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La CEDU su detenzione ed uso di manette e guinzaglio su richiedenti asilo in Ungheria
(CEDU, sez. I, sent. 2 giugno 2022, ric. n. 38967/17)

La Corte Edu si pronuncia sul caso di una famiglia irachena, che dopo la fuga dall'Iraq era stata detenuta per quattro mesi in una zona di transito al confine tra Ungheria e Serbia, alloggiata in un container e sempre sotto scorta della polizia.
I Giudici di Strasburgo hanno ritenuto contrarie alla Convenzione le condizioni affrontate dai ricorrenti (padre, madre in stato di gravidanza e quattro figli, nati tra il 2001 e il 2013), priva di ogni base giuridica la loro detenzione, nonché carente di qualsivoglia giustificazione l'uso di manette e guinzaglio sul padre quando accompagnava la moglie in ospedale per le complicanze della gestazione (unica occasione in cui potevano lasciare il container).
Di qui la accertata violazione del divieto di trattamenti inumani o degradanti (art.3), nonché del diritto alla libertà e alla sicurezza ed alla legittimità della detenzione verificata rapidamente da un tribunale (art. 5 §§ 1 e 4).

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

FIRST SECTION

CASE OF XXXXX AND OTHERS v. HUNGARY

(*Application no. 38967/17*)

JUDGMENT

STRASBOURG

2 June 2022

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 XXXXX and Others v. Hungary,

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

Marko Bošnjak, *President*,
Péter Paczolay,

Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Ioannis Ktistakis,
Davor Derenčinović, *judges*,
and Renata Degener, *Section Registrar*,
Having regard to:
the application (no. 38967/17) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Iraqi nationals, the relevant details being listed in the appended table, ("the applicants"), on 1 June 2017;
the decision to give notice to the Hungarian Government ("the Government") of the application;
the decision not to have the applicants' names disclosed;
the parties' observations;
Having deliberated in private on 3 May 2022,
Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the confinement of an Iraqi family, including four children, in the Tompa transit zone at the border of Hungary and Serbia between 3 April and 24 August 2017. The applicants relied on Articles 3 and 8 (conditions in the transit zone), Article 13, Article 5 (unlawful deprivation of liberty) and Article 34 (non-compliance with an interim measure). In the context of his complaint under Article 3, the first applicant also alleged that he had been handcuffed and attached to a leash when he had accompanied the second applicant to hospital, escorted by police officers.

THE FACTS

2. The applicants live in Aachen, Germany. They were represented by Ms B. Pohárnok, a lawyer practising in Budapest.
3. The Government were represented by their Agent, Mr Z. Tallódi, of the Ministry of Justice.
4. The facts of the case may be summarised as follows.
5. The first and second applicants are the father and mother, respectively, and the third to sixth applicants are their four children who at the time of the events in question were all minors (see the appended table). The applicant family left their country of origin – Iraq – after the applicant father had allegedly been tortured by the national security services. After crossing several countries, they arrived at the Tompa transit zone on the border of Hungary and Serbia on 3 April 2017.
6. The applicants submitted asylum requests upon their arrival at the transit zone. The asylum proceedings were suspended owing to their planned transfer to Bulgaria under the Dublin Regulation. The ruling ordering that transfer was quashed by the Szeged Administrative and Labour Court on 3 July 2017. The Immigration and Asylum Office ("the IAO") was ordered to examine the applicants' asylum requests. The applicants subsequently repeatedly asked the IAO to speed up the proceedings, referring to the second applicant's pregnancy and the needs of their children. On 24

August 2017 the applicants were granted subsidiary protection and were transferred from the Tompa transit zone to an open reception facility.

7. In the Tompa transit zone the applicants stayed in the family section, where they were housed in a container. They could not leave their section, otherwise than when taken to medical or other appointments, escorted by guards or police officers. In addition to describing the general conditions in the Tompa transit zone, the applicants alleged that the first applicant was a torture survivor who had required but had not received any psychiatric or psychological treatment in the transit zone. The second applicant was pregnant upon arrival at the transit zone and experienced complications. She was hospitalised on a number of occasions and her pregnancy was considered high risk. She gave birth to her fifth child on 24 August 2017.

