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"Refugee or Migrant? – Law enforcement context and implications in the application of asylum-related legislation"

After reading the pronounced judgement delivered 13 June 2024 by the Court of Justice of the European Union (hereinafter referred to as CJEU) on case C-123/22, European Commission versus Hungary, I decided to change the content of my presentation. The reason for this is that the question phrased as the title of my presentation could be introduced as a €200 million puzzle, and solving it costs another €1 million a day.

The CJEU established in its referred judgement that Hungary has not implemented the measures necessary to comply with its provisions in its judgement of 2020 yet, and therefore "*in breach of the principle of sincere cooperation, deliberately excludes itself from the application of the whole of the EU's common policy on international protection and from the application of the rules on the removal of illegally staying third-country nationals"*. According to the judgment, "*this infringement constitutes an unprecedented and very serious breach of EU law"*, which, as per the reasoning, is the reason for the decision to impose an unprecedented grave sanction.

Provision of both an in-depth analysis of the referred judgement and an overview of its preluding judgement, delivered on 17 December 2020 by the CJEU on the case C-808/18 in meticulous detail are outside of the scope of my objectives.

Nonetheless, it is worth noting that in its judgement of 2020, the CJEU found several cornerstones of the asylum and migration management legislation of Hungary to be in breach of EU law. Thus, the judgement criticised the rules linking asylum application submissions and asylum procedures to transit zones, as well as the practice of escorting people illegally

staying in Hungary over the border barrier. Furthermore, the referred judgment stressed the requirement to facilitate effective access to the asylum procedure for applicants. The lack of access to effective procedures was a substantial finding established in case C-823/21 as well.

However, it certainly requires some explanation as to why I think that the referred judgment of the CJEU is related to the question raised in the title of my presentation. To answer this, let us go back in time a few years.

Over the past decade, migration was a recurring subject from time to time. Then, since 2015 it has been a major topic of national discourse. In 2015, the phenomenon that started with the Kosovar wave in 2014 reached unprecedented proportions in the history of modern Hungary; in the referred year, Hungarian national authorities detected more than 400,000 illegal migration-related acts along the exterior borders of Hungary, the highest number ever recorded.

Although, thanks to the legal, technical, infrastructural and human resources measures put in place, this number decreased in the following years, the perceivable phenomenon of irregular migration en masse has remained characteristic and continues to have an impact, with varying intensity, on both Hungary and the European Union.

If we assess the number of illegal migrants having arrived in or attempted illegal entry to Hungary, it can be noted that the sharp spike in 2015 was followed by a decline in 2016 and 2017, and then a constant and marked increase in the migration-related data until 2022. This increase could not be stopped even by the COVID-19 pandemic, which occurred in the meantime. Only the changed practice of the Serbian authorities, which were implemented in October, 2023, brought conversion of the increasing tendency that was technically sufficient for the 2023 figures to indicate a perceptible decrease. However, despite the change in the upward trend, the number of illegal entries and attempts still exceeded 173,000 even in this year.

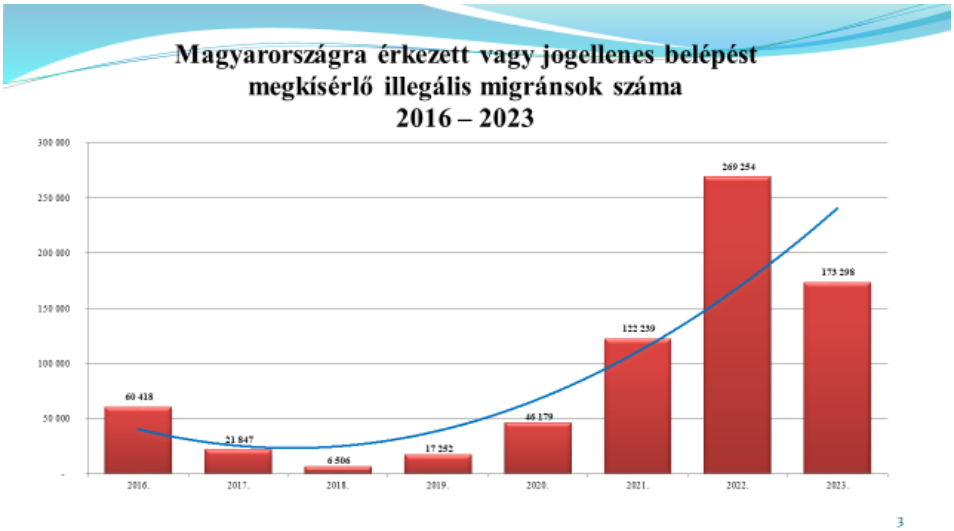

Figure 1
The number of illegal migrants having arrived in or attempted illegal entry to Hungary
2016 – 2023

