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2.5.5 Use of detention

In *European Commission* v *Hungary* (C-808/18), the CJEU reconfirmed its previous finding in *FMS and Others* (C-924/19) that the obligation to remain in one of the transit zones of Röszke and Tompa, at the Serbian-Hungarian border, for the duration of the asylum procedure and for those subject to a return decision constitutes detention within the meaning of the recast Reception Directive. Asylum seekers held at the Serbian-Hungarian border cannot lawfully and freely leave the area since entry into Serbia would be considered illegal by Serbia, possibly exposing them to penalties, and in Hungary, the application would be automatically deemed as withdrawn.[xii] The CJEU held that, according to the recast Reception Conditions Directive, Articles 8 and 9, and the Return Directive, Article 15, an asylum applicant and a third-country national subject to a return decision cannot be detained solely because they cannot meet their needs and without a decision ordering detention after alternative measures or an immediate release had been considered.

Regarding the length of detention, the CJEU noted in both *FMS and Others* and *European Commission v Hungary* that the recast Reception Conditions Directive, Article 9 does not require Member States to lay down a maximum period of detention, while the Return Directive, Article 15 states that the detention of third-country nationals subject to a return decision may not exceed 18 months and can last only for the duration of removal arrangements. In addition, detention of applicants at the border may not exceed 4 weeks.

Regarding safeguards for asylum applicants, the CJEU emphasised in both FMS and Others and in European Commission v Hungary that the recast Asylum Procedures Directive and the Reception Conditions Directive require detention to be ordered and reasoned in writing, that the specific needs of vulnerable applicants must be taken into account to provide adequate support, and that minors should be placed in detention only as a last resort. These guarantees were not respected by Hungary which issued systematic and automatic detention in transit zones, applied to all applicants other than unaccompanied minors under 14 years of age.

On the reasons for detention, the CJEU noted in *Ministerio Fiscal [Spain]* v *V.L.* that the lack of accommodation in a humanitarian reception centre cannot justify the detention of an applicant for international protection.

[xii]This finding is contrary to the ECtHR's view in *Ilias and Ahmed* v *Hungary* (No 47287/15) of 21 November 2019 in which the court found that restrictions in transit zones did not amount to a deprivation of liberty within the meaning of the ECHR, Article 5.

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