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Constitutional Court
H-1015 Budapest, Donáti u. 35-45., Hungary

Budapest, 8 November 2021

The Honourable Constitutional Court,

I, the undersigned dr. Márta Pardavi as the co-chair of the Hungarian Helsinki Committee (H-1074 Budapest, Dohány utca 20., Hungary, hereinafter the "intervener") submit the following

***amicus curiae* brief**

for the purpose of facilitating the adjudication of the petition pending before the Constitutional Court under number X/477/2021, seeking an interpretation of Article E (2) and Article XIV (4) of the Fundamental Law, in accordance with the rule of law and the constitutional norms of fundamental human rights and freedoms.

The intervener is a non-governmental organisation, a public benefit association, active since 1989, defending human dignity with the instruments of law and publicity. It provides help to refugees, detainees and victims of law enforcement violence.

The intervener continuously monitors the rights of refugees under Hungarian jurisdiction and represents them in administrative proceedings, domestic and EU as well as international litigations to protect their fundamental rights.

The practice of push-backs dealt with in the case before the Court of Justice of the European Union (hereinafter CJEU) adjudicated under no. C-808/18, which is the subject of the Government's petition, is thus a serious human rights violation that the intervener has been aware of for years. The practice is not unique to Hungary, as many other European countries also "take advantage of" this blatantly unlawful tool. However, the fact that push-backs are not merely a practical "solution", but an explicit legal obligation and the consequent application of the law, underlines the seriousness of the violation by Hungary.

This is exacerbated by the fact that the petitioner expects the aid of the Constitutional Court to circumvent the clear and binding judgment of the Court of Justice of the European Union, thus justifying the continuation of its unlawful activity. Such an endeavour violates not only the rights of refugees, but also the rule of law and the principle of the democratic exercise of power, and can only be achieved by violating the Fundamental Law of Hungary as well as the EU and international legal norms that bind the country.

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I. The petition must be rejected

I.1. The Constitutional Court has no competence to provide the requested interpretation

In its petition, the Government requests the Constitutional Court to interpret Article E (2) and Article XIV (4) of the Fundamental Law in the framework of the powers vested in it under Section 38 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter the "Constitutional Court Act"). The power to provide an abstract interpretation of the Fundamental Law is based on Section 38 (1) of the Constitutional Court Act, laying down that *"on the petition of the Government, [...], the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a certain constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law."*

According to the case law of the Constitutional Court, in the case of a petition submitted on the basis of Article 38(1) of the Constitutional Court Act, the Constitutional Court must examine whether the petition *"(a) originates from a body or person specified in Section 38(1) of the Constitutional Court Act, (b) whether it relates to the interpretation of a specific provision of the Fundamental Law, (c) whether it is related to a certain constitutional issue, and finally (d) whether the interpretation can be directly deduced from the Fundamental Law."*[1] The Constitutional Court has the power to rule on the petition only if all the above conditions are met, therefore it must first ascertain whether the four conditions are complied with, i.e. whether it has jurisdiction to rule on the petition.

The Government's petition for an abstract interpretation of the Constitution does not meet the requirements of Section 38(1) of the Constitutional Court Act on the interpretation of the Constitution, therefore it must be rejected for lack of jurisdiction.

The conditions provided for in Section 38(1) of the Constitutional Court Act are cumulative ones, and consequently, in the absence of any of the conditions, the petition must be rejected. Only if all the conditions of exercising jurisdiction by the Constitutional Court are fulfilled can the Constitutional Court carry out an abstract constitutional interpretation.

Although the petition does undoubtedly meet the first and third conditions (it originates from the Government and raises a specific constitutional problem), neither the second nor the fourth condition is complied with.

I.1.1. The petition is not solely directed at the interpretation of a specific provision of the Fundamental Law, but requires a broader interpretation of the law

Although the question posed by the Minister of Justice identifies the provisions of the Fundamental Law the interpretation of which is requested from the Constitutional Court, the petition does not only seek an abstract interpretation of these provisions, but requires an examination of the provisions of specific

[1] Decision 8/2014. (III. 20.) AB, Reasoning [20] to [27].

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laws, namely EU law. However, the Constitutional Court does not have the jurisdiction to provide an abstract interpretation of the Fundamental Law if, in order to answer the question, it has to also interpret other laws, such as EU law or a decision of the CJEU ensuring the enforcement of EU law. Neither is the fourth condition fulfilled for the same reason, since in such a case the interpretation cannot be derived directly from the Fundamental Law, because it requires the interpretation of the EU law as well.

I.1.2. The interpretation cannot be derived directly from the Fundamental Law, it also requires the interpretation of EU law and the judgement of the Court of Justice of the European Union

Both the question posed by the Minister of Justice and the petition explicitly state in several places that the Constitutional Court must answer the question posed in the context of EU law. The question itself relates to the implementation of an obligation under EU law, and in order to answer it, the Constitutional Court must also draw conclusions on the extent to which EU law is effectively enforced. In the scope of explaining the specific constitutional problem in detail, the Minister of Justice repeatedly refers to the obligations under EU law that the Constitutional Court must examine in the context of the interpretation (see, for example, pages 6 and 7 of the petition discussing the specific question).

I.2. The Constitutional Court may only interpret Article E (2) of the Fundamental Law in the scope of exercising its own jurisdiction

According to its own case law, the Constitutional Court has the right to examine violations resulting from the exercise of power based on Article E (2) of the Fundamental Law, but only in the scope of exercising its own jurisdiction: *"if it is likely that the exercise of powers based on Article E (2) of the Fundamental Law infringes human dignity, another fundamental right, the sovereignty of Hungary (including the scope of transferred competences) or its identity based on its historical constitution, the Constitutional Court may, on the basis of a relevant petition and by exercising its own jurisdiction, examine whether the alleged infringement is real."*[2] It also clearly follows from this decision that the Constitutional Court may not go beyond its own powers in examining Article E (2), and in particular it has no power to draw conclusions as to the extent to which the enforcement of a provision of EU law operates effectively in practice. Given that only the CJEU has jurisdiction to interpret EU law authentically, the Constitutional Court should refrain from interpreting EU law. The above is also confirmed by paragraph [56] of the reasoning of Judgement 1 of the Constitutional Court, where *"the Constitutional Court stresses that the subject matter of sovereignty or identity control is not directly the legal act of the EU or its interpretation, and therefore it does not make any statement on its validity or invalidity and its primacy of application."*

An abstract constitutional interpretation that cannot be directly deduced from the Fundamental Law would not only be in violation of the limits of the powers of the Constitutional Court, but would also be contrary to the institution of constitutional

[2] Decision 22/2016. (XII. 5.) AB (hereinafter "Judgement 1 of the Constitutional Court"), Reasoning [69]

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interpretation. For all these reasons, the Constitutional Court must therefore reject the petition brought by the Minister of Justice for lack of jurisdiction.

I.3 As regards the content of the Government's petition, it is a complaint submitted against the decision of the CJEU

The Government's petition is unsuitable for an abstract interpretation of the Fundamental Law pursuant to Section 38 (1) of the Constitutional Court Act, simply because its content does not actually aim at a constitutional interpretation. Examining either the subject matter of the requested interpretation of the law (the conformity of the CJEU decision with the Fundamental Law) or its intended legal effect (preventing the obligation to enforce the CJEU decision by referring to the provisions of the Fundamental Law), the Government's petition is nothing but a quasi-constitutional complaint against the decision of the Court of Justice of the European Union; a "disguised" complaint procedure, which, however, contrary to the legal framework, is not brought against an individual decision of a domestic court, but against a judgment of the Court of Justice of the European Union interpreting EU law. However, the Constitutional Court has no jurisdiction under either EU law or domestic law to conduct an ex post individual norm control procedure concerning a judgment delivered by the CJEU, and thus its decision cannot have an effect of preventing the enforcement of a judgment of the CJEU.

