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Meeting: 1514th meeting (December 2024) (DH)

Item reference: Action Plan (11/10/2024)

Communication from Hungary concerning the case of Alhowais v. Hungary (Application No. 59435/17)

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Réunion : 1514^e réunion (décembre 2024) (DH)

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Communication de la Hongrie concernant l'affaire Alhowais c. Hongrie (requête n° 59435/17) (**anglais uniquement**)

Action Plan of 11 October 2024

in the case of Alhowais v. Hungary (Appl. No. 59435/17, judgement of 02/02/2023, final on 02/05/2023)

Introductory case summary

1. This case concerns the ineffective criminal investigation into the death and alleged ill-treatment of the applicant's brother, a migrant who drowned during a border control operation at the Hungarian-Serbian border in 2016 (procedural violation of Articles 2 and 3).
2. The Court found that “the criminal investigation into police ill-treatment was concerned with the physical element of the alleged conduct, and was restricted to verifying the allegations of the use of force... It disregarded altogether the other elements of the police operation and did not provide any assessment of responsibility for failing to protect the right to life” (§ 82). Additionally, the authorities did not seem to have “deployed reasonable efforts to gather the evidence and establish the facts” and “these deficiencies limited the potential of the investigation (...), undermining [its] reliability and effectiveness” (§ 92).
3. The case further concerns the border control authorities' failure to act rapidly and decisively, and thus take the operational measures within the scope of their powers which were reasonably expected to protect the life of the applicant's brother (substantive violation of Article 2).
4. The Court noted that: despite it being a routine border control operation, the officers did not seem to have followed any operational plan (§§ 135-136); there was no evidence that they took any measures or received any instructions upon detecting the migrants' boat (§ 136); “there was no clear order of priorities or course of action set for dealing with migrants in a vulnerable situation that could have guided the officers” (§ 141); there was “no indication of any effort to look for F. [the applicant's brother] after the rescue boat left the spot where he had apparently disappeared” (§ 142); and the “rescue capacities present (...) did not correspond to the requirements of the emergency” (§ 143).

I. Individual measures

a) Just satisfaction

5. The just satisfaction awarded in respect of non-pecuniary damage EUR 34,000 was paid to the applicant on 19 July 2023 (HUF 12,785,020; exchange rate: 387,85). The costs and expenses EUR 7,112 were paid to the applicant's legal representative on 25 July 2023 (HUF 2,674,325; exchange rate: 376,03).

