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

Information Note on the Court's case-law 253

July 2021

Shahzad v. Hungary - 12625/17

Judgment 8.7.2021 [Section I]

Article 4 of Protocol No. 4

Prohibition of collective expulsion of aliens

Migrant's push-back to a narrow strip of State territory on external side of a border fence amounting to expulsion: *Article 4 of Protocol no. 4 applicable*

Applicant's removal, after irregular but undisruptive entry, without an individual decision, despite limited access to means of legal entry lacking formal procedure and safeguards: *violation*

Facts – In August 2016 a group of twelve Pakistani nationals, including the applicant, entered Hungary irregularly by cutting a hole in the border fence between Hungary and Serbia. They walked for several hours before resting in a cornfield where they were intercepted by Hungarian police officers and subjected to the "apprehension and escort" measure under section 5(1a) of the State Borders Act. They were transported in a van to the nearest border fence and then escorted by officers through the gate to the external side of the fence into Serbia. The applicant, who had been injured, went to a reception centre in Subotica, Serbia, and from there was taken to a nearby hospital.

Law – Article 4 of Protocol No. 4

(a) *Applicability* – The fact that the applicant had entered Hungary irregularly and had been apprehended within hours of crossing the border and possibly in its vicinity did not preclude the applicability of Article 4 of Protocol No. 4. Further, this provision might apply even if the measure in question was not classified as "expulsion" in domestic law. In the present case, the Court had to examine whether the fact that the applicant had not been removed directly to the territory of another State but to the strip of land between the border fence and the actual border between Hungary and Serbia, belonging to Hungary, meant that the impugned measure fell outside this provision's scope. It found that this was not the case and that the removal of the applicant to the external side of the border fence amounted to expulsion within the meaning of Article 4 of Protocol No. 4.

In particular, the border fence had clearly been erected in order to secure the border between the two countries. The narrow strip of land with no apparent infrastructure on the external side of that fence only had a technical purpose linked to the management of the border and in order to enter Hungary, deported migrants had to go to one of the transit zones, which normally involved crossing Serbia. The CJEU in its judgment of 17 December 2020 on Hungary's compliance with Directives 2008/115/EC and 2013/32/EU had found that migrants removed pursuant to section 5(1a) of the State Borders Act had no choice but to leave Hungarian territory and further, in the instant case, it transpired that the group had been directed by the officers towards Serbia. Hence, the measure to which the applicant had been subjected to, aimed at and resulted in his removal from

Hungarian territory. Relying merely on the formal status of the strip of land on the external side of the border fence as part of Hungarian territory and disregarding the practical realities referred to above would lead to Article 4 of Protocol No. 4 being devoid of practical effectiveness in cases such as the present case, and would allow States to circumvent the obligations imposed on them by virtue of that provision. Problems with managing migratory flows could not justify an area outside the law where individuals were covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention.

(b) *Merits* – It had not been disputed that the applicant had been removed without having been subjected to any identification procedure or examination of his situation by the Hungarian authorities. It therefore had to be ascertained whether the lack of an individual removal decision could be justified by his own conduct. In this connection the Court had regard to the following:

– First, although the applicant, along with the other migrants, had crossed the Hungarian border in an unauthorised manner, it transpired from the submitted video footage that they had followed the officers' orders and that the situation had been entirely under the officers' control. There had been no indication that they had resisted or used force against the officers. Nor had Government argued that their crossing of the border had created a disruptive situation which had been difficult to control, or that public safety had been compromised as a result. Consequently, apart from the unauthorised manner of entry, the present case could not be compared to the situation to that in the case of *N.D. and N.T. v. Spain* [GC].

– Second, and as to whether the applicant, by crossing the border irregularly, had circumvented an effective procedure for legal entry, each of the two available transit zones admitted a significantly low amount of applicants for international protection per day and those wishing to enter the transit zone had to first register their name on the waiting list with a potential wait of several months in Serbia before being allowed entry. Although the applicant submitted that he had asked the person managing the waiting list to add his name, he had never in fact been registered. In this regard, both UNHCR and the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees had pointed to irregularities and a lack of transparency in managing access to the transit zones and the handling of the waiting lists. UNHCR had also observed that single men who had not been visibly in need of special treatment had been actively discouraged from approaching the transit zones. In view of the foregoing and, in particular, the informal nature of this procedure, the applicant could not be criticised for not having his name added to the waiting list.

Having regard thus to the limited access to the transit zones and lack of any formal procedure accompanied by appropriate safeguards governing the admission of individual migrants in such circumstances, the respondent State had failed to secure the applicant effective means of legal entry. Consequently, the lack of an individual expulsion decision could not be attributed to the applicant's own conduct. In conclusion, in view of the fact that the authorities had removed the applicant without identifying him and examining his situation and, having regard to the lack of effective access to means of legal entry, his removal had been of a collective nature.

In light of the above, the Court also dismissed the Government's objection which had been joined to the merits, as to the applicant's lack of victim status on account of the fact that he had not lodged an application for international protection.

Conclusion: violation (unanimously)

Furthermore, the Court held, unanimously, that there had been a violation of Article 13 taken in conjunction with Article 4 of Protocol No. 4 due to the absence of an effective remedy for the applicant to complain about his removal.

Article 41: EUR 5,000 respect of non-pecuniary damage

(See also *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, 23 February 2012, Legal Summary; *Khlaifia and Others v. Italy* [GC], 16483/12, 15 December 2016, Legal Summary; *N.D. and N.T. v. Spain* [GC], 8675/15 and 8697/15, 13 February 2020, Legal Summary; *M.K. and Others v. Poland,* 40503/17 and 2 others, 23 July 2020, Legal Summary)

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