8. On 13 April 2017, when the second applicant was transported to the hospital by police officers, she was accompanied by the first applicant who had been handcuffed and attached to a leash, which was also witnessed by the applicant children. He also remained handcuffed in the hospital while assisting his wife with interpretation. On 23 June 2017 the first applicant again accompanied the second applicant when she was taken by police officers to the hospital, but this time he was not handcuffed. On the latter occasion the second applicant stayed in the hospital overnight, guarded by police officers.

9. During their stay in the transit zone, the second applicant repeatedly complained to the IAO referring to, inter alia, her pregnancy and the difficulties encountered by the first applicant and their children confined in the transit zone. It would also appear that as a sign of protest she refused food for a few days.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

10. For the relevant provisions of domestic law and for international materials, see R.R. and Others v. Hungary (no. 36037/17, §§ 24-31, 2 March 2021.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

11. The applicants complained that the conditions of their confinement and the treatment to which they had been subjected in the Tompa transit zone were incompatible with Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

12. The Government invited the Court to declare this complaint inadmissible as incompatible ratione materiae with the Convention provisions or as manifestly ill-founded. The applicants disagreed.

13. The Court considers that the applicants' complaint under Article 3 of the Convention concerning their living conditions in the transit zone raises complex issues of law and fact, the determination of which requires an examination of the merits (see R.R. and Others v. Hungary, no. 36037/17, §§ 37-9, 2 March 2021)
14. It follows that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

A. Merits

15. The applicants and the Government put forward arguments similar to those in R.R. and Others v. Hungary (cited above, §§ 41, 43 and 44). In support of their complaints under Article 3, the applicants referred to the applicant mother's pregnancy complications, the applicant children's needs related to their age, and the applicant father's alleged psychological problems related to his experience in Iraq. They also referred to the alleged prison-like constraints in the transit zone; the presence of guards and police in the transit zone, during the transport and at the medical appointments; and the use of measures of restraint on the first applicant.
16. Given the distinctive situation of the first applicant, on the one hand, and the remaining applicants, on the other, the Court will proceed to examine their complaints separately.

1. The second to sixth applicants

17. The general principles concerning the confinement and living conditions of asylum-seekers have been summarised in Khlaifia and Others v. Italy ([GC], no. 16483/12, §§ 158-69, 15 December 2016) and those with respect to the confinement of minors in R.R. and Others (cited above, § 49). As regards the applicant children, the present case is similar to that of R.R. and Others (cited above), where the Court, emphasising the primary significance of the passage of time for the application of Article 3 in situations such as the present one, found a violation of this provision on account of the conditions to which the applicant children were subjected during their almost four-months-long stay in the Röszke transit zone (see R.R. and Others, cited above, §§ 58-60 and 63-65, and compare M.B.K. and Others v. Hungary [Committee], no. 73860/17, § 6, 24 February 2022). Having regard to the evidence before it and noting that the general conditions in the Tompa transit zone appear to be very similar to those in Röszke, the two zones having essentially the same design and the same services provided to those staying in them, the Court sees no reason to find otherwise in the present case, in which the applicant children stayed in the Tompa transit zone for over four months.
18. As regards the second applicant, the Court finds it established that she had a high-risk pregnancy and experienced repeated complications. While she appears to have received the necessary medical attention (see paragraph 7 above), the Court considers that the constraints inherent during confinement, to which she was subjected throughout her advanced stage of pregnancy, must have caused her anxiety and psychological suffering, which, given her vulnerability, attained the threshold of severity required to engage Article 3 of the Convention (see R.R. and Others, cited above, § 65).

19. There has accordingly been a violation of Article 3 of the Convention with respect to the second applicant and the applicant children.

