

# HUNGARY'S POLICY AND PRACTICE ON ILLEGALLY STAYING MIGRANTS

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## ABSTRACT

*This study explores Hungary's policies and practices regarding persons illegally present in the country. It introduces Hungary's unique legal and practical framework resulting from legal amendments aimed at regaining control of the external borders of the EU and the various judicial fora where these provisions have been tested. The study indicates that the policy framework was incompatible with EU and international human rights law, simultaneously discussing the Hungarian Constitutional Court's decision regarding the state's obligation in the case of the incomplete effectiveness of the joint exercise of competences in the field of fighting illegal migration. Moreover, it describes the framework of escorting illegally staying migrants through the Serbian border instead of conducting regular return procedures. In addition to analysing the individual cases and regulatory elements, the study indicates that the results of Hungarian measures in practice and whether it is worthwhile to consider these experiences during the EU migration reform processes should not be overlooked.*

## KEYWORDS

*illegal migration to Hungary  
return to Serbia  
efficient procedures  
effective exercise of EU competence  
EU migration reform*

## 1. Introduction

### 1.1. *The special Hungarian context*

Although this study aims to elucidate Hungary's policy and practice regarding persons illegally present in the country to establish a basis for comparison with

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other countries, it is noteworthy that Hungary has a unique legal and practical framework resulting from legal amendments aimed at regaining control of the external borders of the European Union (EU). Consequently, policy choices are often regulatory attempts to address situations in which previous regulatory frameworks were unable to provide adequate solutions. Newer regulatory ideas have been tested, raising the question of which actions are compatible with the current effective EU framework and which regulatory elements are incompatible with EU law.

Consequently, several court cases have been initiated to test the compatibility of Hungarian measures with EU law and international human rights. The study aims to list these court cases and explain their effect on the development of relevant national measures. In addition to the judgments of the Court of Justice of the EU and the European Court of Human Rights, the Hungarian Constitutional Court had to assess whether the incomplete effectiveness of the joint exercise of competences in the field of fighting illegal migration could lead to a violation of Hungary's sovereignty, constitutional identity, or fundamental rights and freedoms (including human dignity) enshrined in the Fundamental Law of Hungary.

Although, based on many court decisions, it may appear that Hungary is purposefully attempting to evade the implementation of EU law, it should be considered that the country is in a special situation, as it simultaneously protects one of the EU's important external border sections and manages the influx of people from Ukraine. Therefore, when analysing individual cases and regulatory elements, the results of the Hungarian measures in practice and whether it is worthwhile to seriously consider these experiences during the EU migration reform processes that have been ongoing since 2016 should not be overlooked. Moreover, this study aims to reveal the practical side of implementing return decisions and initiatives that aim to facilitate them with regard to both voluntary and forced returns.

### | 1.2. *Present legal framework*

Legal amendments that entered into force on 5 July 2016<sup>2</sup> allowed the Hungarian police to escort illegally entering migrants who were apprehended within 8 km of the Serbian-Hungarian or Croatian-Hungarian border to the external side of the border fence in a summary procedure, without issuing a formal decision or providing the possibility of submitting an application for international protection. The aim was to request law-abiding behaviour from arriving asylum seekers and make them claim asylum rights at the external border of the EU and not to allow the abuse of the legal structure of the EU asylum acquis.<sup>3</sup> Hungary introduced this legal provision in accordance with Article 2(2)a) of the Return Directive, which provides for derogating from the application of the Directive as Member States may decide not to apply this Directive to third-country nationals who are subject

2 | Act XCII of 2016 on amending the laws necessary to implement the broad applicability of the asylum border procedure.

3 | Nevertheless, the number of asylum-seekers that were allowed to enter the transit zones were no more than 15 asylum-seekers per day, those returned therefore had to wait in front of the transit zones, where no infrastructure was available for the asylum-seekers.

to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea, or air of the external border of a Member State and who have subsequently not obtained authorisation or a right to stay in that Member State.

Further amendments entered into force on 28 March 2017<sup>4</sup> stated that when the state of crisis because of mass migration was in effect, irregularly staying migrants found anywhere in Hungary were to be escorted to the external side of the border fence with Serbia. Consequently, this Hungarian provision<sup>5</sup> extended the 8-km zone to the entire territory of Hungary, including migrants who had never even been to Serbia and had entered Hungary through Ukraine or Romania.

On 26 May 2020 the government issued a decree that introduced a new asylum system adopted because of the pandemic, which many referred to as the 'embassy procedure'.<sup>6</sup> The new system was included in the Transitional Act of June 2020.<sup>7</sup> The system was first in place until 31 December 2020 with the possibility of prolongation, and is currently in force until 31 December 2023. According to the new system, those wishing to submit their applications for international protection in Hungary, with the few exceptions noted below, must go through the following steps prior to being able to registering their asylum applications. Foreigners must personally submit a declaration of intent to lodge an asylum application with the Embassy of Hungary in Belgrade or Kyiv.<sup>8</sup> Foreigners who illegally cross Hungary's state border: if they indicate their intention to submit an asylum application to the police, the police will direct them to the Hungarian Embassy in the neighbouring country where they crossed the border.

The declaration of intent submitted to the embassy is then assessed by the asylum authority, during which the authority may interview a foreign national present in person at the embassy in the form of a remote hearing. In case, as a result of the assessment concluded by the authority, the foreigners become eligible for a travel document that entitles its holder to a single entry to Hungary, the asylum authority informs the embassy about this fact within 60 days to issue the travel document. Based on the information provided by the asylum authority, the Embassy of Hungary issues a travel document valid for 30 days, provided that the foreigners do not hold a permit for entry into Hungary. Once they enter Hungary with this travel document, the application for international protection can be submitted within 24 hours, thus, the proceedings are prompt. If the asylum

4 | Act XX of 2017 on the amendment of certain laws related to the tightening of the procedure conducted in the border guarding area.

