NATIONAL SECURITY GROUNDS FOR EXCLUSION FROM INTERNATIONAL PROTECTION AS A CARTE BLANCHE: Hungarian asylum provisions not compliant with EU law

Information Update by the Hungarian Helsinki Committee
20 December 2021

The present information note identifies five main points where Hungarian asylum legislation and practice regarding exclusion from international protection on national security grounds contradict EU law and jurisprudence.

In Hungary, a person can be excluded from refugee status (Section 8(4) of the Asylum Act) or subsidiary protection status (Section 15(b) of the Asylum Act) based on national security grounds. According to these provisions, **a person cannot be recognised as a refugee or a beneficiary of subsidiary protection if their residence endangers national security**. The same provisions also establish grounds for the withdrawal of international protection statuses (Sections 11(3) and 18(2)(g) of the Asylum Act). The power to assess a national security risk belongs to the security agencies; namely the Counter-Terrorism Office (CTO) and the Constitutional Protection Office (CPO).[1] The **opinion of the security agencies** concerning a threat posed by either an asylum-seeker or a beneficiary of international protection contains **no information as to the reasons for the threat;** and the underlying information is classified.[2] Nor must the reasoning be provided under the Asylum Act.[3] Whereas the person concerned might formally request **access to the classified information**,[4] in practice, such requests are **always rejected** by the security agencies.[5] **Access to** at least **the essence of the underlying information** is not regulated by Hungarian laws. In addition, **the asylum authority cannot deviate from the opinion of the security agencies while examining an international protection status**. Moreover, the **asylum authority cannot perform a proportionality test** because it also does not have access to the underlying classified information substantiating the national security risk.

It follows that the opinion of the security agencies automatically leads to exclusion from international protection. Moreover, by not being aware of the reasons, the person concerned is not in the position to effectively challenge the asylum authority's decision before the courts. All in all, the Hungarian law and practice are not only at first glance unfair, but are also at odds with the relevant provisions of the Common European Asylum System ('CEAS'), the Charter of Fundamental Rights of the European Union ('Charter'), and the pertinent Court of Justice of the European Union ('CJEU') and the European Court of Human Rights (ECtHR) jurisprudence as follows:

1. Lack of reasoning for the exclusion decision, and no access to the underlying information

The **Hungarian law (Sections 32/C, 57(6) of the Asylum Act) and practice,** according to which there is **no reasoning** given for decisions on exclusion from international protection on **national security grounds,** infringes EU law for the following reasons:

1.1. Violation of the right to an effective remedy and the rights of the defence

The **right to an effective remedy and a fair trial** is ensured by Art. 47 of the Charter which, as the jurisprudence of the CJEU points out, incorporates among others, the rights of the defence and the principle of equality of arms.[6] The CJEU ruled in the *ZZ* judgment that even if the reasoning of the authorities is limited due to national security grounds, the essence of the grounds substantiating the national security risk must be

[1] Section 2/A of the Decree no. 301/2007 (XI. 9.) on the execution of Act LXXX of 2007 on Asylum.
[2] For a broader perspective regarding the relevant EU and international legal background see '*Legal Template on EU and International Law Regarding Disclosure of Classified Information in Asylum and Return Procedures Based on National Security Grounds*', available here: https://bit.ly/3DHFz1H; and for a comprehensive description of the Hungarian law and practice see '*Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland*', available here: https://bit.ly/3lS4RUS.
[3] Section 57(6) of the Asylum Act.
[4] Sections 3 point 9, 11(1) and 12(1) of the Act CLV of 2009 on the Protection of Classified Data ('Classified Data Act').
[5] According to the information received through HHC Freedom of Information requests to the CTO and the CPO on 8 October 2020 and 4-5 August 2021, none of the access requests submitted to the agencies were granted in 2019, 2020 and first half of 2021.
[6] CJEU C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017, §§30-32.

