



DEFINING THE BOUNDARIES OF THE FUTURE COMMON EUROPEAN ASYLUM SYSTEM WITH THE HELP OF HUNGARY?

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ABSTRACT: In December 2020, the Grand Chamber of the CJUE has confirmed that Hungary has failed to fulfil its obligations under EU law in the area of procedures for granting international protection and returning illegally staying third-country nationals. The judgment in the case *Commission v Hungary* (case C-808/18 ECLI:EU:C:2020:1029) is another landmark judgment concerning the Common European Asylum System (CEAS). The Court's conclusions give clear hints about the limits of a future system, as proposed by the New Pact on Migration and Asylum.

KEYWORDS: CEAS – asylum law – migration law – refugee law – Return Directive – New Pact on Migration and Asylum – infringement procedure.

I. INTRODUCTION

On 17 December 2020, the Grand Chamber of the Court of Justice of the European Union (CJEU) has – once more – condemned Hungary for having violated, with the adoption and implementation of two laws of 2015 and 2017 on “managing mass immigration” and the procedure in special border zones,¹ the Return Directive, the Reception Directive and the Procedures Directive.² The judgment is the last of a series of now five judgments on the Hungarian asylum and migration system, all delivered between mid-2019 and 2020.³ Whereas the other four judgments were rendered in preliminary ruling

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¹ Law n. CXL of 2015 amending certain laws in the context of managing mass immigration, Magyar Közlöny 2015/124 and Law XX of 2017 amending certain laws related to the strengthening of the procedure conducted in the guarded border area, Magyar Közlöny 2017/39.

² Case C-808/18 *Commission v Hungary* ECLI:EU:C:2020:1029.

³ Case C-556/17 *Torubarov* ECLI:EU:C:2019:626; Case C-564/18 *Bevándorlási és Menekültügyi Hivatal (Tompá)* ECLI:EU:C:2020:218; Case C-406/18 *PG* ECLI:EU:C:2020:216; Joined cases C-924/19 PPU and C-925/19 PPU *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* ECLI:EU:C:2020:367;



procedures, *Commission v Hungary*, which shall be discussed here, brings an end to an infringement procedure, in which most of the shortcomings of the Hungarian system, already highlighted in the previous cases, are now officially declared incompatible with EU Law.⁴

The conclusions of the Court are likely to shape the future instruments in the area of asylum and return, where amendments have recently been proposed by the EU Commission's New Pact on Migration and Asylum.⁵ For instance, the Court repeatedly made clear that border procedures have to comply with fundamental rights standards and that keeping asylum seekers in closed centers with no real option to move is considered as detention – contradicting the case-law of the European Court of Human Rights, which did not qualify the conditions in the transit zone of Rösztke as detention.⁶

II. FACTS AND CONTEXT

In 2015, in response to the ongoing migration crisis and the resulting high influx of asylum seekers into the EU, Hungary amended its laws on asylum and return. The law⁷ allowed for the creation of special transit zones at the border to Serbia, where asylum applications were processed. It also introduced the concept of a “crisis situation caused

For a more detailed discussion see C Hruschka and S Progin-Theuerkauf, ‘Rechtsschutz in Transitzone – Ungarn im Fokus der Rechtsprechung des EuGH’ [2021] ZAR 3; See also joint cases C-715/17, C-718/17 and C-719/17 *Commission v Hungary, Poland and Czech Republic* ECLI:EU:C:2020:257, with regard to Hungary's refusal to participate in the relocation scheme, discussed by S Progin-Theuerkauf and V Zufferey, ‘Aucune justification du refus de participer au mécanisme temporaire de relocalisation de demandeurs d'une protection internationale’ [2020] European Papers, www.europeanpapers.eu 587, with further references.

