

Małgorzata Myl

Assistant Professor

Faculty of Law and Administration, University of Silesia in Katowice, Poland

<https://orcid.org/0000-0003-3034-7446>

**WHAT MIGHT BE THE FUTURE MIGRATION AND
ASYLUM POLICY OF THE EUROPEAN UNION?
COMMENT ON THE JUDGEMENT OF THE
COURT OF JUSTICE, CASE C-808/18 EUROPEAN
COMMISSION V HUNGARY**

Abstract: In December 2020, the Grand Chamber of the Court of Justice delivered a judgement in *European Commission v. Hungary* case which is significant in many respects. The CJEU has confirmed that Hungary had failed to fulfil its obligations in providing migrants with international protection and returning illegally staying third-country nationals. The judgement is also of crucial importance in view of the Common European Asylum System and New Pact on Migration and Asylum. The comment aims at presenting possible consequences of the judgement for both the Hungarian administration and, most importantly, future instruments in the area of asylum in the EU.

Keywords: migration law, asylum law, international protection, Return Directive, infringement procedure, New Pact on Migration and Asylum,

1. Introduction

On 17 December 2020, the Grand Chamber of the Court of Justice of the European Union (hereafter CJEU) condemned Hungary for having violated, with the adoption and implementation of two laws of 2015¹ and 2017² on “managing mass immigration” and the procedure in special border zones, EU’s laws on migration and international protection. The Court recognised that the following acts had been violated:

- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (hereafter Procedures Directive);
- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down Standards for the Reception of Applicants for International Protection (hereafter Reception Directive);
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals (hereafter Return Directive).

The judgement is the last of a series of five judgements on the asylum and migration system in Hungary. Its adoption by the CJEU put an end to the five-year long saga. All the judgements were delivered in mid-2019 and 2020 and, whereas the other four judgements³ were rendered in preliminary ruling procedures, the *Commission v. Hungary* (which is discussed in herein) finally ended the infringement procedure against Hungary. Thus, some Hungarian legal provisions are now officially declared incompatible with EU law. The CJEU judgement confirmed the findings which were set out in reports of international human rights bodies, e.g. the Office of the UN

¹ Law n. CXL of 2015 amending certain laws in the context of managing mass immigration, Magyar Közlöny 2015/124.

² Law XX of 2017 amending certain laws related to the strengthening of the procedure conducted in the guarded border area, Magyar Közlöny 2017/39.

³ Case C-556/17, *Torubarov*, ECLI:EU:C:2019:626; Case C-564/18, *Bevándorlási és Menekültügyi Hivatal (Tomba)*, ECLI:EU:C:2020:218; Case C-406/18 PG, ECLI:EU:C:2020:216; Joined cases C-924/19 PPU and C925/19 PPU, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, ECLI:EU:C:2020:367.

High Commissioner for Human Rights (hereafter UNHCHR)⁴ and the UN High Commissioner for Refugees (hereafter UNHCR)⁵. Both bodies have oftentimes expressed their concern on migration and asylum situation in Hungary, proving that Hungarian practices violate fundamental rights.

This comment evaluates the judgement of the CJEU in case C-808/18 and aims at presenting the possible consequences for both the Hungarian administration and, most importantly, for the future instruments in the area of asylum and return in the EU. The issue is of a great importance particularly in a view of amendments that have recently been proposed by the EU Commission's New Pact on Migration and Asylum⁶. The analysed judgement seems to have a by no means negligible impact as many countries have radicalised their migration and asylum policies, thereby demonstrating their negative attitude towards migrants. For this purpose, the present comment first describes the facts of the case and presents the main findings of the Advocate General's (hereafter AG) opinion and of the judgement of the CJEU. Following this, several comments are made in order to evaluate the possible consequences of the CJEU's judgement and the actions undertaken by Hungary in response to the judgement.

2. Facts of the Case

On 17 December 2020, the Grand Chamber of the Court of Justice of the European Union issued a judgement in a case that was brought by the European Commission against Hungary on 21 December 2018. The European Commission requested the Court to find that Hungary has failed to fulfil its obligations in view of the EU's asylum and migration system. The proceeding brought an end to a long process of a review of legislative changes made by Hungary.