given to the applicant.[7] It held that their right to an effective legal remedy is infringed if the parties to the procedure are not provided with an opportunity to examine the facts and documents on which decisions concerning them are based, and on which they are therefore unable to state their views.[8] The right to an effective remedy in asylum procedures is reaffirmed in **Art. 46(3) of the Procedures Directive, and** this should be interpreted and applied in light of **Art. 47 of the Charter**.[9]

The **rights of the defence** are applicable both in administrative and judicial procedures with the view to enable the person '*to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content (…)*'.[10] The right to be heard, falling under the scope of the rights of the defence, guarantees every person the opportunity to effectively make their views known during an administrative procedure, and before the adoption of any decision liable to adversely affect their interests.[11] The obligation for the authorities to give a detailed statement of the reasons for their decisions also forms a part of the rights of the defence.[12] In addition to the CJEU judgment in which it established that authorities are obliged to observe the rights of the defence of addressees of decisions which significantly affect their interests,[13] the right to a reasoned decision is explicitly set out by **Arts. 11(2) and 45(3) of the Procedures Directive** with regard to rejection and withdrawal decisions, respectively. Importantly, the Procedures Directive does not allow for any derogation from these provisions. Moreover, **Preamble (20) of the Procedures Directive** sets out that even if there are serious national security or public order concerns, Member States shall not jeopardise the applicant's effective access to basic principles and guarantees provided in the Procedures Directive.

Consequently, **by not providing any reasoning as to the national security risk the person concerned allegedly presents, the Hungarian law is contrary to Art. 47 of the Charter and violates the provisions of the Procedures Directive ensuring the enforcement of the right to an effective remedy and, in particular, the rights of the defence.**

1.2. Infringement of the right to access to the underlying information and data

The right of asylum seekers and beneficiaries of international protection and their legal representative to access information and data provided by experts (in the meaning of Art. 10(3)(d) of the Procedures Directive) is enshrined in **Art. 12(1)(d) of the Procedures Directive** (and in Art. 12(2) thereof with regard to appeal procedures). This provision refers to **Art. 23(1) of the Procedures Directive** as a limitation of such access. In the meaning of this Article, exceptions can be made to access where disclosure of information or sources would jeopardise national security. However, even in these cases, besides ensuring that courts have access to the totality of the information concerned, further domestic procedures should be provided which guarantee that the applicant's rights of the defence are observed. With regard to the latter, the Directive notes as an example that access to the information by a legal adviser who has undergone a security check might form such a guarantee.

Consequently, **mere access by the courts to the classified data, as according to the Hungarian law, does not on its own guarantee respect of the applicant's rights of the defence. Therefore, the Hungarian asylum law, because it does not provide any other guarantees for the enforcement of the rights of the defence, is in stark contrast with EU law.**

2. Lack of individual assessment and unlawful delegation of powers by the determining authority

According to the **Hungarian law (Section 57(3) of the Asylum Act),** the **asylum authority cannot deviate from the opinion of the security agencies when examining international protection status.** Due to the binding nature of the security agencies' opinion over the asylum authority, the decision on **an exclusion is ultimately made by the security agencies,** and not by the determining authority in the meaning of the Procedures Directive. This results in the infringement of the EU law for the following 3 reasons:

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[7] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §65. Note that even though this case concerned the Free Movement Directive, the standards on access to classified information were established by the CJEU in relation to Art. 47 of the Charter, therefore they are applicable in asylum procedures, as well.
[8] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §56.
[9] CJEU, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017, §31.
[10] CJEU, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017, §35.
[11] CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014, §§46 and 48.
[12] CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014, §48.
[13] CJEU, C-383/13 PPU, *M. G., N. R. v. Staatssecretaris van Veiligheid en Justitie*, 10 September 2013, §35.

