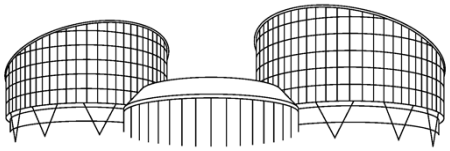

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF M.D. AND OTHERS v. HUNGARY

(Application no. 60778/19)

JUDGMENT

Art 4 P4 • Prohibition of collective expulsion of aliens • Removal of an Afghan family to a narrow strip of State territory on external side of Hungarian border fence with Serbia amounting to expulsion • Removal not based on any valid decision ordering their removal to Serbia and with no consideration of Serbian authorities' refusal to readmit them • No indication that applicants' personal circumstances were genuinely and individually taken into account before removal

Prepared by the Registry. Does not bind the Court.

STRASBOURG

19 September 2024

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 M.D. and Others v. Hungary,

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

Ivana Jelić*, President*,
Alena Poláčková,
Krzysztof Wojtyczek,
Lətif Hüseynov,
Péter Paczolay,
Gilberto Felici,
Raffaele Sabato*, judges*,
and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the application (no. 60778/19) 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 Afghan nationals, Mr M.D., Ms S.A., Mr M.A., Ms R.A., Ms M.H. and Mr A.A. ("the applicants"), whose details are given in the appendix, on 7 November 2019;

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 September 2024,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns the allegedly forced return of the applicants from the Hungarian Röszke transit zone to Serbia by the Hungarian authorities on 7 May 2019. Relying on Article 4 of Protocol No. 4 to the Convention, taken alone and in conjunction with Article 13 of the Convention, the applicants complained about their removal to Serbia, which had been carried out in the absence of a valid decision directing their expulsion to that country, without regard for the Serbian authorities' refusal to readmit them and without their having had access to an interpreter or a lawyer.

THE FACTS

2. The applicants are an Afghan family of six. Their details are set out in the appendix. They were represented by Ms G. Matevžič, Senior Legal Officer at the Hungarian Helsinki Committee 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 (the father and mother respectively) are originally from Afghanistan and moved to Iran more than two decades before the events of the present case. Their children (the third, fourth, fifth and sixth applicants) were born in Iran. The family decided to flee Iran in 2016 owing to their insecure residence status and their constant fear of being removed to Afghanistan. They travelled to Hungary through Türkiye, Greece, North Macedonia and Serbia.

6. On 9 January 2019 the applicants arrived at the Röszke transit zone, situated at the Hungarian border with Serbia. They applied for asylum in Hungary on the same date. The Immigration and Asylum Office ("the IAO") ordered that the applicants be accommodated in the Röszke transit zone.

7. On 12 February 2019 the IAO, acting in its capacity as asylum authority, dismissed the applicants' asylum requests as inadmissible on the basis of section 51(2)(f) of Act no. LXXX of 2007 on asylum ("the Asylum Act") and ordered their removal to Serbia. The IAO found that Serbia was a "safe transit country" where the applicants could have applied for asylum. The asylum authority ordered the applicants' removal to be implemented by way of official escort to Serbia under the terms of the readmission agreement between the European Union and Serbia. Referring to country reports on Serbia, the authority reached the conclusion that the applicants would have enjoyed an adequate level of protection there and that their return to that country would not put them in danger. As regards compliance with the principle of non-refoulement, the asylum authority concluded that, on the basis of country reports concerning Afghanistan and taking into account the applicants' individual circumstances, the prohibition of non-refoulment would not be violated in their case.

8. The applicants applied for judicial review of the decision. On 27 February 2019 the Budapest Administrative and Labour Court rejected their appeals against the inadmissibility decision and found their removal to Serbia lawful.

9. The asylum authority's decision having become final, the IAO, acting in its capacity as immigration authority, initiated immigration proceedings with a view to returning the applicants to Serbia. In accordance with its decision of 28 March 2019 the applicants' designated place of residence remained the Röszke transit zone.