For the above reasons, the Government's petition does not meet the statutory conditions for a petition, and is therefore unsuitable for initiating proceedings before the Constitutional Court. Consequently, the Constitutional Court has to reject the petition in accordance with Section 55 (4) (c) of the Constitutional Court Act.

II. The practice and the significance of push-backs, the current regulations and the procedure no. C-808/18

In the wake of the so-called refugee crisis in 2015, the legislator has made several comprehensive amendments to the laws on asylum designed, at the time of their adoption, to protect refugees. The aim of these amendments has typically been to restrict access to international protection and to remove as quickly as possible foreigners arriving in Hungary irregularly.

The consistent dismantling of the guarantee system of Act LXXX of 2007 on Asylum (hereinafter the Asylum Act) and related laws has been, and still is, carried out by the legislator since March 2016 under the *quasi-special legal regime* known as the crisis situation caused by mass immigration (Chapter IX/A of the Asylum Act) (hereinafter: "crisis situation").[3]

Section 5 (1a) of Act LXXXIX of 2007 on the State Border (hereinafter: State Border Act), as amended as of 5 July 2016, granted the police the power to stop, within a range of 8 km from the external border line according to the Schengen Borders Code or the border sign, any third country national who is

[3] Government Decree 41/2016 (III.9.) on the imposition of a crisis situation caused by mass immigration on the entire territory of Hungary and on the rules related to the imposition, existence and termination of the crisis situation.

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staying irregularly on the territory of the country and to push them back to the Serbian side of the fence. The territorial scope of push-back was extended as of 28 March 2017 to the whole territory of the country in the event of a crisis situation by Section 5 (1b) of the State Border Act.

In parallel with making push-back a legal duty of the Police, the legislator has continuously restricted access to the asylum procedure. First, Section 71/A of the Asylum Act on the border procedure, which entered into force on 15 September 2015, stated that a third country national who is to be removed from the territory of Hungary by force of the push-back order may not apply for asylum within the 8 km range from the border line. With the entry into force of Section 5 (1b) of the State Border Act, the possibility to submit an asylum application also beyond the 8 km range has practically disappeared: Section 80/J (3) of the Asylum Act, as the "twin regulation" of the provision in the State Border Act, ordered push-back to be the consequence of making an asylum application, instead of the registration of the asylum claim and the initiation of the asylum procedure.

Thus, pursuant to Section 5 (1b) of the State Border Act, in a crisis situation caused by mass immigration, the Police shall remove third country nationals who are illegally staying anywhere in Hungary - not only within a range of 8 kilometres from the border - to the Serbian side of the border fence, regardless of whether they have ever been to Serbia or the compelling reason why they had to flee their country of origin. In practice, this means that all such third country nationals, regardless of whether they are in need of international protection or whether *non-refoulement* is applicable in their case, are pushed out of the country in a matter of seconds by the Police without carrying out any procedure. This provision of the law applies indiscriminately to children, elderly, sick and healthy people, regardless of whether they have ever been to Serbia, and its implementation has been accompanied by inhumanity and violence on more than one occasion.[4] As these push-backs are carried out without the application of the readmission agreement between the European Union and Serbia[5], and without the involvement of the Serbian authorities[6], the Hungarian authorities are essentially forcing the third country nationals to cross the border illegally.

The Hungarian law and its application blatantly violate the requirements resulting from the rule of law, due to the complete lack of the most basic procedural guarantees (written, individualised and reasoned decision by the authorities, interpreter, legal aid, legal remedy, etc.).[7]

The police have forced more than ten thousand people back to Serbia since Section 5 (1b) of the State Border Act entered into force.[8]

During the push-backs, the police do not identify the apprehended third country nationals in any way, not even by fingerprinting them. This implies a significant risk to national security, as it could mean

[4] On the cases documented between 2017 and 2020 see the Border Violence Monitoring Group. *Black Book on Pushbacks,* Vol. I, pp. 310 to 405: https://www.statewatch.org/media/1660/eu-bvmn-black-book-pushbacks-vol1.pdf
[5] Council Decision of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation (2007/819/EC)
[6] This fact is openly admitted by the petitioner in paragraph 2 on page 6 of the petition
[7] Shahzad v Hungary, application no. 12625/17, see in details below
[8] Until 1 November 2021 http://www.police.hu/hu/hirek-es-informaciok/hatarinfo/illegalis-migracio-alakulasa

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that people with respect to whom (international) warrant has been issued can come under the actual control of the Hungarian Police without being prosecuted. The Hungarian Police can thus provide effective assistance to foreign nationals trying to leave the European Union who may even be subject of a warrant.

The European Commission has launched infringement proceedings against Hungary for violating the EU asylum acquis, and on 21 December 2018, it referred Hungary to the Court of Justice of the European Union, claiming, among other things, that Section 5 (1b) of the State Border Act is in breach of EU law.

On 17 December 2020, the Court of Justice delivered its judgment (C-808/18 Commission v Hungary, hereinafter "judgement"), in which it clearly ruled that the Hungarian practice of push-backs violates Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals (hereinafter the "Return Directive").

Thus it has been almost a year since the Court of Justice delivered and published its judgment on the interpretation of the law binding Hungary. In spite of this, the Police have continued to carry out push-backs on a daily basis, and the crisis situation caused by mass immigration, as the legal basis for this, has been once again extended by the Government.[9] Push-backs are carried out on the basis of a Hungarian legal order which is in violation of EU law, meaning that each and every one of them is illegal.

In its judgement, the Court underlined that since people escorted (pushed back) to the other side of the border fence cannot in practice apply for international protection, this practice should, in essence, be considered as forced return. Moreover, according to the Return Directive, removal from the territory of a Member State must be preceded by a number of procedural steps, where the fundamental rights of third country nationals are also safeguarded by legal guarantees. In contrast with that, the "escorting" essentially provides the persons returned this way with a choice without any real options: either they wait standing on the few meters wide strip of land between the border fence and the international border[10], or they cross irregularly into Serbia without the necessary permits, since the mere conditions for survival (food, water, shelter, etc.) are only guaranteed there.

[9] Government Decree 93/2021 (II.27.) amending the Government Decree 41/2016 (III.9.) on the imposition of a crisis situation caused by mass immigration on the entire territory of Hungary and the rules related to the imposition, existence and termination of the crisis situation

[10] It should be noted that during most of the proceedings before the CJEU, the Section 80/J(1) of the Asylum Act was effective and applicable, stipulating that, with a few rare and restrictive exceptions, asylum claims could only be lodged in person in the transit zone. However, according to Section 273(a) of Act LVIII of 2020 on Transitional Rules and Epidemic Preparedness in Connection with the End of the State of Danger, Sections 80/H to 80/K of the Asylum Act are not applicable (until 31 December 2022 according to the latest motion to amend). Therefore the fiction that refugees forced back to the other side of the fence can walk along the narrow lane between the outside of the fence and the state border to the transit zone to seek asylum there cannot be accepted, if only because the transit zones have been emptied out in May 2020, following another judgement of the CJEU [C-924/19 and C-925/19 (PPU) FMS and others v Directorate General for Aliens Policing], and asylum seekers are not allowed to enter the country there.

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On the basis of the above, the Court concluded in its judgement that Hungary had failed to fulfil its obligations stipulated in and resulting from Article 5 (non-refoulement), Article 6 (1) (issuing return decisions), Article 12 (1) (formal requirements for return decisions) and Article 13 (1) (right to an effective remedy) of the Return Directive (paragraph 266 of the judgement). Maintaining the relevant Sections of the State Border Act and continuing pus-backs constitutes a failure to execute the judgement, and by this omission the Hungarian legislator breaches its obligation clearly existing under Article 260 (1) of the Treaty on the Functioning of the European Union (hereinafter the TFEU).