5 | Section 5(1b) of Act LXXXIX of 2007 on State Border, Section 80/J(3) of Act LXXX of 2007 on Asylum.

6 | Government Decree 233/2020 (V. 26.) on the rules of the asylum procedure during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens.

7 | Section 267 of Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger.

8 | National Directorate-General for Aliens Policing, 2024.

authority does not support the issuance of travel documents based on the concluded assessment, it informs the foreign national about this via the embassy. Only people belonging to the following categories are not required to go through the process described above:<sup>9</sup> beneficiaries of subsidiary protection who are staying in Hungary; family members of refugees and beneficiaries of subsidiary protection who are staying in Hungary; and those subject to forced measures or punishment affecting personal liberty, except if they have crossed Hungary illegally.<sup>10</sup>

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## 2. Court cases

### | 2.1. Avoiding individual return decisions

#### 2.1.1. CJEU proceedings

On 19 July 2018 the European Commission decided to refer Hungary to the Court of Justice of the European Union (CJEU) for noncompliance of its asylum and return legislation with EU law. In its judgment of 17 December 2020<sup>11</sup> the CJEU found that Hungary's legislation on the rules and practices in the transit zones situated at the Serbian-Hungarian border was contrary to EU law. In particular, the Court identified breaches in the provisions of the Asylum Procedures Directive,<sup>12</sup> the Reception Conditions Directive,<sup>13</sup> and the Return Directive.<sup>14,15</sup> The CJEU's critical conclusions identified four aspects of Hungary's asylum system's non-compliance with EU law. (i) First, in providing applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wish to access its territory, the international protection procedure may be made only in the transit zones of Röszke and Tompa, while adopting a consistent and generalised administrative practice drastically limiting the number of applicants authorised to enter those transit zones daily. (ii) Second, establishing a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa without observing the guarantees provided for in Articles 24(3) and 43

9 | Section 271 (1) of the Transitional Act.

10 | Only one family's declaration of intent was assessed positively in 2020, and in 2021, 8 persons (4 persons in April and 4 in September) were granted a single-entry permit to apply for asylum in Hungary. In 2022, 4 persons were granted a single-entry permit to apply for asylum in Hungary. See Hungarian Helsinki Committee, 2023.

11 | Case C-808/18, *Commission v Hungary*.

12 | 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.

13 | Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

14 | 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.

15 | In its judgment the CJEU declared that Hungary had failed to fulfil its obligations under Articles 5, 6(1), 12(1) and 13(1) of Directive 2008/115/EC, under Articles 6, 24(3), 43 and 46(5) of Directive 2013/32/EU, and under Articles 8, 9 and 11 of Directive 2013/33/EU.

of the Asylum Procedures Directive (APD) and Articles 8, 9, and 11 of the Reception Conditions Directive.<sup>16</sup> (iii) Third, it allows the removal of all third-country nationals staying illegally in its territory, with the exception of those suspected of having committed a criminal offence, without observing the procedures and safeguards laid down in Articles 5, 6(1), 12(1), and 13(1) of the Return Directive. (iv) Finally, making the exercise by applicants for international protection who fall within the scope of Article 46(5) of the APD of their right to remain in its territory subject to conditions contrary to EU law.

The Commission criticised Hungary for allowing illegally staying third-country nationals who were apprehended in Hungarian territory to be forcibly moved beyond a border fence erected in that territory to a few metres from the Serbian-Hungarian border without observing the procedures and safeguards provided for in those provisions. Moreover, the Commission criticised Hungary for having allowed, pursuant to Article 5(1b) of the Law on State borders, in a crisis situation caused by mass immigration, third-country nationals staying illegally in its territory to be forcibly moved to a strip of land devoid of any infrastructure, between a border fence established in Hungarian territory and the Serbian-Hungarian border proper, without observing the procedures and guarantees defined in the Return Directive. The Commission was of the view that the third-country national, escorted to a narrow strip of Hungarian border territory, where there is no infrastructure available and from which there is no means of travelling to the rest of the Hungarian territory, other than the transit zones of Röszke and Tompa, would, in practice, have no choice other than to leave that territory, considering the long wait required to enter one of those two transit zones, and therefore corresponds to the concept of 'removal' as defined in Article 3(5) of the Return Directive, although the physical transfer may not be completed outside the territory of the Member State concerned. The Commission argued that the removal of illegally staying third-country nationals was conducted without a return decision being issued with respect to them, indiscriminately, without considering the best interests of the child, family life, or the state of health of the person concerned, and without observing the principle of non-refoulement, and, in the absence of a return decision, no legal remedy was available to the person concerned.

Hungary argued that such a substantial, general and protracted derogation from the provisions of the Return Directive could be justified under Article 72 of the Treaty on the Functioning of the European Union (TFEU), as it allows Member States to adopt and apply rules relating to the maintenance of public order and the safeguarding of internal security derogated from the provisions of EU law.<sup>17</sup> Therefore, in a crisis situation, such as that prevailing in Hungary, Article 5(1b) of the Law on State borders can be derogated from the provisions of the Return Directive.

16 | The judgment confirmed the 14 May 2020 conclusions of the CJEU in Joined Cases C-924/19 PPU and C-925/19 PPU, which concerned two asylum-seeking families held in the transit zone in Röszke, at the Hungarian-Serbian border. In these preliminary ruling proceedings, the CJEU concluded that a placement in the transit zone is unlawful detention. Soon after the judgment the Hungarian authorities moved nearly 300 people to open facilities and declared that the transit zones would be closed.

17 | See: Töttös, 2021, pp. 212-232.