Facing the challenges of the ongoing migration crisis in 2015 and the resulting high influx of asylum seekers into the EU, Hungary amended its

⁴ E.g.: *Hungary Violating International Law in Response to Migrant Crisis: Zeid*, Office of the UN High Commissioner for Human Rights, 2015.

⁵ E.g.: *UNHCR Global Strategy Beyond Detention: Baseline Reports. National Action Plan: Hungary*, UN High Commissioner for Refugees, 2015.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, 23.09.2020.

laws on asylum and managing mass immigration. Law No. CXL of 2015 entered into force on 15 September 2015 and introduced the concepts of “crisis situation caused by mass immigration” and “border procedure”. This law made it possible to apply a derogatory regime, repealing certain guarantees. The new regulation also provided for the creation of transit zones at the border to Serbia within which asylum procedures were conducted. Following this, in 2017, Hungary introduced another law related to the strengthening of the procedure conducted in the guarded border area. Law No. XX of 2017 expanded the cases in which the Government might declare a “crisis situation caused by mass immigration”, within the meaning of the law on the right to asylum, and amended the provisions allowing derogation from the general provisions of that law in such a situation. Moreover, in 2015 Hungary declared a state of crisis due to mass immigration. While it first applied to counties bordering neighboring countries such as Serbia, Croatia, Slovenia, and Austria, it was extended to the whole of Hungary on 9 March 2016. Since then, the state of crisis has been repeatedly extended due to the continuing mass immigration and the danger caused by COVID-19⁷. The legislative changes as well as the declaration of the state of crisis were accompanied by a general negative narrative towards migrants. The hostility towards asylum seekers has become a hallmark of the administration of Prime Minister Viktor Orbán⁸.

The Hungarian legislative changes have become a focus of attention for the European Commission which expressed its concerns in 2015. In December 2015, the body opened an infringement procedure against Hungary concerning its asylum law⁹. The Commission found Hungarian law to be incompatible with EU law in some instances, specifically, the recast Procedures Directive and the Directive on the Right to Interpretation and Translation in Criminal Proceedings¹⁰. The main concern was the restricted access to the international protection procedure, the disregard for the Rights to Translation and Interpretation in Criminal Proceedings for irregular border crossing and the forced deportations. In addition, the European Commission continued bilateral contact with the Hungarian

⁷ Inotai, “Pandemic Hit Hungary Harps on About ‘Migrant Crisis’”, 3.

⁸ *Immigration Detention in Hungary: Transit Zone or Twilight Zone?*, Global Detention Project, 2020, p. 7.

⁹ EU Commission, *Commission Opens Infringement Procedure against Hungary concerning its Asylum Law*, press release IP/15/6228, 10.12.2015.

¹⁰ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings.

authorities and requested additional clarification on other outstanding issues. Actions undertaken by the Commission have failed to deliver the expected results as Hungary was strongly convinced that its law was compatible with EU law¹¹. This, in turn, led to bringing the proceeding before the Court of Justice of the European Union. This will be discussed herein.

The European Commission argued that Hungary had failed to fulfil its obligations under the Return Directive, the Procedures Directive and the Reception Directive, read in conjunction with Articles 6, 18, and 47 of the Charter on Fundamental Rights¹². In detail, the allegations concerned failure:

1. in requiring that asylum applications be submitted in person with the competent authority, and exclusively in transit zones, which allows only a small number of persons to enter. The Commission submits that by allowing only persons in the transit zone to make an application for international protection and have that application registered, and by severely restricting access to that zone, Hungary does not afford persons at its borders the possibility of making an application and having it registered within the time limit laid down in Directive 2013/32;
 2. in applying a special procedure as a general rule, during which the safeguards laid down in Directive 2013/32 are not observed;
 3. in requiring that a procedure be applied to all asylum applicants, with the exception of unaccompanied minors under 14 years of age, the result of which is that they must remain in detention throughout the duration of the asylum procedure in the facilities of transit zones which they may only leave in the direction of Serbia, and in not coupling that detention with the safeguards laid down in Directive 2013/33;
 4. in moving, to the other side of the border fence, third-country nationals staying illegally in Hungarian territory, without observing the procedures and safeguards laid down in Article 5, Article 6(1), Article 12(1), and Article 13(1) of Directive 2008/115.
- The Commission submitted that that procedure corresponds to

¹¹ Progin-Theuerkauf, “Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary?”, 9.