2.1. It constitutes an unlawful delegation of powers of the asylum authority

Art. 4(1) of the Procedures Directive establishes that the determining authority designated by the Member States shall be responsible for an appropriate examination of applications under the Directive. The same responsibility is established by the definition of 'determining authority' in Art. 2(f) of the Procedures Directive. Furthermore, **Art. 4(2) of the Procedures Directive** sets out two specific cases under the Procedures Directive when other authorities might be designated as competent to conduct particular parts of asylum procedures.[14] The procedure of experts (i.e. national security agencies) does not belong thereto. Moreover, the assessment of facts and circumstances of an application for international protection as specified in Art. 4 of the Qualifications Directive is the duty of the determining authority alone.[15]

Consequently, **it is contrary to the meaning of Art. 4 of the Procedures Directive if authorities other than the determining authority are responsible for examining the recognition, refusal or withdrawal of international protection. Thus, the Hungarian law and practice infringe upon EU law.**

2.2. Exclusion decisions lack individual and comprehensive assessment

Examination of the facts and circumstances of an application for international protection laid down in **Art. 4 of the Qualifications Directive** must be based on an individual assessment. Thus, the determining authority cannot base its decision solely on the conclusions of an expert's report.[16] Regarding the obligation for the asylum authority to comprehensively examine withdrawal procedures follows from Art. 45 of the Procedures Directive Art. 45(1)(b); and sets out that the person concerned should be given the opportunity to submit reasons as to why their international protection should not be withdrawn. In addition, as per Art. 45(2)(a), the competent authority should be able to obtain precise and up-to-date information from various sources regarding the general situation prevailing in the countries of origin of the persons concerned.

The obligation for an individual assessment by the determining authority is also required under **Art. 4(2)-(3) and Art. 10(3) of the Qualifications Directive**.[17] In addition, a **necessity and proportionality assessment** is always required where fundamental rights are at stake.[18] The CJEU ruled in the *Ahmed* case that '*any decision to exclude a person from refugee status must be preceded by a full investigation into all the circumstances of his individual case and cannot be taken automatically'.*[19] The same requirement is also applicable regarding '*decisions to exclude a person from subsidiary protection*'.[20]

National security cases do not form an exception to the requirement of individual assessment prescribed for the determining authority. On the contrary, the **Preamble (20) of the Procedures Directive** mandates that even if there are serious national security or public order concerns, Member States shall not jeopardise the '*adequate and complete examination'* of the application. Furthermore, the determining authority is clearly obligated by **Art. 14(4)(a) and Art. 17(1)(d) of the Qualification Directive** to make a proportionality assessment regarding the examination of the existence of '**reasonable grounds';** to conduct an assessment of the security danger a person presents in relation to refugees; and specify '**serious reasons'** with regard to beneficiaries of subsidiary protection, respectively.[21] Moreover, asylum authorities even have to examine if the national security assessment of the security agencies is in line with the notion of national security as interpreted by the CJEU.[22]

The automatic rulings of the Hungarian asylum authority when delivering exclusion decisions on national security grounds violates EU law by which asylum decisions, including decisions on exclusion, must be made based on individual assessment; including the examination of proportionality.

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[14] Accordingly, another authority shall be responsible for the purposes of Dublin procedures pursuant to the Dublin Regulation (Art. 4(2)(a) of the Qualification Directive), and for border procedures as set out in Art. 43 of Procedures Directive (Art. 4(2)(b) of the Qualification Directive).

[15] CJEU C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, §40.

[16] CJEU, C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, §§41-42 and 45.

[17] CJEU, C-901/19, *CF, DN v. Bundesrepublik Deutschland*, 10 June 2021, §§41-42. The CJEU stated that an application for asylum must be subject to an individual assessment, which means a whole series of factors must be taken into account.

[18] Art. 52(1) of the Charter.

[19] CJEU, C-369/17, *Shajin Ahmed v. Bevándorlási és Menekültügyi Hivatal*, 13 September 2018, §49.

[20] CJEU, C-369/17, *Shajin Ahmed v. Bevándorlási és Menekültügyi Hivatal*, 13 September 2018, §50.