10. On 2 April 2019 Serbia refused to readmit the applicants. As a result, on 18 April 2019 the immigration authority amended the asylum authority's decision directing their removal, changing the destination country to Afghanistan. The authority, having regard to section 118(2) of Government Decree no. 114/2007 (V. 24.) on the implementation of the Asylum Act, chose the applicants' country of nationality as the destination country since there was "no information available to the effect that the applicants could travel to another Member State of the European Union or to any other State under an obligation to readmit them". In every other regard, including the

order to implement the applicants' removal by way of official escort, the asylum authority's decision remained in effect. In finding that there was no breach of the principle of non-refoulement, the immigration authority relied on the asylum authority's opinion of 4 April 2019, in which it maintained its previous opinion of 12 February 2019 (see paragraph 7 above).

11. The applicants lodged a formal objection (*kifogás*) to the amendment of the decision, arguing that the immigration authority did not have jurisdiction to amend the asylum authority's decision. They relied on section 51/A of the Asylum Act and on Article 38 § 4 of 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). They argued that since Serbia had refused to readmit them, the asylum authority ought to have withdrawn its previous inadmissibility decision and conducted an in-merit examination of their application for asylum. Both the formal objection and the request for an in-merit examination were rejected as unfounded by the immigration authority on 3 May 2019.

12. Meanwhile, on 24 April 2019 the applicants, together with two other Afghan families, were orally informed by the immigration authority that their removal to Afghanistan would take place in early May and that, if they did not wish to await removal, they were free to leave the transit zone for Serbia.

13. On 6 May 2019 the applicants were informed that they were to be removed to Afghanistan in the evening of 7 May 2019 on a flight organised by Frontex, the European Border and Coast Guard Agency.

14. On the same day the applicants submitted a request under Rule 39 of the Rules of Court, asking the Court to indicate to the Hungarian Government that their removal to Afghanistan was to be suspended and their asylum claims examined on the merits. The Court rejected the applicants' request for an interim measure.

15. On 7 May 2019 the Regional Representative of the United Nations High Commissioner for Refugees (UNHCR) sent a letter to the head of the IAO, requesting that the applicants not be removed to Afghanistan as their removal might amount to *refoulement*.

16. As to the course of events on 7 May 2019, the parties gave different accounts, in varying degrees of detail.

17. According to the applicants' version of events, they were informed in the afternoon of 7 May 2019 that they were about to be taken to Budapest airport for removal to Afghanistan. They submitted that a "large number" of police officers had arrived in the transit zone and had ordered them and other families to board a bus. As the second applicant had attempted to resist the orders, the police officers had allegedly struck her with batons. In the ensuing turmoil, a pregnant woman from one of the other families had lost consciousness and had had to be taken to hospital. After a long wait, the applicant family had nevertheless been made to board the bus, but the third

applicant (who was 17 years old at the time) had later been taken out of the vehicle. The police had allegedly told him that he needed to write down – on behalf of the entire family – that they wished to return to Serbia, failing which they would be removed to Afghanistan. The third applicant had not understood what was happening but had given in to pressure. No interpreter had been present. Subsequently, at around 10 p.m., the applicants had been driven along the service road between the two Hungarian border fences until they had reached a gate and had been ordered to walk towards Serbia. The applicants submitted that they had had no idea where they were; that it had been completely dark; and that no one had been waiting for them on the other side of the border fence.

18. In the Government's brief account of the events, the family's removal to Afghanistan had not been enforced since they had submitted a written request to the immigration authority indicating their wish to avail themselves of the possibility of voluntary departure for Serbia. As a result, on 7 May 2019, the applicants had voluntarily left the transit zone for Serbia.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

19. The relevant provisions of the Asylum Act, as in force at the relevant time, read as follows:

Section 45

"(1) The principle of *non-refoulement* shall prevail where, in his or her country of origin, the person requesting recognition would be subject to persecution based on race, religion, nationality, membership of a certain social group or political views, or would be subject to treatment proscribed by Article XIV (3) of the Fundamental Law and there is no safe third country which would accept him or her.

...

(3) In the case of a rejection of an application for recognition, or in the case of the withdrawal of recognition, the asylum authority shall state whether or not the principle of *non-refoulement* is applicable.

...

