respect of all costs and expenses.

C. Default interest

260. 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,

1. *Upholds*, unanimously, the Government's preliminary objection that the applicants' complaint under Article 13 of the Convention in conjunction with its Article 3 regarding the alleged lack of remedies in respect of the conditions in the Röszke border transit zone has been submitted out of time and accordingly *declares* this part of the application inadmissible;

2. *Dismisses*, unanimously, the remaining preliminary objections made by the respondent Government;

3. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention with regard to the applicants' removal to Serbia;

4. *Holds*, unanimously, that it is not necessary to examine the complaint under Article 13 of the Convention in conjunction with Article 3 of the Convention concerning the alleged ineffectiveness of the domestic remedies against the applicants' removal to Serbia;

5. *Holds*, unanimously, that there has been no violation of Article 3 of the Convention with regard to the conditions in the Röszke border transit zone;

6. *Holds*, by a majority, that the applicants' complaints under Article 5 §§ 1 and 4 of the Convention are incompatible *ratione materiae* with the provisions of the Convention and accordingly *declares* this part of the application inadmissible;

7. *Holds*, by sixteen votes to one, that the respondent State is to pay, within three months, EUR 5,000 (five thousand euros) to each of the two applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;

8. *Holds*, unanimously, that the respondent State is to pay, within three months, EUR 18,000 (eighteen thousand euros) jointly to the two applicants, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

9. *Holds*, unanimously, 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;

10. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 November 2019.

Johan Callewaert	Linos-Alexandre Sicilianos
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Bianku and Vučinić is annexed to this judgment.

L.A.S.
J.C.

PARTLY DISSENTING OPINION OF JUDGE BIANKU, JOINED BY JUDGE VUČINIĆ

(Translation)

In this case I agree with the majority as regards Articles 3 and 13. Unfortunately I can follow neither their reasoning nor their conclusions as regards the applicability of Article 5 and the complaints under that provision.

The two applicants spent twenty-three days in the Rözske transit zone on the border between Hungary and Serbia. The living conditions in that zone are described in paragraph 15 of the judgment. The majority conclude that Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") is not applicable in the present case.

In paragraphs 212 to 216 of the judgment, the majority set out the usual recapitulation of relevant principles concerning the applicability of Article 5: "*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 in reality and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question ... The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance*."[7]

In their analysis, in order to find that Article 5 is inapplicable in the instant case, the majority take into account three criteria, which I consider problematic. I shall briefly discuss each of those criteria in turn.

Firstly, the majority expound the criterion of the applicants' personal situation and choices in paragraphs 220 to 223. In my view, the approach adopted by the majority concerning the latter point gives pause for thought. In support of their approach, first of all, the majority refer to case-law which has nothing to do with asylum-seekers. The cases cited in paragraph 221 of the judgment did not relate to asylum-seekers, never mind any choice on the part of such persons to agree to detention. It should also be emphasised that the word "choice" means something completely different in connection with asylum-seekers from when it is used in the cases cited by the majority in paragraph 221. An asylum-seeker wants protection, and his asylum request concerns the protection of a right secured under the Convention, namely the right not to suffer treatment contrary to Article 3, or else Article 2. This process concerns a necessity, not a choice. We can see from European history that such "choices" have cost hundreds of people their lives[8]. I

7. See judgment, § 212.

therefore find it difficult to conceive of the fact of asylum-seekers crossing a border as a "choice". The majority seem here to be adopting a position rejected by the Court in its *Amuur* judgment[9]. For those reasons I consider that the Chamber, in the judgment which it delivered on 14 March 2017 in the present case, was right to reach the following conclusion as set out in paragraph 56 of its judgment:

> "To hold otherwise [that is to say to conclude that Article 5 was inapplicable] 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."

The majority's conclusion would also mean that Article 5 could only be deemed applicable in the event of a finding of a violation of Article 3. Yet that is not necessarily the case as regards either the conditions of detention or the existence of possible risks in the country of destination[10].

Although it might be said that in the instant case, returning the applicants to Serbia would not have subjected them to any direct risk of death or torture[11], such a conclusion could only be reached following a sufficiently substantiated individual analysis of the possible danger to the applicants. Furthermore, the Grand Chamber unanimously found a violation, albeit only a procedural one, of Article 3, on the grounds that the Hungarian authorities had decided to return the applicants to Serbia without conducting a prior detailed individual assessment[12]. It chose not to pronounce on the merits of the question whether the applicants would have suffered treatment contrary to Article 3 had they been returned to Serbia. I therefore consider that to conclude that the applicants would have faced no risks is mere speculation[13]. In my view, this no-risk finding as set out in paragraph 223 is conjectural, or indeed contradictory, if we consider paragraph 165 of the judgment. In my view the majority is circumventing the subsidiarity principle in order to reach a conclusion, which should have been a matter for the Hungarian national authorities, on the risks likely to be faced by the applicants in Serbia.

In my opinion, those are the reasons why, in the light of the case-law of the Court, the majority has misinterpreted this subjective criterion[14].

