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

FIRST SECTION

CASE OF SHAHZAD v. HUNGARY

(Application no. 12625/17)

JUDGMENT

Art 4 P4 • 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 • Collective nature of 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 • Lack of individual removal decision not a consequence of applicant's own conduct
Art 13 (+ Art 4 P4) • Lack of an effective remedy against removal

STRASBOURG

8 July 2021

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

In the case of Shahzad v. Hungary,

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

Ksenija Turković, *President,*
Péter Paczolay,
Krzysztof Wojtyczek,
Alena Poláčková,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 12625/17) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Pakistani national, Mr Khurram Shahzad ("the applicant"), on 10 February 2017;

the decision to give notice to the Hungarian Government ("the Government") of the application;

the decision to give priority to the application (Rule 41 of the Rules of Court);

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

Having deliberated in private on 15 June 2021,

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

INTRODUCTION

1. The case concerns the "apprehension and escort" measure introduced by the Hungarian State Borders Act, which authorised the Hungarian police to remove foreign nationals staying illegally in Hungarian territory to the external side of the Hungarian border fence (on the border with Serbia) without a decision. The applicant, who, together with eleven other migrants was subjected to such a measure in August 2016, complained that he had been part of a collective expulsion, in breach of Article 4 of Protocol No. 4 to the Convention. He also complained that he had not had an effective remedy at his disposal.

THE FACTS

2. The applicant was born in 1986 and lives in Gujrat, Pakistan. He was represented by Ms B. Pohárnok, a lawyer practising in Budapest.

3. The Government were represented by their Agent at the Ministry of Justice, Mr Z. Tallódi.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. CIRCUMSTANCES PRIOR TO THE EVENTS COMPLAINED OF

5. According to the applicant, he left Pakistan in 2008 or 2009 because he had been repeatedly ill-treated by members of the Pakistani military forces. He subsequently stayed in Greece until 2011, when he tried to enter other European countries but was allegedly pushed back from Serbia and returned to Greece.

6. Again travelling through North Macedonia, the applicant arrived in Serbia for a second time in April 2016. He claimed to have attempted to apply for asylum in Krnjača camp and Subotica, but was refused both times without having his asylum claims examined. Subsequently, the applicant attempted to enter Hungary through one of the Hungarian transit zones, and asked the person (an Afghan man) managing the waiting list at the time to put his name on the list. He allegedly refused to do so, telling the applicant that single men could not be added. The applicant stayed in Serbia, in the Subotica area. He was occasionally allowed to stay inside the camp, but for the most part stayed on his own without adequate accommodation and food.

7. During this period, the applicant tried to enter Hungary irregularly but was apprehended by the Hungarian police and immediately sent back to the external side of the border fence.

II. APPREHENSION OF THE APPLICANT AND HIS RETURN TO SERBIA ON 12 AUGUST 2016

8. On the evening of 11 August 2016 the applicant again crossed the Serbian-Hungarian border irregularly, by cutting a hole in the border fence with eleven other Pakistani men. They had walked approximately eight hours before resting in a cornfield between Katymár and Madaras in Bács-Kiskun County. At around 11 a.m. on 12 August 2016 they were intercepted by Hungarian police officers. The group of men were eventually encircled by the officers and asked to hand over their belongings, which were inspected and then returned. The applicant told the officers that he wanted asylum, but one of them replied: “asylum is closed”. Subsequently, two investigating officers arrived, as well as someone who could speak Urdu and Hungarian. The applicant again asked for asylum but was told that he “[could] not ask for asylum”. One of the two investigating officers questioned the group in order to determine whether they were smugglers. The two investigating officers and the person who spoke Urdu then left the scene. The group remained with the other officers, who were later identified (see paragraph 15 below) as police and border control officers from Bácsbokod and two Slovak officers in green uniform conducting border

control in the framework of cooperation between the Visegrad Group countries (namely Czechia, Hungary, Poland and Slovakia, also known as the "Visegrad Four" or "V4").

9. The apprehended men were driven about twenty minutes to the border fence. Video footage, which was provided to the applicant's representative in the course of the criminal investigation (see paragraph 15 below), shows the applicant and the eleven other men standing in front of a green van and the applicant reading a document. They are surrounded by officers in blue as well as dark green and military clothing. After the applicant finishes reading, one of the police officers takes the document and someone is heard saying "understand" and a few seconds later "go". The applicant and the eleven other men then go through a gate in the fence. According to information provided in the subsequent criminal investigation (see paragraph 15 below), this happened at 3.25 p.m. On the other (external) side of the border fence, several officers in blue uniforms can be seen surrounding the group and giving orders. According to the criminal case file (see paragraph 15 below), these officers were from the Baranya County police (in particular Siklós police station). One of the officers can be heard ordering the men to sit down after crossing the fence. The video recording stops when the last man passes the border gate and sits down as ordered by the police. According to the applicant, the Hungarian police officers subsequently beat up him and the other men in the group and then ordered them to go to Serbia.

10. It would appear from the information gathered during the criminal investigation (see paragraph 15 below) that there were at least eleven officers present on the internal and external side of the border fence when the measure in question was being carried out.

11. After their removal, the applicant and other men in the group walked about 10 to 15 km to the Serbian village of Bajmok, then took a bus and taxi to the reception centre for migrants in Subotica. From there the applicant was taken by ambulance to a nearby hospital. Later that evening, at 11.30 p.m., he gave a statement to Serbian police at Subotica police station, describing his border crossing and subsequent apprehension, alleged beatings and return to Serbia.

12. According to information obtained from the National Police Headquarters (NPH) by the applicant's representative, there were three cases of "apprehension and escort" in Bács-Kiskun County on 12 August 2016, affecting thirty-seven individuals. Among these were twelve Pakistani nationals who were apprehended at 11.10 a.m. near Katymár and escorted to the external side of the border fence by Hungarian police officers. Images and sound recordings were taken in all cases.

13. In official reports and correspondence concerning the applicant's criminal complaint (see paragraph 15 below), the police officers involved stated that the group, upon exiting the Hungarian border gate, had been

directed towards the Hungarian transit zones. However, the statements given during the investigation by the officers who were standing on the external side of the border fence and giving the orders indicate that the group were directed towards Serbian territory. They explained that it had been for security reasons that they had ordered the migrants to sit down and then pointed them away from the fence. According to one of the police officers, migrants were only allowed to leave the area at the same time and in a group. Two officers testified that their superior had ordered them to make sure that all removed migrants left in one direction – into Serbia, preventing them from spreading along the border fence in two directions and potentially attempting to cross the border fence again.