(5) Where prohibition pursuant to sub-sections 1 and 2 does not apply, the asylum authority shall, in its decision rejecting the application for recognition, revoke the alien's residence permit issued for humanitarian purposes and, where the alien is not entitled to reside in Hungary on any other legal grounds, order his or her removal pursuant to Act no. II of 2007 on the Entry and Residence of Third-Country Nationals, and shall determine the duration of the prohibition on re-entry and residence."

Section 51

"(1) Where the conditions for the application of the Dublin Regulations are not met, the asylum authority shall decide on the admissibility of the application for refugee status ...

(2) An application shall be inadmissible where

...

(e) there is a third country that can be considered a safe third country with regard to the applicant;

(f) the applicant has arrived through a country where he or she is not exposed to a risk of persecution for the purposes of sub-section 1 of section 6 or to a risk of serious harm within the meaning of sub-section 1 of section 12, or if the country through which he or she has arrived in Hungary provides an adequate level of protection."

Section 51/A

"If the safe country of origin or the safe third country refuses to admit or readmit the applicant, the competent asylum authority shall withdraw its decision and shall carry on with the proceedings."

20. At the relevant time, sections 51 and 65 of Act no. II of 2007 on the Entry and Residence of Third-Country Nationals read as follows:

Section 51

"(1) Third-country nationals may not be returned or removed to a country that fails to satisfy the criteria of a safe country of origin or of a safe third country with regard to the person in question, in particular where that person is likely to be subjected to persecution on the grounds of his or her race, religion, nationality, membership of a certain social group or political views, or to a country or the border of a country where there are serious reasons to believe that the removed third-country national is likely to be subjected to the treatment or conduct defined in Article XIV(3) of the Fundamental Law (*non-refoulement*)."

Section 65

"(1) A return or removal measure ordered by a court or by the immigration or asylum authority shall be enforced by way of official escort ... where:

...

(c) it is necessary that the return of the third-country national be supervised for reasons of national security, or to satisfy a commitment undertaken under an international treaty, or to protect public safety or order;

...

(3b) Where the relevant immigration authority changes the destination country designated in the decision directing removal on account of conduct attributable to the third-country national, in particular where he or she has made false representations to that authority regarding his or her nationality, or where such a change is justified by other factors affecting the choice of destination country, a formal objection may be lodged against the amending decision. Such an objection must be lodged with the

immigration authority having issued the decision within 24 hours of its service. No appeal shall lie against the decision delivered in respect of the objection so lodged.

(4) The immigration authority shall without delay communicate the objection, together with the case file, to the authority of competent jurisdiction, which shall issue its decision within eight days."

21. The relevant sections of Government Decree no. 114/2007 (V. 24.) on the implementation of Act no. II of 2007 on the Entry and Residence of Third-Country Nationals provided as follows:

Section 118

"...

(2) The State designated as the destination country for the purposes of removal shall be determined according to the following order of priority:

(a) any Schengen State having issued the third-country national with a valid residence permit,

(b) any member State of the European Union having issued the third-country national with a residence permit certifying long-term residence status under Directive 2003/109/EC, or with any other valid residence permit,

(c) any State under an obligation to readmit the third-country national,

(d) the State where the third-country national has his or her habitual place of residence,

(e) the State of which the third-country national is a citizen,

(f) any other State to which the third-country national wishes to return voluntarily and which he or she has leave to enter."

II. EUROPEAN UNION LAW AND PRACTICE

22. The relevant European Union law and practice have been summarised in *N.D. and N.T. v. Spain* ([GC], nos. 8675/15 and 8697/15, §§ 41-43, 47 and 51, 13 February 2020) and *Shahzad v. Hungary* (no. 12625/17, § 22, 8 July 2021). In addition, the following passages of 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 (the "Return Directive") are of relevance to the present case:

"Whereas:

...

(6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. When using standard forms for decisions related to return, namely return decisions and, if issued, entry-ban decisions and

decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive.

...

(8) It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of *non-refoulement*.

...

(13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.

..."

Article 3
Definitions

"For the purposes of this Directive the following definitions shall apply:

...

3. 'return' means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:

– his or her country of origin, or

– a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or

– another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

..."

Article 9
Postponem ent of removal

"1. Member States shall postpone removal:

(a) when it would violate the principle of *non-refoulement* ..."

23. According to Article 38 § 4 of 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) "[w]here the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II" of the Directive.