1. The first applicant

20. The Court finds that, unlike the second applicant, the first applicant was not more vulnerable than any other adult asylum-seeker confined to the transit zone. As regards his alleged mental health problems which were related to his treatment in Iraq, it has not been shown that the first applicant sought any assistance in this connection from the staff in the transit zone. The Court does not therefore find it substantiated that the otherwise acceptable general conditions in the transit zone were particularly ill-suited in the first applicant's circumstances (see Ilias and Ahmed v. Hungary [GC], no. 47287/15, §§ 186-94, 21 November 2019, and, regarding comparable circumstances, M.B.K. and Others v. Hungary [Committee], no. 73860/17, § 8, 24 February 2022). Having said that, the Court notes that the first applicant also raised a specific issue of his being handcuffed and attached to a leash on one occasion. This issue, even if the conditions were otherwise suitable for the first applicant, could give raise to a violation of Article 3.
21. The Court observes in this connection that the Government made no comment regarding the alleged handcuffing of the first applicant and the use of leash during the trip to the hospital on 13 April 2017 (see paragraph 8 above). Given that an escort by police officers or guards appear to have been a general practice with respect to the asylum-seekers staying in Hungarian transit zones (see R.R. and Others, cited above, §§ 19, 31 and 63), and taking into account the fact that the first applicant could not be expected to provide material proof of handcuffs and leash being used on him, the Court accepts his statement to be sufficiently substantiated. Indeed, it was for the Government to provide information or evidence casting doubt on the first applicant's allegation if they considered it to be ill-founded.
22. The Court has stated on previous occasions that measures of restraint such as handcuffing do not normally give rise to an issue under Article 3 of the Convention where they have been imposed in connection with lawful arrest or detention and do not entail the use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance, for instance, whether there is reason to believe that the person concerned would resist arrest or try to abscond or cause injury or damage or suppress evidence (see Svinarenko and Slyadnev v. Russia [GC], nos. 32541/08 and 43441/08, § 117, ECHR 2014 (extracts), and the cases cited therein). In any case, the Court attaches particular importance to the circumstances of each case and examines whether the use of restraints was necessary (see Gorodnichev v. Russia, no. 52058/99, § 102, 24 May 2007, and Stoleriu v. Romania, no. 5002/05, § 74, 16 July 2013).
23. Moreover, as the Court has pointed out previously, where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person's conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see Bouyid v. Belgium ([GC], no. 23380/09, § 100, ECHR 2015). The Court has emphasised that the words "in principle" cannot be taken to mean that there might be situations in which such a finding of a violation is not called for because the severity threshold has not been attained. Any interference with

human dignity strikes at the very essence of the Convention. For that reason, any conduct by law-enforcement officers vis-à-vis an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his or her conduct, whatever the impact on the person in question (ibid., § 101, and see Pranjić-M-Lukić v. Bosnia and Herzegovina, no. 4938/16, § 73, 2 June 2020)

24. As regards the present case, it must be noted that, as the Court finds in paragraph 32 below, the detention of the applicants in the transit zone was not lawful. It was a de facto measure, not supported by any decision specifically addressing the issue of deprivation of liberty (see R.R. and Others, cited above, §§ 90 and 97). There is also nothing in the case file suggesting any formal indication of a deprivation of liberty regarding the first applicant's transport to hospital. Therefore, and given that the Government advanced no justification for the use of handcuffs and leash in this case, the Court cannot but conclude that those measures of restraint were not "imposed in connection with lawful arrest or detention" (see paragraph 22 above).

25. The Court further observes that the first applicant was an asylum-seeker and was taken to hospital to assist his pregnant wife. There is no evidence that he posed any danger to himself or those around him or that there was any other security risk related to his previous conduct. It is true that the handcuffs and leash were used on one occasion only, that is, during one trip to the hospital and back. However, the Court reiterates that within the context of handcuffing, the relative brevity of the treatment – as well as the absence of any damage to the applicant's health and the lack of any particular severity – is not decisive (see Pranjić-M-Lukić, cited above, § 77). Rather, the Court must also examine whether the measure complained of could reasonably be considered necessary (ibid., and also see Radkov and Sabev v. Bulgaria, nos. 18938/07 and 36069/09, §§ 32-34, 27 May 2014). In the present case there is no basis for that conclusion to be reached.

26. Lastly, the Court cannot overlook the fact that the first applicant was handcuffed while in the hospital and therefore in the presence of medical staff and possibly other people, as well as in the transit zone in front of his children. The public nature of this treatment, likely involving humiliation, even if only in his own eyes (see, mutatis mutandis, Öcalan v. Turkey [GC], no. 46221/99, § 182, ECHR 2005-IV, and Pranjić-M-Lukić, cited above, § 82), and the degradation of his parental image in the eyes of the children (see R.R. and Others, cited above, § 63), further aggravated his situation.

