

# The ECtHR's Ilias and Ahmed and the CJEU's FMS-case: a difficult reconciliation?

## A look at the divergent jurisprudence on the concept of detention in European Asylum Law

Recently, two important judgments concerning detention in European Asylum law were issued: the Ilias and Ahmed case of the ECtHR and the FMS-case of the CJEU. Both Courts had to decide on the question whether the situation of asylum seekers in the Hungarian Röske transit zone amounted to detention. Notwithstanding the similar facts of the cases, no violation of Article 5 ECHR was found by the ECtHR, whereas the CJEU clearly condemned Hungary for its violation of EU Asylum Law. This raises questions concerning the reconcilability and long-term effects of the two judgments.

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## I. Introduction

- 1 Recently, the concept of detention in European asylum law has been the centre of a jurisprudential debate between the European Court of Human Rights (ECtHR) and the European Court of Justice (CJEU). On the one hand, the ECtHR decided in the 2019 judgment *Ilias and Ahmed v. Hungary*<sup>1</sup> that the forced stay of applicants in the Röszke transit zone could not be seen as a deprivation of liberty, which rendered Article 5 ECHR inapplicable. This outcome was based on the fact that the theoretical possibility existed for applicants to leave towards Serbia.<sup>2</sup> On the other hand, the CJEU decided half a year later in the joined cases *C-924/19 PPU* and *C-925/19 PPU* (hereafter the *FMS*-case)<sup>3</sup> that the situation of applicants being detained in the same Röszke transit zone did *de facto* constitute a detention in the meaning of EU law, as the applicants could not leave the transit zone without risking their asylum proceedings to be annulled. Consequently, factually similar situations were assessed differently by the two courts, which has led to contrasting consequences for national authorities.
- 2 In the light of this diverging jurisprudence our contribution will discuss the ECtHR and the CJEU case law concerning detention in European asylum law. The main research question guiding this article is as follows: “*How is detention perceived in the current state of European asylum law, given the recent judgments Ilias and Ahmed v. Hungary and FMS of the ECtHR and the CJEU respectively, and what are the consequences of this diverging interpretation?*”
- 3 This contribution will have a three-fold structure. First, it shall tackle the two judgments in detail and discuss the factual and legal issues at stake. Second, we will answer the following question: are the judgments really diverging, or are the factual circumstances just not suitable for a comparison, as the CJEU argued? We will argue the former. Finally, our contribution will discuss the consequences that arise from this different approach to asylum detention. Which view should be followed by the national authorities of Member States? This is especially important now that asylum procedures have been labelled disproportionate and routine in recent years,<sup>4</sup> with an increasing use of detention by Member States.<sup>5</sup>

1 Decision of the ECtHR [GC] no. 47287/15, 21 November 2019 (*Ilias and Ahmed v. Hungary*).

2 ECtHR, *Ilias and Ahmed*, § 236.

3 Decision of the CJEU *C-924/19* and *C-925/19*, 14 May 2020 (*FMS and others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*).

4 See generally Council of the European Parliament Assembly, Report of the Commission on Migration, Refugees and Population on the Detention of Asylum Seekers and Irregular Migrants in Europe, Doc. No. 12105, 2010.

5 International Commission of Jurists, *Migration and International Human Rights Law: Practitioners Guide* no. 6, 2014, p. 175.

## II. The Ilias and Ahmed case of the ECtHR

In 2017, the Fourth Section of the European Court of Human Rights (hereafter: ECtHR) rendered its judgment in the case of *Ilias and Ahmed v. Hungary*.<sup>6</sup> Not long after, the government of Hungary requested a referral of the case to the Grand Chamber, which delivered its judgment on November 21, 2019.<sup>7</sup>

The case concerned two Bangladeshi nationals who travelled through Greece, the Republic of Northern Macedonia and Serbia before reaching Hungary through the Röszke transit zone. The applicants had already been held for twenty-three days in the transit zone while Hungary treated their asylum applications. These were eventually rejected on the grounds that Serbia, which the applicants crossed through prior to their application, was considered a safe third country by Hungary.<sup>8</sup> The applicants consequently filed a complaint before the ECtHR on the basis of a violation of Article 3, Article 5(1) and (4) and Article 13 ECHR upon their expulsion into Serbia.