24. In its judgment of 14 May 2020 in *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367), the Court of Justice of the European Union (CJEU) held, *inter alia*, as follows:

"118 Thus, under Article 5 of Directive 2008/115, when the competent national authority is contemplating the adoption of a return decision, that authority must necessarily observe the principle of *non-refoulement* (see, to that effect, judgments of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraph 49, and of 8 May 2018, *K.A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 103).

119 As the Advocate General has observed, in essence, in point 84 of his Opinion, observance of such a principle must be assessed by reference to the country to which it is envisaged that the person concerned will be ordered to be returned. It follows that, before an amendment of the country of destination can be made, the competent national authority must carry out a fresh evaluation of observance of the principle of *non-refoulement*, separate from that which it had to carry out when adopting the earlier return decision.

...

122 The treatment of the decision amending the country of destination stated in an earlier return decision as a new return decision has the consequence that the competent national authority must, when it envisages such an amendment of the return decision, ensure that it complies with all the procedural rules laid down in Directive 2008/115 applicable to the adoption of a return decision. Such treatment therefore makes it possible to ensure an implementation of the removal and repatriation policy that is effective and also observes the fundamental rights of the person concerned.

123 It follows from the foregoing that an amendment of the country of destination stated in an earlier return decision constitutes a new return decision, within the meaning of Article 3(4) of Directive 2008/115, against which the third-country national concerned must be afforded an effective remedy, within the meaning of Article 13(1) of that directive."

25. The CJEU also found the ground of inadmissibility provided for in Article 51(2)(f) of the Asylum Act (see paragraph 19 above) to be incompatible with EU law, in particular with Directive 2013/32/EU.

26. Article 3 ("Readmission of third-country nationals and stateless persons") of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, annexed to the Council Decision of 8 November 2007 (2007/819/EC), provides:

"1. Serbia shall readmit, upon application by a Member State and without further formalities other than those provided for in this Agreement, all third-country nationals or stateless persons who do not, or who no longer, fulfil the legal conditions in force for entry to, presence in, or residence on, the territory of the Requesting Member State provided that it is proved, or may be validly assumed on the basis of prima facie evidence furnished, that such persons:

(a) hold, or at the time of entry held, a valid visa or residence permit issued by Serbia; or

(b) illegally and directly entered the territory of the Member States after having stayed on, or transited through, the territory of Serbia."

III. RELEVANT COUNCIL OF EUROPE AND OTHER INTERNATIONAL MATERIAL

27. The relevant parts of the Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, adopted on 4 May 2005 at the 925th meeting of the Ministers' Deputies, are cited in *N.D. and N.T.* (cited above, §§ 53-54).

28. The relevant articles of the Draft Articles on the Expulsion of Aliens, adopted by the International Law Commission and taken note of by the United Nations General Assembly (Resolution A/RES/69/119 of 10 December 2014) are cited in *N.D. and N.T.* (cited above, §§ 65-66) and *S.S. and Others v. Hungary* (nos. 56417/19 and 44245/20, § 32, 12 October 2023).

29. On 8 May 2019 the UNHCR issued a press release concerning the forced return of the applicants and another Afghan family, stating that "Hungary's actions overnight to force two asylum-seeking Afghan families to leave the country under duress [were] deeply shocking and a flagrant violation of international and EU law."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 4 TO THE CONVENTION

30. The applicants complained that they had been removed from Hungary in breach of the prohibition of collective expulsion laid down in Article 4 of Protocol No. 4 to the Convention, which reads as follows:

> "Collective expulsion of aliens is prohibited."

A. Admissibility

1. The parties' submissions

31. The Government submitted that no collective expulsion had taken place. The applicants had left for Serbia voluntarily and the Hungarian authorities had simply respected the family's choice in deciding not to prevent their departure.

32. The applicants contested the Government's account. In their view, their return to Serbia had not been voluntary and they had in fact been subjected to expulsion within the meaning of Article 4 of Protocol No. 4 to the Convention. They had not been in a position to make a free choice not to leave the transit zone in the direction of Serbia, as this would have resulted in their removal to Afghanistan, a country where they feared persecution or ill-treatment. In distinguishing between expulsion and voluntary return, the applicants submitted that the circumstances of their removal were particularly

relevant: they had been deprived of their liberty in the transit zone; the third applicant, who had signed the statement of voluntary departure, had been a minor; and neither the assistance of an interpreter nor legal counsel had been provided to him when the coerced statement had been made. They emphasised that the UNHCR had also found that the measure had been taken under coercion (see paragraph 29 above).