III. ACCESS TO THE TRANSIT ZONES

14. During the police procedure in question, the applicant was made to cross the border fence near Katymár. The distance from this location to Tompa transit zone is approximately 40 km. The remaining transit zone, the Röszke transit zone, is 84 km away. According to the applicant, at the time of his removal, Hungary set daily admission limits – fifteen people per transit zone. Furthermore, those wishing to enter had to register on a waiting list managed by one of the migrants ("the list manager"), who was selected by other waiting migrants with the assistance of the Serbian asylum office. The list manager submitted the waiting list to officials at the Hungarian Immigration and Asylum Office (IAO), who returned the updated list daily, with instructions as to who should be allowed to enter the transit zone that day. The list manager communicated this information to the waiting migrants and/or the Serbian asylum office. The selection of those who could enter one of the transit zones was based solely on this waiting list, and there were no other means of having physical access to the transit zones or officials of the IAO.

IV. SUBSEQUENT EVENTS

15. The applicant's representative lodged a criminal complaint in relation to the alleged ill-treatment of the applicant. A criminal investigation was opened on 24 October 2016 by the Szeged Regional Investigative Prosecutor's Office. The evidence gathered confirms that the "apprehension and escort" of the applicant and other men in the group took place on 12 August 2016. In the course of the investigation, fifteen police officers involved in the event gave statements, including the two Slovak officers. On 9 February 2018 a decision to terminate the investigation was upheld by the Department of Terrorism, Money Laundering and Military Affairs of the Prosecutor General's Office. During the investigation, neither the applicant's identity nor the existence of his injuries was disputed by the

investigative authorities. However, in the authorities' view, it could not be established beyond all doubt that the injuries had been inflicted by the Hungarian police.

16. Following these events, the applicant stayed in Serbia for another three months. He allegedly tried, without success, to have his asylum claim registered in Serbia and to gain access to the Hungarian transit zones. In his submissions to the Court, he corrected his initial statement that he had been subjected to chain *refoulement* to North Macedonia, explaining that he had in fact gone back to Pakistan voluntarily in late 2016.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

17. The relevant parts of section 5(1) of Act no. LXXXIX of 2007 on State Borders (hereinafter "the State Borders Act") reads as follows:

> "(1) In accordance with this [Act], it shall be possible to use, in Hungarian territory, a 60-metre strip [of land] from the external borderline, as defined in Article 2(2) of the Schengen Borders Code, or from the signs demarcating the border, in order to build, establish or operate facilities for maintaining order at the border – including those referred to in section 15/A – and to carry out tasks relating to defence and national security, disaster management, border surveillance, asylum and immigration.
>
> (1a) The police may, in Hungarian territory, apprehend foreign nationals staying illegally in Hungarian territory, within an 8-km strip [of land] from the external borderline, as defined in Article 2(2) of the Schengen Borders Code, or from the signs demarcating the border, and escort them through the gate of the nearest facility referred to in [subsection] 1, except where they are suspected of having committed an offence."

18. Section 15/A of the State Borders Act provides as follows:

> "(1) A transit zone may be created in the area referred to in section 5(1) to serve as a temporary place of stay for persons applying for asylum or subsidiary protection and as the place where asylum and migration control procedures take place and which is equipped with the facilities necessary for that purpose.
>
> (2) The applicant for international protection present in the transit zone may enter Hungarian territory if the competent asylum authority takes a decision granting international protection; the conditions for applying the general rules governing the asylum procedure are met, or in the cases specified in section 71/A(4) and (5) of the Asylum Act.
>
> (3) In the transit zone, public bodies shall perform their duties and exercise their powers in accordance with the legislative provisions applicable to them."

19. Section 71/A of Act no. LXXX of 2007 on Asylum (hereinafter "the Asylum Act") provides:

> "(1) If an applicant lodges his or her application before admission to the territory of Hungary or after being intercepted within 8 km of the external borderline as defined by [Article 2(2)] of the Schengen [Borders] Code or of the [signs demarcating] the

State border and escorted through the nearest gate in the security border fence facility, in a transit zone defined by the [State Borders Act], the provisions of this chapter [on the procedure for recognition as a refugee or a beneficiary of subsidiary protection] shall apply [accordingly, with the differences specified in this section].

(2) In the border procedure, the applicant shall not have the rights stipulated in section 5(1)(a) and (c) [the right to stay in Hungarian territory and to work under certain conditions].

(3) The asylum authority shall decide on the admissibility of an application as a priority and no later than eight days after it is made. The asylum authority shall promptly communicate the decision adopted in the procedure.

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

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

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

(7) The rules applicable to the procedure in the transit zone shall not apply to persons requiring special treatment."

20. Following a request for information by the Hungarian Helsinki Committee, the Chief Commissioner of the National Police explained on 20 October 2016 that in the course of applying the measure under section 5 of the State Borders Act, the police informed the persons concerned of the unlawful nature of their entry to Hungarian territory, the purpose of the measure under section 5 and the possibility of applying for asylum in the transit zones, and escorted them through the closest border gate to the other side of the border fence. Furthermore, the police did not register any personal data in the course of the procedure but could take pictures and recordings.

II. EUROPEAN UNION LAW AND PRACTICE

21. As regards European Union law and practice, see *N.D. and N.T. v. Spain* ([GC], nos. 8675/15 and 8697/15, §§ 41-43, 45-48 and 50-51, 13 February 2020) and the case-law summarised in *Khlaifia and Others v. Italy* ([GC], no. 16483/12, §§ 42-45, 15 December 2016).

22. The relevant provisions of 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 ("the Return Directive") state as follows:

Article 3 - Definitions

"For the purpose of this Directive the following definitions shall apply:

...

5. ‘removal’ means the enforcement of the obligation to return, namely the physical transportation out of the Member State;

...”

Article 5 - Non-refoulement, best interests of the child, family life and state of health

“When implementing this Directive, Member States shall take due account of:

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned and respect the principle of non-refoulement.”

Article 6 - Return decision

“1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

...”

Article 12 - Form

“1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

...”

Article 13 - Remedies

“1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

...”

23. The relevant provisions of 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 (“the Asylum Procedures Directive”) read as follows:

Article 3 - Scope

“1. This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection.