The crux of this case is the question whether the stay in the transit zone can be qualified as a deprivation of liberty, therefore falling within the ambit of Article 5(1) ECHR, or rather as a deprivation of liberty in the sense of Article 2 Protocol no. 4. This exercise in qualification is not obvious since 1) the Röszke transit zone is a guarded compound which could not be accessed from the outside and 2) its occupants are denied entrance into Hungary until asylum is granted. Furthermore, the transit zone is divided into two sectors, one for asylum seekers and one for third country nationals whose asylum requests were denied. The former category of persons could only leave towards Serbia, the latter category could not leave at all, and were put there by the Hungarian authorities after the request rejection. In *Ilias and Ahmed* the applicants based their claim on the first situation: pending the review of their applications, they could not leave for 23 days without risking the rejection of their asylum requests.

It was the first case concerning a transit zone located on the land border between two member States of the Council of Europe, where asylum-seekers had to stay pending examination of the admissibility of their asylum requests.<sup>9</sup> The Grand Chamber answered the qualification question differently than the Fourth Section, and decided the “stay” (Hungary used the term “accommodation”) in the Röszke

6 ECtHR Fourth Section no. 47287/15, 14 March 2017 (*Ilias and Ahmed v. Hungary*).

7 ECtHR, *Ilias and Ahmed*.

8 This decision was based on a 2015 Government Decree listing Serbia as a “safe third country”.

9 ECtHR, *Ilias and Ahmed*, § 219.

transit zone did not amount to a *de facto* deprivation of liberty (“detention”).

- 8 In its judgment the ECtHR introduced the consideration that in drawing the distinction between a restriction on liberty of movement and deprivation of liberty in the context of the situation of asylum seekers, its approach should be “*practical and realistic, having regard to the present-day conditions and challenges*”.<sup>10</sup> It then continued to apply the factors determining whether a confinement of foreigners in airport transit zones and reception centres amounts to a deprivation of liberty in the sense of Article 5 ECHR, to the situation of the applicants in the Röske transit zone.<sup>11</sup> These can be summarized as follows: i) the applicants’ individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on, or experienced by, the applicants.<sup>12</sup>
- 9 As to the first determining factor, the ECtHR considered the entrance of the applicants in the Röske transit zone of their own initiative and of their own free will a pertinent contemplation. As for the second relevant factor, its purpose and the relevant duration in the light of that purpose, the ECtHR noted that the purpose of the Hungarian legislation was to put in place a waiting area while authorities decided whether to formally admit the asylum-seekers to Hungary.<sup>13</sup> It also confirms the importance of the power of states to control entry into its territories.<sup>14</sup> Furthermore, the court claims there was no dissonance between the duration of the detention and the time needed to process asylum claims, especially in the context of a mass influx of asylum-seekers, by which it seems to depart from the 2017 judgment.<sup>15</sup> When considering the third factor, the nature and degree of the actual restrictions, the ECtHR said that neither the nature nor the duration of the detention was unnecessary.<sup>16</sup>
- 10 Regarding the question whether the applicants could leave the transit zone voluntarily towards Serbia, the

ECtHR found that other asylum-seekers in the same situation as the applicants were able to. Furthermore, in contrast to detainees in an airport transit zone, the applicants did not have many material obstacles such as boarding an airplane. Therefore the *de facto* possibility to leave existed.<sup>17</sup> It continued by admitting that even though in *Armuur v. France* it had said that the possibility to leave becomes theoretical if “*no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in*”<sup>18</sup> this must be read in close relation to the “*factual and legal context of that case*”.<sup>19</sup> In the present case, the applicants feared not a direct threat to their life or health, but deficiencies in the functioning of Serbia’s asylum system, and could thus theoretically cross over the border to Serbia. The fear of discontinuation of their asylum applications was “*not a direct threat to the applicants’ life or health*”,<sup>20</sup> and therefore not sufficient to pose an obstacle to voluntarily leave. The ECtHR therefore concluded that the applicants were not deprived of their liberty within the meaning of Article 5.