2. The Court's assessment

33. In order to determine whether Article 4 of Protocol No. 4 is applicable, the Court must establish whether the Hungarian authorities subjected the applicants to "expulsion" within the meaning of that provision.

(a) General principles

34. The general principles in this regard were most recently summarised in *M.K. and Others v. Poland* (nos. 40503/17 and 2 others, §§ 197-200, 23 July 2020), the most pertinent of which are as follows.

35. Concerning the definition of "expulsion", the Court reiterates that it has interpreted the term in the generic meaning, in current use, that is to say, "to drive away from a place" (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 243, 15 December 2016, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 174, ECHR 2012). In addition, the Court has previously referred to the definition used by the International Law Commission (ILC) according to which "expulsion" is "a formal act or conduct attributable to a State by which a foreigner is compelled to leave the territory of that State" (see *Khlaifia and Others*, cited above, § 243). The term refers to any forcible removal of an alien from a State's territory, irrespective of, amongst others, the lawfulness of the person's stay, the length of time he or she has spent in the territory, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border (see *N.D. and N.T. v. Spain*, cited above, § 185).

36. In *N.D. and N.T. v. Spain* (ibid., § 185-86) the Court further noted as follows:

> "185. [...] The Court has also used the term [expulsion] in the context of Articles 3 and 13 of the Convention (see, for example, *J.K. and Others v. Sweden*, no. 59166/12, §§ 78-79, 4 June 2015, and *Saadi* [*v. Italy* [GC], no. 37201/06], §§ 95 and 124-25[,ECHR 2008]), and especially with regard to the removal of aliens at the border (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, §§ 54-58, ECHR 2007-II; *Kebe and Others v. Ukraine*, no. 12552/12, § 87, 12 January 2017; *M.A. and Others v. Lithuania*, [no. 59793/17], §§ 102-03[, 11 December 2018]; and *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 123-28, 21 November 2019).
>
> 186. As a result, Article 3 of the Convention and Article 4 of Protocol No. 4 have been found to apply to any situation coming within the jurisdiction of a Contracting State, including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under these provisions (see, among other authorities, *Hirsi Jamaa*

and Others, cited above, §§ 180 et seq., and *M.A. and Others v. Lithuania*, cited above, § 70) ..."

(b) Relevant examples from the Court's case-law in similar cases

37. In *Ilias and Ahmed v. Hungary* [GC] (no. 47287/15, §§ 40 and 123, 21 November 2019), which concerned the applicants' expulsion to Serbia, allegedly exposing them to a real risk of treatment contrary to Article 3 of the Convention, the Court rejected the Government's argument that the applicants' alleged voluntary departure to Serbia meant that Hungary was not responsible for their expulsion. The Court found it decisive that there had been a binding decision ordering the applicants' expulsion and that the manner in which the applicants had returned to Serbia indicated that they had not done so of their own free will.

38. In this regard, the Court took into account the particular circumstances of the applicants' departure: following the rejection of their asylum request, the police had told them that they could choose between voluntary departure or detention and forceful hand-over to the Serbian police; the applicants had felt threatened and had thought that they were at risk of being exposed to violence; as a consequence, they had decided to leave. The applicants had been made to cross into Serbia *via* the forest and not through the official checkpoint. In the light of these circumstances, the Court found that Hungary's responsibility for the applicants' removal was established.

39. Similarly, in *M.A. v. Belgium* (no. 19656/18, §§ 60-61, 27 October 2020), despite the fact that the applicant had withdrawn his asylum application and had signed a statement of voluntary departure, the Court found that he had not left Belgium voluntarily. In reaching that conclusion it took into account that the applicant had been subject to an enforceable removal order, that he had been detained with a view to his removal and that police officers had escorted him to the airport, where he had signed the statement without the assistance (or prior notification) of a lawyer or an interpreter. The Court added that, even assuming that the right to protection under Article 3 of the Convention could be waived, the Government had failed to show that the applicant had done so in an unequivocal manner, so as to constitute a knowing and intelligent relinquishment of that right. It concluded that the applicant could claim to be a victim of the alleged violation of Article 3 resulting from his removal.