It is important to underline that the above-mentioned legal provisions of the Return Directive referred to in the judgement contain fundamental rights guarantees which are recognised by the Fundamental Law with the same content and guaranteed for all persons under the jurisdiction of Hungary. Article XIV (3) guarantees *non-refoulement*, Article XIV (2) makes expulsion conditional on a decision and Article XXVII I(7) guarantees the right to an effective legal remedy. Consequently, the judgement of the Court of Justice of the European Union established a violation of fundamental human rights that enjoy prominent protection under the Hungarian constitutional order as well. In other words, the CJEU judgement is fully in line with the Fundamental Law.

Therefore, if the Constitutional Court rules in favour of the Minister, it will inevitably lead to upsetting the internal coherence of the Fundamental Law.

III. The abstract constitutional interpretation has to be made without prejudice to the CJEU decision

In the event that the Constitutional Court sees no possibility to reject the petition on the basis of Article 38 (1) of the Constitutional Court Act, the Constitutional Court must carry out the constitutional interpretation requested by the Government strictly within the framework of the Fundamental Law and should refrain from making any findings on the interpretation or applicability of EU law or from overruling the decision of the CJEU in any way.
In the event that the Constitutional Court considers that the question raised by the Government cannot be answered purely on the basis of the Fundamental Law, within the framework of constitutional interpretation, and that the decision requires an interpretation of EU law, the Constitutional Court cannot refrain from clarifying the question under a constitutional dialogue, in the framework of a preliminary ruling procedure before the CJEU. On the basis of the above, the Constitutional Court, during the abstract interpretation of the Fundamental Law, can necessarily choose only one of the following two solutions:

(i) interpret the question raised by the Government within the framework of the Fundamental Law, without prejudice to the decision of the CJEU, and in doing so, resolve only the internal inconsistencies, if any, in the Fundamental Law; or
(ii) if, as part of the constitutional interpretation, it finds a conflict between Hungarian law and EU law (including the content of the CJEU decision), it shall refer the matter to the Court of Justice of the European Union for a preliminary ruling in order to resolve the conflict.

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In the opinion of the Hungarian Helsinki Committee, constitutional identity also implies that Article E (2) of the Fundamental Law can be interpreted without prejudice to the provisions of the CJEU decision, purely by resolving the contradictions between the possible interpretations of the provisions of the Fundamental Law.

III.1. The Hungarian constitutional identity implies respect for the CJEU decision

As explained above, under the interpretation provided by the Government, Article E (2) does not primarily point to a conflict between the contested decision of the CJEU and the Fundamental Law of Hungary, but creates a contradiction within the Fundamental Law, which can be resolved as an internal legal problem by interpreting the Fundamental Law without prejudice to the provisions of the CJEU decision.

In addition to protecting the internal coherence of the Fundamental Law, *"[the] Constitutional Court is of the opinion that the requirement of a constitutional majority under Article E (4) implies a duty of cooperative interpretation of the law. On this basis, the application of EU law takes precedence over domestic law, since, as the German Federal Constitutional Court has pointed out, "the uniform enforcement of European law in the Member States is of central importance for the success of the European Union" (...). The legal community, which currently has 28 members, could not survive if European law did not have uniform enforcement and effect in the Member States (...)."*[11]

If the Government's interpretation of Article E (2) is to be accepted, Article E (2) becomes inextricably conflicting with Article XIV (2), (3) and (4) (the principle of *non-refoulement*, the prohibition of collective expulsion and the obligation to grant the right of asylum). Therefore, the Constitutional Court must adopt an interpretation that does not create a contradiction between the provisions of the Fundamental Law and does not erode the level of protection of fundamental rights. Only an interpretation like this can also be consistent with the requirement of constitutional identity.

It should also be noted that push-backs cannot be justified under Article I (3) of the Fundamental Law either. As explained in detail below, there is no fundamental right or constitutional value that can be identified to justify this systemic breach of fundamental rights.

III.2. The protection of fundamental rights is an obligation deriving from constitutional identity

The Government's petition aims to lower the level of protection of fundamental human rights by invoking the protection of constitutional identity. To achieve this objective, the petition generates an artificial contrast between the protection of constitutional identity and the protection of human rights. This contrast, however, is wrong, since Hungary's constitutional identity is based on the protection of

[11] Decision 2/2019. (III. 5.) AB (hereinafter "Decision 2 of the Constitutional Court"), Reasoning [21]

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freedoms, and therefore, in the name of constitutional identity, the protection afforded to such freedoms must be strengthened, rather than weakened.

The freedoms listed in the catalogue of fundamental rights are an achievement of the Hungarian historical constitution, and safeguarding them is part of Hungarian constitutional identity. In addition to this, the protection of fundamental rights is a primary obligation of the State, not only as part of the constitutional identity, but also under Article I (1) of the Fundamental Law.

According to Decision 1 of the Constitutional Court: *"For the Hungarian Constitutional Court the concept of constitutional identity means the constitutional self-identity of Hungary, and its content is specified on a case-by-case basis on the ground of the Fundamental Law as a whole as well as its individual provisions, in compliance with their purpose, the National Avowal and the achievements of our historical constitution, in accordance with Article R (3) of the Fundamental Law. The constitutional self-identity of Hungary is not a static and closed list of values, nevertheless it has several important components that can be highlighted as examples, which are identical to the constitutional values generally accepted today: freedoms, the division of powers, the republic as a system of government, respect for autonomies under public law, freedom of religion, the legitimate exercise of power, parliamentarianism, equality of rights, recognition of the judicial power, and the protection of the nationalities living with us. Among others, these are the achievements of our historical constitution, the Fundamental Law and the Hungarian legal system is built upon."*[12]

As the paragraphs of Decision 1 of the Constitutional Court quoted above clearly demonstrate, fundamental rights and freedoms are at the core of Hungary's constitutional identity, according to both the Fundamental Law and the Constitutional Court's interpretation. Consequently the level of protection of human rights cannot be reduced by invoking the protection of constitutional identity; on the contrary, the preservation of constitutional identity requires the State to protect human rights.

While it is clear from the wording of Decision 1 of the Constitutional Court that by creating the concept of constitutional identity the Constitutional Court clearly aimed at extending fundamental rights and protect the rule of law, the Government's petition aims at the opposite: the practical elimination of the most basic rights of asylum seekers.

III.3. Protecting constitutional identity may not erode the level of protection of fundamental rights

According to Article I (1) of the Fundamental Law, the protection of fundamental rights is "the primary obligation of the State." In contrast with that, the interpretation of the Minister of Justice suggests that national sovereignty, as a selected element of constitutional identity, necessarily enjoys a higher level of protection than the protection of fundamental human rights and freedoms.

[12] Decision 1 of the Constitutional Court, Reasoning [64] - [65]

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In fact, however, neither the Fundamental Law nor the case law of the Constitutional Court provides for such a hierarchy.

