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**“Access to Justice? Migration Cases before the Constitutional Court
of Hungary”**

REPORT BY

Ms Krisztina KOVACS
Counsellor, Constitutional Court, Hungary

Access to Justice? Migration Cases before the Constitutional Court of Hungary

1. Background

Hungary does not have a history of immigration. Traditionally, Hungary is not a target destination, but a transit country of migration. Last year, the biggest wave of migration ever reached the country.¹ The number of asylum claims submitted in Hungary multiplied by hundred between 2011 and 2015, however, these claims are largely abandoned, as applicants leave the country within a few days.² Over the last summer, thousands of refugees were sitting and sleeping on the ground around railroad stations in Budapest. The majority of them left Hungary within days or weeks. Nonetheless, the Hungarian government has been busy over the past several months handling the migration crisis.

2. Governmental actions

In the spring of 2015, the government launched a countrywide campaign on immigration. Hungarian language billboards were displayed which read: “If you come to Hungary, you have to follow our laws!” or “If you come to Hungary, you shouldn’t take the jobs of Hungarians!”³

In the summer of 2015, a governmental decree declared a list of “safe countries of origin” or “safe third countries” from which asylum applications could benefit from an accelerated procedure⁴ and amendments provided for the erection of a fence on the southern border.⁵ In the autumn of 2015, these fences were built, and new laws made the crossing of the closed border illegal, and criminalised the illegal entry into the country.⁶ The government declared “a state of crisis caused by mass migration” in two southern regions of Hungary⁷ and later it extended to four more counties.⁸

Meanwhile, on the 22nd of September 2015, an EU Council Decision was adopted,⁹ which introduced a quota system for the distribution and settlement of asylum seekers and migrants among the Member States. In response to that, an Act was adopted by the Hungarian Parliament to call on the Hungarian government to initiate an action for annulment against the Council Decision before the EU Court of Justice.¹⁰ Accordingly, the EU Council Decision was challenged by the Hungarian State before the Luxembourg court.¹¹

¹ Frontex: Risk Analysis available at frontex.europa.eu for 2016 at 7.

² Hungarian Helsinki Committee Report available at <http://www.helsinki.hu/en/facts-figures-on-immigration-and-asylum-in-hungary-7-august-2015/>

³ Nick Thorpe: Hungary’s poster war on immigration available at <http://www.bbc.com/news/world-europe-33091597>

⁴ Governmental Decree 191/2015 on the national list of safe countries of origin and safe third countries

⁵ Act CXXVII of 2015 on the establishment of temporary border security closure and on amending acts related to migration

⁶ Act CXL of 2015 on the amendment of certain acts relating to the management of mass migration

⁷ Governmental Decree 269/2015 on declaring a state of crisis caused by mass migration and on the rules in connection with the declaration, continuation and termination of the state of crisis (in counties Bács-Kiskun and Csongrád)

⁸ Governmental Decree 270/2015 on declaring a state of crisis caused by mass migration in counties Baranya, Somogy, Zala and Vas and on the rules in connection with the declaration, continuation and termination of the state of crisis

⁹ EU Council Decision 2015/1601 on establishing provisional measures in the area of international protection for the benefit of Italy and Greece

¹⁰ Act CLXXV of 2015 on acting against the compulsory settlement quota system in defense of Hungary and Europe

¹¹ Case C-647/15: Action brought on 3 December 2015 — Hungary v Council of the European Union. Slovakia

In December 2015, the European Commission opened an infringement procedure against Hungary concerning its asylum legislation.¹² The Commission has found the Hungarian legislation in some instances to be incompatible with EU law, specifically, with the Asylum Procedures Directive and the Directive on the right to interpretation and translation in criminal proceedings as well as the EU Charter of the Fundamental Rights. In response to that, on the 24th of February 2016, the government has called for a referendum that would allow the electorate to vote on the following question: “Do you want the European Union, without the consent of Parliament, to order the compulsory settlement of non-Hungarian citizens in Hungary?” Connected to this, a poster campaign was launched. Hungarian language billboards are displayed all over Hungary which read: “Let’s send a message to Brussels, so that they can understand it as well”. On the top of the billboard the text says “Referendum 2016 against compulsory settlement.”¹³

In March 2016, the government extended the state of crisis to the entire territory of Hungary by declaring a “nationwide migrant crisis”.¹⁴ Moreover, a constitutional amendment was tabled to include Article 51/A on the “state of terrorist threat” in the constitution. The so-called Sixth Amendment to the Hungarian Fundamental Law permits the government to initiate a “state of terrorist threat” by submitting a request to parliament, to declare the state of terrorist threat, and the government can start exercising emergency powers as soon as it makes the request. The argument for adopting this constitutional amendment was that it would be necessary to manage the adverse results from the migration crisis, including also threats of terrorism.¹⁵ To sum up, in the last couple of months, laws were amended and adopted and even the constitution was changed in order to manage the migration crisis in Hungary.