The reasoning of the court in the *Ilias and Ahmed*-case 11 raises some questions. Firstly, it seems that there is an incoherence in the judgment when analyzed in its entirety. On the one hand the court ruled that since the applicants would not be exposed to a direct risk to their life or physical health, they were free to leave the transit zone. On the other hand, it found that Hungary had violated Article 3 ECHR because it did not conduct a proper assessment of the risks the applicants would face upon their return to Serbia. The court explained that “*the Convention cannot be read as linking in such a manner the applicability of Article 5 to a separate issue concerning the authorities’ compliance with Article 3.*”<sup>21</sup> However this reasoning is not very convincing as human rights by their very nature are inextricably linked.<sup>22</sup>

Secondly, this lack of linking will likely have negative repercussions for future cases brought before the ECtHR by asylum-seekers, for whom the protection under the ECHR has already shown gaps. As it is well known, no necessity or proportionality test is necessary when it comes to

10 ECtHR, *Ilias and Ahmed*, §213.

11 ECtHR, *Ilias and Ahmed*, §219 and further.

12 Decision of the ECtHR no. 19776/92, 25 June 1996 (*Amuur v. France*), § 43; Decision of the ECtHR nos. 45355/99 and 45357/99, 27 November 2003 (*Shamsa v. Poland*), § 47; Decision of the ECtHR no. 20420/02, 6 May 2004 (*Mogoş v. Romania*); Decision of the ECtHR nos. 29787/03 and 29810/03, 24 January 2008 (*Riad and Idiab v Belgium*), § 68; Decision of the ECtHR no. 2512/04, 12 February 2009 (*Nolan and K. v. Russia*), §§ 93; Decision of the ECtHR no. 26291/06, 15 October 2013 (*Gahramanov v. Azerbaijan*), §§ 35.

13 ECtHR, *Ilias and Ahmed*, § 224.

14 ECtHR, *Ilias and Ahmed*, § 225.

15 ECtHR, *Ilias and Ahmed*, § 227.

16 ECtHR, *Ilias and Ahmed*, § 233.

17 The applicants could “realistically leave”. ECtHR, *Ilias and Ahmed*, § 236 and § 237.

18 ECtHR, *Amuur v. France*, § 48. In this case the applicants supposedly could not leave the airport zone, neither in theory nor in practice, without authorization to board an airplane and without diplomatic assurances concerning their only possible destination, Syria, a country “*not bound by the Geneva Convention Relating to the Status of Refugees*”.

19 ECtHR, *Ilias and Ahmed*, § 240.

20 ECtHR, *Ilias and Ahmed*, § 248.

21 ECtHR, *Ilias and Ahmed*, § 246.

22 The ECtHR has also recognized this linkage in the 2017 judgment § 56.

asylum detention (Article 5 [1][f] ECHR).<sup>23</sup> Moreover, the ECtHR has shown itself to be more lenient towards national authorities in the case of massive arrivals at State borders,<sup>24</sup> which, while being a practical consideration, raises questions with regard to the application of human rights, namely if their scope and protection diminish when states encounter practical difficulties. The “*practical and realistic approach*” taken by the Court in this case in consideration of the “*present-day conditions and challenges*”<sup>25</sup> raises the same questions. Consequently, it can be concluded that this judgment has led to an overall weakening of the protection of asylum seekers under Article 5 ECHR.<sup>26</sup>

