



Due to the legislative changes made in 2019, the right to family life of Hungarian citizens and their third-country national family members is less protected than the right to family life of Hungarian citizens and their EU family members or EU citizens with no Hungarian family members living in Hungary.

I. Changes in legislation

Residence-related rights of third-country nationals (hereinafter: TCNs) who have Hungarian family members used to be regulated in Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence (Freedom of Movement Act). In 2019, they were transferred to the scope of Act II of 2007 on the Admission and Residence of Third Country Nationals (TCN Act) by legislative amendments. The change has substantially restricted the rights of TCNs, including their right to family life as discussed below. The Freedom of Movement Act now applies only to citizens of other EU Member states and their family members or their dependents.

II. Expulsion procedures

Before the changes in legislation, the expulsion of TCNs with Hungarian family members could only be imposed upon weighing of the following criteria: the nature and gravity of the crime committed, the age and health condition, the family situation, the financial situation, the duration of residence in Hungary, the social and cultural integration of the person concerned and the extent of their links with the country of origin, duration of the family relationship, number of children and their age, relations with the children including visitation rights, if there is another State where there are no legal obstacles for exercising the right to family reunification and the difficulties which the family members are likely to face if they had no other choice but to take up residence in that country.¹

The transition of TCNs with Hungarian family members to the scope of the TCN Act has tightened the application of the abovementioned criteria. Accordingly, the duration of residence in Hungary, the age, family circumstances, and the potential effects of expulsion on the family member of the TCN as well as the links of the TCN to Hungary, or the absence of links with the country of origin must only be taken into account before issuing an expulsion decision, if the residence permit of the TCN in Hungary was issued on the grounds of family reunification,² or the TCN or their spouse or partner has an immigrant status or permanent residence permit.³

Therefore, in cases, where a TCN with Hungarian family members resides in Hungary based on other types of temporary residence permits (e.g. work permit, study permit, etc.), a TCN can be expelled without any consideration being given to their family life, their established life in Hungary and the loss of connection with their country of origin.

The same applies also to those TCNs who had a residence permit based on family reunification, but it had been withdrawn before their expulsion was initiated (for issues regarding the withdrawal of

¹ Section 44 of Freedom of Movement Act.

² Section 45(1) of TCN Act.

³ Section 45(2a) in connection with Section 45(2) of TCN Act.

residence permit see the next chapter). In practice, the HHC witnessed that the Immigration authority first withdraws the residence permit or rejects the application for the extension of the residence permit, but does not expel the person concerned, so by the time the TCN has no legal status anymore, the Immigration authority has a legal basis for disregarding the TCN's right to respect their family and private life, as the relevant provisions of the TCN Act⁴ do not have to be applied.

Further on, if the TCN has already been expelled, the expulsion or SIS alerts cannot be reviewed. This used to be possible under the Freedom of Movement Act before an expulsion would be carried out.⁵

Finally, expulsion under TCN Act based on security considerations is possible for those "*whose entry and residence represents a threat to national security, public security or public policy*".⁶ As opposed to that, conditions for expulsion under the Free Movement Act based on security considerations are stricter: it is possible for those "*whose entry and residence represents a genuine, present and sufficiently serious threat affecting public policy, public security or national security of Hungary*."⁷ A serious nature of national security risk is required only for those TCNs with a permanent residence permit or immigrant status, or if they have family members with immigrant status or permanent residence permit.⁸

The above described practice is not compliant with the European Court of Human Rights (ECtHR) case law. The Court stated among others in the case of *Gaspar v. Russia* that the Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions must, in so far as they may interfere with a right to private and family life protected under Article 8, be in accordance with the law and necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim. Where children are involved, their best interests must be taken into account and national decision-making bodies have a duty to assess evidence in respect of the practicality, feasibility, and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it.⁹

Similarly, it results from the CJEU case law, that Member States, when implementing the Return Directive are required to respect the fundamental rights recognized by the Charter, in particular the right to respect for the private and family life, as guaranteed in Article 7 of the Charter and the best interests of the child. Article 5 of the Return Directive precludes the adoption of a return decision without these aspects being taken into account.¹⁰

III. Withdrawal of residence permits

Due to a legislative gap, there is no obligation in the TCN Act to assess the impacts of a potential withdrawal/rejection of a residence permit on the family life of the TCN concerned (if family members are Hungarian citizens or TCNs). The Hungarian legislation does not prescribe the obligation to examine the existence of a dependency relationship according to Article 20 of the TFEU (establishing a derived right of residence for TCN family members of Hungarian citizens, who did not exercise their right to freedom of movement, i.e. did not move to another EU Member State) either.¹¹ In the past, the Immigration authority did not carry out a clarification of the facts in this regard and did not invite those concerned to provide information or evidence, nor would the courts examine the situation according to

⁴ Sections 45(1) or 45(2a) in conjunction with 45(2).