¹² Charter on Fundamental Rights of the European Union, adopted 26.10.2012, C 326/391.

the concept of “removal” as defined in Article 3(5) of Directive 2008/115. Moreover, the removal of the third-country nationals concerned takes place without a return decision being issued, without careful consideration, without taking account the best interests of the child, family life or the state of the health of the third-country national concerned, and without respecting the principle of non-refoulement. Those third-country nationals receive no adequate written justification or explanation and, in the absence of a return decision, are afforded no remedy;

5. in failing to transpose, into its national law, Article 46(5) of Directive 2013/32 since appeals against decisions rejecting asylum applications as unfounded do not have automatic suspensory effect. Moreover, Hungary adopted provisions which derogate from the general rule of automatic suspensory effect of appeals by applicants for international protection in situations not covered by Article 46(6) of that Directive, since Article 53(6) of the Law on the Right to Asylum provides that the lodging of an appeal does not have suspensory effect.

The abovementioned allegations have met the objections of Hungary which continued to claim that its law was compatible with EU law. Hungary argued that all legal regulations, which were the subjects of the case, applied to a “crisis situation” caused by mass immigration and were aimed at preserving public order and internal security (para. 233 et seq.). In this context, the application of rules which differ from those set out in the Directive 2013/31 was justified by Art. 72 TFEU. Moreover, Hungary argued that the EU legislature allows member states to require that applicants for international protection lodge their application in person at a designated place, which necessarily implies that it may be impossible for a very large number of applications to be lodged at the same time (para. 79 et seq.). Regarding the exclusive transit zones (Röszke and Tompa), it was claimed that the places were not detention facilities, but, essentially, reception centres (para. 148 et seq.). Further, it was argued that the transit zones had been closed as a result of the judgement of 14 May 2020, Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság (C924/19 PPU and C925/19 PPU, EU:C:2020:367), and, thus, it is irrelevant to the assessment of the present action. The fifth complaint, relating to the right to remain in the territory of the member state concerned, Hungary replied that its legislation adequately ensured that applicants for international protection were able to remain in its territory, in accordance with Article 46 of Directive 2013/32, even if that

article had not been transposed into its national law verbatim. In this regard, the Hungarian authorities strongly argued that all international obligations were fulfilled.

3. Advocate General's Opinion

In his opinion, given on 25 June 2020, Advocate General Priit Pikamäe began by explaining the inadmissibility issue raised by Hungary based on the recent closure of transit zones. He stated that Hungary's efforts cannot succeed in light of the settled case-law of the Court according to which the Commission still has an interest in bringing an action for failure to fulfil obligations even when the alleged infringement has been remedied after the expiry of the period prescribed in the reasoned opinion (para. 35)¹³. In view of that, the AG proceeded to examine in turn the substance of the five complaints.

AG Priit Pikamäe proposed that the Court should declare that Hungary failed to fulfil its obligations mentioned as indicated in four complaints. First of all, Articles 3 and 6 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection have been violated by requiring all asylum applications to be lodged in person with the competent authority, and exclusively in the transit zones, access to which is restricted to a limited number of persons. In line with the European Commission, the Advocate General claimed that, in the present case, persons wishing to obtain international protection were left stranded in Hungarian territory for an unnecessarily long time. The reason for that was the fact that the Hungarian authorities did not treat the manifestation or expression of the fear of being returned, made outside a transit zone, as the making of an application for international protection (para. 61). The AG also failed to see the Hungarian argumentation that its law on the right to asylum was compatible with Directive 2013/32 because in Article 6(3) of the Directive allowed member states to require that applications for international protection be lodged in person and/or at a designated place (para. 67). In Priit Pikamäe's opinion this argumentation was based on a

¹³ See, ex multis, C519/03, *Commission of the European Communities v Grand Duchy of Luxembourg*, judgement of 14 April 2005, ECLI:EU:C:2005:234, point 19.

false premise. There was little doubt that the lack of effective access to the procedure for granting international protection, which the Commission claimed to be the case, did not concern the stage at which the application for international protection was lodged, but rather the earlier stage at which the application was made (para. 68).