...”

Article 6 - Access to the procedure

“1. When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.

If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.

2. Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. Where the applicant does not lodge his or her application, Member States may apply Article 28 accordingly.

3. Without prejudice to paragraph 2, Member States may require that applications for international protection be lodged in person and/or at a designated place.

4. Notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned.

5. Where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it very difficult in practice to respect the time limit laid down in paragraph 1, Member States may provide for that time limit to be extended to 10 working days.”

24. 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”) applies to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law. It governs, among other things, residence and freedom of movement, and the conditions under which the applicants may be detained.

25. After repeatedly expressing its concerns as to the compatibility of Hungarian asylum legislation with EU law, the European Commission, on 21 December 2018, brought an action for failure to fulfil obligations before the Court of Justice of the European Union (“CJEU”), seeking a declaration

that part of the Hungarian asylum and border control legislation infringed certain provisions of Directives 2008/115/EC, 2013/32/EU and 2013/33/EU. In its action, the Commission criticised Hungary for, in particular, having restricted access to the international protection procedure, established a system of systematic detention of applicants for that protection and forcibly deported, to a strip of land at the border, illegally staying third-country nationals, without observing the guarantees provided for in Directive 2008/115/EC. The CJEU, sitting as the Grand Chamber, assessed Hungary's compliance with the directives with respect to the period up to 8 February 2018. On 17 December 2020 it upheld most of the Commission's action (C-808/18). In addition to the legislation in force at the time of the applicant's removal in the present case, the CJEU's judgment also takes account of the legislative changes introduced in 2017, in particular Act no. XX of 2017 on amending certain laws related to the strengthening of the procedure conducted in the guarded border area. The following findings of the CJEU are of particular relevance to the present case:

> "118 It follows that the Commission has proved, in a sufficiently documented and detailed manner, the existence, at the end of the period laid down in the reasoned opinion, namely 8 February 2018, of a consistent and generalised administrative practice of the Hungarian authorities aimed at limiting access to the transit zones of Röszke and Tompa so systematically and drastically that third-country nationals or stateless persons who, arriving from Serbia, wished to access, in Hungary, the international protection procedure, in practice were confronted with the virtual impossibility of making an application for international protection in Hungary.
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> ...
>
> 121 ... it should be noted, first of all, that it is true that that Member State disputes the fact that the administrative instructions sought to limit the daily number of applications for international protection that could be made in each of the transit zones of Röszke and Tompa.
>
> 122 However, in addition to the fact that that assertion is formally contradicted by the reports referred to in paragraphs 115 and 116 of the present judgment, Hungary has not explained, to the requisite legal standard, the reason why, in the presumed absence of such instructions, waiting lists – the existence of which it acknowledges – had been drawn up in order to establish the order in which persons situated in Serbia, in the immediate vicinity of the transit zones of Röszke and Tompa, and wishing to make an application for international protection in one of those zones, could enter them.
>
> 123 In that regard, even if, as Hungary contends, the Hungarian authorities did not participate in the drawing up of those lists or influence the order of access to the transit zones thus established by them, the fact remains that the very existence of the lists has to be seen as the unavoidable consequence of the practice identified in paragraph 118 of the present judgment.
>
> 124 Moreover, Hungary's argument that the gradual dissipation of the long queues at the entrance of those transit zones proves that there is no restriction on entry into those same zones cannot succeed, either.

125 After all, it is undisputed that there is no infrastructure available on the strip of land separating the Serbian-Hungarian border from the entry gate of the transit zones of Röszke and Tompa, meaning that it is extremely difficult to remain there for a long period of time. Furthermore, as the Commission has rightly pointed out, it can be inferred from the reports annexed to its application that the length of the queues at the entrance of each of the transit zones has decreased as from the date on which the waiting lists, mentioned in paragraph 122 of the present judgment, appeared, with only the persons placed in a favourable position on those lists being taken, by the Serbian authorities, to the strip of land separating the Serbian-Hungarian border from the entry gate of the transit zone concerned, on the eve of the date prescribed for those persons to enter that transit zone.

126 It follows that the dissipation of the long queues at the entrance of the transit zones of Röszke and Tompa cannot call into question the finding that the Hungarian authorities decided to limit access to those zones drastically.

127 Lastly, although, as Hungary recalls, it is indeed for Member States to ensure, *inter alia*, that external borders are crossed legally, in accordance with Regulation 2016/399, compliance with such an obligation cannot, however, justify the Member States' infringement of Article 6 of Directive 2013/32.

128 It follows from all the foregoing considerations that Hungary has failed to fulfil its obligations under Article 6 of Directive 2013/32, read in conjunction with Article 3 thereof, in providing that applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wish to access, in its territory, the international protection procedure, may be made only in the transit zones of Röszke and Tompa, while adopting a consistent and generalised administrative practice drastically limiting the number of applicants authorised to enter those transit zones daily.

...

254 In the case at hand, first, it should be noted that Hungary does not dispute that, under [section 5(1b) of the State Borders Act], third-country nationals staying illegally in its territory may be subject to forcible deportation beyond the border fence, without prior compliance with the procedures and safeguards provided for in Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115. In that regard, it must be stated that the safeguards surrounding the intervention of the police services, put forward by Hungary and summarised in paragraph 240 of the present judgment, clearly cannot be regarded as corresponding to the safeguards provided for in Directive 2008/115.

255 Second, contrary to what Hungary contends, the forced deportation of an illegally staying third-country national beyond the border fence erected in its territory must be treated in the same way as a removal from that territory.

256 While it is true that, according to Article 3(5) of Directive 2008/115, removal means the physical transportation out of the Member State in enforcement of an obligation to return, the fact remains that the safeguards surrounding the return and removal procedures provided for in that directive would be deprived of their effectiveness if a Member State could dispense with them, even if it forcibly displaced a third-country national, which is, in practice, equivalent to transporting him or her physically outside its territory.

257 Hungary acknowledges that the space between the border fence – beyond which illegally staying third-country nationals may be forcibly deported – and the Serbian-Hungarian border is merely a narrow strip of land devoid of any

infrastructure. After having been forcibly deported by the Hungarian police to that narrow strip of land, the third-country national therefore has no choice other than to leave Hungarian territory and go to Serbia in order to be housed and fed.

258 In that regard, it should be noted that, contrary to what Hungary submits, that national does not have the effective possibility of entering, from that strip of land, one of the two transit zones of Röszke and Tompa to make an application for international protection there.