b) Further individual measures

6. The Office of the Prosecutor General reviewed the case in March 2020, but the legal conditions for the continuation of the proceedings were not met. The following findings were made during the review:
7. According to the facts established in the investigation conducted by the Szeged Regional Division of the Central Chief Prosecution Office of Investigation, in the early hours of 1 June 2016, at the border between Serbia and Hungary, the Rösztke-region of the river Holt-Tisza – with the help of unknown trafficker(s) – a total of nine persons attempted to enter Hungary illegally on rubber boats. The members of the group were Syrian citizens, the applicant, F.A., K.A., M.M. and Iraqi citizens K.K., his wife A.S. and their three minor children K.A., K.B. and K.A.. The illegal migrants started from the Serbian side of the border by boat towards Hungary. When they reached a dense reedbed on the Hungarian side, which is about 10 metres wide and 3-3.5 metres high, they got out of the boat in order to cross the reedbed to reach Hungary. At the other end of the reed was a dirt road with a wire barrier (GYODA) installed along the entire length. Platoon leader D.B., guarding the area from the observation tower at the border marker F16 noticed that some people from Serbia had started to cross the water towards Hungary, so he informed the police at the border marker F37. The illegal border crossers noticed the police presence on the Hungarian side of the border and heard the warnings to return to their home country, so they hid in the reeds. Having failed to reach the shore, they first tried to return to the boat carrying them, but the unknown trafficker had by then returned to Serbia, so they tried again to get to Hungary, without success. Finally, M.M. continued to hide in the reeds, the applicant, F.A. and K.A. swam back towards Serbia. Of the three F.A. did not reach the shore, while the applicant and K.A. landed in Serbia and returned on foot to the Transit Zone in Rösztke.
8. K.K. and his family were arrested at 06:35 on June 1, 2016, in the area of border marker F16. M.M. stayed in the reeds for hours, then climbed out to the shore, but on June 1, 2016, at 9:10 a.m., he was taken into custody on the outskirts of Rösztke.
9. Regarding the death of F.A., it could be established that his body was found on June 3, 2016, in the area of border marker F16, in the Holt-Tisza, and his death may have been caused by drowning. Medical experts could not prove assault of the victim, as there were no injuries or signs of external trauma on his body, and the samples provided during the autopsy were not suitable for proving the use of gas spray.
10. The occurrence of the alleged abuse of the applicant could not be clarified beyond doubt during the conducted full-scale investigation, also considering that the illegal border crossers gave different statements in this regard. It should be noted that according to the testimonies of the applicant and M.M. as well as the record of the hearing of K.K. - contrary to the testimonies of the officials interviewed -, the police and soldiers who arrived at the F16 border marker upon the alert of the watchtower duty officer, platoon leader D.B., threw clods of earth from the bank towards the reed bed in order to make the illegal border crossers hiding there come out.
11. Upon evaluation of the evidence gathered during the investigation, the testimonies of witnesses can be divided into two main groups: the testimonies of the illegal border crossers interviewed

as victims/witnesses and the testimonies of the police officers and soldiers who were on duty at the scene of the border violation.

12. The testimonies of the witnesses the applicant and M.M., although essentially identical, were ambiguous on several points and contradictory. Neither witness could say who threw objects towards them while they were hiding in the reeds, because they could not see it. The applicant testified that he heard stones being thrown into the water at least 10 times, whereas M.M. testified that he heard about 4-5 objects being thrown.
13. In his testimony, the applicant pointed out that they used their bags to protect their heads from the falling stones and claimed that one of the stones hit his brother F.A. in the left shoulder blade. This claim of the witness was not supported by the autopsy report, as already explained in the findings of fact.
14. Contrary to the testimony of the applicant, witness M.M. was not sure whether stones had fallen next to them, he assumed this from the sound of the impact, but also considered it possible that there were larger clods of earth. However, he was certain that none of them had been hit by the objects thrown.
15. In this regard, K.K., who was interviewed in the administrative immigration proceedings, said that no one had thrown stones at them and their families, but mentioned that "a man in a dark blue uniform threw two stones into the water blindly". However, contrary to the above statements, the report of the site visit showed that there were no stones or gravel in the area, but that the wet ground had a 'cloddy consistency' and could have been made up of pieces of earth.
16. Regarding the use of tear gas, the applicant said that the Iraqi father, who was walking towards the police with one of his children, was tear-gassed in the face by the police from a distance of about one and a half metres. According to the witness, he and his brother F.A. were also sprayed in the face three times by the police as they tried to get ashore.
17. In this context, K.K., refuting the applicant's allegations, stated during his interview that a policeman had sprayed tear gas at his legs from a distance of about 2 metres. M.M., in his testimony about the use of tear gas, said that he did not directly see F.A. being tear-gassed by the police, but only heard him say so. He could not comment on whether F.A. was tearful, as he claimed not to have observed it.
18. K.K., one of the victims, did not mention the use of dogs, while the applicant said in his testimony that while he and his companions tried to go ashore three times, they were attacked by unleashed dogs and that is why they turned back towards the water. M.M., on the other hand, said in his testimony that he had not heard any dogs barking, had not seen any dogs, and was not aware of any dogs being used against by the police. While the witness was hiding in the reeds, he did hear a dog barking, but he could not say whether it was a police dog or a dog from the neighbourhood.
19. Contrary to the previously detailed testimonies of the victims and the partially contradictory statements made during the hearings, the Hungarian police officers and soldiers interviewed as

witnesses unanimously denied that any coercive means - such as tear gas, patrol dogs or other means - were used against the illegal border crossers during the operation, nor did they observe any throwing of stones or other objects.