### III. The FMS case of the CJEU

13 The Grand Chamber of the CJEU issued an important judgment on asylum detention in May 2020: *FMS, FNZ and others versus the immigration authorities of Hungary*.<sup>27</sup> Almost all EU law instruments relating to asylum were at stake in the FMS case. Firstly, the judgment interpreted the Reception Directive<sup>28</sup> that lays down standards for the reception of applicants for international protection. Article 8 sets out the main principles of detention in EU asylum law. It i) reiterates the prohibition to detain an asylum seeker on the sole ground that he or she has filed an application for international protection, ii) emphasises the necessity requirement of detention, and iii) provides an exhaustive enumeration of motives for detention. Secondly, Article 26 of the Procedure

Directive<sup>29</sup> merely refers to the detention provisions of the Reception Directive and was thus also taken into account. Thirdly, Articles 15 and 16 of the Return Directive<sup>30</sup>, consisting out of very similar principles, were at stake. Finally, the Court ruled on numerous provisions of the Charter of Fundamental Rights (hereinafter: Charter),<sup>31</sup> of which Article 6 on the right to liberty (corresponding to Article 5 ECHR) was the most important.

All the applicants involved had left their home states, 14 entered the Union a first time via Bulgaria, left it via Serbia to then re-enter the Union’s territory in the Rözske transit zone in Hungary.<sup>32</sup> After some time, they received an order from the Hungarian authorities to stay in the Rözske transit zone. They were placed in the sector for third country nationals whose asylum request was rejected,<sup>33</sup> a sector that could not be entered nor left voluntarily. The applicants brought proceedings against this decision, which the national judge suspended to request a preliminary ruling by the CJEU. The Court finally rendered eight interpretations on the EU asylum instruments with conclusions four to seven concerning detention matters.

The CJEU starts its judgment by defining the concept of 15 detention, based on Article 2(h) Reception Directive, which it then interprets as a coercive measure whereby one is deprived of one’s liberty, isolated from the rest of the population and required to reside in a restricted and limited place.<sup>34</sup> This abstract definition of detention is applied to the concrete situation of the applicants.<sup>35</sup> The Rözske transit zone consisted of a limited space, fenced by high enclosures with barbed wire, where armed police forces patrol permanently. Given that applicants would lose their right to apply for international protection by leaving the Union’s territory, the Court held that there never was a real possibility to leave the transit zone to Serbia.<sup>36</sup> Considering all factors, the Court judged that the situation at hand did constitute detention.<sup>37</sup>

23 Article 5 (1) (f) ECHR “does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing[...].” The only conditions for a lawful detention in the context of asylum procedures is therefore that the detention i) has as purpose the prevention of unauthorized detention or deportation or extradition and ii) meets the four criteria against arbitrariness set out in *Saadi v. United Kingdom*.

24 In the case of massive arrivals of asylum-seekers at State borders the lawfulness requirement of Article 5 may be considered generally satisfied by a domestic legal regime that provides, for example, for no more than the name of the authority competent to order deprivation of liberty in a transit zone, the form of the order, its possible grounds and limits, the maximum duration of the confinement and, as required by Article 5 § 4, the applicable avenue of judicial appeal (Decision of the ECtHR [GC] nos. 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019 [*Z.A. and Others v. Russia*], § 162). It also mentions this in the *Ilias and Ahmed* judgment, and endorses the representation of the situation as a “crisis”, see § 228.

25 ECtHR, *Ilias and Ahmed*, § 213.

26 VLADISLAVA STAYONOVA, *The Grand Chamber Judgment in Ilias and Ahmed v. Hungary: Immigration Detention and how the Ground beneath our Feet Continues to Erode*, *The Strasbourg Observers* from 23 December 2019.

27 CJEU, *FMS and others*.

28 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), *Pb.L.* 29 June 2013 (hereafter: Reception Directive).

29 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *Pb.L.* 29 June 2013 (hereafter: Procedure Directive).