259 As has been noted in paragraph 128 of the present judgment, there was, at least until the end of the period laid down in the reasoned opinion issued by the Commission to Hungary [8 February 2018], a consistent and generalised practice of the Hungarian authorities consisting in drastically reducing access to those transit zones which rendered completely illusory the possibility, for an illegally staying third-country national forcibly deported beyond the border fence, of entering one of those transit areas at short notice.

...

266 It follows from all the foregoing considerations that, in allowing the removal of all third-country nationals staying illegally in its national territory, with the exception of those of them who are suspected of having committed an offence, without observing the procedures and safeguards laid down in Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115, Hungary has failed to fulfil its obligations under those provisions."

26. On 27 January 2021 Frontex, the European Border and Coast Guard Agency, announced that it had suspended all its operational activities on the ground in Hungary until the latter implemented the CJEU's above judgment. Prior to that, on 14 October 2016, the Fundamental Rights Officer of Frontex also expressed concerns about the potential human rights violations related to the migration policies at the Hungarian border (FRO observations, Situation at the Hungarian-Serbian border, 2016). The situation was described as follows:

"The 8-km rule, which allows Hungarian border guards to send migrants stopped within 8 km of the Serbian border directly back to Serbia without any registration or opportunity to apply for international protection, poses serious risks to the right to asylum (Art. 18 [of the EU Charter on Fundamental Rights]), the prohibition of non-refoulment (Art. 19) as Serbia is not a safe country of asylum according to UNHCR; and the prohibition against collective expulsions (Art. 19).

The coercive tactics (e.g., beatings, dog bites, pepper spraying) allegedly used to enforce the 8-km rule have led to incidents that jeopardize the right to human dignity (Art. 1); the right to life (Art. 2); the right to the integrity of the person (Art. 3); and the prohibition of inhuman or degrading treatment (Art. 4).

Hungary's entry limit of 30 asylum-seekers per day impedes the right to asylum (Art. 19) of those forced to wait in Serbia, in particular for vulnerable groups for whom no prioritization system exists. Moreover, the dire humanitarian situation on the Serbian side can negatively impact the right to human dignity (Art. 1) and the rights of the child (Art. 24)."

III. COUNCIL OF EUROPE DOCUMENTS

27. The relevant Council of Europe documents are cited in *N.D. and N.T.* (cited above, §§ 53, 54 and 59).

28. In a report (SG/Inf(2017)33) dated 13 October 2017 of the fact-finding mission in June 2017 by Ambassador Tomáš Boček, Special Representative of the Secretary General of the Council of Europe on Migration and Refugees, the following observations were made concerning Serbia and the Röszke and Tompa transit zones in Hungary:

> "Almost every migrant we have met in the asylum and reception centres that we visited in Serbia complained about the long waiting time, in most of the cases lasting for months, before his/her turn on "the list for Hungary" would come up.
>
> ...
>
> It is my understanding that the waiting list for entry into Hungary is an informal practical tool that governs the migration flow from Serbia into Hungary. The authorities of the two countries do not have formal competence over it, do not play any formal role in its compilation and do not formally communicate with each other on any aspect related to this list. However, several discussions led me to conclude that staff members of the Serbian Commissariat for Refugees and Migration are involved informally in the selection of community leaders as well as in including names in the waiting list. Several people have reported to us that the information about their place on this list is communicated to them by Commissariat staff. There were also several allegations made by migrants and refugees that they had had to pay bribes to be included in or ranked higher on the waiting list. I have also heard that migrants and refugees who had not been able to pay the required fee were ranked further down the list or that their names disappeared completely from it.
>
> Despite the lack of any official status, the waiting list for admission into Hungary *de facto* determines the amount of time that migrants and refugees actually spend in asylum and reception centres in Serbia, which in most of the cases is several months...
>
> ...
>
> Also, the level of informality and the lack of transparency with which this waiting list is compiled and handled create a lot of suspicion that corruption is involved. Many migrants and refugees prefer dealing with smugglers to waiting for long periods of time until their turn on the list comes up. Hence, the waiting list should be seen as one of the many aspects contributing to a favourable environment for smuggling migrants and refugees in both Serbia and Hungary.
>
> ...
>
> Pushbacks of migrants and refugees by competent authorities without acknowledging and assessing their asylum claims raise concerns regarding the respect of the principle of non-refoulement, which requires that states refrain from removing asylum-seekers without an individual assessment of their cases.
>
> ...
>
> Due to the quotas restricting admission into Röszke and Tompa, many migrants and refugees try to enter Hungary illegally ... However, during a state of crisis caused by mass migration declared by the government, asylum applications can only be submitted in the transit zones. Migrants and refugees who have crossed into Hungary

illegally and who are apprehended are rarely taken to these zones. During our visit in Serbia, notably in the reception centres of Sombor and Obrenovac, we met several persons, including unaccompanied children, who alleged that they had been apprehended by Hungarian police within Hungarian territory and, thereafter, returned to Serbia without passing through the transit zones. They alleged that violence had been used against them by the police; and they had been beaten or attacked with dogs.

...

While it is true that, generally speaking, the objective of migrants and refugees who entered Hungary illegally is only to transit through Hungary towards their countries of destination, it is clear that, in practice, they do not have a real opportunity to express their intention to seek asylum in Hungarian territory and to access the asylum procedure."

IV. OTHER INTERNATIONAL MATERIALS

29. The relevant international instruments and reports are summarised in *N.D. and N.T.* (cited above, §§ 62-67).

30. In May 2016 the Office of the United Nations High Commissioner for Refugees (UNHCR) issued its observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016 in Hungary concerning refugees and asylum-seekers. It noted, *inter alia*, the following:

"22. After the transit zones became operational on 15 September 2015, the Ministry of Interior informed UNHCR that a maximum of 10 asylum-seekers would be permitted to enter each transit zone at any one time, and a maximum of 100 asylum-seekers a day per zone would be processed by the OIN between 06:00 and 22:00. On 21 February 2016, the processing capacity was reduced to 50 people a day and, on 22 March, following the introduction of level 2 security level in the whole country, it was further reduced to 30 people a day. However, such ceilings may be incompatible with Hungary's obligations under EU law. The EU Asylum Procedures Directive (recast) makes express provision to ensure that basic principles and guarantees are respected in the event large numbers of asylum-seekers arrive and need to be dealt with under border procedures.