20. The witnesses Cs.K., police chief petty officer and L.A., civilian lifeguard, gave the details of the water rescue operation on 1 June 2016. They explained that they went by motorboat to the section between the F17 and F15 border markers on the orders of the sector commander, where they patrolled up and down for about half an hour, looking at the water and searching for a person in need of help. The sector commander sent them to this border section because they saw a jacket and a rucksack floating in the water in the middle of the river at the F17 border marker. As they could not find anyone, they later rescued the Iraqi family of five from the water, also on the sector commander's orders. Both witnesses unanimously stated that they were not aware of any acts of violence committed by Hungarian police officers or soldiers against the migrants, that they had not heard or seen any stone-throwing, and that to their knowledge no tear gas had been used against the migrants. No such act was reported to them by the persons they rescued, nor was there any reference to it in their communications, nor did they see any injury to the persons they rescued, who they said were on the verge of freezing to death.
21. In his testimony, civilian lifeguard L.A. said that after a lengthy search they found no one in need of help in the water.
22. No objective evidence, such as CCTV footage or even individual camera footage, which could help clarify what had happened, was found during the investigation.
23. At the request of the victim's representative in the case, a forensic medical expert was appointed to carry out a toxicological examination to determine whether the deceased F.A.'s body showed signs of chemical residue from a chemical device used by the Hungarian police. According to the opinion, the samples provided at the time of the autopsy were not suitable to prove the use of a gas spray, and due to the washing off and dilution caused by soaking in water for several days no results can be expected from such a sample.
24. In addition to the above, the prosecution office of investigation obtained the documents generated during the administrative procedure conducted by the Szeged Police Department in connection with the death of F.A., including the expert opinion of the National Institute of Toxicology, according to which the capsaicin used as the active substance in the gas spray could not be detected in the eye drop sample submitted.
25. The investigation complied with the requirements of a prompt and efficient investigation, given that the investigation ordered and conducted on the basis of the complaint received on 6 June 2016 was concluded with the opening of the file on 6 October 2016.
26. The investigation file contains a site plan and a site inspection report, according to which 'the area in question lies along the Holt-Tisza (...), the soil is homogeneous when dry, when wet it is of a rough consistency, with so-called clods of earth. There are no stones or gravels in the area (...) Between the Holt-Tisza and the dirt road there is a dense reed bed about 10 metres wide, 3 to 3,5 metres high. The reed on the dirt road side of reed there is a GYODA fence all

along the border. From the dirt road, the water surface of the Holt-Tisza is not visible due to the above-mentioned reed'. In addition, a photographic supplement taken on the spot is also part of the investigation file, and the report of the Szeged Police Department's Rapid Response Service, No. 06010/10523/2016. ált. on the spot and the autopsy of the corpse, also contains a description of the location, i.e. 'to the left of the road there is a farmland, on which grain is growing about 60 cm high. To the left of the roadway is the Holt-Tisza, with an area of reeds 2 m high and 2-4 m wide on the bank.'