⁴ Since 2010, Hungary has turned in a direction that has been criticized as violating the rule of law and other fundamental values of the EU, see N Chronowski, M Varju, P Bárd and G Sulyok, ‘Hungary: Constitutional (R)evolution or Regression?’ in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Springer 2019). Resolution of the European Parliament of 12 September 2018 on a proposal calling on the Council to determine, pursuant to art. 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)). See also the so-called ‘Sargentini report’ on Hungary for the LIBE Committee, www.europarl.eu. Hungary currently seeks to annul the resolution. However, in December 2020, Advocate General Bobek has suggested to dismiss the action, see case C-650/18 *Hungary v Parliament* ECLI:EU:C:2020:985. Another infringement procedure was opened in October 2020 against Hungary for unduly limiting access to the asylum procedure as a response to the coronavirus pandemic, see ec.europa.eu. The EU also (for the moment unsuccessfully) tried to link access to EU funding to the respect of the rule of law, see section III. and the references in footnotes 20 and 21.

⁵ EU Commission, New Pact on Migration and Asylum ec.europa.eu. Cf. already the different discussions on EU Immigration and Asylum Law and Policy, ‘Special Collection on the ‘New’ Migration and Asylum Pact’ eumigrationlawblog.eu.

⁶ ECtHR *Ilias and Ahmed v Hungary* App n. 47287/15 [13 November 2019].

⁷ Law n. CXL of 2015 amending certain laws in the context of managing mass immigration, Magyar Közlöny 2015/124.

by mass immigration”⁸, which, when declared by the Government, made it possible to apply a derogatory regime, repealing certain guarantees. In 2017, another law⁹ expanded the cases in which such a crisis situation could be declared.

The European Commission, already in 2015,¹⁰ raised concerns with regard to the compatibility of the Hungarian regime with the Procedures Directive,¹¹ the Reception Directive¹² and the Return Directive.¹³ It especially pointed out the restricted access to an international protection procedure, a practice of systematic detention of applicants for international protection and the forced deportation of illegally staying third country nationals to an area without infrastructure at the border to Serbia.

Hungary made some amendments to its laws, but was globally convinced that its regime was compatible with EU Law.

The Commission therefore brought an action for failure to fulfil obligations before the Court. In detail, it argued that Hungary had failed to fulfil its obligations under the Return Directive, the Procedures Directive and the Reception Directive, read in conjunction with arts 6, 18 and 47 of the Charter on Fundamental Rights:

a) in limiting, in appeal proceedings against a decision rejecting an application for international protection, the examination referred to art. 46(3) of the Procedures Directive to the facts and points of law considered when the decision was adopted;

b) in failing to transpose, into its national law, art. 46(5) of the Procedures Directive and in adopting provisions which derogate from the general rule of the “automatic suspensory effect” of appeals by applicants for international protection in situations not covered by art. 46(6) of that directive;

c) in forcibly moving, beyond the border fence, third-country nationals staying illegally in Hungarian territory, without observing the procedures and safeguards laid down in arts 5, 6(1), 12(1) and 13(1) of the Return Directive;

d) in requiring that asylum applications be lodged with the competent authority in person, and exclusively in the transit zone;

⁸ This is actually also one of the ideas of the New Pact on Migration and Asylum, see the discussion of art. 2 of the Proposal for a Migration and Asylum Crisis Regulation by F Maiani, ‘A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact’ (EU Immigration and Asylum Law and Policy, 20 October 2020) eumigrationlawblog.eu.

⁹ Law n. XX of 2017 amending certain laws related to the strengthening of the procedure conducted in the guarded border area, Magyar Közlöny 2017/39.

¹⁰ EU Commission, ‘Commission opens infringement procedure against Hungary concerning its asylum law’ (press release IP/15/6228, 10 December 2015) ec.europa.eu.

¹¹ 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 (Procedures Directive).

¹² 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 (Reception Directive).

¹³ Directive 2008/115/EC of the European Parliament and of the Council 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive).

e) in requiring that a procedure be applied to all asylum applicants, with the exception of unaccompanied minors under 14 years of age, the result of which is that they must remain in detention throughout the duration of the asylum procedure in the facilities of a transit zone which they may only leave in the direction of Serbia, and in not coupling that detention with the appropriate safeguards;

f) and in reducing, from eight days to three, the deadline for applying for review of first-tier decisions rejecting an asylum application.