The obligation of the State to protect fundamental rights under Article I (1) is a primary duty also on the basis of the Hungarian "constitutional identity based on the historical constitution". Neither the obligation to protect fundamental rights, nor the level of protection of fundamental rights may be eroded due to the protection of identity. In its earlier case law, the Constitutional Court has emphasised that *"the level of constitutional legal protection and the system of guarantees once achieved cannot be reduced, nor can the scope of its fundamental elements be narrowed – only in very exceptional cases – in order to protect another fundamental right, by taking into account the standard of necessity and proportionality and without violating the essential content of the fundamental rights concerned. Reducing the level of constitutional protection to an inadequate level is contrary to the requirement of the constitutional State under the rule of law."*[13]

III.4. The protection of human rights cannot be subordinated to the safeguarding of national sovereignty

According to the Government's petition, the Constitutional Court *"may examine whether Hungary's sovereignty has been infringed by the exercise of powers based on Article E (2)"* and in this respect the Government considers that the decision of the CJEU infringes national sovereignty because the exercise of EU powers *"violates Hungary's inalienable right to dispose of its population."*

It is the task and responsibility of the Constitutional Court to resolve contradictions within the Fundamental Law. *"The rules that generally govern constitutional interpretation must be followed, i.e. no content may be attributed to a rule, if that could result in emptying another one. The Fundamental Law is a closed system without contradictions. [...] The focus of interpretations of the same constitutional provision may differ, but the interpretations must form a system free of contradictions. [...] The rules of the Fundamental Law can and must be interpreted only with regard to each other."*[14]

III.5. The protection of constitutional identity may not result in the infringement of the primacy of EU law

Given that only the CJEU has competence to interpret EU law authentically, the Constitutional Court should refrain from interpreting EU law:

"On the basis of this element of the reasoning, in the case of a conflict between EU law and the Fundamental Law, the most obvious solution is inevitably the start of a dialogue in the form of a request for a preliminary ruling, which provides an opportunity to articulate constitutional concerns."[15]

[13] Decision 61/2011. (VII. 13.) AB V. 3.
[14] Decision 33/2012. (VII. 17.) AB, Reasoning [94], Decision 12/2013. (V. 24.) AB, Reasoning [47]
[15] Endre Orbán: Az alkotmányos identitás az Európai Unióban (Constitutional Identity in the European Union), Centre for Social Science Research Institute for Legal Studies, 2020. p. 80

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III.6. *Ultra vires* is not applicable[16]

The petitioner refers to the judgement of the Constitutional Court of the Federal Republic of Germany of May 2021 (BVerfG 2 BvR 859/15, hereinafter the "PSPP Decision") and suggests that the Constitutional Court should declare the judgement *ultra vires* and therefore unenforceable.

The petition merely "draws the attention" of the Constitutional Court to the developments in Germany, without detailing the conditions for *ultra vires* control or the circumstances of the case[17]. In the intervener's view, therefore, in the absence of a definitive request for the declaration of *ultra vires*, this "argument" is inapplicable.

The reference to the PSPP Decision is yet another argument for rejecting the petition, as this way the petitioner creates a context around the constitutionality problem that requires more than an abstract interpretation to be derived solely from the Fundamental Law. Furthermore, the PSPP Decision has no substantive connection whatsoever with the issue that the present case is based on.

In addition to the formal concerns, *ultra vires* cannot be established as an obstacle to the enforcement of the judgement for the following reasons.

Ultra vires may occur in two ways: either it affects the validity of the applicable law or it affects the jurisdiction of the forum interpreting the law.

As regards the first possible ground, the petitioner does not raise any concerns, nor can there be any doubt that the Return Directive is valid law under Articles 3 (2), 6 (1) and (3) of the Treaty on European Union, Articles 4, 18 and 19 of the Charter of Fundamental Rights of the European Union and Article 79 (1) (c) of the TFEU.

As the Return Directive is valid law, *ultra vires* may only be applicable against the judgement of the Court of Justice.

The German Federal Constitutional Court (hereinafter the "German Constitutional Court") ruled that it may declare a judgement of the Court of Justice of the European Union *ultra vires*, i.e. that the Court has exceeded its powers specified in the second sentence of Article 19 (1) of the Treaty on the European Union, if the interpretation of the Treaties is not clear and must therefore be regarded as objectively arbitrary.

[16] The following section is built to a great extent on Nóra Chronowski's work "Fordulópont az európai bírói párbeszédben: a Német Szövetségi Alkotmánybíróság PSPP-döntése" (Turning Point in the European Judicial Dialogue: the PSPP Decision of the German Federal Constitutional Court) (Közjogi Szemle (Public Law Review)), 2020/2) and Attila Vincze and Nóra Chronowski's article "Magyar alkotmányosság az európai integrációban" (Hungarian Constitutionalism in the European Integration) (hvg orac, 2018). and the book by Endre Orbán "Alkotmányos identitás az Európai Unióban" (Constitutional Identity in the European Union) (Centre for Social Science Research Institute for Legal Studies, 2020.), and takes verbatim phrases from these

[17] For example, the petitioner fails to mention the otherwise not insignificant fact that the PSPP decision was taken by the German Constitutional Court following a preliminary ruling procedure initiated by itself.

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The Court of Justice of the European Union exceeds its powers and its decision becomes arbitrary if it manifestly disregards the traditional European methods of interpretation, i.e. (in a broad sense) the general principles of law which are common to the laws of the Member States. As long as the Court applies the recognised methodological principles and its judgement is not arbitrary and it is adopted on the basis of objective criteria, the German Constitutional Court will follow it even if there are strong constitutional arguments against the judgement.[18] Furthermore, the obviousness of exceeding powers is justified if it is supported by a well-reasoned interpretation.[19]

However, the German Constitutional Court only exercises *ultra vires* control if the exceeding of powers is sufficiently qualified, i.e. it is obvious, and it constitutes a shift to the detriment of the Member States in the distribution of powers in the EU. This control mechanism must be applied in an open manner to integration and with restraint.[20] According to Section 1 (b) in the operative part of the *Honeywell* judgement, the establishment of *ultra vires* must be preceded by a preliminary ruling procedure, in which the Court of Justice of the European Union is given the opportunity to remedy the exceeding of powers.[21]

According to the relevant literature[22], the possibility of *ultra vires* control is limited to extremely serious, drastic EU acts that completely depart from the Treaty basis, as a kind of legal emergency brake.

In the PSPP Decision referred to in the petition, the German Constitutional Court found *ultra vires* against the Weiss judgement of the Court of Justice of the European Union[23] because it manifestly failed to take into account the importance and scope of the principle of proportionality, although it applies, in addition to other aspects, to the division of powers between the European Union and the Member States. The CJEU's failure to assess the actual effects of the PSPP also plays an important role in establishing *ultra vires*. The wide discretionary power granted to the European Central Bank in the implementation of the mechanism fails to give sufficient effect to the principle of conferral of powers and provides a basis for the continued erosion of the Member States' competences.[24] Ultimately, the democratic legitimacy of German legislature is undermined due to not taking properly into account the principle of the division of powers, because the Bundestag, as a representative body of the people, has no meaningful room for manoeuvring in shaping the budgetary policy, since the source of its legitimacy is the people and the right to vote forms part of constitutional identity, which is protected by Article 79(3) of the German Constitution and is outside the scope of European integration.

It should be noted, however, that the German Constitutional Court did not declare a general inapplicability in the PSPP case, but, on the basis of the responsibility for European integration (*Integrationsverantwortung*), called on the federal government and the Bundestag, by setting an

[18] PSPP Decision ind. 112.
[19] PSPP Decision ind. 113.
[20] BVerfGE 142, 123. 156.
[21] BVerfGE 126, 286.
[22] Attila Vincze, Nóra Chronowski: Magyar alkotmányosság az európai integrációban (Hungarian Constitutionalism in the European integration), hvg orac, 2018. page 202.
[23] C-493/17. Weiss
[24] PSPP Leitsatz 3-4.

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appropriate date, to take steps to ensure that the European Central Bank carries out an assessment of the proportionality of the programme.

In view of the intervener the above can be applied to the present case as follows.

In relation to the CJEU judgement, the petitioner requests the Constitutional Court to declare that the judgement is contrary to the Fundamental Law in Hungary, taking into account the actual effects of its implementation. By contrast, it is the actual, tangible and practical effect of push-back that the judgement takes into account when it rejects the Government's arguments.[25] The petitioner also fails to explain why, in its opinion, the CJEU did not apply recognised methodological principles in reaching its decision. Indeed, by examining the practical enforcement of the Hungarian law at issue, the CJEU has carried out a comprehensive examination of the legal question referred to it. The judgement presents in detail, among others, the positions of the Commission and the Government, and rejects the latter on the basis of evidence and sufficient reasoning.