The Court found<sup>18</sup> that it was not disputed that Section 5(1b) of the Law on State borders permits the adoption of a measure of forcible deportation beyond the border fence against third-country nationals who are staying illegally in Hungary within the meaning of Article 3(2) of the Return Directive, except where those nationals are suspected of having committed an offence. Further, the Court stated<sup>19</sup> that the safeguards surrounding the intervention of police services proposed by Hungary clearly cannot be regarded as corresponding to the safeguards provided in the Return Directive. Contrary to Hungary's contention, the Court concluded that the forced deportation of an illegally staying third-country national beyond the border fence erected in its territory must be treated in the same way as its removal from that territory.

According to the Court's argument, the safeguards surrounding the return and removal procedures provided in the Return Directive would be deprived of their effectiveness if a Member State could dispense with them, even if it forcibly displaced a third-country national, which is, in practice, equivalent to transporting him or her physically outside its territory. It is concluded that after having been forcibly deported by the Hungarian police to a narrow strip of land, the third-country national has no choice other than to leave Hungary and go to Serbia to be housed and fed, and that the national does not have the effective possibility of entering the two transit zones of Rösztke and Tompa to apply for international protection there.

Finally, the Court also rejected<sup>20</sup> Hungary's line of argument, according to which Article 5(1b) of the Law on State borders is justified under Article 72 of the TFEU, read in conjunction with Article 4(2) of the Treaty on European Union (TEU). According to its reasoning, Hungary merely invoked, in a general manner, a risk of threats to public order and national security, without demonstrating the requisite legal standard that was necessary for it to derogate specifically from the Return Directive considering the situation prevailing in its territory on 8 February 2018. More specifically, Article 4(2) of the TEU, Hungary, did not indicate that, considering that situation, effectively safeguarding the essential State functions to which that provision refers, such as that of protecting national security, could not be conducting other than by derogating from the Return Directive.<sup>21</sup>

It becomes extremely visible in this part of the judgment that the concept of illegal entry and stay could have different interpretations in different areas of EU law:<sup>22</sup> Hungary strictly views entries as illegal based on the Schengen acquis, whereas the CJEU views it strictly from the perspective of international protection by stating that those arriving as applicants for international protection cannot be regarded as illegally entering or staying.<sup>23</sup> This divergence in legal interpreta-

18 | Paragraph 244 of Judgment of Case C-808/18.

19 | Paragraphs 254–255 of Judgment of Case C-808/18.

20 | Paragraphs 261–263 of Judgment of Case C-808/18.

21 | The Court used an analogy with judgment of 2 April 2020, *Commission v Poland, Hungary and the Czech Republic* (temporary mechanism for the relocation of applicants for international protection), C 715/17, C 718/17 and C 719/17, EU:C:2020:257, Paragraph 170.

22 | See e.g. Menezes Queiroz, 2018.

23 | Case C-808/18, Judgment of the Court, Paragraph 219.

tions also contributed to the conclusions regarding the lack of a link between the evidence provided and the necessity that should have been demonstrated according to the Court's demand. The Court also added that the provisions of the Return Directive allow Member States to derogate from a number of rules laid down by that directive, if required, for the protection of public order or public or national security.

The consequences of the decision of the CJEU were far reaching, particularly at the end of January, when Frontex, for the first time in the agency's history, decided to suspend its operational activities in Hungary. The agency confirmed its decision to suspend joint operations along the border until Hungary fully complied with the previous month's ruling of the European Court of Justice in connection with the country's asylum and immigration laws. Joint operations may resume immediately once Hungarian authorities comply with the ruling.<sup>24</sup>

Although the Hungarian Government closed the transit zones immediately after the preliminary ruling in May 2020,<sup>25</sup> the Commission considered that Hungary did not take the necessary measures to fully comply with the judgment in the infringement case, particularly regarding the infringement of the relevant provisions of the Asylum Procedures, Reception Conditions, and Return Directives. Consequently, on 9 June 2021 the European Commission sent a letter of formal notice to Hungary for failing to comply with the CJEU ruling.<sup>26</sup> In November 2021, the European Commission decided to refer Hungary to the Court of Justice of the European Union,<sup>27</sup> requesting that the Court order the payment of financial penalties for Hungary's failure to comply with a Court ruling in relation to EU rules on asylum and return; the case is ongoing in mid-2023.<sup>28</sup>

The embassy procedure did not help create compliance with the EU law. The European Commission considered that by adopting these new measures in 2020, following the outbreak of the COVID-19 pandemic, Hungary failed to fulfil its obligations under EU law, particularly the Asylum Procedures Directive.<sup>29</sup> In its judgment on 22 June 2023 the CJEU held that by making it possible for certain third-country nationals or stateless persons present in its territory or at its borders to apply for international protection subject to the prior submission of a declaration of intent at a Hungarian Embassy situated in a third country and to the grant of a travel document enabling them to enter Hungarian territory, Hungary had failed to fulfil its obligations under the directive. The Court found that the condition relating to the prior submission of a declaration of intent is not laid down by the Asylum Procedures Directive and is contrary to its objective of ensuring effective, easy, and rapid access to the procedure for granting international protection. In addition, according to the Court, legislation deprives third-country nationals or stateless persons concerned of the effective enjoyment of their right

24 | About Hungary, 2021.

25 | Hungarian Government, 2020.

26 | Proceedings No. INFR(2015)2201: European Commission, 'June infringements package: key decisions', 9 June 2021.

27 | *Commission v Hungary*, Case C-123/22.

28 | European Commission, 2021.

29 | Case C-823/21, *Commission v Hungary*.

to seek asylum in Hungary, as enshrined in the Charter of Fundamental Rights of the European Union. Second, the Court considered that the restrictions may not be justified by the objective of public health protection and, more specifically, the fight against the spread of COVID-19, as argued by Hungary. The Court's reasoning declared that the Hungarian measures were unsuitable for combating the spread of the pandemic and manifestly disproportionate with regard to the interference with the right of persons seeking international protection to apply for international protection upon their arrival at a Hungarian border.