One might think that the increasing illegal migration pressure could also be associated with a rise in asylum applications, and we could be looking at a similar trend when looking into the number of applications for asylum in Hungary. Thus, it may be somewhat unexpected that there was a steep decline in the number of asylum applications submitted in Hungary between 2016 and 2023. Compared to 29,432, the number of registered applications in the base year 2016, only 31 applications for recognition as a refugee were received in 2023.

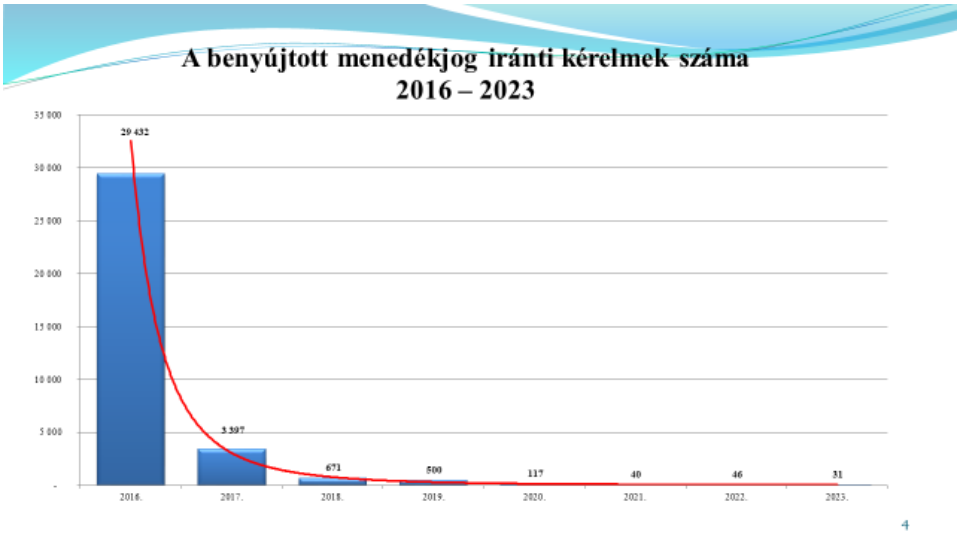

Figure 2
The number of asylum applications submitted
2016 – 2023

When the two sets of data are examined collectively, the difference is quite striking: in the data of 2023 173,298 illegal entries or attempts are juxtaposed with only 31 applications for recognition as a refugee. By all means, it should be taken into account that the number of illegal entries and attempts include people whose border crossing to Hungary was prevented along the temporary border barrier (71,266 people in 2023), people sustained within the territory of Hungary, as well as people escorted via the temporary security border barrier (85,913 people from border areas and 14,225 people from the territory of Hungary).

The question arises as to what conclusion can be drawn from the above. On the one hand, it can be concluded that Hungary's three-pillar system of border guarding does work in practice. The first pillar, the work of the police (in certain periods of time, members of the defence forces and assisting civil guards), the second pillar, the physical protection of the border (the temporary security border barrier with an intelligent signalling system) and

the third pillar, the legal border barrier indeed constitute an efficient solution. It is worth noting that the operation and practical functioning of the three-pillar system in fact also incorporates an invisible fourth pillar. This invisible fourth pillar has message value of Hungary's border guarding and asylum system, making it clear that Hungary is taking action against illegal migration. The significance of this cannot be underestimated, as in an era of mass and abusive asylum application submissions and asylum-related 'application shopping', it is to be considered as rather instrumental.

The legal border barrier is based, on the one hand, on the retention of illegal migrants outside the border, as well as their escort across the state border, and, on the other hand, on specific rules providing governance in the field of asylum. Among the specific rules in the field of asylum, the rules governing the state of crisis caused by mass immigration, the institution of transit zones and, following the closure of the transit zones, the rules of the 'declaration of intent procedure' are to be underlined. At the same time, the CJEU judgement highlighted that these rules are not compatible with EU standards.

