

THE GOVERNMENT OF HUNGARY

Bill No. T/333

amending certain laws relating to measures to combat illegal immigration

**Submitted by: Dr. Sándor Pintér
Minister of Interior**

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Act ... of 2018

amending certain laws relating to measures to combat illegal immigration

1. Amending Act XXXIV of 1994 on the Police

Section 1

Point 10 of Subsection (2) of Section 1. of Act XXXIV of 1994 on the Police. (Hereinafter: Police Law.)

10. shall be replaced by the following provision:

(The police, as defined in the Basic Law, in this Act and in other legal provisions under law, in its function in the field of crime prevention, law enforcement, public administration and public security:)

"10. protects the state border, prevents, detects, interrupts the unlawful crossing of the state border, carries out the duties of alien policing and asylum tasks referred to its competence, participates in the prevention of illegal immigration."

Section 2

Chapter V of Police Law. is amended by the following subheading:

“Border security restraining measure

Section 46/F. In order to ensure the unrestricted state border regime and the border surveillance activity, the police officer shall prevent a person from entering the territory of Hungary in accordance with the external border line as defined by point 2 of Article 2 of the Schengen Borders Code, or within an 8 km area of the border line, and order the person present there to leave, who is under criminal proceedings due to the criminal offence of the unlawful crossing of the border barrier (Criminal Code Section 352/A.), damaging the border barrier (Criminal Code Section 352/B.), the obstruction of the construction work on the border barrier (Criminal Code Section 352/C.), human smuggling (Criminal Code Section 353.), facilitating unlawful residence (Criminal Code Section 354.), facilitating illegal immigration (Criminal Code Section 353/A.)”

Section 3

Section 91/O of the Police Law. shall be amended by the following subsection (6):

“(6) In order to ensure compliance with the regulations of the border security restraining measure, the police shall handle the personal identification data, citizenship, address, postal address, the data related to the case as well as the criminal data related to the criminal activity in the criminal records, of the person reasonably suspected of having committed the criminal offence of the unlawful crossing of the border barrier (Criminal Code Section 352/A.), damaging the border barrier (Criminal Code Section 352/B.), the obstruction of the

construction work on the border barrier (Criminal Code Section 352/C.), human smuggling (Criminal Code Section 353.), facilitating unlawful residence (Criminal Code Section 354.), facilitating illegal immigration (Criminal Code Section 353/A.) from the day of the communication of the suspicion until the data in the criminal record system are registered.”

2. Amending Act XII of 1998 on Travelling abroad

Section 4

In Subsection (2) of Section 1 of the Act XII of 1998 on Travelling abroad, the text “Subsection (1) of Article XIV. Of the Basic Law” shall be replaced by “Subsection (2) of Article XIV. of the Basic Law”.

3. Amending Act I. of 2007 on the entry and residence of persons having the right of free movement and residence

Section 5

In Subsection (1) of Section 34 of Act I. of 2007 on the Entry and residence of persons having the right of free movement and residence, the text “in Subsection (2) of Article XIV. of the Basic Law” shall be replaced by “Subsection (3) of Article XIV. of the Basic Law”.

4. Amending Act II. Of 2007. on the entry and residence of Third-country nationals

Section 6

(1) In Subsection (2) of Section 51. of Act II. of 2007. on the entry and residence of third-country nationals (hereinafter referred to as: Harmtv.), the text “in Subsection (2) of Article XIV. of the Basic Law” shall be replaced by “in Subsection (3) of Article XIV. of the Basic Law”.

(2) Harmtv. will be amended after Section 111. with the following subheading and Section 112:

“Compliance with the cardinality requirement of the Basic Law

Section 112.

a)Section 86/A.,

b)Section 86/E.,

c)Section 86/I.,

d)Section 86/J.,

e)Sections 86/L-86/M.

f)Section 87.

g)Sections 87/L-87/M.

h)Section 87/N. Subsection (1)

Shall be considered as cardinal law based on Section (1) of Article XIV. of the Basic Law.