23. In practice, OIN did not register 100 asylum applications per day. Between 15 and 19 September 2015, several thousand individuals arrived at Röszke wanting to enter Hungary and they were made to camp out in front of the entry door to the transit zone without water, food or shelter. Many left for Croatia after waiting for two days or more and only 352 individuals were allowed to enter and submit asylum applications. After 22 September 2015, UNHCR observed that single males and persons who were not visibly in need of special treatment were actively discouraged from approaching the transit zones. Official – government contracted – interpreters, told them that their asylum applications would be denied. Vulnerable people are not systematically prioritized and the lack of a clear admission system leads to frustration among the asylum-seekers. Families with small children have to wait outside the transit zone with no shelter, water or food. They are not given information on the procedures and interpretation is not always available."

31. In August 2016 UNHCR, in Europe's Refugee Emergency Response Update #30, reported the following concerning the pre-transit zone areas at Röszke and Tompa:

> "Serbian authorities, UNHCR, partners and refugee community leaders continued to encourage asylum-seekers to move to governmental centres instead of camping in open spaces near the Hungarian border. Consequently, the number of asylum-seekers staying outdoors on the Serbian side in front of the Hungarian transit zones at Horgos and Kelebija border-crossings decreased to 280 at the end of the month, compared to its peak of over 1,000 in mid-July. Hungarian authorities continued to admit around 30 asylum-seekers daily through the transit zones in Horgoš and Kelebija [these are the transit zones of Röszke and Tompa]. At the same time, in August, UNHCR and partners encountered over 550 individuals claiming they were pushed back from Hungary without being allowed access to asylum procedures and protection in Hungary. Among those, several cases made serious allegations of use of force during the [pushbacks]. UNHCR remains deeply concerned about the restrictive law, increased reports of violence, and a deterioration of the situation at border with Serbia. Nearly 800 asylum-seekers and migrants entered Hungary in August out of which the police apprehended 345 people inside the country for crossing the border irregularly, while 418 people entered through the transit zones on the border with Serbia. Since the new border regulations came into force on 5 July 2016, allowing the police to return to the other side of the border fence people intercepted within 8 km from the border, the police reported that 8,201 people have been prevented from accessing the Hungarian territory. A total of 4,700 people were blocked entry upon attempting to cross the border irregularly and 3,501 were intercepted inside Hungary and escorted back to the other side of the border fence.
>
> ...
>
> By the end of August, around 260 asylum-seekers and migrants (170 in Röszke and 80 in Tompa) were in the waiting areas without adequate shelter, awaiting admission into the transit zones while the daily admission rate remained 15 people per day in each transit zone. The average waiting time for families and UACs ranged between 30-70 days in Röszke, 35-50 days in Tompa and for single men up to 90 days. Therefore, many single men are resorting to smugglers to cross the border irregularly."

THE LAW

I. PRELIMINARY ISSUES

32. The Government argued that the applicant had failed to prove that he had ever personally suffered the measure complained of. In particular, he had not applied for asylum in Hungary and had therefore not shown even a likelihood that he had been a victim of a violation within the meaning of Article 34 of the Convention. There was also no indication that had been sent back to Pakistan as a result of chain *refoulement*.

33. They further argued that the medical certificate issued in Serbian and submitted by the applicant did not contain his name.

34. The applicant argued that the evidence obtained from the authorities and in the criminal investigation file (see paragraph 15 above) supported

beyond reasonable doubt his allegation that he, together with eleven other men, had been escorted by Hungarian officers from Hungary through the border fence towards Serbia on 12 August 2016 on the basis of section 5 of the State Borders Act. He further submitted that his name on the medical report had been misspelled.

35. According to the Court's case-law, the distribution of the burden of proof and the level of persuasion necessary for reaching a particular conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (see, among other authorities, *El Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 151). In the context of the expulsion of migrants, the Court has previously stated that where the absence of identification and personalised treatment by the authorities of the respondent State is at the very core of an applicant's complaint, it is essential to ascertain whether the applicant has furnished prima facie evidence in support of his or her version of events. If that is the case, the burden of proof should shift to the Government (see *N.D. and N.T.*, cited above, § 85).

36. In the present case, the Court notes that the applicant's apprehension and escort to the external side of the border fence has been confirmed by the video footage provided by the Hungarian police, as well other information from official sources (see paragraphs 9, 10, 12 and 15 above). While it is true that the applicant changed his statement as regards his return to Pakistan following the events complained of, he himself acknowledged and corrected the initial misinformation (see paragraph 16 above). Having regard to the fact that his return to Pakistan is not the subject-matter of the present case, the Court finds that this element alone cannot be considered sufficient to undermine the credibility of his account concerning the measures taken against him on 12 August 2016.

37. In such circumstances, the Court considers that the applicant has presented sufficient evidence of being apprehended and escorted to the external side of the border fence, which has not been refuted by the Government.

38. In so far as the Government argued that the applicant had not lodged an application for international protection in Hungary, the Court observes that, in fact, he has not claimed to have lodged such an application. On the contrary, he complained of his inability to do so because of the limited access to the Röszke and Tompa transit zones. The Court notes that the question of whether or to what extent he was prevented from making his application for international protection in Hungary is closely linked and should thus be joined to the examination of the merits of his complaint under Article 4 of Protocol No. 4.

39. Lastly, the Government also pointed out that the spelling of the name on the medical report which allegedly concerned the applicant's examination in the hospital in Subotica did not correspond to that of the

applicant (see paragraph 11 above). The Court notes that the present case concerns complaints under Article 4 of Protocol No. 4 and Article 13, and that the applicant lodged a separate application concerning his alleged ill-treatment by the Hungarian police in which he relied on Article 3 of the Convention. It is therefore unnecessary to establish in the present case whether the applicant suffered injuries at the hands of the Hungarian police.

40. In conclusion, the Court finds it sufficiently established that the applicant was apprehended and escorted to the external side of the border fence on 12 August 2016. As regards the Government's objection of lack of victim status on account of the fact that the applicant did not lodge an application for international protection, the Court joins it to the examination of the merits of the complaint under Article 4 of Protocol No. 4.

II. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 4 TO THE CONVENTION

41. The applicant complained that he had been part of a collective expulsion, in violation of Article 4 of Protocol No. 4 to the Convention, which reads as follows:

> "Collective expulsion of aliens is prohibited."