30 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, *Pb.L.* 24 December 2008 (hereafter: Return Directive).

31 Charter of Fundamental Rights of the European Union from the 26. October 2012, C 326/391.

32 CJEU, *FMS and others*, §§ 48 and §§ 80.

33 CJEU, *FMS and others*, §§ 53 and § 86.

34 CJEU, *FMS and others*, § 223.

35 CJEU, *FMS and others*, §§ 68 and § 226.

36 CJEU, *FMS and others*, §§ 228.

37 CJEU, *FMS and others*, § 231.

## IV. Comparison of the two cases

- 16 Although the CJEU specifically refers to the Ilias and Ahmed-case in its FMS-ruling by stating that the facts in these two cases did not coincide, it seems that the factual situations of the applicants were similar. The referring court in the FMS-case decided on a different interpretation of detention in the two cases based on factual grounds. Their main argument is the difference in sectors in which the applicants were placed. Ilias and Ahmed entered the Rösztke transit zone in the sector for asylum seekers. The ECtHR consequently argued that they could leave the transit zone towards Serbia and did therefore not fall into the detention regime. The applicants in the FMS-case, however, were placed in the sector of third country nationals whose asylum request was denied.<sup>38</sup> They did not enter this sector voluntarily but were placed there by Hungarian authorities, and they could not lawfully leave this zone except by departure by air to their country of origin.<sup>39</sup> Therefore, the situation of these applicants could be classified as detention.
- 17 It seems the difference in interpretation of the facts is based on the definition of “voluntary” departure. While in the FMS-case the applicants could not leave their sector of the Rösztke transit zone, the ECtHR argues that Ilias and Ahmed could leave towards Serbia and that they entered the transit zone voluntarily. Notwithstanding the fact that this may be true from a strict legal point of view, it is de facto clear that they could not leave for fear of discontinuation of their asylum proceedings. Therefore, a distinction between a restriction in movement in the two sectors of the Rösztke transit zone is based on a strictly legal rather than a “practical and realistic” approach.<sup>40</sup>
- 18 How then does the FMS-case fit in the judicial dynamics between the CJEU and the ECtHR? Generally, it can be said that the CJEU upheld a capricious tradition relating to the case law of the ECtHR. In 2011, the CJEU awaited the outcome of the M.S.S. case of the ECtHR,<sup>41</sup> carefully considered the judgment and even explicitly referred to this judgment several times.<sup>42</sup> Although this is a nice example of judicial dialogue, the CJEU is not always eager to adjust its case law. In the *Nabil* case, the ECtHR showed itself strict and condemned Hungary for a violation of Article 5 ECHR. A few months later, the CJEU, in the *J.N.* case,<sup>43</sup> was asked to rule on Article 6 of the Charter in a

38 CJEU, *FMS and others*, § 72.

39 CJEU, *FMS and others*, § 74.

40 ECtHR, *Ilias and Ahmed*, § 213.

41 Decision of the ECtHR [GC] no. 30696/09, 21 January 2011 (*M.S.S. v. Belgium and Greece*).

42 ECtHR, *M.S.S. v. Belgium and Greece*, §§ 88.

43 Decision of the CJEU C-601/15, 15 February 2016 (*J.N. v. Staatssecretaris van Veiligheid en Justitie*).

similar case. Notwithstanding the fact that Article 6 of the Charter should confer the same protection as Article 5 ECHR (Article 52 Charter), the Court found that the facts of the case differed and did not see a violation of the Charter by the Reception Directive.<sup>44</sup> The fact that the two Courts delivered a divergent jurisprudence in the present case is thus not so surprising; what is, however, is the observation that for the first time the CJEU showed itself more protective than the ECtHR in asylum matters. This observation is fortified by the recent CJEU judgment on an infringement procedure from the Commission against Hungary against the former’s migration law and practices.<sup>45</sup> The Court strongly confirmed the principles it set forward in the *FMS* case, gave them a general scope, and clearly condemned Hungary.