Following this, it is worth taking a look at how the number of recognitions as a refugee in the EU, where rules different from the procedure and practice of Hungary are followed, compares to the figures concerning Hungary.

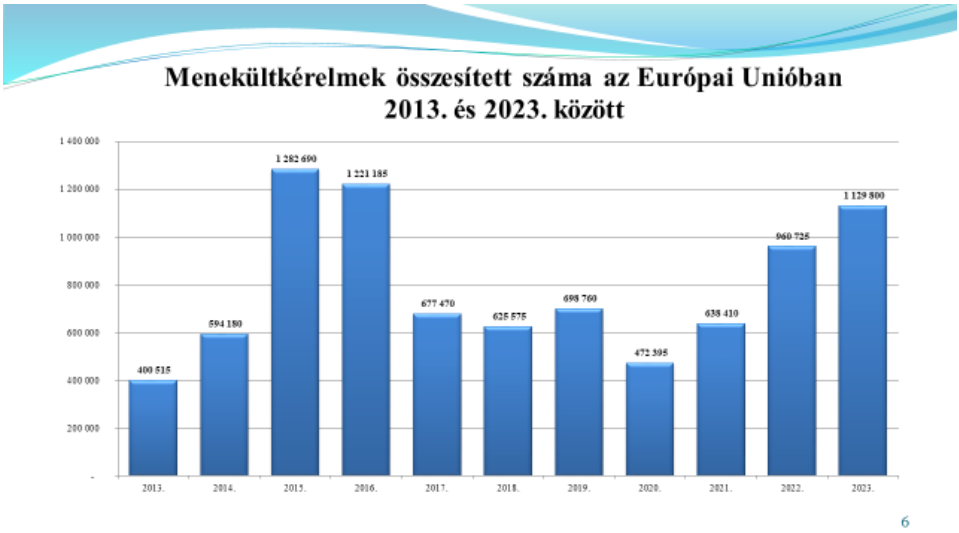

Figure 3
The cumulative total number of asylum applications within the European Union between 2013 and 2023

According to a summary report recently published by the European Union Agency for Asylum (hereinafter referred to as EUAA), the number of applications for asylum submitted in the Member States of the EU in 2023 exceeded 1 million, i.e., it is the highest number since 2016. By comparison, the number of applications in 2022 was still below 1 million, which is also extremely high. Nevertheless, even this high number has continued to grow over the past year. As a result of this increase, in 2023, the number of asylum applications rose to levels reminiscent of the 2015-2016 asylum crisis. As a relevant factor, it is also worth adding that Member States have registered more than 4.3 million people as beneficiaries of temporary protection refugees (cf. the Hungarian term 'menedékes') since the start of the outbreak of the war in Ukraine, which has obviously resulted in a significant workload for the authorities and the provision and care system as well.

The summary report of the EUAA also implicated that the number of displaced people reached an all-time high last year, exceeding 114 million

worldwide. This does not bode well for the future. Given the environmental, economic and social phenomena underlying migration, due to the permanence of conflicts in source countries, and the emergence of newly developing conflicts, it is to be expected that the number of people seeking refuge will continue to rise.

In addition to indicating the number of refugees, the report also underlined that the external borders of the EU had remained under pressure. This is indicative of the fact that this year the number of illegal border crossing was the highest since 2016; national authorities detected 385,000 illegal border crossings at EU external borders, which constitutes an 18% increase.

Looking at the state of play in the EU, the question then arises as to how to distinguish between a refugee and an illegal migrant, who is not eligible for recognition, in practice. The baseline is: what is actually covered by the asylum law. In order to answer this question, it is worth revisiting one of the fundamental international documents on the subject, the rules of the 1951 Geneva Convention.

The definition of the term ‘refugee’ does not need any special explanation. The fact that refugees, as well as applicants for recognition as beneficiary of refugee status, not only have rights but also obligations is all the more interesting and is hardly ever addressed.

One of the most general obligations is that the refugee is obliged to comply with the laws of the country of his/her residence. However, in some respects it is even more critical whether asylum law encompasses the right to be granted freedom of choice over the country in which a person will be granted asylum. In case this premise is true, there is no need to ask many further questions, the situation can be inferred from it; an application system should be developed, even within the framework of an international organisation, where a person wishing to be recognised as a refugee can declare his/her claim, on what grounds, as well as in which state, presumably with an excellent social and health care system, he/she wishes to apply for asylum. Once the application has been submitted, it is only a matter of waiting time for a fair decision, which may be challenged by legal remedy, of course.

