



Hungarian Helsinki Committee

Preserved legal deficiencies post-CJEU *Ahmed* judgement: Hungarian asylum provisions on exclusion from international protection still not compliant with EU law

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In Hungary, a person who commits a serious crime can be excluded¹ from refugee status (Section 8(5) of the Asylum Act) or from subsidiary protection status (Section 15(ab) read together with Section 8(5) of the Asylum Act) based on the same criteria. This is in contrast *per se* with the Qualification Directive,² since the Qualification Directive differentiates between the conditions for exclusion from the two types of international protection. EU law³ requires that a person may be excluded from refugee status if they have been convicted by a final judgment of a particularly serious crime, whereas the commission of a serious crime suffices regarding exclusion from subsidiary protection.⁴ Consequently, the fact that the conditions of exclusion from refugee and subsidiary protection status are not differentiated in the Asylum Act, the emphasis on the particularly serious nature of the crime with regard to refugee status vanishes.

Section 8(5) of the Asylum Act is also in violation of Article 14(4)(b) of the Qualification Directive due to the lack of cumulative conditions set out therein. When it comes to exclusion from the refugee status, besides the requirement of a particularly serious crime, the EU legislation sets out a further condition that the person must constitute a danger to the community of that Member State. Whereas the latter appears in the Asylum Act in Section 8(4), it is not required to be applied cumulatively with the serious crime condition.

Furthermore, the asylum authority does not conduct an individual assessment of all the circumstances of the case and has no discretion when determining the seriousness of the crime as a reason for exclusion from international protection. The CJEU has already ruled in the *Ahmed* case that it is for the authority ruling on the application for subsidiary protection to assess the seriousness of the crime at issue, by carrying out a full investigation into all the circumstances of the individual case concerned.⁵ Therefore, the current Section 8(5) of the Asylum Act that has been amended after the ruling of the Court still does not satisfy the requirement of individual assessment, since it sets out specific cases according to which a foreigner must be automatically excluded from international protection.

Section 8(5) point (a) foresees exclusion if the person was sentenced to *imprisonment of five years or more* as a result of committing an intentional criminal offense. Since the CJEU declared in the *Ahmed* case that serious crime could not be used as the sole criterion to determine the penalty for a specific crime under the law of a Member State, this provision clearly violates EU law.⁶

Section 8(5) point (b) foresees exclusion if the person was sentenced to imprisonment for committing a crime as *recidivist*, habitual recidivist or a recidivist with a history of violence who has already been convicted by a final judgment and given a prison sentence. Similar to point (a), this provision applies a sole criterion, namely that the person is a recidivist, and does not take further factors into account such as the nature of the crime, the penalty or its eventual suspension.

Section 8(5) point (c) sets out the basis for exclusion in a list of specific crimes and their associated lengths of imprisonment. A person shall be excluded if they have been sentenced to *imprisonment of three years or more* for *committing a criminal offense against* life, physical integrity, health, personal

¹ The same goes for withdrawal of statuses as well (Section 11(3) and Section 18(2)(g) of Asylum Act).

² Directive 2011/95/EU of the European Parliament and of the Council 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.

³ According to the joint reading of Article 14(4)(b) and (5) of the Qualification Directive.

⁴ Article 17(1)(b) of the Qualification Directive.

⁵ Judgment of 13 September 2018, *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal*, C-369/17, para. 58.

⁶ *Ibid.*

freedom, sexual freedom, public peace, public safety, or criminal offense related to administrative procedures. In fact, this subsection covers the majority of the crimes listed in the Hungarian Criminal Code,⁷ meaning that virtually anyone who has been convicted of almost any crime will be automatically excluded. Moreover, the selection of crimes is quite arbitrary. There is no reason why crimes against the state are not listed, yet causing bodily harm is. It follows that the selected criminal offenses do not necessarily represent crimes with a higher material weight.

The CJEU referred to the European Asylum Support Office's (EASO) *Exclusion: Articles 12 and 17 of the Qualification Directive (2011/95/EU) Report* in the *Ahmed* case.⁸ In paragraph 3.2.2 on Article 17(1)(b) of the Qualification Directive, the report recommends that the gravity of the crime is to be assessed in light of a number of criteria such as, inter alia; the nature of the act, the consequences of that act, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions also classify the act in question as a serious crime. The Asylum Act does not entail, nor does the Asylum Authority apply such an assessment.⁹

Furthermore, given the lack of individual assessment, Section 8(5) is at variance with Article 10(3) of the Procedures Directive¹⁰ and Article 4(3) of the Qualification Directive. The list of cases where exclusion shall be applied is the "sole criterion"¹¹ imposed by law and not the result of the decision-making of the asylum authority (but in fact of the criminal court judge). Moreover, Article 19(4) of the Qualification Directive explicitly obliges the asylum authority to examine the conditions for exclusion from subsidiary protection on an individual basis.