III. JUDGMENT OF THE GRAND CHAMBER

In its judgment, the Grand Chamber of the CJEU, first pointed out that some of the questions that were submitted in this case had already been resolved by the Court in the FMS¹⁴ case and that, meanwhile, Hungary had closed its two transit zones in Röszke and Tompa. However, the situation to be assessed by the Court is the one at the end of the period laid down in the reasoned opinion of the EU Commission, here 8 February 2018.

The Court then treated the five different complaints. With regard to the first complaint, the Grand Chamber came to the conclusion that Hungary had failed to fulfil its obligations under arts 6 and 3 of the Procedures Directive, in providing that applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wished to access the international protection procedure in Hungary, were only possible in the transit zones of Röszke and Tompa, while at the same time drastically limiting the number of applicants authorized to enter those transit zones daily. It was virtually impossible for concerned third country nationals to deposit an application. For the Court, the existence of that practice was sufficiently demonstrated by the Commission. The Court also recalled that it is essential to grant access to the asylum procedure and that Member States must not delay that essential step unjustifiably.

As far as the second and third complaint are concerned, the Court, in line with the FMS case¹⁵, repeated that the obligation to remain in the transit zone for the duration of the procedure constitutes detention, within the meaning of the Reception Directive. The Court recalled that the situations in which the detention of an applicant for international protection is authorized are listed exhaustively in the Reception Directive, and that a Member State may detain an applicant for international protection in order to rule on his or her right of entry into its territory. However, the conditions for detaining third country nationals were not fulfilled here.

¹⁴ *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* cit.

¹⁵ *Ibid.*

The Court emphasized that the Procedures and Reception Directives require, *inter alia*, that detention be ordered in writing with reasons, that the specific needs of applicants identified as vulnerable and in need of special procedural guarantees be taken into account, in order that they receive “adequate support”, and that minors be placed in detention only as a last resort. None of these guarantees were respected in Hungary; on the contrary, detention was automatically and systematically ordered for every applicant aged 14 and more.

The Court also reiterated, as pointed out in the infringement procedure against Hungary, Poland and the Czech Republic regarding relocation,¹⁶ that Hungary is not entitled to rely on art. 72 TFEU¹⁷ to justify the disregard of its obligations under the Procedures Directive. Art. 72, that contains a public order clause, has to be interpreted strictly. The Reception and the Procedures Directives already sufficiently take into account the situation of a high number of applications for international protection, as they provide for the possibility of departing in such cases from some of the rules imposed in normal times.

As to the fourth complaint, the Court declared the removal of all third-country nationals staying illegally in Hungary’s national territory, with the exception of those of them who are suspected of having committed an offence, incompatible with the procedures and safeguards laid down in arts 5, 6(1), 12(1) and 13(1) of the Return Directive. The Court again rejected Hungary’s argument that it was permitted to derogate from these rules based on art. 72 TFEU.

Finally, the Court also found a violation of the right to remain in the territory of a Member State after the rejection of an application for international protection, until the time limit within which to bring an appeal against that rejection or, if an appeal has been brought, until a decision has been taken on it (art. 46(5) of the Procedures Directive). The only complaints that were rejected concerned the alleged insufficient transposition of art. 46(6) of the Procedures Directive, allowing Member States to not grant automatically a right to remain in the territory pending the outcome of the appeal brought by the applicant. Accordingly, the action was dismissed with regard to that part of the fifth complaint.

¹⁶ Joined cases *Commission v Hungary, Poland and Czech Republic* cit.

¹⁷ For a more detailed discussion of art. 72 TFEU see S Progin-Theuerkauf and V Zufferey, ‘Aucune justification du refus de participer au mécanisme temporaire de relocalisation de demandeurs d’une protection internationale’ cit.

IV. COMMENT

The judgment is another piece of the puzzle, now comprised of five judgments,¹⁸ all rendered on the Hungarian migration and asylum system in the last two years. In fact, by the end of 2020, Hungary had been found to violate numerous provisions of EU asylum and migration law instruments.¹⁹ The difference between the latest judgment and the others is that the first four judgments were rendered in preliminary ruling procedures – where the pressure to immediately adapt national legislation is considerably lower –, whereas the latest judgment in *Commission v Hungary* was an infringement procedure. The judgment in *Commission v Hungary* once more highlights the major shortcomings of the Hungarian system, already detected in the former cases, and there is no doubt as to whether the Hungarian asylum system needs to be modified or not. Hungary is obliged to take all measures necessary to comply with the judgment. If it fails to do so, it is open to the Commission to take further action under art. 260 TFEU. The Court may ultimately impose a fine, in the form of a lump sum, penalty payment or both.