5. Amending Act LXXX of 2007 on Asylum

Section 7

(1) Subsection (2) of Section 51. of Act LXXX. of 2007. (hereinafter "Asylum Act") shall be amended with the following point *f*):

(The application is inadmissible if)

"*f*) the applicant arrived via a country where they had not been subjected to persecution as defined in Subsection (1) of Section 6 or to the serious harm as defined in Subsection (1) of Section 12 or if the adequate level of protection is provided in the country through which they had arrived in Hungary."

(2) Section 51. of the Asylum Act shall be amended with the following Subsection (12):

"(12) In case of the application of point *f*) of Subsection (2), the applicant may, without delay, but no later than 3 days from the date of notification, declare that, in their individual case, the conditions specified in point *f*) of Subsection (2) were not met regarding the given country."

(3) In the Asylum Act, in

a) Subpoint *ic*) of point *i*) of Section *i*)

b) in Section 25/A.,

c) in Subsection (1) of Section 45.

the text "in Subsection (2) of Article XIV. of the Basic Law" shall be replaced by the text "in Subsection (3) of Article XIV of the Basic Law".

(3) In Subsection (1) of Section 6 of the Asylum Act, the text "In Subsection (3) of Article XIV. of the Basic Law" shall be replaced by the text "in the first sentence of Subsection (4) of Article XIV of the Basic Law".

(4) The Asylum Act shall be amended with the following Subheading and Section 94. after Section 93:

"Compliance with the cardinality requirement of the Basic Law

94. Section 94. In this Act,

a) Subsection (2) of Section 1.,

b) Section 5,

c) Sections 31/A-31/M.

d) Section 31/I.,

e) point *a*) of Section 32/C,

f) Sections 32/D-32/M.,

g) Subsection (1) of Section 32/G,

h) Subsections (1)-(3) and Subsections (7)-(8) of Section 32/Q.,

i) Section 32/R.,

j) Section 32/S.

Shall be considered as cardinal law based on Section (5) of Article XIV. of the Basic Law.

6. Amending Act LXXXIX of 2007 on the State border

Section 8

Section 5. of Act LXXXIX. of 2007. on the State border shall be amended with the following Subsection (1c):

“(1C) Whoever is under criminal proceedings launched on the basis of a criminal offence of the unlawful crossing of the border barrier (Criminal Code Section 352/A.), damaging the border barrier (Criminal Code Section 352/B.), the obstruction of the construction work on the border barrier (Criminal Code Section 352/C.), human smuggling (Criminal Code Section 353.), facilitating unlawful residence (Criminal Code Section 354.), facilitation of illegal immigration (Criminal Code Section 353/A.), may not stay in the territory referred to in paragraph (1a).”

7. Amendment of Act XLVII of 2009 on the criminal record system, the registration of judgments handed down by courts of the Member States of the European Union against Hungarian citizens and the recording of criminal and law enforcement biometric data of third-country nationals

Section 9

Point c) of Subsection (2) of Section 68. of Act XLVII of 2009 on the criminal record system, the registration of judgments handed down by courts of the Member States of the European Union against Hungarian citizens and the recording of criminal and law enforcement biometric data shall be replaced by the following provision:

(The police are entitled to receive the following data through direct access:)

“c) during the performance of its tasks related to the public order and border security
ca) for the purposes of the execution of coercive measures, data specified in points c) and h) of Section 23,
cb) for the purposes of ensuring compliance with the provisions of the border security restraining, the data specified in point c) of Section 23., if the person concerned is under criminal legal proceedings on the basis of the criminal offence of the prohibited crossing of the border barrier (Criminal Code Section 352/A.), damaging the border barrier (Criminal Code Section 352/B.), the obstruction of the construction work on the border barrier (Criminal Code Section 352/C.), human smuggling (Criminal Code Section 353.), facilitating illegal residence (Criminal Code Section 354.), the promotion of illegal immigration (Criminal Code Section 353/A.);”

8. Amending Act II of 2012 on petty offences, the petty offence procedure and the petty offences records

Section 10

(1) Subsection (4) of Section 201. of Act II of 2012 on petty offences, the petty offence procedure and the petty offences records (hereinafter “Petty Offences Act”) shall be replaced by the following provision:

“(4) Anyone who violates the rules of residence in the area specified in Subsection (1c) of Section 5 of the State Border Law commits a petty offence.”

(2) Section 201. of Petty Offences Act shall be amended with the following Subsection (5):

"(5) For the petty offence specified in paragraphs (1) to (4), the proceedings fall within the competence of the police."