### 2.1.2. *European Court of Human Rights*

During the early years of transit zones at the Hungarian-Serbian border, the ECtHR had the opportunity to examine the Hungarian legal framework. The *Ilias and Ahmed v. Hungary*<sup>30</sup> case concerned two Bangladeshi nationals who transited through Greece, the former Yugoslav Republic of Macedonia and Serbia before reaching Hungary, where they entered the transit zone in Röszke and immediately applied for asylum. They were held in the transit zone for 23 days. The admission of applicants to the Hungarian transit zone coincided with the introduction of a new asylum regime in Hungary.<sup>31</sup> Although the judgment of the Grand Chamber reflected a practical and realistic approach to the confinement of 23 days in the transit zone in 2015, by finding that it did not constitute a *de facto* deprivation of liberty, the ECtHR reached negative conclusions regarding the applicants' return to Serbia. The Grand Chamber found that Hungary, opting to use inadmissibility grounds and expelling applicants to Serbia, failed to conduct a thorough assessment of the Serbian asylum system, including the risk of summary removal.<sup>32</sup>

On 8 October 2021 the ECtHR issued a judgment in the first case against Hungary involving collective expulsion (the *Shahzad* case).<sup>33</sup> The case concerns the 'apprehension and escort' measure introduced by the Hungarian State Borders Act, which authorised the Hungarian police to remove foreign nationals staying illegally in Hungary to the external side of the Hungarian border fence (on the border with Serbia) without a need for a formal decision. The applicant, who, together with 11 other migrants, was subjected to such a measure in August 2016, complained that he was part of a collective expulsion in breach of Article 4 of Protocol No. 4 of the Convention. Moreover, he complained that he did not receive an effective remedy at his disposal. Considering the fact that Hungarian authorities removed the applicant without identifying him and examining his situation, and with regard to the above finding that he did not have effective access to means of legal entry, the Court concluded that his removal was of a collective nature.<sup>34</sup> Therefore, the measures conducted by Hungary under domestic regulation were in breach of

30 | *Ilias and Ahmed v. Hungary* (GC), No. 47287/15, 21 November 2019 (*Ilias and Ahmed GC judgment*).

31 | Act CXL of 2015 on Amending certain laws relating to the management of mass immigration, which entered into force on 15 September 2015.

32 | Tóttós, 2020, pp. 169–191.

33 | *Shahzad v. Hungary*, Appl. No. 12625/17, 8 October 2021.

34 | Paragraphs 58–59 and 67 of the Judgment of the ECtHR.



the prohibition of collective expulsions enshrined in Article 4 of Protocol 4 of the Convention.

On 22 September 2022 a similar judgment followed in *H.K. v. Hungary*.<sup>35</sup> Unlike the applicant in the *Shahzad* case, the applicant in this case had in fact been placed on the waiting list outside of the transit zone at the Hungarian-Serbian border; after a few months of waiting in Serbia and a few failed attempts to enter Hungary irregularly, he was admitted to the transit zone where he was able to apply for asylum. However, when the applicant entered Hungary irregularly and was removed, he had no information on whether or when to gain access to the asylum procedure. Thus, the Court considered that the mere fact that he later managed to enter the transit zone did not make his removal compliant with the Convention, and the Court once again concluded that the applicant's removal was of a collective nature. Several other cases of collective removal have already been communicated by the ECHR.<sup>36</sup>

### 2.1.3. *The interpretation of the Hungarian Constitutional Court*<sup>37</sup>

On behalf and under the authorisation of the Government, the Minister of Justice submitted a petition to the Constitutional Court seeking an interpretation of Article E (2)<sup>38</sup> and Article XIV (4)<sup>39</sup> of the Fundamental Law because the implementation of the judgment of the CJEU delivered on 17 December 2020 in Case C-808/18 raises a constitutional problem that warrants an interpretation of the Fundamental Law. The Hungarian Government claimed that the implementation of the judgment of the Court of Justice of the European Union in case C-808/18 raised the constitutional problem at issue if Hungary allowed the implementation of an EU legal obligation which may lead to a foreign national illegally staying in Hungary and remaining in the territory of a Member State for an indefinite period of time, thus becoming part of the population of that State. The Constitutional Court had to assess whether the incomplete effectiveness of the joint exercise of

35 | *H.K. v. Hungary*, Appl. No. 18531/17, 22 September 2022.

36 | *H.Q. v. Hungary*, Appl. No. 46084/21; *K.P. v. Hungary*, Appl. No. 82479/17; *F.W. and others v. Hungary*, Appl. No. 44245/20; *S.S. and others v. Hungary*, Appl. 56417/19; *R.N. v. Hungary*, Appl. No. 71/18; *R.D. v. Hungary*, Appl. No. 17695/18, *Arab and Arab v. Hungary*, Appl. No. 60778/19.

37 | Constitutional Court of Hungary, 2021.

38 | 'With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.'

39 | 'Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or in the country of their habitual residence for reasons of race, nationality, the membership of a particular social group, religious or political beliefs, or have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin, nor from any other country. A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution.'

competences could lead to a violation of Hungary's sovereignty, constitutional identity, or fundamental rights and freedoms (including human dignity) enshrined in Fundamental Law.

In its petition, the government referred to the quota decision of the Hungarian Constitutional Court,<sup>40</sup> which brought about a breakthrough, as the decisions of the Constitutional Court did not clearly read the place of EU law in the legal system prevailing in Hungary.<sup>41</sup> The Constitutional Court made far-reaching findings regarding the relationship between EU Law and the Constitution.