Referring to the second complaint (infringement of the procedural rules applicable to applications for international protection), the AG did not agree with the Hungarian argumentation and had little doubt that the procedure under the review fell within the scope of Art. 43 of the Directive 2013/32 (para. 88). Priit Pikamäe suggested the Court declare that Hungary failed to fulfil its obligation since the border procedures conducted in transit zones did not observe the safeguards provided by Art. 43 of the Directive 2013/32 (para. 97). Furthermore, the AG rejected the argumentation that the application of rules which differ from those set out in the Directive 2013/32 was justified by Art. 72 TFEU (which allows certain derogations from the rules of EU law for the purpose of maintaining law and order and safeguarding internal security). The AG referred in his reasoning to the Court's judgement in *Commission vs. Poland and Others* (Temporary mechanism for the relocation of applicants for international protection), in which the Court considered that it is for the member state which seeks to take advantage of Article 72 TFEU to prove that it is necessary to have recourse to that derogation in order to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security.

As to the third complaint, the AG suggested that the disagreement between the European Commission and Hungary centred on their differing characterisation of the concept of detention as provided for in Art. 2(h) of Directive 2013/33 (para. 127). Hungary claimed that applicants for international protection in a transit zone could not be considered as being kept in 'detention' due to the fact that they were free to leave the transit zone. The AG rejected that argumentation and, in support of his opinion, he referred to the Court judgement in *FMS and Others* case¹⁴. Priit Pikamäe concluded that placing applicants in a transit zone while they were waiting for international protection, must be regarded as constituting 'detention'

¹⁴ Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, ECLI:EU:C:2020:367.

lacked the safeguards laid down in Art. 8, 9, and 11 of Directive 2013/33 (para. 129 et seq.).

Referring to the fourth complaint, the AG noted that Hungary did not deny that third-country nationals staying illegally in Hungary were taken to the gate at the nearest facility by the Hungarian police without safeguards laid down in Directive 2008/115 (para. 171). However, Priit Pikamäe did not agree with the Hungarian argumentation contesting the alleged infringement. He rejected submission as to which Directive 2008/115 was not applicable to the present case and he suggested to the Court to find that Hungary failed to fulfil its obligations (para. 173).

Analysing the last complaint, the AG proposed that the Court uphold the first part of it and dismiss the rest. He assessed the merits of the complaint in light of principles concerning the transposition of directives into national laws. The AG reiterated that transporting a directive does not necessarily require its provisions to be copied expressly, specific law or regulation (para. 191 et seq.). A general legal context may be sufficient provided that it does effectively ensure the full application of the directive in a sufficiently clear and precise manner. Moreover, where the provision of the directive is designed to create rights for individuals, the transposition must ensure that individuals are able to ascertain the full extent of their rights and, where appropriate, rely on them before the national courts (para. 192). In view of this, the AG proved that Hungarian law has the effect of conferring a right to stay in Hungarian territory on every asylum applicant, however, the exercise of that right appears to be subject to additional conditions which seem to be unclear. Thus, Priit Pikamäe agreed with the argumentation of Commission in this part. However, he did not agree with the rest part of complaint. The AG proved that Hungarian legislative wished to confer automatic suspensory effect on appeals, thereby suggesting to the Court that it dismiss the complaint in this part (para. 211).

4. Judgement of the Court of Justice

In its judgement, the Grand Chamber of the CJEU, first referred to the fact that, meanwhile, Hungary had closed its two transit zones in Rösztke and Tompa. However, the situation to be assessed by the Court was at the end of the period laid down in the reasoned opinion of the EU Commission, here 8 February 2018 (para. 68 et seq.). Then, the Court treated the five

different complaints and agreed with the Advocate General's opinion in significant parts.