A. Admissibility

1. The parties' arguments

42. The Government argued that the applicant's complaint fell outside the ambit of Article 4 of Protocol No. 4, since the escort measure did not amount to either collective expulsion or expulsion in general, given that it was made to Hungarian territory and not Serbian territory. They emphasised that, under the relevant provision of the State Borders Act, those intercepted were escorted through the nearest gate in the temporary security border fence to the other side of the border fence situated in the direction of Serbia but in Hungarian territory. Although their "functional jurisdiction" in this border zone was limited on account of EU law concerning the external borders of the Schengen area, it was still Hungarian territory. People escorted through the gate were in a position to freely decide whether to apply for asylum in the transit zone or leave Hungarian territory. They could apply for asylum after a temporary return to Serbia, which at the time had been common practice. In support of their argument that the applicant's complaint was incompatible *ratione materiae* with the Convention, the Government also submitted that "expulsion" carried with it an entry ban for a specific period, whereas the escort measure did not have such a legal consequence.

43. The applicant argued that the "apprehension and escort" measure to which he had been subjected fell within the meaning of "collective

expulsion". In his view, the question of whether the external side of the fence to which he had been made to go was or was not part of Hungarian territory was irrelevant to the resolution of his case. The relevant question was whether he had had any practically feasible opportunity of accessing the Hungarian authorities and asylum procedure from the place to which he had been escorted. Any other view would make Article 4 of Protocol No. 4 devoid of its purpose in circumstances such as those in the present case. It was of particular importance that he had not been escorted to any of the transit zones with a view of having his asylum claim, based on Articles 2 and 3 of the Convention, examined. When attempting to reach any of the transit zones, he had had to enter Serbia irregularly. His return had thus been *de facto* expulsion to Serbia or at least to the so-called "no man's land" between the two countries.

44. The applicant further submitted that the classification of the measure under domestic law was irrelevant and that even under domestic law, not all expulsion decisions carried an entry ban.

2. The Court's assessment

45. In order to determine whether Article 4 of Protocol No. 4 is applicable, the Court must seek to establish whether the Hungarian authorities subjected the applicant to "expulsion" within the meaning of that provision.

46. The Court refers to the general principles summarised in *M.K. and Others v. Poland* (nos. 40503/17 and 2 others, §§ 197-200, 23 July 2020) and reiterates that it has interpreted the term "expulsion" in the generic meaning in current use ("to drive away from a place") (see *Khlaifia and Others*, cited above, § 243, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 174, ECHR 2012), as referring to any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border (see *N.D. and N.T.*, cited above, § 185). It has also applied Article 4 of Protocol No. 4 to those who were apprehended in an attempt to cross a national border by land and were immediately removed from the State's territory by border guards (ibid., § 187).

47. Turning to the present case, the Court observes that the applicant, together with eleven other Pakistani nationals, entered Hungary in an unauthorised manner by cutting a hole in the border fence between Hungary and Serbia. He was intercepted some hours later when resting in a field. Together with the eleven other men, he was subjected to the "apprehension and escort" measure under section 5(1a) of the State Borders Act. The latter stipulated that within 8 km of the State border the police could intercept foreign persons unlawfully staying in Hungarian territory and escort them

through the nearest gate in the border fence. After being removed to the external side of the border fence, the applicant, who had been injured, went to a reception centre in Subotica, Serbia, and from there was taken to a nearby hospital.

48. Referring to the principles established in its case-law (see paragraph 46 above), the Court finds that the fact that the applicant entered Hungary irregularly and was apprehended within hours of crossing the border and possibly in its vicinity do not preclude the applicability of Article 4 of Protocol No. 4. Moreover, as regards the Government's argument concerning the nature of the escort measure and its legal consequences (see paragraph 42 above), it is noted that Article 4 of Protocol No. 4 may apply even if the measure in question is not classified as "expulsion" in domestic law (see *M.K. and Others*, § 198, and *Khlaifia and Others*, §§ 243 and 244, both cited above). It remains to be examined whether the fact that the applicant was not removed directly to the territory of another State but to the strip of land which belonged to Hungary – that is to say the land between the border fence and the actual border between Hungary and Serbia – means that the impugned measure fell outside the scope of Article 4 of Protocol No. 4.

49. The Court observes in this connection that the border fence which the applicant was made to cross had clearly been erected in order to secure the border between Hungary and Serbia. The narrow strip of land on the external side of that fence to which the applicant was escorted only had a technical purpose linked to the management of the border (see paragraph 17 above). There appears to have been no infrastructure on that strip of land and, as the respondent Government confirmed (see paragraph 42 above), 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 also found that migrants removed pursuant to section 5(1a) of the State Borders Act had no choice but to leave Hungarian territory (cited in paragraph 25 above, §§ 255-58). Another relevant, though not decisive, consideration is that according to the applicant and the statements of the officers who were standing on the external side of the border fence, he and the other men in the group were directed towards Serbia (see paragraphs 9 and 13 above). Having regard to the nature of the procedure to which he was subjected (see paragraph 9 above), the instruction given by the police officers could only be understood by him to be an order that had to be obeyed.

50. In view of the above, the Court finds that the measure to which the applicant was subjected on 12 August 2016 aimed at and resulted in his removal from Hungarian territory. It reiterates that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory

(see *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161, and *Hirsi Jamaa and Others*, cited above, § 175). Bearing this in mind, the Court notes that 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 in the preceding paragraph 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.

51. While the Court accepts that the measure in question was aimed at preventing unauthorised border crossings at a time when Hungary was faced with a substantial influx of migrants, it emphasises that problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention (see *Hirsi Jamaa and Others*, cited above, § 179). The Court finds it appropriate to reiterate that the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (see *N.D. and N.T.*, cited above, § 110).

52. Having regard to the foregoing, the Court considers 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. This provision is therefore applicable. The Government's objection should be accordingly dismissed.

53. Since this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention, it must be declared admissible.

B. Merits

1. The parties' arguments

54. The applicant argued that when being apprehended by the Hungarian police, he had clearly stated in English and Urdu that he wished to apply for asylum, but to no avail. Following his return to Serbia, he had had no direct access to the two transit zones, which had been the only available option to enter Hungary and claim asylum. He had thus been denied any opportunity to claim international protection or rely on the *non-refoulement* principle.