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8. See *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, §§ 13 and 47 *in fine*, ECHR 2001-II.
9. See *Amuur v. France*, no. 19776/92, § 46-49, 25 June 1996.
10. See, for example, *Tabesh v. Greece*, no. 8256/07, 26 November 2009, and *Louled Massoud v. Malta*, no. 24340/08, 27 July 2010. See also Harris, O'Boyle and Warbrick, *Law on the European Convention on Human Rights*, Second Edition, p. 130.
11. See judgment, § 223.
12. Ibid., §§ 163 and 164.
13. Ibid., § 165.
14. See, generally, *Stork v. Germany*, no. 61603/00, § 74, ECHR 2005-V, *Stanev v. Bulgaria*, [GC], no. 36760/06, § 117, ECHR 2012, and more specifically, *Saadi v. the*

Secondly, in determining the applicability of Article 5 of the Convention, the majority takes account of the applicable legal regime, the objective pursued, the period of retention of the applicants in the zone and the applicable procedural safeguards.

As regards the applicable legal regime, the Court has reiterated on many occasions that it does not consider itself bound by the domestic courts' legal conclusions as to the existence of a deprivation of liberty. It conducts its own assessment of the situation (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 71, 15 December 2016, and *Creangă v. Romania* [GC], no. 29226/03, § 92, 23 February 2012).

In connection with the purpose of the applicable regime, it is true that the Commission used to refer to this matter in assessing the existence of detention[15]. Nevertheless, the Court abandoned this line of authority many years ago, and the purpose of measures by the authorities depriving applicants of their liberty no longer appears decisive for the Court's assessment of whether there has in fact been a deprivation of liberty. There is a long-established line of case-law to the effect that the Court takes this aspect into account only at a later stage of its analysis, when examining the compatibility of the measure with Article 5 § 1 of the Convention (see *Saadi*, cited above, § 74; *Creangă*, cited above, § 93; *Tabesh*, cited above; *Osypenko v. Ukraine*, no. 4634/04, §§ 51-65, 9 November 2010; *Salayev v. Azerbaijan*, no. 40900/05, §§ 41-42, 9 November 2010; *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 71, 22 May 2008; *Soare and Others v. Romania*, no. 24329/02, § 234, 22 February 2011; *Rozhkov v. Russia* (no. 2), no. 38898/04, § 74, 31 January 2017, etc.). In *Khlaifia*, cited above, the Grand Chamber clearly stated the following:

> "... the applicability of Article 5 of the Convention cannot be excluded by the fact, relied on by the Government, that the authorities' aim had been to assist the applicants and ensure their safety (see paragraphs 58-59 above). Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty."[16]

On this point, the majority has clearly opted for an interpretation which turns the clock back many years on the interpretation of Article 5.

As regards the length of detention issue, the majority emphasise that the applicants only spent twenty-three days in the Rözske transit zone. However, it should be remembered that in situations similar to that of the applicants, the Court has considered that periods of twenty days (see *Amuur*, cited above[17]), fourteen 14 days (see *Shamsa v. Poland*, nos. 45355/99 and

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United Kingdom, [GC], no. 13229/03, § 74, ECHR 2008.

15. See, for example, *X. v. Germany*, no. 8819/79, decision of 19 March 1981, (DR) vol. 24, p. 158; *Guenat v. Switzerland* (dec.), no. 24722/94, decision of 10 April 1995; and *E.G. v. Austria*, no. 22715/93, decision of 15 May 1996.

16. See paragraph 71, second sentence.

17. See *Amuur,* cited above, § 44.

45357/99, § 47, 27 November 2003), eleven and fifteen days (see *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, 24 January 2008), seven days (see *Saadi*, cited above) and nine hours (see *Nolan and K v. Russia*, no. 2512/04, §§ 93-96, 12 February 2009) constituted periods of detention.

As regards safeguards, I have trouble pinpointing in the judgment any actual analysis of the Article 5 procedural safeguards implemented in the instant case! At no point in the proceedings was the two applicants' stay in the Rözske transit zone assessed by a national court with a view to determining the necessity of the measure or whether or not the latter had been arbitrary. On that point, I do not consider the judgment very convincing in the light of the very specific criticisms levelled by the Chamber at the domestic proceedings[18].

Thirdly, the majority refer to the nature and degree of the restrictions actually imposed on or experienced by the applicants.

As regards the nature and degree of the restrictions imposed in the Rözske transit zone, the United Nations Working Group on Arbitrary Detention (UNWGAD), in a statement published after it had been refused access to transit zones in Hungary, pointed out that "there can be no doubt that holding migrants in these 'transit zones' constitutes deprivation of liberty in accordance with international law."[19] I do not think that the majority relied on any factual evidence or expert opinions in order to refute that conclusion, reached by a special group of experts who had heard a range of credible witness statements concerning the lack of safeguards against arbitrary detention in the zone in which the applicants were held[20].