3. The role of the Hungarian Constitutional Court

One could assume that several petitions have challenged the constitutionality of the recently adopted legal measures, but that is not the case. Under the Constitution, the affected migrants, judges of the immigration proceedings and the Commissioner of the Fundamental Rights (the ombudsman) are placed to challenge these new rules. None of them have submitted a complaint to the Constitutional Court over this issue yet. There are two cases before the Court, which somehow are connected to the migrant crisis: the case concerning the EU Council Decision and the case on the government’s referendum.

3.1. The ombudsman’s petition

In December 2015, the ombudsman turned to the Constitutional Court¹⁶ asking the Court to interpret two articles of the Fundamental Law over the issue of the European Union migrant resettlement system. One of the constitutional provisions in question prohibits collective expulsion and says that foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision.¹⁷ The other is the so-called European Union clause, which

also filed an action for annulment against the Decision to the EU Court. Case C-643/15: Action brought on 2 December 2015 — Slovak Republic v Council of the European Union.

¹² European Commission Press Release available at http://europa.eu/rapid/press-release_IP-15-6228_en.htm

¹³ Nick Thorpe: Migrant crisis: The smugglers’ route through Hungary, available at <http://www.bbc.com/news/world-europe-36368580>

¹⁴ Governmental Decree 41/2016 on declaring a state of crisis caused by mass migration to the entire territory of Hungary and on the rules in connection with the declaration, continuation and termination of the state of crisis

¹⁵ More on this see Kriszta Kovács: Hungary’s Struggle. In a Permanent State of Exception, *VerfBlog*, 2016/3/17 available at <http://verfassungsblog.de/hungarys-struggle-in-a-permanent-state-of-exception/>, DOI: <https://dx.doi.org/10.17176/20160317-170900>

¹⁶ Section 38 of the Act CLI of 2011 on the Constitutional Court (Constitutional Court Act). The application number of the ombudsman’s petition is X/3327-0/2015.

¹⁷ Article XIV (1) of the Fundamental Law

allows Hungary, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties of the EU, to exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union.¹⁸

The ombudsman explained this move by saying that he would like to clear up legal concerns around the issue of the mandatory transfer of asylum seekers to Hungarian territory. Although the ombudsman did not challenge explicitly the constitutionality of the Council Decision, the petition questions its lawfulness.

One of the issues asked by the ombudsman is whether Hungarian institutions can lend a helping hand in enforcing the “illegal” expulsion decisions of other states. According to the ombudsman, after receiving a decision for expulsion from European Union authorities asylum-seekers have no chance to have their say against the move, which is against general EU legal norms. He says that when the European Union issues expulsion decisions for migrants *en masse*, this leads to collective expulsion, which is against basic European Union treaties and that expulsion is only possible after processing applications on an individual basis.

The ombudsman also claims that the EU Council Decision violates international law, namely the Geneva Convention relating to the Status of Refugees, by depriving applicants of their right to remain in the territory of the Member State in which they made their application and by allowing their relocation to another Member State.

Last, but not least, the ombudsman suggests that, under the EU clause of the Fundamental Law, there are constitutional constraints as to the validity of the rules of the European Union in the Hungarian legal system. Accordingly, Hungarian institutions cannot enforce any European Union measures which run against the Fundamental Law’s human rights chapters.

According to the ombudsman, it is the Constitutional Court which, by interpreting the Fundamental Law, could empower itself to exercise *ultra vires* control by referring to powers granted to the European Union or to exercise control by referring to national and/or constitutional identity. (Article 4(2) of the Treaty of the European Union).

Briefly, in the view of the ombudsman, the Fundamental Law protects the fundamental rights of the asylum seekers more than the EU law, therefore the Hungarian Constitutional Court should be competent to declare secondary EU legislation inapplicable in the Hungarian legal order if and to the extent that they conflict with the national protection of human rights.

3.2. Government Referendum

The other relevant case before the Constitutional Court is the case concerning the referendum on the EU resettlement plan. The question of the government-initiated referendum will ask whether citizens are in favour of the European Union being allowed to make the settlement of non-Hungarians obligatory in Hungary, even if the Hungarian Parliament does not agree.

In Hungary, the National Election Committee has the competence to review the formulation and content of the referendum question.¹⁹ The Committee decision can be challenged before the *Curia* (the Supreme Court).²⁰ Petitioners challenged the question, among others,

¹⁸ Article E (2) of the Fundamental Law

¹⁹ Section 3 of the Act CCXXXVIII of 2013 on the initiation of national referendum, European Citizens’s Initiative and on the referendum procedure (Referendum Act)

²⁰ Section 29 of the Referendum Act

because of the inaccurate wording. They argued that, for example, the notion of “compulsory settlement” (*betelepítés*) used by the question does not exist in either Hungarian or EU law. The terms used in connection with refugee matters are “transfer” (*áthelyezés*) or “resettlement” (*áttelepítés*). Despite these preliminary concerns, the referendum question got through both the National Election Committee and the *Curia*.