9. Amending Act C of 2012 on the Penal Code

Section 11

(1) Act C of 2012 on the Penal Code (hereinafter "Criminal Code") shall be amended with the following subheading and Section 353/A after Section 353:

"Facilitating illegal immigration

Section 353/A.

(1) Anyone who conducts organizational activities

- a) in order to allow the initiating of an asylum procedure in Hungary by a person who in their country of origin or in the country of their habitual residence or another country via which they had arrived, was not subjected to persecution for reasons of race, nationality, membership of a particular social group, religion or political opinion, or their fear of indirect persecution is not well-founded,
- b) or in order for the person entering Hungary illegally or residing in Hungary illegally, to obtain a residence permit, if a more serious criminal offense is not committed, is punishable by confinement for the misdemeanour.

(2) Anyone who provides financial means for committing the criminal offence specified in Subsection (1), or who regularly carries out such organisational activities, is punishable by a term of imprisonment of up to one year.

(3) Those shall be punishable according to Subsection (2), who commit the criminal offence specified in Subsection (1)

- a) for the purposes of financial gain
- b) or providing support for more than one person
- c) commits the criminal offence within an 8 kilometre area from the external borders of Hungary as specified in point 2 of article 2 of the Schengen Border Code or from the border signs.

(4) The punishment may be relieved without limits - and may be lifted in cases of special justification - against the perpetrator of the offence specified in Subsection (1) if the perpetrator reveals the circumstances of the offence before the indictment has been brought.

(5) For the purposes of Section 353/A., it shall be regarded as organisational activity especially if with the purpose specified in Subsection (1)

a) the person organises border monitoring at the external borderlines of Hungary as specified in point 2 of Article 2 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons in the territory of Hungary.

- b)* prepares or distributes information materials or commissions such activities,
- c)* builds or operates a network.”

(2) Section 364. of Criminal Code shall be replaced by the following provision:

“Section 364. Banishment may also be imposed against perpetrators of human smuggling, illegal crossing of the border barrier, the obstruction of the construction work on the border barrier, the facilitation of illegal residence, the facilitation of illegal immigration and the organization of unlawful gambling.”

10. Final provisions

Section 12

This Act shall enter into force on the first day of the month following its publication.

Section 13

On the basis of Subsection (6) of Article 46 of the Basic Law, this Act shall be considered a cardinal law.

General reasoning

Hungarians made it clear both at the Parliamentary Elections on 8 April, and at the national consultations carried out during recent years, as well as at the quota referendum held in 2016, that they do not want Hungary to become an immigrant country. This also obliges the Hungarian government. We firmly believe that immigration poses serious risks and is therefore a question of national security.

In order to protect Hungary, an action plan is needed, this is the STOP Soros Act package.

Hungarian people are right to expect the government to use all means to combat illegal immigration and activities that facilitate it. This is the purpose of the STOP Soros Act Package, which makes the organization of illegal immigration punishable. With the Bill, we want to prevent Hungary from becoming a migrant country.

Hungarians want to live in security, and therefore expect and support the government to take further measures to ensure Hungary's security and to prevent the organization of illegal migration. This is also the purpose of the Stop Soros Act Package, which strengthens the country's defence and creates another obstacle to Hungary also becoming an immigrant country.

For us, Hungary is first!

Detailed reasoning

Section 1

The Basic Law defines the task of the police as the prevention and detection of criminal activities, as well as the protection of public security, public policy and of the state borders. This protection is achieved through the statutory limitation of the rights of persons who demonstrate illegal behaviour. Taking into account the provisions of the Basic Law and the migration pressure on Hungary, it is necessary to establish police action to counteract illegal immigration. According to preamble Subsection (6) of the Schengen Borders Code, border control should help to combat illegal immigration and human smuggling. As border control in Hungary falls within the competence of the police, it is therefore necessary to clarify it with the inclusion of the task of preventing illegal immigration.