With regard to the first complaint, the Grand Chamber came to the conclusion that Hungary had failed to fulfil its obligations under Articles 6 and 3 of the Procedures Directive. For the Court, the Commission proved, in a sufficiently documented and detailed manner, the existence of a consistent and generalised administrative practice of the Hungarian authorities aimed at limiting access to the transit zones of Röszke and Tompa so systematically and drastically that third-country nationals or stateless persons who, arriving from Serbia, wished to access, in Hungary, the international protection procedure, in practice were confronted with the virtual impossibility of making an application for international protection in Hungary (para. 118 et seq.). None of the arguments put forward by Hungary was, in the opinion of Grand Chamber, capable of calling such a conclusion into question.

The second and third complaints, relating to the detention of applicants for international protection, were examined together by the Court. The Grand Chamber agreed with the AG, who claimed that placing applicants for international protection in the transit zones was no different from a detention regime. The Court reiterated that Article 8(3) of Directive 2013/33 listed exhaustively the various grounds which may justify the detention of an applicant for international protection (para. 168). Significantly, each of those grounds must meet a specific need and is self-standing. The Grand Chamber proved that the detention of the applicants for international protection in the transit zones of Röszke and Tompa, upon their arrival in Hungarian territory, did not fall within any of the situations listed in Article 8(3) of Directive 2013/33 nor within Article 43 of Directive 2013/32. The Court referred also to the Hungarian argumentation as to which Article 72 TFEU authorises member states to derogate from the EU rules adopted, in accordance with Article 78 TFEU, in the field of asylum, subsidiary protection and temporary protection, where compliance with those rules precludes member states from adequately managing an emergency situation characterised by arrivals of large numbers of applicants for international protection (para. 213 et seq.). The Grand Chamber reminded the judgement that had been adopted in *Commission vs. Poland and Others* and expressed that Article 72 TFEU, which contains a public order clause, has to be interpreted strictly. Moreover, the Court (as the AG) considered that it is for the State which seeks to take advantage of Article 72 TFEU to prove that it was necessary to have recourse to derogation. However, it was agreed that in the present case,

Hungary merely invokes, in a general manner, the risk of threats to public order and internal security that arrivals of large numbers of applicants for international protection might cause, without demonstrating, to the requisite legal standard, that it was necessary for it to derogate safeguards laid down in Directive 2013/32 (para. 217 et seq.).

As to the fourth complaint, relating to the removal of illegally staying third-country nationals, with the exception of those who are suspected of having committed an offence, the Court found incompatible with the procedures and safeguards laid down in Article 5, 6(1), 12(1) and 13(1) of the Directive 2008/115. The Grand Chamber did not agree with the Hungarian argumentation and, thus, it was declared that the forced deportation of an illegally staying third-country national beyond the border fence erected in its territory must be treated in the same way as a removal from that territory (para. 255). Moreover, the Court rejected Hungary's line of argumentation according to which Article 5(1b) of the Law on State Borders is justified under Article 72 TFEU, read in conjunction with Article 4(2) TEU. It is due to the fact that Hungary, merely invokes, in a general manner, a risk of threats to public order and national security, without demonstrating, to the requisite legal standard, that it was necessary for it to derogate specifically from Directive 2008/115 (para. 261).

With regards to the fifth complaint, the Court found a violation of the right to remain in the territory of a member state after the rejection of an application for international protection, until the time limit within which to bring an appeal against that rejection or, if an appeal has been brought, until a decision has been taken on it (Article 46(5) of the Directive 2013/32) (para. 282 et seq.). Finally, the Court rejected complaints concerning the alleged insufficient transposition of Article 46(6) of the Directive 2013/32, allowing member states to not automatically grant a right to remain in the territory pending the outcome of the appeal brought by the applicant (para. 303). Accordingly, the action was dismissed with regard to that part of the fifth complaint.