55. The applicant pointed out that collective expulsions had become a daily routine since 5 July 2016. They had been done in a summary manner without any provision as to how the police should communicate with intercepted migrants and how they should register and deal with their claims and responses.

56. The applicant further submitted that the transit zones could only be reached by irregularly crossing Serbia. Furthermore, even if the applicant

could physically get to the location of the transit zones from Serbian territory, he would have had no real chance of gaining access to them as people were obliged to wait for several months in order to be granted access and have their asylum applications submitted. As regards the wait before the transit zone, the applicant referred to the reports by UNHCR and other organisations indicating the severe conditions in which those waiting to access the transit zone were made to live. He claimed to have endured inhumane conditions without the ability to meet basic human needs and in a state of uncertainty. He emphasised that he had attempted to register his name on the waiting list before and after the last removal on 12 August 2016 but had been denied the opportunity to do so.

57. The Government explained that when escorting people under the State Borders Act, the police were obliged to supply them with multi-language information brochures, inform them of their violation of the law, the measure taken and its aim, the possibility and manner of filing a complaint against the police measure, the location of the nearest transit zone and the possibility of applying for asylum. After that, the police were obliged to escort those intercepted through the nearest gate in the temporary security border fence. Those concerned could apply for asylum in one of the transit zones after a temporary return to Serbia. If the asylum application was rejected, the decision on expulsion was taken in proceedings containing appropriate safeguards.

2. The Court's assessment

(a) Relevant principles

58. The Court refers to the principles concerning the "collective" nature of an expulsion summarised in *N.D. and N.T.* (cited above, §§ 193-201). It reiterates that the decisive criterion in order for an expulsion to be characterised as "collective" is the absence of "a reasonable and objective examination of the particular case of each individual alien of the group" (ibid., § 195). In line with this, in *Hirsi Jamaa and Others v. Italy* the Court found a violation of Article 4 of Protocol No. 4 because the applicants, who had been intercepted on the high seas, were returned to Libya without the Italian authorities carrying out any identification or examination of their individual circumstances (cited above, § 185).

59. Exceptions to the above rule have been found in cases where the lack of an individual expulsion decision could be attributed to the applicant's own conduct (see *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), no. 18670/03, 16 June 2005, and *Dritsas v. Italy* (dec), no. 2344/02, 1 February 2011). In the case of *N.D. and N.T.* (cited above), the Court considered that the exception absolving the responsibility of a State under Article 4 of Protocol no. 4 should also apply to situations in which the conduct of persons who crossed a land border in an unauthorised

manner, deliberately took advantage of their large numbers and used force, was such as to create a clearly disruptive situation which was difficult to control and endangered public safety (§ 201). The Court added that in such situations, it should be taken into account whether in the circumstances of the particular case the respondent State provided genuine and effective access to means of legal entry, in particular border procedures, and if it did, whether there were cogent reasons for the applicants not to make use of it which were based on objective facts for which the respondent State was responsible (ibid.).

(b) Application of the above principles to the present case

60. In the present case, the applicant maintained that he had expressed his wish to apply for asylum during the police procedure leading to his return, but that this had been denied (see paragraphs 8 and 54 above). While the Government submitted that those removed pursuant to section 5(1a) of the State Borders Act, like the applicant, were given certain information about the possibility of applying for asylum in one of the transit zones (see paragraph 57 in connection with paragraph 20 above), it has not been disputed that the applicant was removed from Hungary without being subjected to any identification procedure or examination of his situation by the Hungarian authorities. This should lead to the conclusion that his expulsion was of a collective nature (see *Hirsi Jamaa and Others*, cited above, §§ 185 and 186), except if the lack of examination of his situation could be attributed to his own conduct (see paragraph 59 above). The Court will therefore proceed to examine whether in the circumstances of the present case and having regard to the principles developed in its case-law, in particular the judgment in *N.D. and N.T.* (cited above, see paragraph 59 above), the lack of individual removal decision can be justified by the applicant's own conduct.

61. The Court takes note of the fact that the applicant, together with eleven other migrants, crossed the Hungarian border in an unauthorised manner. However, the Government have not argued that their crossing of the border created a disruptive situation which was difficult to control, or that public safety was compromised as a result. The group, including the applicant, were apprehended after walking for several hours. The video footage submitted to the Court shows the presence of numerous officers, who encircled the men, transported them in a van and then escorted them through the gate in the border fence. According to the criminal investigation file, there were at least eleven officers present during the removal (see paragraphs 9, 10 and 15 above). There is no indication that the applicant or other men in the group used any force or resisted the officers. On the contrary, the video footage shows that the situation was entirely under the officers' control and that the migrants, including the applicant, followed the orders given by the officers. The Court therefore considers that, apart from

the applicant's unauthorised manner of entry, the present case cannot be compared to the situation in *N.D. and N.T.*, where the applicants were apprehended during an attempt to cross the land border *en masse* by storming the border fences (cited above, §§ 22, 166, 206 and 231). It will nevertheless proceed to examine whether, by crossing the border irregularly, the applicant circumvented an effective procedure for legal entry.

62. The Court reiterates that with regard to Contracting States like Hungary, whose borders coincide, at least partly, with external borders of the Schengen Area, the effectiveness of the Convention rights requires that these States make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Those means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the Convention, under conditions which ensure that the application is processed in a manner consistent with international norms, including the Convention (see *N.D. and N.T.*, cited above, § 209). The Court also observes that the Convention does not prevent States, in fulfilment of their obligation to control borders, from requiring applications for international protection to be submitted at the existing border crossing points (ibid., § 210). What is important is that such entry points secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner (ibid.).

63. In the present case, it is uncontested that the only possibilities for the applicant to legally enter Hungary were the two transit zones, Tompa and Röszke, located approximately 40 km and 84 km respectively from the location to which the applicant was returned. The Court notes that once a person entered the transit zone and made a request for international protection, that request was dealt with in accordance with the procedure set out in the Asylum Act (see paragraphs 18 and 19 above). However, it does not need to assess the quality of that procedure because in the present case the applicant argued that he had had no realistic chance of entering the transit zones and making his request for international protection. He submitted that although he could physically reach the area surrounding the transit zones, he could not have made use of the asylum procedure because of the limited access to the transit zones resulting from the limit on the daily number of applications. Migrants could only enter the transit zone after being called from a waiting list on which they had to register their name beforehand. It took several months for single men to be called from the waiting list. Moreover, the applicant argued that he had tried to register his name on the aforementioned waiting list but that this had been denied because of his status as a single man (see paragraphs 6, 16 and 54 above).