Based on an overview of the practice of the supreme courts and constitutional courts of the member states performing constitutional court duties, the Constitutional Court established that, within its competence, based on a petition to this end, in exceptional cases and as an *ultima ratio*, i.e. while respecting the constitutional dialogue between the member states, it can examine whether as a result of the joint exercise of powers based on Article E) Paragraph (2) of the Basic Law, human dignity, the essential content of other fundamental rights, or the sovereignty of Hungary (including the scope of the powers transferred by it) or its constitutional identity are violated.<sup>42</sup>

When examining the new petition submitted by the Minister of Justice, the Constitutional Court, interpreting the 'Europe Clause' of the Fundamental Law,<sup>43</sup> held<sup>44</sup> that where the exercise of joint competences with the Union is incomplete, Hungary shall be entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU, until the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences.

The Constitutional Court further held that where the incomplete effectiveness of the joint exercise of competences resulted in consequences that raised the issue of the violation of the right to identity of persons living in Hungary, the Hungarian State shall be obliged to ensure the protection of this right in the context of its obligation of institutional protection. In this regard, the Constitutional Court indicated that man, as the most elementary constituent of all social communities, particularly the State, is born into a given social environment that can be defined as the traditional social environment of man, particularly through its ethnic, linguistic, cultural, and religious determinants. These circumstances create

40 | 22/2016. (XII. 5.) Decision of the Constitutional Court of Hungary on the interpretation of Article E) Paragraph 2 of the Basic Law.

41 | Várnay, 2019, p. 65.

42 | 22/2016. (XII. 5.) Decision of the Constitutional Court, Paragraph 46.

43 | In its decision, the Constitutional Court observed that the abstract constitutional interpretation cannot be converted into a position applicable to the specific case giving rise to the petition, and therefore, the Constitutional Court only addressed the genuine problems of constitutional interpretation directly derivable from the issue. The Constitutional Court thus interpreted Article E (2) of the Fundamental Law.

44 | Decision number: X/477/2021., Subject of the case: Application of the Minister for Justice for interpretation of Article E (2) and Article XIV (4) of the Fundamental Law (judgment of the Court of Justice of the European Union in Case C-808/18, asylum, exercise of EU powers).

natural ties determined by birth that shape the identity of community members. These natural ties or qualities, which are determined by birth, are considered as circumstances that influence a person's self-determination, which are created by birth or are qualities that are difficult to change. Protection under constitutional law should not be an abstract, static protection of the individual detached from his or her historical and social reality and must consider the dynamic changes in contemporary life. In the Constitutional Court's view, since the State cannot make unreasonable distinctions regarding fundamental rights on the basis of these characteristics, it must also ensure, considering its obligation of institutional protection, that changes to the traditional social environment of the individual can only occur without significant harm to these determining elements of identity.

The Constitutional Court stated that the joint exercise of competences through EU institutions of the European Union may not lead to a lower level of protection of fundamental rights than that required by Fundamental Law. Similarly, the fact that an EU legal norm, binding on all Member States, meets the requirements of the Constitution but is not properly implemented, meaning that the resulting obligations of the binding norm are not or only partially enforced, cannot lead to a lower level of protection of fundamental rights than required by the Constitution. In this context, the Constitutional Court has held that if the joint exercise of competences through the institutions of the European Union is incomplete, Hungary is entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU until such time as the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences.

Finally, the Constitutional Court held that the protection of Hungary's inalienable right to determine its territorial unity, population, form of government and State structure should be part of its constitutional identity. Várnay finds that the sword of constitutional identity has been forged against EU law.<sup>45</sup> Although in Spieker's typology of identity review mechanisms the Hungarian version has been classified as 'revealing a clear tendency towards hard conflict (i.e. between the national courts and the ECJ – E.V) identity review',<sup>46</sup> the Constitutional Court, was not in a position to assess whether the incomplete effectiveness of the joint exercise of competences had been resolved in the specific case. Nor was the Constitutional Court able to take a position on whether the government's argument that the CJEU judgment could lead to foreign nationals becoming part of Hungary's population was correct. The Constitutional Court found that the above was a matter to be judged by the body applying the law, and not by the Constitutional Court.<sup>47</sup>

Nevertheless, a judge of the Budapest-Capital Regional Court (Fővárosi Törvényszék) initiated an individual norm control procedure before the Hungarian

45 | Várnay, 2022, p. 81.

46 | Spieker, 2020.

47 | However, the Constitutional Court stressed that the abstract interpretation of the Fundamental Law cannot be aimed at reviewing the judgment of the CJEU, nor does the Constitutional Court's procedure in the present case, by its very nature, extend to the review of the primacy of EU law.

Constitutional Court<sup>48</sup> with regard to the Section 5(1b) of Act LXXXIX of 2007 on the state border and also requested an investigation into the conflict of the contested provision with an international treaty. The initiative was taken during an administrative legal proceeding in the case of a complaint against a police measure. Based on the challenged provision, during a crisis situation caused by mass immigration, Hungary's police may arrest foreigners who are illegally staying in Hungary and escort them through the nearest gate of the border fence. The plaintiff, who is an Afghan citizen, entered the Schengen area with a valid visa in 2018. His legal stay in Hungary ended in 2019, and his asylum application submitted in 2021 was rejected by the authorities without a substantive examination. The police then transported the plaintiff to the Hungarian-Serbian border and escorted him through the gate of the border guard facility.

The judge of the Budapest-Capital Regional Court filed an individual norm control appeal with the Constitutional Court, expressing its opinion that the disputed provision was unconstitutional in both form and content. First, the court refers to the fact that the act of escorting in practice is equal to deportation without a formal decision and without the police, considering the individual circumstances of the foreigners, as it provides no right to foreigners to submit an asylum application in Hungary. This situation creates the possibility of group deportation, contrary to Article XIV of the Fundamental Law of Hungary. Second, the judge highlighted that the plaintiff deported to a location with no infrastructure and had to enter Serbia by violating Serbian legislation, which, according to the court's opinion, violates human dignity and can be evaluated as inhumane and humiliating treatment. Third, the Court determined the challenged provision to be substantively unconstitutional, as the measure in question did not provide an effective legal remedy.