27. Having regard to the foregoing, in particular the fact that the handcuffing and the use of leash was not imposed in connection with lawful arrest or detention, and the absence of any discernible security risk or other legitimate reason warranting the measure, the Court considers that the use of handcuffs and leash was not justified. The measures imposed on the first applicant thus diminished his human dignity and were in itself degrading.

28. There has accordingly been a violation of Article 3 of the Convention.

I. Alleged violation of article 5 §§ 1 and 4 of the Convention

29. The applicants complained that their confinement in the transit zone was in breach of Article 5 §§ 1 and 4 of the Convention, the relevant parts of which read as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
...
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

30. The Court notes that the complaints under Article 5 §§ 1 and 4 of the Convention are similar to those examined in R.R. and Others (cited above, §§ 74-83), where the Court found that the applicants' stay for almost four months in the transit zone amounted to a de facto deprivation of liberty. The Court, having regard to all the relevant circumstances, does not consider that the present case warrants a different conclusion. Article 5 is therefore applicable.
31. This part of the application, which is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor inadmissible on any other grounds, must therefore be declared admissible.
32. As regards the merits, having examined all the material before it and in the light of its findings in R.R. and Others (cited above, §§ 87-92 and 97-99), the Court concludes that he applicants' detention cannot be considered "lawful" for the purposes of Article 5 § 1 of the Convention and that they did not have at their disposal any proceedings by which the lawfulness of their detention could have been decided speedily by a court.
There has therefore been a violation of Article 5 §§ 1 and 4 of the Convention.

I. OTHER COMPLAINTS

33. The applicants also complained that the conditions of their stay in the Tompa transit zone had given rise to a violation of Article 8 of the Convention. Furthermore, they raised complaints under Article 13 in conjunction with Article 3, and a complaint under Article 34. Having regard to the facts of the case, the submissions of the parties, and its findings above, the Court considers that it has examined the main legal questions raised in the present application. It thus considers that the applicants' remaining complaints are admissible but that there is no need to give a separate ruling on them (see Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], no. 47848/08, § 156, ECHR 2014, and R.R. and Others, cited above, §§ 69 and 107).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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

35. The applicants claimed 15,000 euros (EUR) each in respect of non-pecuniary damage.
36. The Government disputed the claim.
37. Having regard to the circumstances of the present case, and making its assessment on an equitable basis, the Court awards the first applicant EUR 3,000 and the second to sixth applicants jointly EUR 12,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

38. The applicants also claimed jointly EUR 5,300 in respect of costs and expenses incurred before the Court.
39. The Government argued that the claims were excessive.
40. 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 applicants jointly EUR 1,500 for the proceedings before the Court, plus any tax that may be chargeable to them.

C. Default interest

41. 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. Declares the application admissible;
2. Holds that there has been a violation of Article 3 of the Convention in respect of the first applicant;
3. Holds that there has been a violation of Article 3 of the Convention in respect of the second to sixth applicants;
4. Holds that there is no need to examine the complaint under Article 13 of the Convention in conjunction with Article 3 and the complaint under Article 8;
5. Holds that there has been a violation of Article 5 §§ 1 and 4 of the Convention;
6. Holds that there is no need to examine the complaint under Article 34 of the Convention;
7. Holds

(a) that the respondent State is to pay, 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) to the first applicant EUR 3,000 (three thousand euros), and to the second to sixth applicant jointly, EUR 12,500 (twelve thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) to the applicants jointly EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicants, 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;

1. Dismisses the remainder of the applicants' claim for just satisfaction."

Done in English, and notified in writing on 2 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Marko Bošnjak
Registrar	President

APPENDIX

List of applicants

No.	Applicant's Name	Gender	Year of birth/registration	Nationality
1.	H.M.	M	1978	Iraqi
2.	J.K.	F	1980	Iraqi
3.	L.M.	F	2001	Iraqi
4	A.M.	M	2007	Iraqi
5.	A.M.	M	2009	Iraqi
6.	A.M.	M	2013	Iraqi