Based on CJEU case law, the same criterion establishing the necessity of a full investigation into all the circumstances of an individual case applies not only to exclusion from subsidiary protection (as it was ruled in the *Ahmed* judgment), but also to exclusion from refugee status (B and D,¹² and the *Lounani* judgments).¹³ In the former ruling, the CJEU made it clear that not even membership of the applicant in a terrorist organisation can automatically constitute the basis for their exclusion from refugee status.

The Asylum Act is further at odds with the Qualification Directive on account of the non-transposition of Article 14(6) of the Qualification Directive. This Article provides persons excluded from refugee status, based on Article 14(4) and (5), with rights (or similar to those) set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention. The CJEU made it clear in its judgment in the case of *M, X, X*¹⁴ when it interpreted that Article 14(6) of the Qualification Directive means that the exclusion from refugee status under Article 14(4) and (5) differentiates from the exclusion clause set out in Article 12. Under the latter, a person is not entitled to the rights listed under Chapter VII of the Qualification Directive; whereas in case of exclusion under the former provisions, a person remains a refugee for the purposes of Article 1A of the Geneva Convention¹⁵ and is excluded only from a certain set of rights. Therefore, going beyond Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention determined by Article 14(6), the Court also referred to rights a person is entitled to under Articles 4, 18 and 19(2) of the Charter of Fundamental Rights of the European Union, and those Articles of the Geneva Convention that do not require the lawful residence of the refugee on the territory of the Member State.¹⁶

⁷ Act C of 2012 on the Criminal Code, available at: <https://bit.ly/34TU0kE>.

⁸ Judgment of 13 September 2018, *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal*, C-369/17, para. 56.

⁹ In a case concerning the withdrawal of refugee status and exclusion from subsidiary protection based on a crime which had been already known to the asylum authority when the refugee status was granted, a preliminary reference procedure was initiated by the Metropolitan Court before the CJEU on 27 January 2021. The court is asking whether such exclusion is compliant with Article 17(1)(b) of the Qualification Directive.

¹⁰ 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.

¹¹ Judgment of 13 September 2018, *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal*, C-369/17, para. 58.

¹² Judgment of 9 November 2010, *Bundesrepublik Deutschland v B and D*, C-57/09 and C-101/09, paras. 91 and 93.

¹³ Judgment of 31 January 2017, *Lounani*, C-573/14, para. 72.

¹⁴ Judgment of 14 May 2019, *M, X, X*, Joined Cases C-391/16, C-77/17 and C-78/17.

¹⁵ *Ibid.*, paras. 99-100.

¹⁶ *Ibid.*, para. 105; these rights are enshrined in articles 8, 13, 14, 20, 25, 27, 29 and 34 of the Geneva Convention.

In Hungary, even if a person is not expelled from the country, the mentioned articles – including the right to initiate a naturalisation procedure or the right to public education - are not provided to them either *ex lege* or *de facto*. The non-transposition of Article 14(6) of the Qualification Directive is relevant when it comes to the application of Section 8(4) of the Asylum Act that establishes the possibility for exclusion if the asylum-seeker poses a threat to national security, and of Section 8(5) analysed above. It follows that the Hungarian law merges the exclusion grounds of Article 12 (Article 1F of the Geneva Convention) and Article 14(4) and (5) of the Qualification Directive, and does not guarantee the entire set of rights enshrined in EU law to the persons excluded from refugee status under the latter provisions. Consequently, the Asylum Act contradicts EU law.

In summary, the infringement of EU law centres around the following issues:

1. Persons committing a "*serious crime*" can be excluded from both types of international protection based on the same provision (Section 8(5) of the Asylum Act). This is contrary to the Qualification Directive. The latter requires the crime to be "particularly serious" [Article 14(4)(b) read together with Article 14(5)] with regard to refugees, and to be "serious" with regard to beneficiaries of subsidiary protection status (Article 17(1)(b));
2. Inappropriate transposition of Article 14(4)(b) of the Qualification Directive as the condition "to constitute a danger to the community" is not transposed as a *cumulative condition* in Section 8(5) of the Asylum Act;
3. Lack of *individual assessment and discretion* of the asylum authority with regard to all the circumstances of the case in determining the seriousness of a crime as the reason for exclusion from international protection contradicts the jurisdiction of CJEU (*Ahmed, B and D, Lounani* judgments); and
4. *Non-transposition of Article 14(6) of the Qualification Directive*: The rights enshrined in Article 14(6) of the Qualification Directive and provided by the interpretation of the CJEU in the *M, X, X* case are not provided to those refugees who are excluded from protection based on Section 8(4) and 8(5) of the Asylum Act.