In the present case, considering the complaint against police action and its subject matter, the Constitutional Court did not find it justified that there was a direct connection between the individual case on which it was based and the requested norm control. Therefore, the Constitutional Court found that the motion – both in relation to the unconstitutionality and violation of the international treaty – was in fact extending beyond the scope of the authorisation of individual norm control, as it was aimed at conducting the abstract subsequent norm control of the disputed provision.<sup>49</sup>

## | 2.2. Procedural questions before the regular courts

Although the *GM* case<sup>50</sup> raised the interpretation of the Asylum Procedure Directive, it is important from the perspective of expulsion as it resulted in the withdrawal of refugee status in the given case, which could have led to expulsion if the principle of non-refoulement had not been applied.

48 | Decision number III/01701/2022 [Online]. Available at: <http://public.mkab.hu/dev/dontesek.nsf/0/4B0458270B9ABCABC1258892005B05E6?OpenDocument> (Accessed: 18 October 2023).

49 | Order of the Constitutional Court 3206/2023. (V. 5.) on the rejection of a judicial initiative.

50 | *GM v Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorrelhárítási Központ*, Case C-159/21, ECLI:EU:C:2022:708.

By decision of 15 July 2019, the Directorate-General withdrew GM's refugee status and refused to grant him subsidiary protection status while applying the principle of non-refoulement to GM. That decision was taken on the basis of a non-reasoned opinion issued by the Alkotmányvédelmi Hivatal (Constitutional Protection Office, Hungary) and by the Terrorrelhárítási Központ (Counterterrorism Centre, Hungary) (together, 'the specialist bodies'), in which those two authorities concluded that GM's stay constitutes a danger to national security. GM filed an action before the court to challenge that decision, which was uncertain, as to whether Hungarian legislation on access to classified information was compatible with the relevant EU law. Although the person concerned or his or her representative admittedly has the right to submit a request for access to confidential information concerning that person, they cannot use the confidential information in the context of administrative or judicial proceedings. Moreover, the Hungarian court was uncertain about the compatibility with EU law of the rule laid down by Hungarian law that the asylum authority is required to rely on a non-reasoned opinion given by specialist bodies and cannot itself examine the application of the ground for exclusion in the case before it, with the result that it can provide reasons for its own decision only by referring to that non-reasoned opinion. In these circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling.

In case C-159/21, the CJEU interpreted Article 23(1) of the Directive and stated that it precludes national legislation which provides that although the person concerned or his or her legal adviser can access that information, they are not provided even with the substance of the grounds on which such decisions are based and cannot, in any event, be used for the purposes of administrative procedures or judicial proceedings.<sup>51</sup> The CJEU also concluded that contrary to EU law,<sup>52</sup> the determining authority is systematically required where bodies entrusted with specialist functions linked to national security have found, by way of a non-reasoned opinion, that a person constituted a danger to that security, to refuse to grant that person subsidiary protection, or to withdraw international protection previously granted to that person based on that opinion.<sup>53</sup>

Another case raised the question of the range of factors to be evaluated and the need to compare the specialised authority's opinion, without which no administrative decision can be made regarding a particular procedure. It concerned the case of a third-country national family member of a Hungarian citizen, whose application for permanent residence was rejected by the Hungarian immigration police authority, as he had been awarded a prison sentence for the offence

51 | Paragraph 60 of Judgment C-159/21.

52 | Article 4(1) and (2), Article 10(2) and (3), Article 11(2) and Article 45(3) of Directive 2013/32, read in conjunction with Article 14(4)(a) and Article 17(1)(d) of Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

53 | Paragraph 86 of Judgment in C-159/21.

of trafficking migrants by assisting in the unauthorised crossing of the border. The Alkotmányvédelmi Hivatal (Constitutional Protection Office, Hungary), as a specialised authority, found that a person's conduct must be regarded as a real, immediate, and serious threat to national security, which forms the basis of the responsible authority's decision. After court appeal, the questions were referred to the CJEU.<sup>54</sup> The CJEU stated<sup>55</sup> that Article 5 of the Return Directive must be interpreted as precluding that a third-country national, who should have been the addressee of a return decision, is the subject – in a direct extension of the decision which withdrew from him or her, for reasons connected with national security, his or her right of residence in the territory of the Member State concerned – of a decision banning entry into the territory of the European Union, adopted for identical reasons, without consideration being given beforehand to his or her state of health and, where appropriate, his or her family life and the best interests of his or her minor child.

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### 3. Present practice

#### | 3.1. Statistical figures

The number of border violators<sup>56</sup> is constantly increasing; in 2022, the authorities caught 269,254 migrants, an average of 738 people per day. In 2021, 122,239 border violators were caught, with an average of 335 people per day. Nevertheless, these data contain three categories: illegal border crossings prevented, persons caught and escorted through gates, and persons arrested with legal proceedings initiated. The number of those in the latter group was 1,150 in 2022, and reached 1,208 by the 28<sup>th</sup> week of 2023. Last year, 1,924 people were arrested for human smuggling, compared with 1,277 people in the previous year, which indicates a significant increase.

Although in the case of escorting illegally staying foreigners, authorities are not required to conduct a complete return procedure, regular expulsions are ordered and executed.<sup>57</sup> A total of 800 expulsions were ordered by the alien policing authority in 2022, of which Albanian (152) and Turkish (85) nationals stood out. Moreover, 678 expulsions were also ordered by judicial decisions in 2022, primarily for Serbian (165) and Romanian (122) nationals. The distribution of forced returns by nationality also reflects these decisions: 127 Albanian, 11 Serbian, 89 Romanian, and 70 Turkish nationals were deported by alien policing authorities in 2022.

