

Tango by estranged  
partners.  
The relationship of  
the ECtHR and  
Hungary in asylum  
matters

Presentation by  
Boldizsár Nagy  
at the conference:  
„70th anniversary of the  
European Convention on  
Human Rights”  
Pargue University  
and others,  
Prague, 27 November 2020



Photo by [jovivebo](#) on [flickr](#) ··· Buenos Aires, Argentina.

# Overview of the issues

The relic of the past: (almost) unlimited detention of „aliens” and the ECtHR’s resistance

Removing a major pillar of the whole Hungarian asylum system – *Ilias and Ahmed* – Chamber judgement – vehement political reactions

The Court bowing to the sovereign: *Ilias and Ahmed*, Grand Chamber

## Context

M.K v Poland

Z.A. v Russia

FMS v Hungary (CJEU)

Infringements

# The relic of the past (almost) unlimited detention of „aliens” and the ECtHR’s resistance

## Detention of asylum seekers

1993 -1999: **Indefinite**

1999 - 2002: **18** months

2002 - 2007: **12** month

2007 - 2010: **6** months

2010 - 2013: **12** months

2013 - separate **asylum detention: 6** Months

Aliens’ detention: to be ended when in-merit asylum procedure starts

2017 – **Indefinite** in transit zone

*Mentality – as during Socialism:  
(Western) migrants are suspicious  
**biopolitical control (police surveillance)**  
is desirable*

# Correcting „mistakes” – not engaging the system

Lokpo et Touré v. Hungary, App. No. 10816/10 (20 September 2011),  
Al-Tayyar Abdelhakim v. Hungary, App. No. 3058/11, (23 Oct, 2012),  
Ali Said and Aras Ali Said v. Hungary App. No. 13457/11 (23 Oct 2012)

**Law:** Section 55 of the Asylum Act:

„the immigration authority shall release the applicant at the initiative of the refugee authority” once the asylum authority starts the in merit phase

**Reality:** Continuous detention – asylum authority does not initiate release

**Complaint:** Breach of § 5/1 ECHR

**Finding:**

- **Months** of detention – **not proportionate** to the aim of expulsion = **arbitrary**
- **Silence** of the authority causes detention = **arbitrary**
- **Absence of elaborate reasons** for detention = **not lawful**

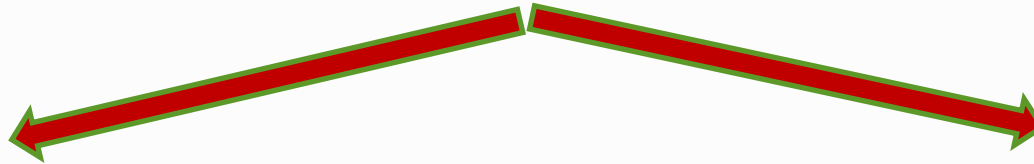
# Reaction of the government

No intensive political reaction



*Vajnai v. Hungary*, Judgment of 28 April 2008, no. 33629/06,  
*Fratanoló v. Hungary*, Judgment of 3 November 2011, no. 29459/10

in the case of the ECtHR judgments condemning the ban on publicly wearing the red star (Vajnai, Fratanoló)



Possibility of special tax  
In case of payment obligation derived from ECtHR Judgment  
(Abolished a few months later)

Parliament's resolution:  
It does not agree with the ECtHR's judgment in the Fratanolo case  
(58/2012. (VII. 10.) OGY resolution)

Conformity related to the red cross later silently restored with modification of the Penal Code

# Between individual mistakes and systemic failure - Nabil

After the first three judgments Asylum Act changed – new legal title specifically for detaining asylum seekers introduced = „Transposition of the recast Reception Conditions Directive”

**Nabil and Others v. Hungary, Judgment of 22 Sept, 2015. no. 62116/12**

ECtHR, judgment, § 40

„to validly prolong the applicants’ detention, the domestic authorities had to verify that

- they were indeed **frustrating** the enforcement of the **expulsion**;
- that **alternative, less stringent measures** were not applicable, and
- whether or not the expulsion could **eventually be enforced**.