In paragraph 236 of the judgment the majority choose to draw a distinction between the situation of persons arriving at a country's land border and that of individuals arriving on an island or at an airport. This distinction drawn by the majority, as compared to previous judgments, from *Amuur* (cited above) to *J.R. and Others v. Greece* (no. 22696/16, §§ 83-87, 25 January 2018) and, more recently, *Kaak and Others v. Greece* (no. 34215/16, §§ 83-90, 3 October 2019), through *Khlaifia* (cited above), seems to me to be quite artificial. In my view, the majority have adopted an erroneous interpretation of paragraph 48 of the *Amuur* judgment, which they quote in paragraph 239 of the judgment and which I feel I must reproduce here:

> "The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4). Furthermore, this possibility becomes theoretical if no

18. See Chamber judgment, §§ 66 to 68.
19. See "UN human rights experts suspend Hungary visit after access denied", UNWGAD, 15 November 2018, available at https://bit.ly/2B7X5Pu.
20. Ibid.

other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in."

My reading of this paragraph leads me to conclude that the mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge is linked not to the practical aspects of the implementation of that possibility but to the question whether another country is prepared to take them in and provide them with protection comparable that which they hoped to enjoy in the country where they sought asylum. This paragraph does not concern the means of transport used, contrary to what paragraphs 240 and 241 of the judgment might suggest, but rather relates to a fundamental aspect of Article 3 in this sphere, namely the absence of any risk in the event of return. The Grand Chamber concludes that the applicants could not have lawfully entered Serbia[21] and that the Hungarian authorities failed duly to assess the real risks which the applicants would have faced had they been returned to Serbia[22]. Yet it accepts that the applicants had a practical possibility of returning to Serbia, to a situation of illegality in which they could have been exposed to risks under Article 3. This reasoning leads me to conclude that the applicability of Article 5 also depends on the means of transport chosen by the asylum-seeker to reach the border[23]!

I consider that the majority's approach in the present case is contrary to Article 28 (Detention) 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[24], and to Article 8 (Detention) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of

21. See judgment, § 237.
22. Ibid., § 164.
23. I am convinced that if it had been a question of transport, the Member States would, as they have in fact done on several occasions, have organised the return of the rejected asylum-seekers to safe third countries. The problem is finding such countries, because it is easy to find an aircraft or a vessel to transport such persons.
24. This Article provides:

"1. Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.

2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

3. Detention shall be for as short a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out". OJEU 2013, L 180, p. 31.

applicants for international protection (revised)[25]. These texts, both of which are applicable in Hungary, provide that Member States cannot place a person in detention on the sole grounds that he or she is an asylum-seeker. The Court of Justice of the European Union ("CJEU") interpreted the provisions in question in its judgment delivered on 15 March 2017 in the case of *Al Chodor and Others* (C-528/15). It stated the following:

> "... the detention of applicants, constituting a serious interference with those applicants' right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness."

The CJEU reached that conclusion on the basis of Article 6 of the Charter of Fundamental Rights of the European Union. I find it difficult, nay impossible, to reach a different conclusion on the basis of Article 5 of the Convention[26]. In December 2015 the European Commission brought infringement proceedings before the CJEU against Hungary relating to its asylum legislation[27], and the Commission has on several occasions decided to renew the proceedings, also extending it to the issue of the detention of asylum-seekers in the transit zones[28].

That having been said, I support the position that States have "the undeniable sovereign right to control aliens' entry into and residence in their territory" (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 59, Series A no. 94; *Chahal v. the United Kingdom*, 15 November 1996, § 73, Reports of Judgments and Decisions 1996 V; *Saadi*, cited above, § 64; *Khlaifia*, cited above, § 89; and *F.G. v. Sweden* [GC], no. 43611/11, § 111, ECHR 2016). That right may also induce them to detain persons who attempt unlawfully to cross the border, who attempt to escape or who are dangerous, and to ensure their return, provided that they would not be exposed to any risks. That is the ultimate purpose of Article 5 § 1 (f). However, to rule out the applicability of Article 5 in such a situation as that of the present applicants would have the effect of rendering Article 5 § 1 (f) nugatory and impeding the member States' control of events at their land borders and, ultimately, weakening their ability to deal with issues concerning the arbitrariness, necessity and proportionality of detention at national borders.

Those are the reasons why I voted in favour of the applicability of Article 5 in the instant case. Having thus found the provision applicable, I concur with the reasoning and conclusions of the Chamber in its judgment of 17 March 2017, to wit that there has been a violation of Article 5 § 1 in the present case[29].

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25. Quoted in paragraph 58 of the judgment.
26. See also *El Dridi,* C-61/11 PPU, 28 April 2011, and *J.N. against Staatssecretaris van Justitie en Veiligheid*, C-601/15 PPU, 15 February 2016.
27. IP/15/6228.
28. IP/17/5023, IP/18/4522, and as regards the latest decision (25 July 2019), IP/19/4260.

29. See Chamber judgment, §§ 58 to 69.