5. Comments

The judgement of the Court of Justice of the European Union in the analysed case raises several questions, both of great importance for the Hungarian administration as well as of a general nature. Primarily, it addresses the issue of ensuring compliance of national regulations with

EU laws and implementation by States of the resulting obligations. It also refers to current and future instruments in the area of asylum and return in the European Union. Finally, it puts an end to the long-lasting deadlock and melee between Hungary and the EU, thus, demonstrating how long an EU member state can get away with systematic violations of EU law.

First of all, the procedure can be seen as the next stage of finding infringements held by Hungary. Up until the end of 2020, it was declared many times that Hungarian migration policy violates EU laws. The judgement from 17 December 2020 revealed, once again, the deficiencies in Hungarian law and practices. However, unlike the previous decisions undertaken in the preliminary ruling, the recent one obligates Hungary to take whatever measures are necessary in order to implement the judgement. Unfortunately up until now, Hungary has not effectively fulfilled its obligations. The lack of Hungarian action in this area has ultimately entitled the European Commission to take steps provided for in Article 260 TFEU. On 9 June 2021 the Commission sent Hungary a letter of formal notice and on 12 November 2021 brought the case before the Court of Justice of the European Union. It was requested that the Court order the payment of financial penalties (in the form of a lump sum and a daily penalty payment) for Hungary's failure to comply with a Court ruling in relation to EU rules on asylum and return¹⁵.

Despite the importance of the CJEU's judgement, it should be noted that the whole procedure against Hungary did take some time to be dealt with. As already noted, the Hungarian asylum policy has become a testing ground for how long EU institutions and the whole international community can tolerate unlawful practices in an EU member state. In this regard two additional issues are worthy of mention. Firstly the complaint that was brought before the European Court of Human Rights (hereafter ECtHR) and, secondly, the actions undertaken by the Hungarian Ministry of Justice in response to the CJEU's judgement. As to the first issue, the situation of migrant applicants for international protection in Hungary was also the subject of complaint to the European Court of Human Rights. On 21 November 2020, the ECtHR published its judgement in the case of *Ilias and Ahmed v Hungary*¹⁶ in which the body referred to the Hungarian practice

¹⁵ The European Commission, *Migration: Commission refers HUNGARY to the Court of Justice of the European Union over its failure to comply with Court judgement*, press release, IP/21/5801, 12.11.2021

¹⁶ *Ilias and Ahmed v. Hungary*, No. 47287/15, judgement of 21 November 2019.

of removal of third-country nationals as well as to detentions in transit zones. The Court in particular found that the Hungarian authorities had failed in their duty under Article 3 to assess the risks of applicants not having proper access to asylum proceedings in Serbia or being subjected to chain-refoulement, which could have seen them being sent to Greece, where conditions in refugee camps had already been found to be in violation of Article 3. In development of its case-law, it held that Article 5 was not applicable to the applicants' case as there had been no de facto deprivation of liberty in the transit zone. Among other things, the Court found that the applicants had entered the transit zone of their own initiative and it had been possible in practice for them to return to Serbia, where they did not face any danger to life or health. Their fears of a lack of access to Serbia's asylum system or of refoulement to Greece, as expressed under Article 3, had not been enough to make their stay in the transit zone involuntary. The judgement of the ECtHR served as references for the Advocate General and for the CJEU, which partly confirmed and partly disagreed with the verdict. For example, the EU Court made it clear that border procedures have to comply with fundamental rights standards and that keeping asylum seekers in closed centres with no real option to move is considered as detention contradicting the case-law of the European Court of Human Rights. This proves that the practice of both courts is partly consistent, however, the CJEU, unlike the ECtHR, attached more importance to the behaviour of Serbia, which actually refused to readmit third country nationals or sanctions returning persons¹⁷.