The deadline set in the PSPP decision to the Bundestag and the federal government, and the constitutionality requirement imposed on them, is not similar to the current Hungarian situation. While the German Constitutional Court concluded on the basis of the democracy argument that the Bundestag's substantive room for manoeuvring (the democratic empowerment of which derives from the right to vote) is part of the constitutional identity enshrined by Article 79 (3) of the German Constitution, and thus it is outside the scope of the European integration, the Hungarian Government fails to present a similar argument. In fact, on the basis of the Fundamental Law, it is inconceivable that a legitimate parliamentary demand for a room for manoeuvring can only be satisfied by eliminating the procedural guarantees for the prevention of torture and inhuman and degrading treatment, or by completely emptying this fundamental right, practically terminating it. In other words, it is precisely the judgement of the CJEU that remedies the situation where the essential content of the fundamental rights mentioned above is systematically violated. On the contrary, the legal regulation that the petitioner intends to maintain is aimed at continuing this practice, openly opposing the Fundamental Law and the conclusions of Decision 1 of the Constitutional Court.[26]

Furthermore, the condition that only a careful and well-reasoned interpretation can lead to establishing *ultra vires,* is not fulfilled. As will be explained in detail below, the petition is burdened by serious errors of law and fact that themselves justify the need to reject the petition, and support the point that an abstract constitutional interpretation can only be made without prejudice to the judgment of the CJEU. As the majority of the petition consists of such explanations that are contrary to the substantive law and the facts, the petition cannot be taken for a carefully and thoroughly reasoned document.

[25] Judgement C-808/18. paragraphs 254 to 260
[26] In the exercise of its powers, the Constitutional Court may examine, on the basis of a relevant petition, whether the joint exercise of powers based on Article E(2) of the Fundamental Law violates human dignity, another fundamental right, or the sovereignty or identity of Hungary based on its historical constitution.

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Thus, the petitioner actually sees a violation of the Fundamental Law in statistical data and predictions that are not supported by solid factual grounds.

However, according to the intervener, the Court of Justice acted within its powers under the TFEU, subject to the action brought by the Commission, interpreting the applicable and valid EU law by using the traditional methods, taking due account of the real impact of the contested national legislation. Its effect is precisely to protect the fundamental substantive and procedural rights of third country nationals under Hungarian (and EU) jurisdiction (also guaranteed by the Fundamental Law, as referred to above).

The substantive conditions for *ultra vires* control are therefore not met in the present case, and the petitioner has failed to demonstrate and carefully analyse these conditions. The intervener holds that what the petitioner expects from the Constitutional Court would be in its actual effect a "reverse Solange"[27], since it would result in the primacy of the political motivations and simplistic practical solutions of the executive power of a Member State over an EU judgement protecting fundamental rights.

III.7. The purpose of the Government's petition

In light of the above, the Government's petition can only have the purpose and the intended legal effect of continuing to systematically erode the fundamental rights of asylum seekers and refugees by openly and clearly violating the law of the European Union and the Fundamental Law of Hungary.

In fact, the Court's judgement is clear and precise, it is unambiguous, and it is not only fully compatible with the Hungarian constitutional system, but also establishes a legal obligation for Hungary that necessarily follows from its system of guarantees for the protection of fundamental rights and the rule of law.

It should be pointed out that the European Commission has launched a new infringement procedure against Hungary for failing (refusing) to implement the judgement.[28] The intervener, as an NGO set up to defend the rule of law, is firmly of the opinion that what is adjudicated must be accepted as truth (*res iudicata pro veritate accipitur*), even if the losing party to the dispute (necessarily) disagrees with it. One of the cornerstones of the rule of law, the binding force and enforceability of court judgments, would be violated if the Government were to use the Constitutional Court as a tool to circumvent the EU court system and manage to evade compliance with its clear legal obligation resulting from the judgment.

[27] BVerfGE 37, 271 - Solange-I.
[28] June infringement package: key decisions https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743

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IV. Preliminary ruling procedure

If the Honourable Constitutional Court would still have doubts as to whether the judgement is enforceable without prejudice to the Fundamental Law, or if it is not clear to the Constitutional Court how the Fundamental Law should be interpreted in the present situation in such a way that its normative content is in conformity with EU law[29], it may suspend the proceedings pending before it and refer a question to the Court of Justice of the European Union for a preliminary ruling on the basis of Article 267 TFEU *"in the framework of cooperation carried out with mutual respect to each other and based on the principles of equality and collegiality"*[30].

It is also clear from the case law of the Constitutional Court that the interpretation of the Fundamental Law in conformity with EU law is an obligation deriving from constitutional identity.[31] In order to effectively enforce the constitutional dialogue, *"also the right of the Constitutional Court to initiate preliminary rulings is deductible from the interpretation of the Fundamental Law (...), in particular if the case before it involves a threat to the compliance with fundamental rights and freedoms under Article E (2) of the Fundamental Law or to the restriction of Hungary's inalienable right to dispose of its territorial unity, population, form of government and state system. In this context, the case law of the German Federal Constitutional Court can be regarded as standard [cp. BVerfGE 134, 366 and BVerfGE 142, 123; BVerfGE 146, 216 and BVerfG, Urteil des Zweiten Senats vom 05. Mai 2020 – 2 BvR 859/15.]"*[32]

The intervener respectfully directs the Court's attention to the fact that the Constitutional Court itself refers to the PSPP Decision by listing the above German Constitutional Court case law, which can be considered as a standard, further supporting the statement that the petitioner intends to use it for its own purposes in a completely wrong context.

In this case, the intervener proposes that the Constitutional Court refers the following question to the Court of Justice of the European Union:

Is Article 260(1) of the Treaty on the Functioning of the European Union to be interpreted as meaning that a Member State must execute a judgement of the Court of Justice of the European Union applicable to that Member State, delivered in an infringement procedure, even if, in the Member State in question, according to the executive power's interpretation of the law, which has been rejected by the Court of Justice of the European Union, a content contrary to the judgement is deductible from the constitution (Fundamental Law) of that Member State?

The above procedure would not be unprecedented: the Italian Constitutional Court (Corte costituzionale) also "referred a question back" to the Court of Justice of the European Union in the

[29] Decision 2 of the Constitutional Court, Reasoning [37]
[30] Decision 1 of the Constitutional Court, Reasoning [63]
[31] Decision 2 of the Constitutional Court, Reasoning [16], [21]
[32] Decision 26/2020. (XII. 2.) AB, Reasoning [26]

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manner described above, after it considered the content of the judgement in a preliminary ruling procedure to be incompatible with the Italian constitution.[33]

In the case referred to above, the CJEU was open to the legal arguments put forward by the Italian Constitutional Court and took them into account in its judgement. The cases Taricco I and II are excellent examples of the constitutional dialogue the Constitutional Court has also committed itself to.

As explained above, according to the intervener, the constitutional issue can be decided without a preliminary ruling procedure. However, approving the practice that hinders the enforcement of EU law in Hungary is opposed to the principle of constitutional dialogue. In this context, it is also worth pointing out that failure to comply with an obligation under EU law is just as much a breach of the law as an active breach.[34]

V. Errors of fact and law in the petition

In addition to the above, the petition also contains serious errors related to asylum and migration law. The problems arising from the misinterpretation of the EU and Hungarian law on asylum and the expulsion of illegally staying third country nationals are of such magnitude that they may in themselves justify the rejection of the petition as unfounded.

