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La Corte EDU sulla detenzione del richiedente asilo
(Cedu, sez. V, sent. 4 maggio 2023, ric. n. 26819/15)

La decisione resa dalla Corte EDU riguarda il caso di un cittadino afghano, residente a Budapest, che, dopo aver attraversato clandestinamente il confine con l'Ungheria, ha avanzato richiesta di asilo. L'autorità competente, in attesa della determinazione del suo diritto di ingresso e soggiorno nel paese ne ha disposto il trattenimento. Nel frattempo, al ricorrente è stato concesso un permesso di soggiorno per motivi umanitari e successivamente gli è stato riconosciuto lo *status* di rifugiato in Ungheria. Secondo i Giudici di Strasburgo, l'autorità competente era tenuta a rilasciare al richiedente asilo un permesso di soggiorno per motivi umanitari entro tre giorni dalla presentazione della suddetta domanda. Pertanto, tenuto conto del fatto che il ricorrente era in possesso del predetto permesso di soggiorno la Corte ha ritenuto che il trattenimento non fosse finalizzato ad impedire un ingresso abusivo nel paese e ha concluso accertando la violazione dell'articolo 5 § 1 della Convenzione.

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

FIFTH SECTION

CASE OF XX v. HUNGARY
(Application no. 26819/15)

JUDGMENT
STRASBOURG
4 May 2023

This judgment is final but it may be subject to editorial revision.

In the case of XX v. Hungary,
The European Court of Human Rights (Fifth Section), sitting as a Committee composed of:
Stéphanie Mourou-Vikström, *President*,
Lado Chanturia,
Mattias Guyomar, *judges*,
and Sophie Piquet, *Acting Deputy Section Registrar*,

Having regard to:
the application (no. 26819/15) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 26 May 2015 by an Afghan national, X.X., born in 1997 and living in Budapest ("the applicant") who was represented by Mr T. Fazekas, a lawyer practising in Budapest;
the decision to give notice of the application to the Hungarian Government ("the Government"), represented by their Agent, Mr Z. Tallódi, of the Ministry of Justice;
the decision not to have the applicant's name disclosed;
the parties' observations;
Having deliberated in private on 30 March 2023,
Delivers the following judgment, which was adopted on that date:

SUBJECT MATTER OF THE CASE

1. The case concerns the detention of the applicant pending his asylum proceedings.
2. After crossing the border with Hungary clandestinely, the applicant submitted an asylum request on 29 August 2014. On the same day the asylum authority commenced the asylum proceedings and ordered his detention relying on section 31/A (1) (a) and (c) of Act no. LXXX of 2007 on Asylum (the "Asylum Act", see *O.M. v. Hungary*, no. 9912/15, § 21, 5 July 2016) and referring to the need to clarify the applicant's identity in view of the fact that he did not have travel documents, his lack of connections in the country or resources to subsist on and the resultant risk of absconding. On essentially the same grounds, the Nyírbátor District Court prolonged his detention first on 1 September 2014 and then again on 22 October 2014. In the meantime, on 17 October 2014 the applicant requested that he be considered a minor. An expert opinion was obtained in this connection on 19 November 2014. It found that the applicant was not a minor. The applicant was released from detention on 26 November 2014.
3. It would appear that the applicant was granted a residence permit on humanitarian grounds for the duration of the asylum proceedings. He was later granted refugee status in Hungary.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

4. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.
5. The Government argued that the applicant's detention fell under Article 5 § 1 (f) of the Convention because the applicant had been detained pending the determination of his right to enter and stay in the country. The Court takes note of this argument. It would refer in this respect to the principles set out in *Saadi v. the United Kingdom* ([GC], no. 13229/03, §§ 64-66, ECHR 2008) and *Suso Musa v. Malta* (no. 42337/12, §§ 90 and 97, 23 July 2013). It notes that the applicant submitted that he had been granted a residence permit on humanitarian grounds in line with the national law and had held this permit throughout the proceedings (contrast *M.K. v. Hungary* [Committee], no. 46783/14, 9 June 2020, where no such information was put forward). It observes in this connection that, pursuant to Section 70 of Government Decree no. 114/2007. (V. 24.) on the implementation of Act no. II of 2007 on the Admission and Right of Residence of Third Country Nationals, the asylum authority was required to give an asylum seeker a residence permit on humanitarian grounds within three days from when the request for asylum had been made. Therefore, having regard to the fact

that the applicant was in possession of the aforementioned residence permit, and in the absence of any convincing argument to the contrary, the Court does not accept that in the present case the detention was meant to prevent an unauthorised entry into the country (see *O.M. v. Hungary*, cited above, § 47; *Dshijri v. Hungary* [Committee], no. 21325/16, § 12, 31 January 2023; and contrast *Suso Musa*, cited above, §§ 97-99).

6. In so far as the applicant's detention could have been argued to fall under Article 5 § 1 (b), namely detention for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law, the Court notes that the present application is similar to *O.M. v. Hungary* (cited above), where the Court found a violation of Article 5 § 1. It observes that, pursuant to the Asylum Act, asylum detention could not be ordered for the sole reason that the person seeking recognition had submitted an application to that effect (Section 31/B (1)). Under section 31/A it could be ordered on the grounds listed therein and based on an individual assessment when its purpose (that is, the conduct of the asylum procedure or the securing of a transfer under the Dublin Conventions) could not be achieved through other measures securing the person's availability (see *O.M. v. Hungary*, cited above, § 21).

7. In the present case, there is no indication that the applicant failed to cooperate with the Hungarian authorities. The Court further notes that, as in *O.M. v. Hungary*, the decisions ordering and prolonging the applicant's detention referred to the need to clarify his identity and prevent his absconding, but finds that their reasoning was not sufficiently individualised to justify the measure in question, as also required by the national law (ibid., §§ 49-52 and 54, and compare *Dshijri v. Hungary* [Committee], cited above, § 14).

8. The Court therefore concludes that there has been a violation of Article 5 § 1 of the Convention regarding the applicant's detention from 29 August to 26 November 2014. This makes it unnecessary to address the applicant's arguments concerning the age assessment put forward in relation to his Article 5 § 1 complaint.

II. REMAINING COMPLAINT

9. The applicant also complained under Article 5 § 4 of the Convention. Having regard to the facts of the case, the submissions of the parties, and its findings above, the Court considers that it has dealt with the main legal questions raised by the case and that there is no need to examine this remaining complaint (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

10. The applicant made no claim with respect to pecuniary or non-pecuniary damage. He, however, claimed 5,100 euros (EUR) in respect of costs and expenses incurred before the Court.

11. The Government argued that the claim was excessive.

12. Having regard to the documents in its possession, the Court considers it reasonable to award EUR 1,500 covering the costs and expenses for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under 5 § 1 of the Convention admissible and *decides* that there is no need to examine the applicant's remaining complaint;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 4 May 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sophie Piquet Acting Deputy Registrar
Stéphanie Mourou-Vikström President