## V. Conclusion

In conclusion, these two interpretations of detention in the Rösztke transit zone raise some fundamental questions concerning European asylum law. It is expected from a human rights court, like the ECtHR, that it does just that: protect human rights. Therefore, it appears strange that the CJEU, thought up as the arbiter in an economic supranational order, wields a more stringent interpretation of detention, and consequently upholds, objectively speaking, a stronger protection for asylum seekers. While this poses an interesting conundrum, it cannot be answered without geopolitical considerations which is outside the scope of this short legal contribution.

Secondly, there appears to be not only a decrease in convergence of the jurisprudence of these two European courts, but also a decrease in convergence between the jurisprudence of the CJEU and the European Commission’s vision on the future of European Asylum. On September 23<sup>rd</sup> 2020, not even four months after the *FMS*-judgment, the Commission proposed its New Pact on Migration and Asylum.<sup>46</sup> This new round of proposals sets out improved and faster procedures throughout the asylum and migration system and a better balance in the

44 CJEU, *J.N.*, §§ 78.

45 Decision of the CJEU C-808/18, 17 December 2020 (*Commission v. Hungary*).

46 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609, 23 September 2020. It must be noted that this Pact merely concerns proposals to amend older secondary EU legislation, namely the Asylum Procedures Regulation, the Eurodac Regulation, and the Dublin Regulation, and also envisions the adoption of new regulations such as a new Asylum and Migration Management Regulation; a new Screening Regulation; and a new Crisis and Force Majeure Regulation. The new Pact also contains some “soft law” and attempts to relaunch talks on stranded plans (in particular concerning the EU-Turkey deal).

principles of fair sharing of responsibility and solidarity, which is crucial for rebuilding trust between the Member States. In the newly proposed Screening Regulation however, the cases in which the screening requires detention the legal basis and the modalities thereof are left to national law. In legal doctrine it has been often observed that the secondary EU law instruments on asylum confer too much discretionary power upon the Member States, for example by foreseeing lists of justification grounds for detention that are (too) extensive.<sup>47</sup> This diminishes the protection of asylum seekers in the European Union. Furthermore, this screening will take place at the first point of entry, which for most asylum cases means countries like Hungary and Greece. These Member States already have a reputation of unlawfully detaining asylum seekers and have shown disrespect for the criteria of necessity, proportionality, and duration of the measures taken. Therefore, the Commission's first concern does not seem to be the protection of the fundamental rights of asylum seekers, especially concerning detention. This in stark contrast to the CJEU which, as it demonstrated in the *FMS*-judgment and in *Commission v. Hungary*, puts forward a restrictive approach towards detention.

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47 CATHRYN CASTELLO, Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law, *Indiana Journal of Global Legal Studies* 2012, p. 257 ss.

It therefore attempts to uphold a strong protection of asylum seekers, leading to a decrease in convergence of the Commission's policy and the Court's jurisprudence concerning migration and asylum.

Lastly the question arises of whether this difference in jurisprudence leads to a decrease in human rights protection. It appears that the situation is not all bad. The question of which interpretation should be followed is easily answered: the states adhering only to the ECHR are now granted a more lenient interpretation of detention in transit zones. This leads to a decrease of protection of Human Rights in a country like Turkey, where the asylum and migration situation is already described as dire.<sup>48</sup> However, the Member States of the European Union are subject to the jurisdiction of the CJEU and need to follow its jurisprudence. Therefore, and because of the divergence in jurisprudence, the protection of human rights regarding detention in asylum matters has not weakened in the European Union. We now look at the future and will observe with interest how this jurisprudence evolves in light of the developments concerning the New Pact on Migration and Asylum.

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48 PÄIVI LEINO / DANIEL WYATT, No public interest in whether the EU-Turkey refugee deal respects EU Treaties and international human rights, *European Law Blog*, 28 February 2018.