Therefore, in early May 2016, the Hungarian Parliament adopted a parliamentary resolution to order the referendum.²¹ Under the Constitutional Court Act, anyone can file a petition with the Court to review this parliamentary decision with regard to conformity with the Fundamental Law and legality. However, the scope of this constitutional review is limited. The Court can examine the merits of the resolution if, between the authentication of the question and the ordering of the referendum, the circumstances changed to a significant degree in a manner that may significantly affect the decision. The Constitutional Court cannot examine the content of the referendum question itself.²²

Several petitions requested the Court to declare the parliamentary resolution 8/2016 ordering the referendum unconstitutional.

The Fundamental Law says that “national referenda may be held about any matter within the tasks and competences of Parliament”.²³ The main concern of the petitioners was that it was not in the Hungarian Parliament’s power to pass such a resolution, since the referendum question has an impact on EU common policy. Title V Chapter 2 of the Treaty on the Functioning of the European Union treats the policies on external border control, asylum and immigration as EU common policies. Consequently, the Hungarian Parliament has no direct competence over the dealings between Hungary and the European Union on migration matters.

The other main concern of the petitioners was that between the authentication of the question and the ordering of the referendum, the circumstances changed to a significant degree in a manner that significantly affects the decision. On the 4th of May 2016, the European Commission presented legislative proposals to reform the Common European Asylum System among others by providing “for tools enabling sufficient responses to situations of disproportionate pressure on Member States’ asylum systems” through a “corrective allocation mechanism”.²⁴

The Constitutional Court, in its decision delivered on 22nd of June 2016, rejected all quota referendum petitions. The Court rejected the first concern of the petitioners by arguing that the merits of the referendum question shall not be examined in the current procedure. Therefore, the Constitutional Court was not in a position to answer the question of whether or not the subject of the referendum concerned the EU common policy. The Court also rejected the second main concern by saying that the proposal of the European Commission to reform the Common European Asylum System is just a proposal that cannot be seen as a document that changed the circumstances significantly.

Conclusion

The case concerning the ombudsman’s petition is still pending. At this point, the only certainty is that almost all constitutional institutions were involved in the handling of the migration crisis. The result will be determined by Parliament, the ombudsman, the National Election Committee, the *Curia*, and the Constitutional Court reacting to each other’s

²¹ Parliamentary Resolution 8/2016 on ordering the referendum

²² Section 33 of the Constitutional Court Act

²³ Article 8 (1) of the Fundamental Law

²⁴ European Commission Proposal available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf

activities. The way, however, these institutions protect rights is Janus-faced. Apparently, the ombudsman protects the basic human rights of the migrants and the referendum is there to ensure the participatory rights of the citizens. But, both the ombudsman's petition and the referendum are in conflict with the efforts made by the European Union.

Kriszta Kovács

Access to Justice?

Migration cases before the
Hungarian Constitutional
Court





If you come to Hungary, you should not take the jobs of Hungarians!

If you come to Hungary, you have to keep our laws!





NÉPSZAVAZÁS 2016
a kényszerbetelepítés ellen

**Üzenjünk Brüsszelnek,
hogy ők is megértsék!**

Referendum 2016 against compulsory settlement

“Let’s send a message to Brussels,
so that they can understand it as well!”

The image shows a blue poster with white and yellow text. The top part has a yellow box with the text 'NÉPSZAVAZÁS 2016 a kényszerbetelepítés ellen'. Below that, in large white letters, is the main message 'Üzenjünk Brüsszelnek, hogy ők is megértsék!'. Underneath the poster, there is a line of text in italics: 'Referendum 2016 against compulsory settlement'. At the bottom, there is a quote in English: 'Let’s send a message to Brussels, so that they can understand it as well!’.

Cases before the Constitutional Court

- ❖ no constitutional complaint
- ❖ no judicial initiative
- ❖ no abstract control initiated by the ombudsman
- ❖ two pending cases
 - ❖ connected to EU Council Decision 2015/1601
 - ❖ on the government initiated referendum

The ombudsman's petition

- ❖ asking constitutional interpretation
 - ❖ Article XIV(1) of the Fundamental Law prohibits collective expulsion
 - ❖ Article E(2) of the Fundamental Law — the EU clause
- ❖ the ombudsman's argument
 - ❖ The resettlement is against basic EU treaties, international law and it runs into the Fundamental Law's human rights chapter.

Petitions against the referendum

- ❖ Referendum question: "Do you want the European Union, without the consent of Hungarian Parliament, to order the compulsory settlement of non-Hungarian citizens in Hungary?"
- ❖ The question got through the National Election Committee and the Curia.
- ❖ Parliament adopted a resolution to order the referendum.
- ❖ Petitioners challenged this parliamentary resolution.
- ❖ The petitioners' argument:
 - ❖ its not within the Parliament's competence
 - ❖ the referendum has an impact on EU common policy
 - ❖ new legislative proposals of the European Commission