40. As noted above, the term "expulsion" has been interpreted for the purposes of Article 4 of Protocol No. 4 in the same way as it has for the purposes of Article 3 of the Convention, namely meaning a forcible removal of an alien from a State's territory. Therefore, the Court finds that the above criteria leading to the characterisations of alleged voluntary departure as expulsion – which were used to establish the attributability to a member State of the applicants' departure in one case, and in the other to establish the

applicant's victim status with regard to an alleged violation of Article 3 – are also applicable for the purposes of Article 4 of Protocol No. 4.

(c) Application of the above principles in the present case

41. The Court observes that the applicants entered Hungary *via* the Röszke transit zone to seek asylum. Following the rejection of their asylum requests as inadmissible, a decision was issued directing their expulsion to Serbia. Serbia having refused to readmit them, the destination country was changed to Afghanistan.

42. The Court notes that regarding what happened on the day the applicants were to be removed to Afghanistan, in particular the circumstances of their departure, the accounts of the parties differ significantly. In order to establish whether the applicants' departure for Serbia was of a voluntary nature or whether it amounted to an "expulsion" within the meaning of Article 4 of Protocol No. 4. the Court takes into account the following elements.

43. It is undisputed between the parties that the authorities attempted to remove the applicants to Afghanistan in the evening of 7 May 2019. Furthermore, both parties referred to a written request to return to Serbia, the validity of which is however disputed. It is also uncontested that the applicants eventually crossed the border to Serbia.

44. Concerning the circumstances of their departure, what is particularly relevant is that the applicants gave a detailed account of the events; they were held in the transit zone, which they could not lawfully leave; and, according to the immigration authority's decision, they were to be removed to Afghanistan under police escort. The applicants claimed that it was in that context that the third applicant – who was a minor at the time – signed a statement that the family wished to return to Serbia. They alleged that no interpreter was present. The Government made only a very brief statement that did not challenge any specific aspect of the applicants' description or provide an alternative account of the sequence of events leading to their removal. Even though they referred to a written statement, according to which the applicants allegedly wished to leave for Serbia voluntarily, they have not submitted that document and, even if the right under Article 4 of Protocol No. 4 could be waived, there is nothing to suggest that, in the circumstances, such a document could be regarded as an unequivocal – that is "knowing and intelligent" – waiver of their right to protection under Article 4 of Protocol No. 4 (compare *M.A. v. Belgium*, cited above, §§ 60-61; and *Akkad v. Turkey*, no. 1557/19, § 74, 21 June 2022).

45. Finally, the Court also refers to the press release issued by the UNHCR on 8 May 2019, which lends further support to the applicants' claim of forced departure (see paragraph 29 above).

46. Based on the above circumstances, it can be regarded as established that the applicants, as a result of the Hungarian authorities' conduct, were compelled to leave Hungary.

47. The Court notes that the applicants, like the applicant in *Shahzad v. Hungary*, were not removed directly to Serbian territory but to a strip of Hungarian land between the border fence and the actual border between Hungary and Serbia. However, as explained in the *Shahzad* judgment (ibid., §§ 48-50), this fact does not preclude the applicability of Article 4 of Protocol No. 4.

48. In the light of the above considerations, the Court finds that the applicants were subjected to expulsion within the meaning of Article 4 of Protocol No. 4. Accordingly, that provision is applicable in the present case.

49. The Court considers that this part of the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

50. The applicants submitted that the removal procedure had not been individualised and they had not been afforded a genuine and effective possibility of presenting arguments against their expulsion, in breach of Article 4 of Protocol No. 4.

51. They argued that their removal to Serbia had not been preceded by any corresponding legal or administrative proceedings and that there had been no valid decision directing their expulsion to Serbia at the time of their transfer to that country.