With regard to the second issue mentioned above, the Hungarian Ministry of Justice requested the Hungarian Constitutional Court (hereafter CC) to decide, in light of the CJEU's judgement, whether the Hungarian Government was constitutionally allowed to implement the CJEU's judgement in case C-808/18, if the Government considered that the implementation of the judgement could result in the permanent relocation to Hungary of irregular immigrants, in violation of Hungary's sovereignty. On 7 December 2021, the CC eventually held that it would interpret the Hungarian Constitution (Hungarian Fundamental Law) separately from the judgement and without addressing whether the EU had failed to properly handle the refugee crisis (pp. 8-9, 17)¹⁸. Thus, the

¹⁷ Progin-Theuerkauf, "Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary?", 8.

¹⁸ Decision of the Constitutional Court, Case X/477/2021, 7.12.2021.

Court avoided the challenging question whether the implementation of the CJEU's judgement could lead to the restriction of Hungary's sovereignty to the extent impermissible of the principle of conferral of powers to the EU in areas of shared competences¹⁹. The Constitutional Court noted, however, that the delegation of certain competences to the EU may not result "in depraving the people of the chance to control the exercise of public power" as the national sovereign is the "ultimate source of competence" (pp. 22). Thus, the conferral of competences to the EU may not "limit the inalienable right of Hungary to determine its territorial unity" (pp. 10). Following that, the CC gave the Hungarian Government significant leeway to decide whether and how to implement the CJEU's judgement.

The Hungarian Constitutional Court's judgement, cited above, as well as a lack of effective implementation of the CJEU's decision seem to be of the great importance for the assessment of the rules of law and promotion and safeguard of EU values by Hungary (and might be taken as an example for other member states). For some time now, European institutions have been discussing the possibility of triggering the EU's so-called Article 7 procedure against Hungary. It is worth mentioning that in September 2018 the European Parliament moved against Hungary, becoming the first EU institution to initiate Article 7 proceedings against the country. It was argued that Budapest, under Prime Minister Viktor Orbán, had damaged the country's judicial independence, engaged in corruption, restricted freedom of expression and infringed on minority and migrant rights, among other concerns. Hungary has submitted the objections to the resolution of the European Parliament. The objections, however, were rejected in June 2021 by the Court of Justice of the European Union²⁰. The ruling will not necessarily move the Article 7 proceedings forward, however. The process is currently blocked at the Council of the EU because some member governments have been reluctant to take action. The importance of rules of law and safeguarding the EU's values have been strongly expressed also in the context of the EU multi-annual

¹⁹ Dózsa, Menkes, "Somewhere between Poland and Germany – The Hungarian Constitutional Court's Ruling in the Refugee Push-Back Case", <https://eulawlive.com/op-ed-somewhere-between-poland-and-germany-the-hungarian-constitutional-courts-ruling-in-the-refugee-push-back-case-by-daniel-dozsa-and-marcin-j-menkes/> (accessed 22.12.2021).

²⁰ Court of Justice of the European Union PRESS RELEASE No 93/21 Luxembourg, 3 June 2021 Judgement in Case C-650/18 *Hungary v Parliament*.

financial framework 2021-2027²¹. This, however, caused strong opposition of Hungary and Poland, the countries which tried to block the approval of the EU's 2021-2027 budget and COVID-19 recovery fund²². Eventually, in December 2020 a last-minute compromise was found but the quarrels continued. It is worth mentioning that on 16 December 2020, the EU legislature adopted Resolution 2020/2092²³ which established a general regime of conditionality for the protection of the EU budget in case of breaches of the principles of the rule of law in member states. Hungary and Poland brought actions before the Court of Justice of the European Union, seeking the annulment of the Regulation²⁴. The case is still in progress, however, on 2 December 2021 the Advocate General's Opinion in Case C-156/21 and Case C-157/21 was released in which the AG suggested that the actions of Poland and Hungary should be dismissed.

The CJEU's judgement is of great importance also of a general nature as it refers to migration and asylum policies in the whole European Union. At first, it is worth mentioning that in September 2020 the European Commission proposed the New Pact on Migration and Asylum. The Pact addresses migration, asylum, integration, and border management. The document is believed to create more efficient and fair migration processes, reducing unsafe and irregular routes and promoting sustainable and safe legal pathways to those in need of protection. However, detailed analyses of the new legislative and non-legislative instruments contained in the Pact shows that the document seems to provide few answers to the specific challenges that pre-entry procedures present; and some of the proposals may even exacerbate existing problems²⁵. For instance, 'new migration management tools' at the external border which include harmonised

²¹ Communication COM(2018) 322 final from the Commission of 2 May 2018 proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, Art. 7.