Section 2

Chapter V on police measures of Act XXXIV of 1994 on the Police (Police Law) is supplemented by the sub-heading entitled Border security restraining in order to prevent people from entering the territory of Hungary in accordance with the external border line as defined by point 2 of Article 2 of the Schengen Borders Code, or within an 8 km area of the border line, and order the person present there to leave, who are under criminal proceedings on the basis of the criminal offence of the unlawful crossing of the border barrier (Criminal Code Section 352/A.), damaging the border barrier (Criminal Code Section 352/B.), the obstruction of the construction work on the border barrier (Criminal Code Section 352/C.), human smuggling (Criminal Code Section 353.), facilitating unlawful residence (Criminal Code Section 354.), facilitating illegal immigration (Criminal Code Section 353/A.)

Hungary can thus comply with the requirement of Article 13 (2) of the Schengen Borders Code, according to which border surveillance must be implemented in such a way as to prevent and discourage persons from circumventing the checks at border crossing points. . Act XC of 2017 on Criminal Proceedings entering into force on 1 July 2018 states that if it is not possible to establish a reasonable suspicion of the offence at the time of accusation, the public prosecutor may state that the legal conditions for being suspected were not met. In this case, the qualification of the suspect as such will be terminated by the decision brought in connection with the complaint. The legal system defines several cases where a person under criminal proceedings is subject to legal restriction. The result of this restriction can be the banning from certain activities or exclusion from establishing legal relationships. These are applied even if the presumption of innocence is also applicable to the person concerned. Such statutory rules are laid down in the Act on the Health Care, the Act on the Armed Security Guard, the Act on Nature Conservation and Field Guards, the Act on the Protection of Persons and Property, the Act on Private Investigation, and the Act on the Legal Service of the Professional Staff of Law Enforcement Bodies.

Section 3

The suspect's data will be uploaded to the register of persons undergoing criminal prosecution within several days from the date of the suspicion. This means that in certain cases, for several days after the suspicion has been communicated, the suspect can enter the 8-kilometer radius from the border line - despite being prohibited from doing so by the State Borders Act - due to not being able to detect the ban during police check-ups.

The proposal provides the police with the possibility of handling the suspects' data in the case of the crimes mentioned, bridging the period of time until the data are being uploaded to the criminal records system.

Sections 4 and 5

The technical amendments of the proposal are necessary due to the amendment of Article XIV of the Basic Law. This amendment to the text clarifies the rigid reference to the Basic Law.

Section 6

According to the seventh amendment to the Basic Law, the basic provisions for the submission of applications for staying in Hungary by foreign nationals who are not entitled to free movement are laid down in a cardinal law, thus it was necessary to provide for cardinality regarding the entry and stay of third-country nationals in the country as specified in the provisions of Act II of 2007 as specified in the Basic Law with regard to the specific procedural rules.

Section 7

If the applicant arrives in Hungary through a country where he or she was not exposed to persecution that could serve as a basis for their recognition as a refugee or a serious harm that could serve as a basis for their recognition for subsidiary protection, or if the country through which he or she travelled has provided or would have provided adequate protection if the applicant had applied for such protection, it is reasonable for the applicant to use the protection provided by the community of nations in that country. The provision is in line with Subsection (1) of Article 31 of the Geneva Convention, which protects only those who came

directly from an area where their lives or their freedom were at risk. An adequate level of protection is ensured if the applicant has resided in the country on any grounds of residence (eg employment, humanitarian residence).

According to the Seventh Amendment to the Basic Law, the basic rules for the granting of asylum are determined by a cardinal law, so it was necessary to make a decision on the cardinality regarding the provisions of Act LXXX of 2007 on Asylum (Asylum Act) based on the Basic Law.

According to the above, pursuant to Article 5 (2) of the Seventh Amendment to the Basic Law, it is appropriate to establish the cardinality of particular provisions of Asylum Act

Section 8

It is necessary to state in the Act on State Borders, that a person being prosecuted for the commission of crimes related to border protection and state border regime may not be present in the area specified in Subsection (1a) of Section 5.

Section 9

For the purpose of performing the task of border security restraining measure by the police, it is necessary to establish the possibility to receive data from the criminal records system. Data transfer is only possible if the person being checked is prosecuted for the criminal offences indicated.

Section 10

The Act on State Border defines the persons who, due to their behaviour violating the Penal Code may not stay in the area specified in the Act on the State Border. The police are entitled to control this, but the police should be given the right to sanction if the person fails to comply with his statutory obligation.