52. As to the asylum and immigration proceedings preceding their physical removal, they submitted that these proceedings could not serve to justify their removal to Serbia for two reasons. First, Serbia had explicitly refused to readmit them, which had constituted a new circumstance that should have been taken into consideration before removing them; as none of the previous administrative or judicial decisions could, by definition, have taken account of this subsequent change of circumstances, it could not be said that the applicants' individual circumstances had been sufficiently taken into consideration. Second, the asylum proceedings that had resulted in an inadmissibility decision and their removal to Serbia had been unlawful since the decision had been based on a ground of inadmissibility that had later been found to be incompatible with EU law (see paragraph 25 above). Furthermore, as a result of Serbia's refusal to readmit them, the asylum authority had had an obligation to institute fresh asylum proceedings and examine their asylum application on the merits before any potential removal.

53. The applicants also contested all arguments to the effect that they had simply been complying with the decision directing their expulsion to Afghanistan, albeit by choosing to leave for Serbia instead. Conceding such an argument would mean that any member State could execute any decision directing expulsion to a non-neighbouring country (in their case, Afghanistan) simply by encouraging aliens to enter a neighbouring country (in their case, Serbia) unlawfully, without any cooperation with that country's authorities, or even against their expressly stated will.

(b) The Government

54. The Government submitted that there had been no collective expulsion in the applicants' case as both the asylum and the immigration proceedings had been individualised. The facts had been established objectively, the applicants' personal circumstances had been duly taken into account and they had been expelled from Hungary based on a well-reasoned decision. The authorities had duly examined whether the applicants' return to Serbia or to Afghanistan might have fallen foul of the principle of *non-refoulment* and had reached the conclusion that it would not.

55. Furthermore, the Government emphasised that the State had a duty to enforce final decisions directing expulsion and to implement an effective system for the return of aliens.

56. In the Government's account of the events of 7 May 2019, the applicants had left for Serbia voluntarily. The Hungarian authorities had decided not to enforce the family's removal to Afghanistan or to interfere with their voluntary return to Serbia, due regard being had to the family's own choice of a more favourable "method of enforcement", namely departure for Serbia as opposed to removal to Afghanistan. The authorities had merely respected the applicants' wishes.

2. The Court's assessment

(a) General principles

57. The general principles for assessing the collective nature of expulsion were summarised most recently in *M.K. and Others v. Poland* (cited above, §§ 201-03). The Court reiterates that Article 4 of Protocol No. 4 requires States to examine the personal circumstances of each person concerned by a potential expulsion measure and to take decisions on a case-by-case basis, by way of proceedings enabling that person to put forward arguments against the measure. The Court also held that as far as accompanied minors are concerned, the requirements of Article 4 of Protocol No. 4 might be met, if the accompanying adults to whom their legal situation is linked had an opportunity to raise their arguments against their joint expulsion in a meaningful and effective manner (see *Moustahi v. France*, no. 9347/14, §§ 134-35, 25 June 2020).

58. In order to determine whether there has been a sufficiently individualised examination, regard must also be had to the "general context at the material time", in addition to the particular circumstances of the expulsion (see *Georgia v. Russia (I)* [GC], no. 13255/07, § 171, ECHR 2014 (extracts)). As the Court noted in *Čonka v. Belgium* (no. 51564/99, § 59, ECHR 2002-I), compliance with the requirement of an individual examination does not mean that "the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4".

59. In previous cases, when assessing the collective nature of the expulsion in question, the Court has taken account of a number of circumstances, such as the applicants' difficulties in contacting a lawyer, the fact that the decisions directing expulsion made no reference to their application for asylum or that the asylum procedure was still ongoing (see *Čonka v. Belgium,* cited above, §§ 60-62).

(b) Application of those principles to the present case

60. The Court must determine whether the applicants' expulsion was carried out following, and on the basis of, a reasonable and objective examination of their particular situation, regard being had to the background to the execution of the expulsion.

61. As to the background to the execution of the expulsion, the Court notes that the applicants' asylum requests were rejected as inadmissible on 12 February 2019 in a decision that was upheld by a court on 27 February 2019 (see paragraphs 7 and 8 above). The inadmissibility decision gave reasons for the inadmissibility of the requests and for the non-applicability of the principle of *non-refoulement* with regard to Afghanistan, based on the applicants' submissions and generally available country information. It also ordered the applicants' removal to Serbia, which was to be executed by way of official escort. As Serbia refused to readmit the applicants, the decision directing expulsion was amended and the destination country changed to Afghanistan (see paragraph 10 above). The asylum authority maintained its previous position that, in the applicants' case, the prohibition of *refoulement* would not thereby be disregarded (see paragraphs 7 and 10 above).