²² Regulation (EU, Euratom) 2020/2093 of the Council of 17 December 2020 laying down the multi-annual financial framework for the years 2021 to 2027.

²³ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget

²⁴ Action brought on 11 March 2021 – *Republic of Poland v European Parliament and Council of the European Union* (Case C-157/21) and *Hungary v European Parliament and Council of the European Union* (Case C-156/21)

²⁵ Conrelisse, Reneman, "Border procedures in the Commission's New Pact on Migration and Asylum: A case of politics outplaying rationality?", 182.

procedures to decide swiftly upon arrival. Thus, a ‘pre-entry phase’ is established consisting of a screening and a border procedure for asylum and return, all of which have implications for the personal liberty of migrants. On the basis of screening, the third-country nationals will be referred to the suitable procedure, which can be asylum, refusal of entry or return²⁶. With references to the above, it should be noted that new measures are proposed in the Pact when the application of existing EU legislation in this context has not been adequately evaluated yet. Moreover, these new measures are proposed without a proper impact assessment. The new propositions also raise questions with regard to the Commission’s role in monitoring compliance with EU law and to the soundness of its proposals in the Pact²⁷. Therefore, the analysed CJEU judgement seems to be crucial for developing and shaping future instruments in the area of asylum and return in the EU’s member states.

Conclusions, presented by the CJEU, contribute to the indication of some features of the future asylum and return system. Firstly, asylum procedures must be accessible at all times and everywhere: at the border and within the territory of the country. Secondly, States must be obliged to implement and respect all procedural guarantees, including the possibility to appeal against any negative decision. Moreover, all guarantees ensured in the Return Directive must be respected. Thirdly, impermeable transit zones violate EU law and standards and may be recognised as unlawful detention places. Fourthly and foremost, Article 72 TFEU (public order clause) cannot be used by States if applicable legislation enables dealing with a sudden high influx of migrants applying for international protection.

6. Concluding Remarks

The EU’s migration and asylum laws and procedures are believed to be developed for “fair weather conditions and not for a storm”²⁸. However,

²⁶ See more: Cornelisse, *The Pact and Detention: An Empty Promise of ‘certainty, clarity and decent conditions’*, 2021, <https://eumigrationlawblog.eu/the-pact-and-detention-an-empty-promise-of-certainty-clarity-and-decent-conditions/> (accessed 28.09.2021).

²⁷ Conrelisse, Reneman, “Border procedures in the Commission’s New Pact on Migration and Asylum: A case of politics outplaying rationality?”, 183.

²⁸ Heijer, “Coercion, Prohibition and Great Expectations. The Continuing Failure of the Common European Asylum System”, 614.

since 2015 the European Union and member states have been seeing huge waves of migrants and applicants for international protection. In the opinions of many, these migrants are swamping the EU and causing a danger to public order and internal security. In reply to this, many EU states have introduced special border procedures that limit the possibility of entry into their territories²⁹. The willingness to accept migrants and applicants for international protection has also significantly dropped. Significantly, all these changes in practice have been made without any EU legal changes. Thus, the gap between EU normative expectations and national practices has deepened as well as the gap between the law and reality. The gap may be filled amongst others by the evaluation of the effectiveness of the implementation of States' obligations.

The CJEU's judgement delivered in the *European Commission vs. Hungary* case has impacted both Hungarian law and practice as well as the general rules concerning future migration and asylum policy. This proves that practices and laws incompatible with EU obligations will be met with resistance from EU bodies and, in the longer term, possible sanctions. This will also contribute to the design of future EU instruments which will hopefully help deal with these waves of immigration and will help adjust the European Union not only to "fair weather conditions" but also to "storms".

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²⁹ Lang, Nagy, "External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement", 12.

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