§ 43:

„**the requisite scrutiny** as prescribed by the law was **not carried out** on these occasions of prolonging the applicants’ detention” = breach of ECHR Art 5 (1)

Introducing EU acquis based substantive requirements – **alternatives to d. imply „necessity of detention” argument** – otherwise denied by ECtHR

# Between individual mistakes and systemic failure – O.M.

O.M. v Hungary Judgment of 5 July 2016, n.o. 9912/15,

Reaction to the new Asylum detention rule (Section 31/A) and practice.  
Government claims: detention lawful under § 5 (1) b „...in order to **secure the fulfilment of any obligation** prescribed by law”

The Court:

- No proportionality between the aim and the deprivation of liberty
- No individualised assessment of the case
- Vulnerability of the LGBT applicant ignored

Essentially: **arbitrary detention** (verging on arbitrariness) - violation of 5 (1)

**The whole practice of asylum detention criticized** as the factors leading to finding a violation were part of everyday practice. The Court notes the **dehumanising measures** (without naming them as such)

# Ilias and Ahmed Chamber judgment

**Ilias and Ahmed v Hungary**, Judgment, of 14 March 2017 n.o. 47287/15


**Law:** The transit zone regime introduced in 2015, especially section 71/A of the Asylum Act

**Facts:** Two applicants' application rejected on the day of arrival, based on safe third country grounds – both detained in the transit zone under the „border procedure” for 23 days. Thereafter - upon police pressure - they re-entered Serbia illegally

**Complaint:** Breach of § 3 and 5/1, 5/4 and 13 of ECHR

**Finding:**

- **It was detention**, it was more than restriction on liberty and departing towards Serbia entailed and illegal act + giving up the asylum claim, so it was not voluntary stay

- It was **not lawful** as did not rely on any explicit legal ground and **it was arbitrary** as neither a formal decision on the detention was taken, nor were specific, individualised grounds given  Breach of 5/1

- There **was no appropriate judicial review**  Breach of 5/4



# Ilias and Ahmed Chamber judgement

## Article 3 issues

### Treatment in transit zone – no breach

„in view of the relatively short time involved” (§ 88)

§ 83 „the *undeniable difficulties and inconveniences* endured by the applicants stemmed to a significant extent from the situation of *extreme difficulty confronting the authorities at the relevant time*”

### Removal to Serbia - breach

The Hungarian authorities **did not assess the individual risks** and they refused even to consider the merits of the information provided by the counsel – **unfair and excessive burden of proof** was imposed on the illiterate applicants – **no guarantees against inhuman or degrading treatment** (e.g. by chain refoulement)

The legal regime introduced in response to the large numbers arriving in 2015 is essentially **illegal**, both the detention and the return to Serbia

# Estrangement from the ECtHR

## Governmental and political reactions to the Ilias and Ahmed chamber judgment

The **Prime Minister** (Orbán) on a radio show:

<https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-on-kossuth-radio-s-programme-180-minutes20170331>

Hungary required to pay six million forints on account of two Bangladeshis = well-established migrant business. **The procedure was „unnecessary”** and **the lawyers were** simply , „**profiteering** at our expense”.

„It’s regrettable that **the Court of Human Rights in Strasbourg assists in this business**, and its decisions undermine the safety of the Hungarian people”

„**[S]ome judges sitting comfortably in Strasbourg...** say that these two people should be let into Hungary... **These are unacceptable things. This court must be reviewed**, we must conduct a review of its operation, and I’ve suggested that we change it – that we reform it – on some important points.”

# Estrangement

Minister Lázár (head of Prime Minister's Office):

<https://2015-2019.kormany.hu/en/prime-minister-s-office/news/strasbourg-ruling-unacceptable-and-unenforceable>

[The chamber judgment in Ilias and Ahmed] was „unacceptable and unenforcable”. The ECtHR decides on the basis of the recommendations of the Hungarian Helsinki Committee

[https://hvg.hu/itthon/20170330\\_Kormanyinfo\\_CEUtol\\_Orbanig\\_percol\\_percre/2?isPrintView=False&liveReportItemId=0&isPreview=False&ver=1&order=desc](https://hvg.hu/itthon/20170330_Kormanyinfo_CEUtol_Orbanig_percol_percre/2?isPrintView=False&liveReportItemId=0&isPreview=False&ver=1&order=desc)