The whole petition is pervaded by the lack of distinction between asylum seekers and illegally staying third country nationals, as well as between expulsion and removal, and the imprecise use and mixing of the terms. Therefore, the intervener considers it of the utmost importance to submit the following basic considerations to the Constitutional Court in relation to the stay and the expulsion of third country nationals.

The right to seek asylum and access to the asylum procedure are fundamental procedural rights. Article 18 of the Charter of Fundamental Rights of the European Union (hereinafter the "Charter") guarantees the right of access to refugee *status*, which can only be effectively enforced if the third country national who wishes to seek asylum has access to the asylum *procedure* itself.[35]

Of course, the fact that someone applies for asylum does not in itself mean that they will be recognised as a refugee by a Member State. However, as soon as the claim is made, the person becomes an asylum seeker, regardless of whether the claim has been made with the authority with jurisdiction to examine the claim and in what form it has been made.[36] The procedure, like any procedure conducted

[33] Judgement C-105/14 Taricco and Others, followed by the judgement in the preliminary ruling procedure C-42/17 brought by the Constitutional Court of the Italian Republic for the interpretation of the Taricco judgement in accordance with the Italian constitution (the so-called Taricco II judgement).
[34] C-265/95. Commission v France paragraph 65
[35] C-808/18. Commission v Hungary, paragraph 102
[36] Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Procedures Directive), Article 6, C-36/20 (PPU) VL v Ministerio Fiscal, paragraphs 87 to 92, C-808/18. Commission v Hungary, paragraph 97

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by the State, must be fair and comply with the procedural requirements resulting from the rule of law and the democratic exercise of power.[37]

At the end of the procedure, the asylum authority may recognise the applicant as a refugee or as a beneficiary of subsidiary protection, or in their absence (if one of the two grounds for exclusion from the former status applies), it may also establish the applicability of non-refoulement, which will result in the applicant being recognised as enjoying tolerated status. If it fails to do either, it will expel the applicant, decide on the target country of the expulsion, the method of execution of the expulsion decision, and it may also impose a ban on entry and stay. The asylum authority can also order to implement the expulsion by means of forced return, i.e. administrative coercion, and in certain cases it must also impose a ban on entry and stay.[38]

The applicant has the right to an effective remedy against the decision of the asylum authority.[39] Only after the final conclusion of the asylum procedure, including any judicial remedy, can an aliens policing (immigration) procedure for expulsion be launched, provided that the asylum authority has ordered the expulsion of the applicant.

It can also happen that a third country national who is staying in Hungary without a residence title does not apply for asylum. In such a case, the authorities will not initiate an asylum procedure, but an aliens policing procedure, in which (also effectively enforcing the requirements of the fundamental right to a fair procedure) they may decide on the expulsion of the third country national and the manner in which the decision is to be enforced.

The requirements of the principle of *non-refoulement* must be enforced in both the asylum procedure and the aliens policing procedure (paragraph 46 of the Decision 1 of the Constitutional Court). In the case law of the European Court of Human Rights (ECtHR), *non-refoulement* is intended to provide effective protection against prohibited treatment under Article 3 of the European Convention on Human Rights (hereinafter the: "Convention"). It means that regardless of the status of a person in Hungary and the procedure to which they are subject, they cannot be returned to a state where they would be subjected to torture, inhuman or degrading treatment. Even if a third country national has not applied for asylum or his/her application has been rejected by a final decision, the aliens policing procedure must include a thorough and fair examination of whether he/she would be at risk of being ill-treated in the destination country of expulsion. This is the only way to enforce the prohibition of torture, as an inalienable fundamental right inseparable from the right to human dignity.[40]

Along these lines, collective expulsion is also prohibited [Article XIV(2) of the Fundamental Law]. In its judgement of 8 July 2021, the ECtHR ruled that the practice of push-backs, which is the subject-matter of the present petition as well, violates the prohibition of collective expulsion.[41] As the Government did

[37] Decision 3223/2018. (VII. 2.) AB, Reasoning [29] to [33].
[38] Section 45(6) of the Asylum Act, Section 47(1), Section 65(1)(c) of the Third Country Nationals Act
[39] Article XXVIII(7) of the Fundamental Law, Article 47 of the Charter of Fundamental Rights of the European Union, Article 46 of the Procedural Directive, C-556/17. Alexey Torubarov v Immigration and Asylum Service, paragraphs 51 to 53
[40] Ilias and Ahmed v Hungary, Application No 47287/15 (Grand Chamber), paragraph 126
[41] Shahzad v Hungary, application no. 12625/17

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not request that the case be referred to the Grand Chamber of the ECtHR, i.e. did not contest its content, the judgement became final on 8 October.

In the light of the above, the main allegations of the petition can be refuted as follows.

"In the case of rejecting the asylum claim [of an illegally staying foreigner], expulsion is a de facto unrealistic option in the current circumstances."[42]

Expulsion, as explained in detail above, is not an option for the rejected asylum seekers, but an obligation under the law if they have no other legal title to stay in the country. The petitioner argues more than once that there is currently no effective regime stipulated by EU law for the execution of expulsion orders. We will react to these "arguments" later, but we would like to note already here that the enforcement of fundamental rights cannot depend on the number of those who exercise that right. Along this line of reasoning, a demonstration could even be banned on the grounds that *it may happen* that too many people attend the demonstration, which thus becomes more difficult to control by the police.

In other words, from the point of view of the existence of Hungary's obligations under the Fundamental Law, it is completely irrelevant that the number of people wishing to enter the territory of Hungary and, if necessary, seek asylum corresponds to the number of people living in a Hungarian town of whatever size, the Hungarian constitutional order requires nothing else but that they should be free to exercise their fundamental human rights. It means that their expulsion can only be decided in a fair procedure compliant with the standards of the rule of law.

The wording "in the present circumstances" is particularly paradoxical because international events, which force many people to leave their homes and seek protection from other states, are constantly changing. An extremely sad and striking example of this is the situation in Afghanistan, which was fundamentally different on 25 February, when the petition was dated, then it is at present and which, of course, affects whether the persons concerned can be expelled. It is not contested by the Hungarian Government that the requirement of *non-refoulement* prohibits the expulsion of Afghans whose existence is not desirable in the eyes of the new extremist regime.[43]

It should be noted, and the misleading and unfounded nature of the petition is also well demonstrated by the petitioner's assumption that the asylum application of a third country national entering the territory of our country should be automatically considered as rejected.[44]

[42] Petition, page 1
[43] Világgazdaság (World Economy): Éjfélkor érkezik haza az első mentőakció utasait szállító repülőgép Afganisztánból (The first plane carrying rescue mission passengers arrives home from Afghanistan at midnight), 22 August 2021. https://www.vg.hu/kozelet/2021/08/ejfel-korul-erkezik-haza-az-elso-mentoakcio-utasait-szallito-repulogep-afganisztanbol?utm_medium=Social&utm_campaign=vilaggazdasag&utm_source=Facebook&fbclid=IwAR1GktF0lsTsh6BeL-67w1oGw9fZ9jtP6lrGsvdJ5F-WhTL8jnZOIwG97GY#Echobox=1629646062
[44] Petition, page 2, first paragraph, continued from page 1

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"... in the absence of an application (for asylum), an aliens policing procedure must be initiated, but in the latter case, or in the case of a rejection adopted in the asylum procedure, the foreigner will continue to stay in Hungary due to the ineffective implementation of EU rules (footnote: Section 29(1a) of the Third Country Nationals Act)."[45]

The petitioner is wrong in claiming that after the (final, enforceable) expulsion a foreigner stays in Hungary pursuant to Section 29 (1a) of the Third Country Nationals Act. The correct legal basis is Section 30 (1) (j) of the Third Country Nationals Act, according to which the authority shall provide the foreigner with a certificate entitling them to temporary residence pending the enforcement of the expulsion order, or takes the foreigner in detention if either of the conditions specified in Section 54 (1) of the Third Country Nationals Act is met.