62. It was in the general context described above that, on 7 May 2019, the applicants were removed to Serbia by the Hungarian authorities, following an aborted initial attempt to execute their removal to Afghanistan (see paragraph 17 above).

63. In the Court's view, several circumstances are of relevance in determining whether the national authorities genuinely took into account the applicants' individual situations before removing them. First and foremost, at the time of the applicants' removal to Serbia, the immigration authority's decision directing their expulsion and removal to Afghanistan was still in force (see paragraph 10 above). At the same time, their removal to Serbia was

not based on any formal decision issued by the authorities. As to the authorities' decision-making process prior to the applicants' removal, it is not clear from the case file what considerations led them to remove the applicants to Serbia, after that State had refused to readmit them. The Government's submissions suggest that the sole basis for the decision to remove the applicants to Serbia was the applicants' alleged wish to depart for Serbia instead of Afghanistan, which the authorities claimed to have simply respected. However, the Court has already established that the applicants' removal by the Hungarian authorities amounted to an expulsion within the meaning of Article 4 of Protocol No. 4 (see paragraph 48 above). As a consequence, the authorities ought to have considered the applicants' individual circumstances before removing them, yet there is no indication that they did so, let alone in a genuine and effective manner. In particular, the fact that Serbia had refused to readmit the applicants and that their entry to Serbia would thus take place unlawfully – a circumstance which arose after the asylum authority and the domestic court had delivered their respective decisions – remained entirely unexamined.

64. Furthermore, given the circumstances surrounding their departure (see paragraph 17 above), it cannot be said that the applicants were afforded a genuine and effective possibility of submitting arguments against their expulsion to Serbia or of having any such arguments appropriately examined by the state authorities.

65. In short, it has not been demonstrated to the Court that the personal circumstances of the applicants were genuinely and individually taken into account by the State authorities before their removal to Serbia.

66. The Court wishes to emphasise that the above findings do not call into question the right of States to establish and implement their own immigration policies. It must be recalled, however, that problems with managing migratory flows cannot justify a State's having recourse to practices which are not compatible with its obligations under the Convention (see, *mutatis mutandis*, *Hirsi Jamaa and Others*, cited above, § 179).

67. The Court finds that, in the light of the considerations set out above, the applicants' removal was incompatible with the requirements of Article 4 of Protocol No. 4 to the Convention. There has accordingly been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

68. The applicants also complained under Article 13 of the Convention, read in conjunction with Article 4 of Protocol No. 4, that they had been deprived of any remedy by which to have their requests thoroughly and rigorously examined by a competent authority prior to enforcement of the removal measure.

69. 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 complaint is admissible but that there is no need to give a separate ruling on it (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, and *S.S. and Others v. Hungary*, cited above, §§ 71-72).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. 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."

71. The applicants claimed 17,000 euros (EUR) jointly in respect of non-pecuniary damage.

72. The Government argued that the applicants' claim was excessive.

73. Ruling on an equitable basis, the Court awards the applicants EUR 9,000 jointly in respect of non-pecuniary damage, plus any tax that may be chargeable.

74. The applicants made no claim in respect of costs and expenses.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 4 of Protocol No. 4 to the Convention;

3. *Holds* that there is no need to examine the merits of the applicants' complaint under Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of non-pecuniary damage;
   (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;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 19 September 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Registrar	Ivana Jelić President

APPENDIX

List of applicants:

No.	Applicant's Name	Year of birth	Nationality	Place of residence
1.	M.D.	1978	Afghan	Oldenburg, Germany
2.	S.A.	1988	Afghan	Oldenburg, Germany
3.	M.A.	2002	Afghan	Oldenburg, Germany
4.	R.A.	2006	Afghan	Oldenburg, Germany
5.	M.H.	2013	Afghan	Oldenburg, Germany
6.	A.A.	2015	Afghan	Oldenburg, Germany