64. The Court observes that the above accounts of the applicant have not been refuted by the Government, who provided no information as to how the entries to the transit zones had been organised and managed at the

material time. The Court, having regard to the applicant's submissions corroborated by the reports of UNHCR, finds it established that at the time of the events in issue each transit zone admitted only fifteen applicants for international protection per day, which was significantly low (see paragraphs 30 and 31 above). It also finds it established that those wishing to enter the transit zone had to first register their name on the waiting list – an informal tool for establishing the order of entering the transit zones – and then potentially wait several months in Serbia before being allowed to enter (see paragraphs 25, 28 and 31 above). It further takes note of the applicant's submission that he had in fact never been registered on the waiting list even though he had asked the person managing the list to add his name. In this regard, the Court observes that both UNHCR and the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees pointed to irregularities and a lack of transparency in managing access to the transit zones and the handling of the waiting lists (see paragraphs 28 and 30 above). UNHCR also observed that single men who had not been visibly in need of special treatment had been actively discouraged from approaching the transit zones (see paragraph 30 above). 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.

65. Having regard 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 Court considers that the responded State failed to secure the applicant effective means of legal entry. The lack of an individual expulsion decision could not therefore be attributed to the applicant's own conduct.

66. In light of the above circumstances, the Court finds that the Government's objection as to the applicant's victim status based on the argument that he did not lodge an application for international protection (see paragraphs 32, 38 and 40 above) must be dismissed.

67. In view of the fact that Hungarian authorities removed the applicant without identifying him and examining his situation, and having regard to the above finding that he did not have effective access to means of legal entry, the Court concludes that his removal was of a collective nature (see paragraph 59 above).

68. There has therefore been a violation of Article 4 of Protocol No. 4 to the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 4 OF PROTOCOL NO. 4 TO THE CONVENTION

69. The applicant complained, under Article 13 of the Convention, that he had had no remedy at his disposal that would have enabled him to complain of a violation of Article 4 of Protocol No. 4 to the Convention. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

70. The Government argued that the complaint under Article 13 of the Convention was essentially identical to that under Article 4 of Protocol No. 4. They further argued that Article 13 was inapplicable because it did not provide for the right to challenge a Contracting State's primary legislation before a national authority on the grounds that it was contrary to the Convention.

71. The applicant argued that he was not contesting the legislation as such but was complaining about the measure taken against him based on it. He submitted that the application of the measure in question had clearly led to him being unable to apply for asylum and have access to domestic proceedings that complied with Article 13 requirements.

72. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and grant appropriate relief (see *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI).

73. The Court notes that the applicant's complaint does not concern the legislation as such but, as he rightly pointed out, the alleged lack of an effective remedy in relation to a particular measure taken against him. It further notes that the finding of a violation of Article 4 of Protocol No. 4 does not preclude it from also examining the applicant's complaint under Article 13 taken together with of Article 4 of Protocol No. 4 (see, for instance, *M.K. and Others*, cited above, §§ 219-20). The finding of a violation (see paragraph 66 above), on the other hand, indicates that the complaint lodged by the applicant on this point is arguable for the purposes of Article 13 (see, for instance, *Hirsi Jamaa and Others*, § 201, and *M.K. and Others*, § 219, both cited above).

74. The Court accordingly finds that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

75. The applicant argued that as his removal had not been accompanied by any procedural safeguards and no decision had been issued in that regard, he had had no effective way of challenging it. The law did not provide for any remedy against the removal carried out under section 5(1a) of the State Borders Act, but legalised the practice of summary and automatic expulsions. The applicant argued that he had had the right to have the credibility of his claims under Articles 2 and 3 of the Convention examined before his removal.

76. The Government did not comment on the merits of this complaint apart from submitting that it raised no separate issue to that already raised under Article 4 of Protocol No. 4 taken alone.

77. The Court notes that the scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. However, the remedy required by that provision must be "effective" in practice as well as in law (see, among many other authorities, *Kudła*, cited above, § 157). Where an applicant alleges that the expulsion procedure was "collective" in nature, he or she should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum (see *Khlaifia and Others*, cited above, § 279).

78. Turning to the facts before it, the Court notes that the Government mentioned in connection with Article 4 of Protocol No. 4 that persons being removed pursuant to section 5(1a) of the State Borders Act were informed of their right to, *inter alia*, complain against the police measure (see paragraph 57 above). However, they did not indicate the legal basis for such a complaint, let alone submit any domestic case-law in this regard. In view of the foregoing, the Court finds that they failed to illustrate the effectiveness of the remedy to which they referred in their submissions (see, *mutatis mutandis*, *Yarashonen v. Turkey*, no. 72710/11, § 63, 24 June 2014). The Court further notes that the Government did not refer to any other remedy the applicant could have used to complain about his removal from Hungary and that no remedy appears to be provided for by law regulating such removals (see paragraph 18 above). Consequently, and in view of the above finding that the applicant had no effective access to the procedure for examining his personal situation because of the limited access to the transit zones, the Court considers that he did not have at his disposal any remedy which might satisfy the criteria under Article 13 of the Convention.

79. There has accordingly been a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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

81. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage for the emotional distress and damage to physical and mental health suffered as a result of the violations complained of.

82. The Government argued that the claim was excessive.

83. In view of the particular circumstances of the present case and the nature of the violations found, the Court considers that the sum claimed by the applicant is reasonable and awards him the amount in full, plus any tax that may be chargeable.

B. Costs and expenses

84. The applicant also claimed EUR 12,105 for the costs and expenses incurred before the Court. The sum corresponds to 80.5 hours of legal work at an hourly rate of EUR 150, plus EUR 30 for clerical expenses. The applicant's representative submitted that, according to their agreement, the applicant would only be obliged to pay the costs of legal representation if he succeeded with the application before the Court.

85. The Government argued that the expenses claimed were excessive, especially in view of the similarity of the applicant's observations and annexes to those submitted in other cases by the applicant's representative and the fact that a significant proportion of the applicant's submissions were news articles and NGO reports lacking any probative value and thus relevance to the case.

86. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join to the merits the respondent Government's objection concerning the applicant's victim status, and *dismisses* it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 4 of Protocol No. 4 to the Convention;

4. *Holds* that there has been a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4 to the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Renata Degener
Registrar

Ksenija Turković
President