The problems in the migration/asylum area are also emblematic for the issues Hungary currently has with the rule of law and other EU values. A debate on a possible opening of art. 7 TEU proceedings against Hungary is still ongoing. The EU also tried to tie EU funding to a respect of the rule of law in the 2021-2027 multiannual financial framework.²⁰ However, this caused a strong opposition of Hungary and Poland, whose reaction was foreseeable: they tried to veto the approval of the EU's 2021-2027 budget,²¹ including the important COVID recovery fund, which would have been a disaster for the EU. In December 2020, a last-minute compromise was found and the linkage to the respect of the rule of law was deleted from the regulation, so that the EU budget could finally be adopted, but the quarrels continue.²²

The restrictions that Hungary has implemented in 2015 are actually not unfamiliar to many other Member States. The desire to limit access to the asylum system, to shorten procedures, to restrict the freedom of movement of applicants for international protection during their asylum procedure and to quickly return persons not in need of protection is omnipresent in all Member States of the European Union. However, so far,

¹⁸ *Torubarov* cit.; *Bevándorlási és Menekültügyi Hivatal* cit.; *PG* cit.; *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, cit.; *Commission v Hungary* cit.

¹⁹ As a response, at the end of January 2021, Frontex, who has been accused for participating in human rights violations, suspended its operations in Hungary, see euobserver.com and FL Gatta, 'Between Rule of Law and Reputation - Frontex's withdrawal from Hungary' (Verfassungsblog 8 February 2021) verfassungsblog.de.

²⁰ Communication COM(2018) 322 final from the Commission of 2 May 2018 proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, art. 7.

²¹ Regulation (EU, Euratom) 2020/2093 of the Council of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027.

²² L Bayer, 'EU budget plan lets Hungary, Poland off the rule-of-law hook (for now)' (Politico, 9 December 2020) www.politico.eu.

only Hungary has been subject to an infringement procedure – maybe due to the fact that the relations between Hungary and the EU have considerably degraded in the last years and that migration is not the only bone of contention in the relationship between Hungary and the EU.

Remarkably, even the EU Commission itself, in its so-called “New Pact on Migration and Asylum”,²³ a bundle of proposals published in September 2020 to reform the current system, has copied at least some of Hungary’s ideas. For instance, it suggests the introduction of a new screening procedure²⁴ and a special border procedure.²⁵ This would mean that border zones like those in Röske and Tompa will actually have to be established by many Member States.²⁶ Furthermore, the Commission proposes a gradual – and only partially mandatory – “solidarity mechanism”, where the notion of “crisis” (used in the above-mentioned Hungarian Law) is also used.²⁷

Therefore, the conclusions of the Court are of utmost importance, as they will help to design the future instruments. Several features of the future system now seem to be clear:

a) Access to an asylum procedure must be granted at all times, be it at the border or within the territory of a country.

b) Impermeable transit zones are not compatible with EU standards and must be qualified as detention. What is remarkable is that, when it comes to the assessment of the conditions in the Hungarian transit zones, the CJEU is stricter than the European Court of Human Rights, which did not qualify the conditions in the transit zone of Röske as detention.²⁸ The CJEU, unlike the ECtHR, attaches more importance to the

²³ EU Commission, ‘New Pact on Migration and Asylum’ ec.europa.eu. Cf. already the different discussions on EU Immigration and Asylum Law and Policy, ‘Special Collection on the ‘New’ Migration and Asylum Pact’ eumigrationlawblog.eu.

²⁴ Communication COM (2020) 612 final from the Commission of 23 September 2020 on the ‘Proposal for a Regulation of the European Parliament and the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817’.

²⁵ Communication COM (2020) 611 final from the Commission of the 23 September 2020 on the ‘Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’.

²⁶ See F Maiani, ‘A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact’, cit.