⁵ Section 47/B of Freedom of Movement Act.

⁶ Section 43(2)(d) of TCN Act.

⁷ Section 40(2)(c) of Freedom of Movement Act.

⁸ Section 45(2) of TCN Act.

⁹ *Gaspar v. Russia*, appl. no. 23038/15, 12 June 2018, paras. 38, 39.

¹⁰ For example: C-69/21, X, 22 November 2022, paras. 89-91, C-82/16, K.A., 8 May 2018, paras. 102-104, C-112/20, M.A., 11 March 2021.

¹¹ The derived right of residence must be ensured if, as a result of the action of the Member State, the EU citizen would be "deprived of the actual enjoyment of the essence of the rights provided by this legal status", which occurs when the EU citizen is forced to leave the territory of the Union as a whole due to the "absence of the right of residence" of their TCN family member. This occurs if there is a "relationship of dependency" between an EU citizen and their TCN family member.

Article 20 of the TFEU, even if requested by the applicant. However, the HHC observed that jurisprudence has developed in the last two years and the practice has favourably changed. Today, in most of cases, neither the Immigration authority nor the courts dispute that Article 20 of the TFEU should be considered, as it has a direct effect. There have been court judgments delivered in which courts referred to the obligation to examine the dependency relationship establishing the existence of a derivative right of residence according to Article 20 of the TFEU. Despite the recognition of this obligation under the EU law given by Hungarian courts, the TCN Act has not yet been amended in order to include this obligation and HHC continues to witness the Immigration office's shortcomings with regard to Article 20 of the TFEU assessment in some cases.

Further, the rejection/withdrawal of the residence permit based on national security or public security threat remains problematic, as such threat forms an automatic reason for rejection/revocation of the residence permit.¹² The decisions of the Immigration authority do not even qualify as discretionary decisions due to the binding positions of the specialized authorities determining the risk (e.g. security agencies).¹³ Thus, if a decision was made in connection with national security or public security reasons, the Immigration authority is not obliged to consider the facts related to family coexistence, the best interest of the child principle, established private life, etc., as such consideration cannot lead to a different decision due to the mandatory exclusionary provisions. In conclusion, even if Article 20 of the TFEU is applicable, in the case of security concerns it bears no consequences on the TCN concerned.

Another issue with regard to residence permits concerns TCNs who have divorced their Hungarian spouses. In case they have children, they do not qualify as family members of their Hungarian children in the residence permit procedure, only if they have and exercise official parental custody and they live in the same household with the child.¹⁴ Such understanding is at odds with the right to family life under Article 8 of the European Convention of Human Rights (ECHR), as family life does not end upon the parents' divorce, as a result of which the child ceases to live with one of their parents.¹⁵

IV. Conclusion

Where EU law is applicable, any limitation on the exercise of the rights recognised by the Charter must be provided for by law and respect the essence of those rights. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.¹⁶ Similarly interference in someone's right to respect for private and family life guaranteed under Article 8 of the ECHR is only possible when it is prescribed by law, pursues a legitimate objective and is necessary in a democratic society (proportionate to the legitimate aim pursued).

It is not in accordance with the ECHR, Convention on the Rights of the child (CRC) and EU law that a substantive decision on expulsion or rejection/withdrawal of residence of TCN is made in such a way that individual circumstances are not thoroughly examined (private, family life, children's best interest) and that necessity and proportionality are not considered.¹⁷

The Hungarian law and practice regarding residence permit procedure and expulsion of TCNs with Hungarian family members are in breach of the right to respect for family and private life, as well as the best interest of the child principle both guaranteed by international and EU law.

¹² Sections 13(1)(h), 33(2)(b), 34(6)(b) and (11), 35(7), 37(2)(g), 38(9) of TCN Act.

¹³ Section 97(1) of Government Decree 114/2007. (V. 24.) and Section 87/B(4) of TCN Act.

¹⁴ Section 2(de) of TCN Act.

¹⁵ Mustafa and Armağan Akin v. Turkey, appl. No. 4694/03, 6 April 2010, §19.

¹⁶ Article 52 of the Charter, see also e.g. CJEU, C-50/06, *Commission of the European Communities v Kingdom of the Netherlands*, judgment of 7 June 2007; Joined cases C-715/17, C-718/17 and C-719/17, *European Commission v Republic of Poland and Others*, judgment of 2 April 2020; and C-380/18, *Staatssecretaris van Justitie en Veiligheid v E.P.*, judgment of 12 December 2019.

¹⁷ Article 8 of the ECHR and Article 7 of the Charter guarantee the right to respect for private and family life. The best interest of the child principle is ensured by the CRC and Article 24 of the Charter.