[21] Note regarding beneficiaries of subsidiary protection, that the level of scrutiny must be even higher than in the case of refugees.

[22] CJEU, C-601/15 PPU*, J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, §64. According to *i.a.* §66 of the *J. N.* judgment, this interpretation is also applicable in asylum cases.

3. Non-Transposition of Art. 14(6) of the Qualification Directive[23]

Article 14(6) of the Qualification Directive 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. Furthermore, by the interpretation of the CJEU in the case of *M, X, X*[24] regarding this provision, persons excluded from refugee status based on Art. 14(5) or (5) of the Qualification Directive enjoy rights enshrined under Articles 4, 18 and 19(2) of the Charter. Accordingly, persons excluded from refugee status based on national security grounds should automatically enjoy non-refoulement. Furthermore, the CJEU also established that articles of the Geneva Convention that do not require the lawful residence of the refugee on the territory of the Member State are applicable.[25]

In Hungary, there is **no automatic finding of non-refoulement upon the establishment of exclusion from refugee status based on national security grounds.** Additionally, even if a person is not expelled from the country, the mentioned **articles of the Geneva Convention – *e.g. the right to initiate a naturalisation procedure or the right to public education* - are neither provided to them *ex lege* nor *de facto*. It follows that the Asylum Act is at odds with the Qualification Directive on account of the non-transposition of Article 14(6) of the Qualification Directive.[26]**

In summary, the Hungarian law and practice on exclusion decisions based on national security grounds violate the fundamental rights of asylum-seekers and beneficiaries of international protection, and are in contrast with a wide range of EU provisions set out in the CEAS directives:

- The Hungarian law does not provide any reasoning as to the national security risk allegedly presented by the person concerned. This is contrary to **Art. 47 of the Charter,** and violates the provisions of the Procedures Directive ensuring the enforcement of the right to an effective remedy and, in particular, the rights of the defence (**Arts. 46(3), 11(2), 45(1), (3) and Preamble (20) of the Procedures Directive**);
- The mere access by the courts to the classified data provided by the Hungarian law does not on its own guarantee the respect of the applicant's rights of the defence. Furthermore, it violates the rights of access to information and data underlying the decision on exclusion (**Arts. 12(1)(d), 23(1) and 45(4) of the Procedures Directive**);
- Due to the binding nature of the security agencies' opinion over the asylum authority, a decision on an exclusion is ultimately made by the security agencies. This diverges with the requirement that the determining authority is responsible for the examination of the recognition, refusal or withdrawal of international protection (**Art. 4 of the Procedures Directive**);
- The automatic rulings of the Hungarian asylum authority when delivering exclusion decisions on national security grounds violates the requirement of individual assessment, including the examination of proportionality (**Arts. 4, 10(3), 14(4)(a) and Art. 17(1)(d) of the Qualifications Directive; Preamble (20) of the Procedures Directive**); and
- Non-transposition of **Art. 14(6) of Qualification Directive** as interpreted by the CJEU in the ***M* case**.

[23] This also holds for those excluded from international protection based on the commission of a serious crime (Art. 8(5) of the Asylum Act).
[24] CJEU, joined Cases C-391/16, C-77/17 and C-78/17, *M v. Ministerstvo vnitra,* 14 May 2019, §§99-100.
[25] CJEU, joined Cases C-391/16, C-77/17 and C-78/17, *M v. Ministerstvo vnitra,* 14 May 2019, §§99-100, §105; these rights are enshrined in articles 8, 13, 14, 20, 25, 27, 29 and 34 of the Geneva Convention.
[26] The same is true for the regulation on exclusion based on the commission of a serious crime. See *'Preserved legal deficiencies post-CJEU Ahmed judgement: Hungarian asylum provisions on exclusion from international protection still not compliant with EU law, Information Update by the HHC on 7 April 2021*', available here: https://helsinki.hu/en/hungarian-asylum-provisions-on-exclusion-from-international-protection-still-not-compliant-with-eu-law/.