In 2021, the statistics indicated a similar tendency, with one major difference: Before the war in Ukraine, Ukrainians were the top nationality with regard to expulsion orders by both the aliens' policing authority (351) and judicial decisions

54 | *M.D. v Országos Idegenrendészeti Főigazgatóság Budapesti és Pest Megyei Regionális Igazgatósága*, Case C-528/21, ECLI:EU:C:2023:341.

55 | Paragraph 92 of the Judgment in Case C-528/21.

56 | Hungarian Police, 2022.

57 | National Directorate-General for Aliens Policing, 2022.

(84). Furthermore, the alien policing authority issued most of the expulsion decisions (1,120) for Albanian (166), Turkish (74), Kosovar (50), and Serbian (45) nationals, while judicial expulsion decisions (412) were ordered for Serbian (60), Romanian (52), Albanian (29), and Syrian (21) nationals. Forced returns (661) were conducted for Albanian (139), Ukrainian (138), Serbian (72), Romanian (56), and Turkish (31) nationals.

Between 2017 and 2020, a gradual increase in the number of expulsion orders was observed, with Ukrainian nationals being at the top of the list regarding expulsion orders by both the alien policing authority and judicial decisions.

The list of nationalities in cases where forced returns can only be implemented in European countries is visible. However, there is only one exception. In 2020, 19 Iranian nationals were deported from Hungary.<sup>58</sup> Based on the news from that year, this corresponds to the number of Iranian students who were expelled by the alien policing authority because of violations of the health safety rules regarding the COVID-19 pandemic. At the beginning of March 2020, two Iranian students were the first to be diagnosed with the coronavirus in Hungary, and then several university students associated with them were isolated in Saint László Hospital. However, according to the authorities, some people disobeyed the regulations and medical staff. Therefore, police action was taken and criminal proceedings were initiated against all quarantined students who were later found to be asymptomatic. The police initiated the deportation of all foreign university students at the Directorate General of the National Immigration Police, which expelled young people and imposed a three-year entry and residence ban on them. The criminal proceedings against most of the Iranian students who were expelled from Hungary for violating the quarantine rules had been terminated, and the Hungarian authorities had also begun to withdraw their entry ban, which could allow their return to Hungary to complete their studies.

### | 3.2. Readmission willingness

The readmission agreement between the EU and Serbia<sup>59</sup> is the most relevant regarding the readmission of those illegally arriving and staying in Hungary. Article 3(1) of the agreement extends its scope to the readmission of third-country nationals and stateless persons.

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.

58 | Tordai, 2020.

59 | 2007, 'Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation', OJ L 334, 19.12.2007, pp. 46–64.

Nevertheless, since 15 September 2015, Serbia generally does not take back third-country nationals under the readmission agreement except for those who hold valid travel/identity documents and are exempted from Serbian visa requirements.<sup>60</sup> Consequently, the Hungarian authorities escort out of the fence at the Hungarian-Serbian border without officially contacting the Serbian authorities and without the application of the readmission agreement.

Regarding cases handled in regular return procedures, the return of African nationals could prove problematic, as Hungary does not have bilateral initiatives with these countries, considering the geographical distance. Readmission procedures are sometimes unsuccessful owing to the lack of a registration system in Morocco, Algeria, and Tunisia; for example, fingerprint identification is limited. Consequently, recent EU initiatives regarding the external dimension of migration, with the aim of improving returns and readmissions, could also prove beneficial to Hungary.

### | 3.3. Facilitating returns

#### 3.3.1. Liaison officers

Third-country cooperation is essential for successful return and readmission policies, and one of the tools used to foster such cooperation is the use of liaison officers. Frontex operates a network of European Return Liaison Officers (EURLOs), which facilitates local contact and contributes to the successful implementation of returns. The European Return Liaison Officers (EURLO) Network comprises national return liaison officers deployed by EU Member States and Schengen associated countries to a host third country or region to enhance cooperation and support Member States and Frontex in all phases of the return process.<sup>61</sup>

The Hungarian National Directorate General for Alien Policing has no liaison officers dedicated only to return activities, however, Hungary has nine special consular officers deployed in Nigeria, Lebanon, Iraq, Vietnam, Russia, China, Iran, Tunisia, and India who can provide return assistance if required. The deployed experts can help assess the needs and possibilities on the spot, and these national liaison officers sent to third countries provide serious assistance to Hungary in the field of returns; one of their primary tasks is to facilitate the effectiveness of returns to third countries.

60 | Hungarian Helsinki Committee, 2023.

61 | The deploying Member State has a leading role in the EURLO deployment and its administration. On its side, Frontex ensures coordination of the EURLO Network and supports Member States in the deployment process and day-to-day management. The EURLO Network is implemented as part of the overall EU Policy on Return and Readmission. Each EURLO deployment is based on a dedicated Implementation Plan tailored to the identified needs outlining the activities to be undertaken by the EURLO during the return process. Frontex finances and reimburses costs incurred by the deploying Member State throughout the deployment based on a bilateral Grant Agreement. They are also part of the European network of immigration liaison officers (the ILO Network).