Pursuant to Section 29 (1a) of the Third Country Nationals Act referred to above, a foreigner who was 'originally' expelled must indeed be provided with a humanitarian residence permit for longer stay, but only if the immigration authority has revoked the expulsion decision and lifted the prohibition of entry and stay pursuant to Section 47 (10) of the Third Country Nationals Act. Issuing a humanitarian residence permit is conditional upon the foreigner cooperating with the authorities throughout the expulsion process, their compliance with the rules of conduct required of them, and not being subject to criminal proceedings, or not having a criminal record. Pursuant to Section 47 (10) of the Third Country Nationals Act, the authority may revoke the expulsion and the prohibition on entry and stay only if the failure of enforcement was not due to a reason for which the foreigner is responsible, but even then, this may be done at the earliest 12 months after the (final) order of expulsion.

It is clear, therefore, that this is far from an automatic procedure suggested by the petitioner, as the issue of a residence permit is at the discretion of the authority even if the legal conditions are met.

As regards 'effectiveness', the intervener submits the following to the Honourable Constitutional Court. EU law must be *effectively* enforced (*effet utile*) by the Member States, by the national bodies applying the law. One of the essential elements in the development of EU (Community) law over the decades has been the principle of effectiveness , which the CJEU has given substance to in several prominent judgements.[46]

The effective enforcement of decisions against third country nationals who have been expelled in a fair and lawful procedure under the rule of law is therefore a clear obligation for Member States. The petitioner's argument (recurring all through the petition) that the European Union is unable to enforce expulsion decisions against illegally staying third country nationals is incomprehensible, as the *Union* actually does not issue such decisions, but the *Member States*, including Hungary, do so. To be more precise: Hungary fails to issue any such decisions, which is partly why the infringement procedure was

[45] Petition, page 5 last sentence
[46] See in C-6/64, Costa v ENEL, C-106/77, Amministrazione delle Finanze dello Stato v Simmenthal SPA, C-14/83 Sabine Von Colson v Lord Nordrhein-Westfalen, C-6/90 and C-9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic, C-224/10 Gerhard Köbler v Republic of Austria (not exhaustive list)

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launched, the result of which the Government is now trying to escape from, by using the Constitutional Court as a tool.

We stress that the essence of the CJEU judgment is not that third country nationals cannot be expelled under any circumstances, but that expulsion must be carried out in a regulated manner, along with a due procedure (with a written decision subject to legal remedy), and the requirement of *non-refoulement* shall be complied with.

If a procedure, despite being regulated at the appropriate hierarchy levels of the sources of law and enforcing the guarantees of the rule of law, does not achieve its objective (i.e. in this case, the practical enforcement of the expulsion of illegally staying third country nationals), this may not entail a complete, unilateral disregard of the law. This conduct by the authorities applying the law is clearly incompatible with the rule of law and legal certainty. If the Government believes that the means available are not sufficiently effective to execute expulsion decisions, the legitimate course of action, in accordance with the founding Treaties[47], is not to wilfully break and unilaterally disregard the laws, but to actively and proactively work towards the introduction of more effective legislation as soon as possible. Otherwise, the Government itself provides both a basis and an example for the subjects of law to exempt themselves from procedures that are deemed (even arbitrarily) ineffective, which is incompatible with the rule of law, one of the main pillars of the state under the rule of law and democracy.

"Taking into account that the effectiveness of the EU rules established regarding expulsion is not guaranteed, which the CJEU failed to take into account as stated in the previous point, it can be concluded that the people concerned will remain within the territory of Hungary for an unforeseeable period of time, since Serbia, the primary affected country with respect to illegal migration to Hungary, does not receive, despite the readmission agreement, the foreigners that Hungary intends to transfer, and furthermore, such a decision is difficult or impossible to execute into the country of nationality of the person concerned, as was already the case experienced before the Covid-19 pandemic. Furthermore, even if the person concerned leaves Hungary (which is illegal in the absence of the right to free movement), other Member States may return or send back that person here pursuant to EU rules."[48]

At this point, the petition first refers to the so-called Dublin procedure, and then, at a later point, the petitioner presents to the Constitutional Court as a concrete allegation that, on the basis of Regulation 604/2013/EU (hereinafter the Dublin Regulation), all third country nationals who have previously entered the territory of Hungary and have applied for asylum elsewhere are returned to Hungary by the other Member States.[49] In connection with the so-called Dublin procedure, the petitioner's argument suffers from a number of errors of fact and law, as follows.

[47] Article 4(3) of the Treaty on European Union
[48] Petition, page 6 paragraph 2
[49] Petition, page 7 paragraph 2

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In the above-quoted paragraph, even the petitioner admits that returning or sending back third country nationals who have previously entered the territory of Hungary, is not an automatic right, but an option ("may return or send back").

First of all, it should be noted that no so-called Dublin transfer can take place without the consent, either explicit or implied, of the receiving (requested) Member State.[50] The Hungarian statistics of the last few years provide clear evidence of this: In 2019, 1,265 requests were received from other Member States, but only 1 transfer actually took place[51], and in 2020, 1 transfer was realised out of the 1,804 requests.[52]

In fact, the predecessor of the current Dublin Regulation was drafted with the aim of regulating, in an easy, fast and efficient procedure, the designation of the Member State responsible for examining the application of asylum seekers. However, the fact remains that the principle of mutual trust between Member States cannot replace the need to investigate whether upon return, there would be a risk of torture and inhuman and degrading treatment. In the judgement M.S.S. v. Belgium and Greece, the ECtHR made it clear that an asylum seeker can still have a valid ground for claiming that they would be at risk of torture and inhuman and degrading treatment in case of return even if the transfer takes place between two EU Member States.[53] The intervener also wishes to point out that, under the Dublin Regulation, it is not only the place of entry which determines responsibility for the asylum procedure.[54]

What makes the petitioner's argument in this regard extremely cynical is precisely the fact that the Government represented by the petitioner has in the recent years created a legal and material environment in Hungary which, even without the practice of push-backs, has led several European countries to suspend the so-called Dublin returns to Hungary.[55]

"... due to the shortcomings of the EU rules, the foreigners concerned who are not recognised as refugees and in respect of whom it was not possible to conduct the expulsion procedure following a negative decision become part of the population of Hungary, which in turn violates the Fundamental Law's articles affected by the present petition."[56]

[50] Article 25 of the Dublin III Regulation
[51] Ministry of Justice Human Rights Working Group Secretariat - Thematic Working Group on Refugees and Migration, meeting held on 8 November 2019 https://emberijogok.kormany.hu/download/0/7c/a2000/Emlekezteto_2019_11_08_Menekultugyi_TMCS.pdf
[52] ECRE - Hungarian Helsinki Committee: Asylum Information Database Country Report: Hungary https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU_2020update.pdf
[53] M.S.S. v Belgium and Greece, Application No 30696/09 (Grand Chamber), paragraphs 341 to 361
[54] Article 7(1) of the Dublin III Regulation
[55] Switzerland: Federal Administrative Court reference ruling (D-7853/2015), Judgement delivered on 31 May 2017 https://jurispub.admin.ch/publiws/download?decisionId=ee4c786a-088a-425f-b7a2-499a199bb9a9, Italy Consiglio di Stato, judgement delivered on 27 September 2016 https://www.asylumlawdatabase.eu/en/case-law/italy-council-state-27-september-2016-no-rg-7312016#content Council of State, the Netherlands, judgement delivered on 22 April 2020 https://www.asylumlawdatabase.eu/en/case-law/netherlands-council-state-administrative-law-section-22-april-2020-2019045291v3#content
[56] Petition, page 6, second paragraph

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The concept of 'population' is a recurring element in the petition and an important element in the question to be interpreted.