The ECtHR is a tool of pressure on Hungary when it wants to get Hungary give up border defence and let in the immigrants

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János Halász, leader of the Fidesz fraction in Parliament:

<https://444.hu/2017/03/31/a-fidesz-felszolitotta-a-kormanyt-hogy-ne-fizessek-ki-a-helsinki-bizottsagnak-amit-az-europai-birosag-megitelt-a-szamukra>

The government should not pay the fee of the lawyers adjudicated by the ECtHR

# Dancing again – The Grand Chamber judgment

Ilias and Ahmed v Hungary, Grand Chamber Judgment, of 21 November 2019  
n.o. 47287/15

The Government requested referral to the G.C.

## Judgment:

No unlawful detention – as **it was not detention** (No review of lawfulness and arbitrariness)

§ 237 „It is probable that the applicants **had no legal right to enter Serbia.**” ... 241 „In the present case, ... **it was practically possible** for the applicants to walk to the border and cross into Serbia...”

*If a prisoner is brought to work on a construction outside the prison and she can escape – she is not detained – BN*

The Court subscribes to the Government’s view that holding in the transit zone is „**pre-entry waiting period**”



Photo by Aradij Golovan from Pexels

# Dancing again – The Grand Chamber judgment

## Article 3:

The Grand Chamber agrees with the chamber – **violation in respect of the removal** but not in respect to conditions in the transit zone.

158 „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”

163 „[T]he 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** ... to assess the risks of treatment contrary to that provision before removing the applicants from Hungary.”

# Reception of the judgment

## Government

Minister of Justice Ms Judit Varga  
„with this decision of great importance **the political and legal attacks against the Hungarian immigration policy and border protection failed**”

Magyar Nemzet online 21 November 2019

## Academia

Vladislava Stoyanova: The judgment is **inconsistent and creates uncertainty**

<https://strasbourgoobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/>

No own culpable conduct, unlike in N.D and N.T v Spain

Ágnes Töttös: [S]eeing this judgment ... **through the lens of pragmatism**, it might **not point to erosion**, but rather a **more living approach** to legal notions **instead of** handling them as **artificial principles**. It finally **reacts** to the **critical views** according to which **Courts fail to take into account the will of policy makers...**”

Ms Töttös is university lecturer and counsellor of the Government

# Contextualisation

ECtHR

**Ilias and Ahmed** Grand Chamber  
**N.D and N.T** v Spain

Essentially legitimising detention /  
pushback  
= bowing to political expectations

Basis

←  
Extraordinary  
circumstances

→  
- own culpable  
conduct

ECtHR

**M.K and o.** v Poland (2020)  
**Z.A and o.** v Russia (2019)

Pushback (§ 4 of Prot 4 breach)  
and breach of § 3 condemned

Holding in airport transit:  
detention

Court of Justice of the EU

**FMS, and others** v Hungary(2020)  
2020 (C-924/19 PPU and  
C-925/19 PPU) **Grand Chamber**

Violations: detention in transit zone,  
new inadmissibility ground (safe  
transit country), breach of border  
procedure rules

European Commission

**3 infringement procedures**

C-808/18: detention, border procedure,  
effective remedy

C-821/19: new ground of inadmissibility,  
criminalising assistance to refugees

Pre-Court phase

25 July 2019: Commission sent letter of formal  
notice: starving and detention conditions

## Whose music – what dance?

„ According to the Government of Hungary, there was **no right to be granted asylum.**” **Z.A and O v Russia** (Hungary intervening) § 124

Will the ECtHR increasingly take into account

- „**the will of the policy makers**” (Töttös)?
- **Reinterpret the rules** in light of the **pressing circumstances**?
- **Increase the gap** with the CJEU in interpreting **detention** and insist on refraining from the necessity or proportionality arguments used by the CJEU

**or**

will it follow its own dictum in **Z.A and o v Russia**:

The 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 [**51 Geneva**, ECHR - BN]

**Z.A and O v Russia**, § 184



**Thanks for the attention!**

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