²⁷ Communication COM(2020) 610 final from the Commission of 23 September 2020 on ‘Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]’, arts 47-49 (SAR situations), art. 51 (situations of migratory pressure); Communication COM (2020) 613 final from the Commission of 23 September 2020 on ‘Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum’, art. 2 (for a “crisis”); Communication COM (2020) 613 final from the Commission of 23 September 2020 on ‘Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum’.

²⁸ *Ilias and Ahmed v Hungary* cit.

behaviour of Serbia, that actually refuses to readmit third country nationals or sanctions returning persons. Therefore, it cannot be considered as a safe third country.

c) Procedural guarantees have to be respected; it must be possible to appeal against any negative decision. A court seized with the case must have full cognition. Deadlines must not be excessively short.²⁹

d) Administrative authorities must be bound by the findings of a court.³⁰

e) A right to remain on the territory must be granted until the negative decision becomes effective or until the appeal has been rejected.

f) The guarantees of the Return Directive³¹ must be respected.

g) It is not possible to invoke the application of art. 72 TFEU (public order clause),³² if the applicable secondary legislation provides for possibilities to manage a sudden high influx of applicants for international protection (which all instruments currently do).

Even though the boundaries of a future system have been sharpened, there is absolutely no reason to rejoice: The judgments clearly show that Hungary is blatantly disrespecting EU standards and that, apart from fines and the suspension of voting rights under art. 72 TFEU, there is little to force it to cooperate.³³ It has already announced further amendments to its asylum law; in the future, it shall only be possible to deposit applications for international protection in Hungarian Embassies.³⁴ Furthermore, Hungary is only willing to discuss the proposals for a reform of the CEAS if the focus is on return and prevention of the entry of migrants – be they in need of international protec-

²⁹ *Bevándorlási és Menekültügyi Hivatal* cit.; *PG* cit.

³⁰ *Ibid.*

³¹ For an overview of the guarantees and problems of the Return Directive see F Maiani, 'Directive de la honte ou instrument de progrès ? – Avancées, régressions et *statu quo* en droit des étrangers sous l'influence de la Directive sur le retour', in A Epiney and N Gammethaler (eds), *Schweizerisches Jahrbuch für Europarecht 2008/2009* (Schulthess 2009) 289; M Berger and S Tanzer, 'Die Rückführungsrichtlinie im Spannungsfeld von effektiver Rückführungspolitik und Grundrechtsschutz', in S Salomon (ed), *Der Status im europäischen Asylrecht* (Nomos 2020) 265; A Baldaccini, 'The EU Directive on Return: Principles and Protest' (2009) 4 *Refugee Survey Quarterly* 114; A Baldaccini, 'The return and removal of irregular migrants under EU law: An analysis of the Returns Directive' (2009) *EJML* 1; K Zwaan (ed), *The returns directive: Central themes, problem issues, and implementation in selected member states* (Wolf Legal 2011); S Peers, E Guild, D Acosta Arcarazo, K Groenendijk, V Moreno-Lax (eds), *EU Immigration and Asylum Law: Text and Commentary* (2nd edn, Martinus Nijhoff 2012) 483; P Boeles, M den Heijer, G Lodder, K Wouters (eds), *European Migration Law* (2nd edn, intersentia 2014) 385; J Augustin, *Die Rückführungsrichtlinie der Europäischen Union - Richtliniendogmatik, Durchführungspflichten, Reformbedarf* (Dike 2016); M-K Diekmann, *Menschenrechtliche Grenzen des Rückführungsverfahrens in Europa* (Nomos 2016); S Progin-Theuerkauf, 'The EU Return Directive – Retour à la «case départ»? (2019) *sui-generis* 32.

³² For a discussion of art. 72 TFEU see S Progin-Theuerkauf and V Zufferey, 'Aucune justification du refus de participer au mécanisme temporaire de relocalisation de demandeurs d'une protection internationale' cit.

³³ *Ibid.*

³⁴ See European Council of 19 June 2020, 'Hungary: New Law on the Lodging of Asylum Applications at Embassies' on Refugees and Exiles, www.ecre.org.

tion or not. It is therefore not likely that any positive developments will occur in the near future.