The Fundamental Law does not define the concept of population, although the words 'people' and 'population' appear several times in it. According to Article B (3), for example *"The source of public power shall be the people."*

The Hungarian Explanatory Dictionary defines 'population' as: "*All the people living in an area or community; resident people.*" This, however, still does not answer the question of how long someone has to live in a place to become a part of the population.

Does a British tourist visiting Budapest for a week become part of the population? Will the Ukrainian guest worker who moves to a workers' hostel for a few weeks to serve the production needs of a large, domestically based multinational company become part of the population? Will the Iranian student who keeps renewing his residence permit to study at the medical university and thus lives in the country for years become part of the population? Will a Dutch pensioner who moves to a small Hungarian village in his or her old age for an unspecified period of time become part of the population? Will a Portuguese student who spends a semester at a Hungarian university under the Erasmus programme become part of the population?

So is being part of the 'population' more than a question of fact? If not, what length of stay, what kind of intention to enter makes someone more than a temporary resident? A stay of 90 days within 180 days under the Third Country Nationals Act does not make a foreigner part of the population, but if they overstay – for whatever reason – will they become a part of it? Is the Serbian student who overstayed in Hungary in the first semester of 2020 beyond the validity period of his or her residence permit for study purposes issued in accordance with the Third Country Nationals Act, now part of the population because he or she could not return home due to the Covid-19 pandemic?

Does the concept 'being part of the population' presuppose some kind of legal relationship between the State and the individual – such as the right to vote for recognised refugees or EC residency permit holders?[57] Does the personal scope of Act LXVI of 1992 on the Registration of Personal Data and Addresses of Citizens determine who is included in the 'population' of the country? If this is the case, a person who is not covered by this personal scope but is still here, for whatever reason, is not part of the population?

It raises many questions, including some absurd ones, when the petitioner requests the Constitutional Court to give a constitutional interpretation of a concept that has no constitutional meaning. It is unrealistic and incompatible with the constitutional order to seek such an extreme exercise of control over the 'population', especially when the existing EU and international legal order does not question

[57] Article XXIII(3) of the Fundamental Law

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the right of the State to protect its borders. However, this must not be aimed at undermining the effective exercise of human rights.[58]

According to the intervener, however, th question is not when one becomes part of the 'population' of the country, but on what basis the petitioner believes that it could escape the obligation to respect fundamental rights by operating with vague concepts.

"In the vast majority of cases, the people arriving from Serbia, as a safe third country, cannot prove that they have been subjected to persecution in Serbia or in certain other countries considered safe, or that they have not had effective access to the asylum system in these countries."[59]

In the context of the above, it should be pointed out first of all that since the Hungarian authorities undisputedly do not conduct any formal procedures in relation to the asylum seekers and other third country nationals arriving from (among others) the direction of Serbia, it is conceptually impossible for them to prove anything in any procedure. There is no procedural act where they could put forward any evidence: in fact, not only any such procedure is missing, there is no procedure at all. Indeed, the essence of push-back is that the police automatically, without any further action, pushes these people to the Serbian side of the border fence.

Furthermore, asylum seekers do not only arrive in Hungary from the direction of Serbia. However, the practice of push-backs affects everyone, even those who have come by plane directly from their country of origin and sought protection in Hungary without ever having been to Serbia before.

The part quoted above presents the mixing up of two concepts to the Constitutional Court: one is the concept of a safe third country[60] while the other one is the concept of a safe transit country.[61] Both cases are grounds for inadmissibility under the Asylum Act, but the first may be one under EU law as well, while the second is contrary to EU law following a judgement of the Court of Justice of the European Union and is no longer applied in practice by the asylum authority.[62] Thus it is not worth saying more about the latter.[63]

However, the safe third country principle is a valid and applicable ground for inadmissibility, but it is far from legitimate if it is considered by the authorities as an automatic mechanism. An asylum claim may be rejected as inadmissible if, after a fair examination of the applicant's individual situation, the competent authority verifies that the conditions laid down in the Asylum Act and the Procedures Directive are met.[64] The applicant still has the right to an effective remedy, i.e. to dispute before an

[58] Chahal v United Kingdom, Application No 22414/93 (Grand Chamber), paragraph 73; Saadi v Italy, Application No 37201/06 (Grand Chamber), paragraph 124
[59] Petition, page 6 to 7
[60] Article 38 of the Procedural Directive, Section 51(2)(e) of the Asylum Act
[61] Section 51(2)(f) of the Asylum Act
[62] C-564/18. LH v Immigration and Asylum Service
[63] The only question worth asking is why, despite all this, the Asylum Act still includes the concept of 'safe transit country'.
[64] Section 51(4)(e) of the Asylum Act, Article 38(2) of the Procedural Directive

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administrative court whether in their case Serbia or any other state can be considered a safe third country.

The petitioner's approach of presenting to the Constitutional Court as an irrefutable presumption that this particular ground for inadmissibility exists in the case of *all* asylum seekers is incompatible with the meaning of the fundamental constitutional right to a fair procedure. However, even if this was the case, pursuant to the above-mentioned provisions of the State Border Act and the Asylum Act, a foreigner would not be able to initiate the asylum procedure that might establish this, let alone "become part of the population" by preventing the expulsion that would be the hypothetical consequence of a hypothetically prejudiced outcome of a non-existent procedure. Moreover, even in such a case, this would not release the Government from its obligation to enforce a binding court judgement.

We emphasize also in this regard that the petitioner has failed to substantiate its factual allegations with any tangible evidence.

"In practice, the diplomatic missions and consular posts of the countries of origin establish the identity of third country nationals only after a lengthy procedure, given that, in the absence of cooperation from the foreigners, their real identity at the start of the procedure is unknown. Moreover, according to the Communication connected to the New Pact on Migration and Asylum presented by the European Commission (hereafter the "Communication"), only one third of those who are ordered to return are currently actually leaving the territory of the Member States."[65]

There clearly is a serious interest in the effective execution of lawful expulsion decisions. However, the effectiveness of the system should not be based on assertions without factual basis – this would be absolutely incompatible with the Fundamental Law. A system which is 'effective' by virtue of such a method is unlawful, as the judgement of the Court of Justice of the European Union clearly points out, the enforcement of which judgement the Government is trying to evade by using the Constitutional Court as a tool.

The petition itself confirms that a third country national who remains in Hungary because of the unenforceability of the expulsion can only be entitled to a humanitarian residence permit if he or she is not responsible for such unenforceability. Consequently, the petitioner essentially intends to present as a constitutional threat the cooperative foreign citizens who got stuck in our country through no fault of their own.

In this context, the petitioner also suggests that some children may even be eligible for kindergarten care. The intervener does not wish to comment on this. However, it should be stressed that the best interest of the child, the right of children to physical, psychological, emotional and mental development and protection also enjoys primary protection in the Hungarian constitutional system, and access to education is not an option, but an obligation under the Act CXC of 2011 on National Public Education.

[65] page 7, first paragraph

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It should also be noted, however, that only a fraction of third country nationals with a legal residence permit are entitled to any support from the Hungarian social welfare system. This group typically includes foreign nationals with refugee or beneficiary of subsidiary protection status and, to a limited extent, people possessing humanitarian residence permits. Therefore, even if we could talk about foreigners who "got stuck here", one should see that they do not pose a burden on the social welfare system, because their number is very low.

VI. Closing part

As explained in detail above, the petitioner's aim is to unlawfully maintain a legal situation that has already been ruled unlawful. The Government is trying to use the Constitutional Court as a tool to evade its clear obligation to enforce a court judgment.

Such an endeavour seriously violates not only the rights of refugees, but also the rule of law and the principle of the democratic exercise of power, and can only be achieved by violating the Fundamental Law of Hungary as well as the EU and international legal norms that bind the country.

dr. Márta Pardavi
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