### 3.3.2. *Assisting in voluntary<sup>62</sup> and forced returns*

The Hungarian Assisted Voluntary Return, Reintegration, and Information Program<sup>63</sup> was implemented by the International Organization for Migration (IOM) in Hungary within a 32-month period until 31 December 2023 with a budget of HUF 323,901,084 (approximately EUR 837,000) financed by the Asylum, Migration and Integration Fund (AMIF). The objective of the programme is to facilitate the safe and dignified return of migrants staying in Hungary to their country of origin, and to advance their return with integration support. The project comprises four components: (1) through various communication channels, the information component ensures that potential beneficiaries as well as the staff of various relevant facilities can obtain up-to-date, easily accessible, and reliable information regarding voluntary return and reintegration support; (2) in the context of the return component, the IOM provides support to 310 beneficiaries to facilitate a safe return to their country of origin, including the organisation of voluntary return home, pre-departure assistance, and the provision of pre-departure cash support; and (3) the reintegration component is intended to facilitate reintegration after returning to the country of origin. In this framework, the IOM provides financial support to 50 volunteer returnees, the primary purpose of which is to promote direct or indirect participation in income-generating activities; (4) the basis of the evaluation component is a reintegration-specific questionnaire, with the help of which the feedback of beneficiaries who received reintegration support after returning to their country of origin is collected. This programme has also become important for third-country nationals who had to flee Ukraine and wished to return to their country of origin. According to the IOM, as of April 2023, 92 persons have received voluntary humanitarian return assistance since the outbreak of the war in Ukraine.<sup>64</sup>

Although Frontex activated Article 46 of the Frontex Regulation against Hungary and suspended its operations at Hungarian borders in early 2021 after a ruling by the EU Court of Justice, the agency continues to conduct return operations from Hungary.<sup>65</sup> Frontex can provide operational and technical support to a requesting EU or Schengen country in different phases of the return process.

## 4. Conclusion

This study highlighted that Hungary has a unique legal and practical framework resulting from legal amendments aimed at regaining control of the external borders of the EU. Nevertheless, in a relatively low number of cases, Hungary continues to issue and implements return decisions for illegally staying third-country

62 | Magyarországi Támogatott Önkéntes Hazatérési, Reintegrációs és Információs Program [Online]. Available at: <https://www.volret.hu/hu/programrol> (Accessed: 18 October 2023).

63 | HAVRRIP (AMIF-3.2.1/9-2020-00001; RR.0208).

64 | International Organisation for Migration, 2023.

65 | Agence Europe, 2022.

nationals. These cases prove the existence of real and efficient control over rights by independent tribunals.

However, several crises have affected the migration situation and governance in Hungary in various ways. Regarding regular return procedures, the war in Ukraine resulted in a significant change, as Ukrainian citizens comprised the largest number among those previously expelled; however, since the war, Ukrainian citizens cannot be returned. Nevertheless, the majority of persons found to be illegally staying in Hungary is escorted out of the fence at the Hungarian-Serbian border without undergoing a complete return procedure.

The migration crisis in 2015 had a negative impact on Hungary's asylum system and the execution of expulsion decisions. Regarding the readmission of those illegally arriving and staying in Hungary, the readmission agreement between the EU and Serbia is the most relevant because its scope extends to the readmission of third-country nationals and stateless persons. Nevertheless, since 15 September 2015, Serbia generally does not take back the majority of third-country nationals arriving illegally at the borders of Hungary. Consequently, Hungary aimed to find solutions that prevented masses of migrants from transiting through its territory by misusing the EU asylum framework, which was not designed for such inflows.

Hungary's paradox is that although a Member State must be able to perform enhanced external border protection according to EU rules, the common European asylum system provides loopholes for those arriving illegally that neutralise the efforts of these Member States. Although this contradiction between the Schengen and the asylum *acquis* needs to be handled at the EU level to not allow the degradation of the efficiency of our actions, and Hungary's experience is undoubtedly a valuable input in such policy discussions, its viewpoint appears to be increasingly isolated. Such complete disregard of a Member State protecting the EU's external borders cannot lead to effective *de lege ferenda* legislation, either.

Thus, Hungary attempted to find an unusual but effective solution in two respects. First, it introduced special sets of rules applicable to particular crisis situations, such as in the case of a crisis caused by mass immigration, and separate rules for pandemic situations. Second, Hungary also wished to tackle this regulatory problem in terms of the relationship between national and EU laws by requesting that the Hungarian Constitutional Court assess whether the incomplete effectiveness of the joint exercise of competences in the field of fighting illegal migration could lead to a violation of Hungary's sovereignty, constitutional identity, or fundamental rights and freedoms (including human dignity) enshrined in the Fundamental Law of Hungary. Regarding the tendency of judicial review, Polgári and Nagy concluded that while some of the lower courts appear to be more open to the influence of the CJEU and the European Court of Human Rights, the Hungarian Constitutional Court turned more sovereign and the government became reluctant to implement critical judgments.<sup>66</sup>

In this context, Hungary raises the 'heretic idea' of diverging from the primary conception of the present EU framework and not allowing asylum applications to

be submitted on the territory of the EU as a primary rule. This approach aims to eliminate the elements that give rise to abuse.

Although the legal standards currently in force in the EU have their roots in the Geneva Convention, European asylum law has evolved into its current form through the layering of a legal superstructure onto the Convention. As a result, there are considerable differences between what is laid out in the Convention and the implementation carried out by the Common European Asylum System. (...) The Geneva Convention itself cannot be linked to certain overly generous interpretations and that such an outcome was not intended by the framers of the Convention. Rather, supplementary judicial and legislative interpretations, which have accumulated over decades, have caused Europe's asylum system to become more permissive in certain aspects, compared to those of other major democratic jurisdictions.<sup>67</sup>

Šimonák and Scheu attributed this outcome to the jurisprudence of the European Court of Human Rights and the EU's legislative ambition, which is broader than that of the Geneva Convention. The question is whether the decades-long case law, also reflected in court cases Hungary had to face, would allow for a different reaction. However, the situations along the external borders of the EU no longer indicate any version of the 'normal situation' of arrivals of asylum seekers, as atypical situations of mass arrivals and asylum applications by non-eligible persons have become the new normal. The present unfitness of the current asylum and migration acquisition makes the entire EU vulnerable to, among others, situations of instrumentalisation of migration.

67 | Šimonák and Scheu, 2021, p. 11.

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