In the case of repeated offences, the law already includes procedural rules ensuring graduality, which are also applicable in the present case.

Section 11

The change in the nature of the organizational and supporting activities related to illegal immigration and the increased risk of its effects justify the modification of the Penal Code and the inclusion of the new legal provision.

In connection with illegal migration, the abusive use of asylum procedures and the organizational activity promoting the stay in the country, which is increasingly threatening public order and public security, justifies having to deal with such practices by means of the most rigorous public authority, i.e. by criminal sanctioning.

With this in mind, the Penal Code chapter on crimes against public order is complemented by a new provision, facilitating illegal immigration.

The legal object protected by the law of the new offence is the public order and public security of our country through the protection of the state border. The crime is purposeful, so it can only be committed deliberately.

As a conduct of the perpetrator of the offence, any conduct that may be of assistance to the person mentioned in the legal provision that may be used to obtain international protection in Hungary by deceiving the public authorities or contributes to obtaining a residence permit for unlawfully entering or unlawfully staying in Hungary. However, the exact content of the organizing activity can not be fully listed, therefore, paragraph (5) of the new provision defines the most typical components of the organizational activities with an appropriate abstraction as an interpretative provision. This allows the provision to penalize any conduct, which can in practice be identified as a type of organizational behaviour, in addition to punishing the most typical organizational behaviours and modes of committing listed.

It is also appropriate to sanction the perpetration of an offence when persons arriving illegally or residing illegally in Hungary try to legalize their stay with applications for residence or applications for residence card issuing, in case the organisational activity behind these actions has been proven. Foreigners very often submit applications after their expulsion, or with the purpose of avoiding it to regularise their stay, they marry Hungarian citizens, or recognize Hungarian children with a full formal father's declaration of recognition or their children are recognized by Hungarian citizens through a full formal father's declaration. In many cases, this type of application is backed by organized activities.

The offence is not a material criminal offence (immaterial criminal offence), so it is not necessary for a person to initiate an asylum procedure or to obtain the legal title necessary for his stay in Hungary for it to be completed.

The provision is subsidiary, and can only be established if a more serious offence, such as human smuggling, is not carried out by the perpetrator.

As a classified case of the criminal offence, the provision provides for more severe punishment for a person who provides financial means in any form for his or her criminal organizational activity, in other words, he or she finances it or engages in such activities in a regular manner. Regular perpetration means at least two offences with a short period of time in between them, in accordance with established practice.

Also, as a qualified case, the legal provision provides for punishment as such if the person who committed the crime for financial gain or through providing assistance to several persons or within the boundary of Hungary's external border in accordance with Article 2 (2) of the Schengen Borders Code or within an 8 km area from the border sign. These behaviours carry a greater risk, since while in the first case the organizer himself or herself gains from their activity, in the other two cases, what justifies the threat of a more severe punishment is that the perpetrator supports more than one persons with one act, and carries out the activity on the location where the conditions for the offence are best available (within 8 kms).

The privileged case of the basic criminal offence is when the perpetrator reveals the circumstances of the offence before the indictment has been brought. In this case, the punishment may be relieved without limits - and may be lifted in cases of special consideration.

It is important to emphasize that, under the rules in force, the court may, along with other punishment or in a stand-alone manner, apply the punishment of banishment to serve even more effectively the individual prevention by banning, for example, a person who has been convicted of facilitating illegal immigration, from the area within 8 kms of the border line as

specified in Article 2 (2) of the Schengen Border Code, or from an 8-km area from the border sign. Anyone who violates the rules of banishment may be held liable for violating banishment or injunction as a petty offence.

Practical experience confirms that unauthorized entry into Hungary and the entering into Hungary by persons residing in Hungary illegally is assisted not only by international organizations, but also by Hungarian organizations, which justifies acting against it with a criminal law instrument. By introducing the new legal provisions, the responsibility of legal entities providing organizational, personal and material frameworks for such activities can also be examined and -- in accordance with the legal provisions applicable on the basis of Act CIV of 2001 on the Criminal code measures against a legal person -- will be sanctionable under the conditions set out in the Act.

Section 12

It establishes the entry into force of the relevant amendments.

Section 13

Contains the cardinality clause with regard to the provisions of the Police Law.