27. From the above documents it can be concluded that the so-called GYODA runs directly along the dirt road side of the reedbed, so there is no distance between them. The depth of the water is not known, nor is the slope of the bank, but the available photographs show that the water level is essentially only a few centimetres below the level of the road, so there is no steep bank. The scene of the action is the Holt-Tisza, which is not in natural contact with the living Tisza river, and consequently there is no appreciable drift of the water.
28. On the basis of the evidence obtained during the investigation, there is no explanation beyond reasonable doubt as to why the victims and the patrol officers had a different recollection of the circumstances of the action, specifically the possible throwing of clods or stones into the water. On the basis of the sketch about the crime scene and the evidence obtained the victim's allegation that there may have been "throwing of clods of earth" in order to make the illegal border crossers hiding in the reeds "jump out" cannot be substantially refuted but it could not be proved beyond reasonable doubt, nor could it be proved that there was any use of a gas spray or any act of violence to harm the illegal border crossers by Hungarian police officers, soldiers or anyone else.
29. There is no clear statement in any of the testimonies that the "throwing" was targeted, so that any injury could only have been caused by negligence. On the basis of the above, no intent to cause bodily harm can be established in criminal law. Even in the event of a finding beyond reasonable doubt that the offenders had "thrown clods", only the disciplinary responsibility of the perpetrators could have been examined. It would not have been possible to establish the elements of a criminal offence as defined and punishable under the Special Part (individual crimes) of the Criminal Code.
30. Criminal liability for the death of F.A. would not have been established anyway, as it cannot even be concluded that a possible blow to the shoulder blade would have constituted a degree of force that would have been causally linked to F.A.'s drowning. In this context, it should be pointed out that, according to the testimonies of the applicant and Mahmoud Mohammad, the late F.A. reported to his companions being thrown into the shoulder blades and sprayed tear gas in the eyes before they had returned to Serbia. In addition, according to the testimony of witness D.B., who was on duty at the watchtower, one of the three 'staggered and sometimes dived and tried to swim', while his companions swam quite well. He reported all this to the sector commander, who took action and sent a motorboat to the designated spot. When the boat arrived, the two persons had already reached the Serbian side, but the third person was not found.
31. In addition to the above, the fact that K.A. was not questioned was not due to his age. According

to the investigative file, the representative of the applicant requested the hearing of K.A. in his submission dated 10 June 2016. On the basis of the petition received on 13 June 2016, the Szeged Regional Division of the Central Chief Prosecution Office of Investigation contacted the Director of the Immigration Reception Centre (BÁH) in Bicske on 17 June 2016 to establish the whereabouts of K.A. The Director of the Bicske BÁH informed him by telephone and in a transcript dated 21 June 2016 that K.A., was not registered with the BÁH and that if he was treated as an unaccompanied minor in Rösztke, he could be staying at the Károlyi István Children's Centre in Fót. On 22 June 2016, the Szeged Regional Division of the Central Chief Prosecution Office of Investigation addressed the Károlyi István Children's Centre in Fót with a request to establish the whereabouts of A.K.. The director of the Children's Centre in Fót informed via telephone and then in a reply letter dated 23 June 2016, that K.A.'s whereabouts are unknown.

32. On the basis of the above, the legal conditions for the continuation of the proceedings were not met in the absence of the conditions set out in Article 400 of the Criminal Procedure Code (herein after referred to as: CP). There is no possibility to continue the proceedings, as the criminal liability for the act was already statute-barred before the final judgment of the Court.

II. General measures

a) Procedure at the border during escort measures

33. The Police carries out escorts pursuant to Section 5 (1a) and (1b) of Act LXXXIX of 2007 on State Borders (hereinafter referred to as the SB Act). There is no implementing legislation in force in connection with the performance of these tasks, therefore in order to establish a uniform legal practice, on 23 March 2017 the Policing Department issued an action plan for the implementation of police tasks arising from Act XX of 2017 amending certain acts related to the tightening of procedures in the border police area, which has been amended several times in view of the changes that have occurred in the meantime.
34. Pursuant to Section 5 (1a) of the SB Act, - as of 5 July 2016, when the given provision entered into force -, the police officer shall be authorised to apprehend a foreigner illegally staying on the territory of Hungary within a radius of 8 km from the border or state border sign in accordance with Article 2 2. of the Schengen Borders Code, and escort through the nearest gate of the facility for the protection of the orderly functioning of the state border (temporary security border crossing point, hereinafter referred to as "IBH"), unless a criminal offence is suspected.
35. Pursuant to Section 5 (1b) of the SB Act, in a crisis situation due to mass immigration, a police officer or a contracted border guard under the Act on the Service Status of Professional Staff of Law Enforcement Agencies may detain any foreigner illegally staying in Hungary and escort him/her through the nearest gate of the IBH, unless there is a suspicion of criminal offence.
36. The detention - the legal basis of which is not Act XXXIV of 1994 on the Police (hereinafter: the Police Act), therefore it cannot be qualified as a police measure in itself - lasts from the

moment the foreign person is taken under control until the moment he or she is escorted through the IBH. For the execution of other police measures or the use of coercive means which become necessary in the course of the performance of the police officer's duties based on the authorisation of the SB Act, the rules of the Police Act and BM Regulation No. 30/2011 (IX. 22.) on the Police Service Regulations apply.

37. In addition the further procedure to be followed by the Police is regulated by internal rules which information is not public.

b) Cooperation with the Serbian authorities

38. The cooperation is constructive, direct and excellent, through contacts at local and regional level, personal border meetings, international correspondence through the local joint committee, and through the involvement of the service contacts.

39. The cooperation with the Serbian side is continuous and constant, also through the staff of the Border Police Near-Hungary Regional Centre in Subotica (*"Határrendőrség Magyarország-menti Regionális Központ Szabadka"*). According to Article 28 of the *Act XCII of 2012 on the promulgation of the Convention on Police Cooperation in South-Eastern Europe*, the coordination of joint patrol services with the Serbian side is agreed upon by the sub-units every month, where, in addition to the tasks, the previous month's services are evaluated. Their decisions are based on the conclusions drawn from the current operational situation of the border police.

c) Investigating complaints of police assault

40. Pursuant to Article 696 (1) (b) of the Be., military criminal proceedings are to be conducted for military offences committed by professional staff of the police and the penitentiary services during their actual service period, as well as for other offences committed on duty or in connection with their duty. The scope of military criminal procedure shall cover all the offences committed by the defendant, if any of them is subject to military prosecution and the separation of the cases is not possible. In case there is more than one defendant, a military criminal proceeding shall be conducted if the criminal offence committed by any of the defendants is subject to military criminal procedure, and the cases cannot be separated as the facts of the cases are closely related.

41. The investigation of cases subject to military criminal proceedings currently falls under the exclusive competence of the Central Chief Prosecution Office of Investigation and the six subordinate regional prosecution offices of investigation (in Budapest (two units), Debrecen, Győr, Kaposvár and Szeged).

42. In the field of migration-related police assaults, the Office of the Prosecutor General conducted a targeted inspection entitled 'Analysis of pending criminal proceedings for assaults committed in official proceedings in the course of police measures in connection with illegal migration'. The aim of the inspection was to provide a comprehensive picture of the nature, evidential difficulties and effectiveness of criminal proceedings in connection with measures taken by the

police in illegal migration cases. The methodology of the study was a batch check of the case files of criminal cases in the former regional divisions of the Central Chief Prosecution Office of Investigation and the current regional prosecution offices of investigation in the relevant subject area, conducted between 1 January 2015 and 1 September 2019.

43. The inspection report revealed that the nature of the proceedings and the difficulties of proof did not show a real trend different from the same type of proceedings related to non-illegal migration. All cases were characterised by poor evidence and the vast majority of proceedings were closed for lack of evidence.

d) Publication and dissemination

44. The ECtHR's judgment was translated and published on the website of the Ministry of Justice. (<https://igazsagugyiinformaciok.kormany.hu/az-emberi-jogok-europai-birosaganak-iteletei>) and was disseminated to the competent authorities.

IV. Conclusions of the respondent state

45. The Government consider that the measures adopted have remedied the consequences for the applicant of the violation of the Convention found by the Court in this case, and that Hungary has thus complied with its obligations under Article 46, Paragraph 1 of the Convention.

Budapest, 11 October 2024

Zoltán Tallódi
Agent of the Government of Hungary