In my opinion, it is an obviously absurd idea. It raises the question of what the welfare democracies of Western Europe would think the establishment of such a system, which would soon impose unbearable burdens on their care and provision systems. The consequences would probably prompt voters of the general public in a country concerned to express their disapproval in the near future, if not already in the next elections.

However, my conclusion, which is certainly startling at first hearing, is that, in line and full compliance with EU requirements, this system seems to be ultimately realised in practice, although not with the seemingly absurd but convenient solution outlined. This is because the practice under EU law lacks the principle called 'first safe country of asylum' principle. Even though Article 31 of the Geneva Convention provides that people illegally entering or being present in the territory of a given state shall not be imposed sanctions upon only if they have come directly from a territory where their life or freedom is threatened; it is in fact technically possible under EU asylum law for a refugee to make his/her application in an EU Member State, regardless of which distant country (s)he set out on a journey. It is only a matter of will, money, perseverance and the effectiveness of the migrant smuggling networks.

This practice is certainly fraught with dangers, most notably by pushing people into the arms of migrant smuggling criminal organisations, resulting in thousands and thousands of deaths each year on the treacherous journey towards the European Union.

The European Union certainly strives to keep the processing of applications from refugees within a controlled framework, paying particular attention to human rights and the specific rights of refugees. To this end, the Common European Asylum System (CEAS), which was established decades ago, provides detailed rules through directly applicable and directly enforceable regulations (perhaps the most important being the Dublin Regulations, which govern the determination of the Member State responsible

for examining a specific asylum application), on the one hand, and directives that guide the content of Member States' procedures, including the provisions of the Reception Conditions Directive and the Asylum Procedures Directive, on the other hand.

This system may have been functional in the past, in a very different context and in the face of completely different challenges, than the ones today. By now, however, both external conditions and the migrants' behaviour, with the advent of 'asylum application shopping', have changed to such an extent that a revision of the system has become inevitable.

At the same time, asylum, migration and mass immigration have become an issue that makes it extremely difficult to come to a compromise solution typical of the EU, exactly because of the changing external circumstances and their impact on the societies of the reception countries. The interests of the Member States, which encounter this phenomenon to varying degrees and in diverse ways, are fundamentally disparate, which dismantled the common practice and solidarity that many sought to establish in this area years ago.

As a result of lengthy preparations, the EU decision-making bodies have recently adopted the Pact on Migration and Asylum, more specifically the legal acts that constitute its components. The complexity of the preparation is illustrated by the fact that the Commission initially submitted its proposal for the Pact in September 2020. Due to the somewhat incompatible EU institutional and national proposals, as well as interests, the lengthy preparation led to the majority adoption of a legislation whose effectiveness is highly doubtful. This is well illustrated by the fact that not only Hungary and Poland[1] expressed their criticism, opposing the Pact; 15 May 2024, the day following the adoption of the Pact by the Council, in an almost unprecedented way, 15 ministers in charge of migration and immigration-related affairs sent a joint letter addressed to EU Commissioner for Home Affairs. In the joint letter, the ministers, who signed it, called on the Commission

[1] HU and PL voted against the Pact, CZ, SK and AT abstained from voting, IE and DK did not vote. In the meantime, Ireland made a decision, and will apply the Pact; Denmark also came to a decision and is opting out.

to develop new methods and solutions to prevent illegal migration to Europe.

Hence, it can be argued that with regards to the rules of the newly adopted Pact which is to be applicable 2 years from now, there is already a majority of those who think it will be ineffective in addressing the consequences of illegal migration sufficiently.

The question is why the EU model based on the Geneva Convention is not functional? In my opinion, the answer lies in the changed external environment and changes in the behaviours and expectations of people involved in migration subsequent thereto. In essence, we are fighting in the era of globalisation with rules that were established before the era of globalisation.

The Geneva Convention was adopted in the period that shortly followed the horrors of World War II, and consequently has a fundamentally humanitarian focus. However, nowadays, typically, people involved in migratory movements are not only people who are actually subject to persecution, but also masses of asylum abusers who are migrating for economic reasons and who are/should be subject to the strict Schengen rules to safeguard the foundations of an area established upon law, freedom and security.

A refugee sets out on a journey and leaves his/her hitherto existing life behind because his/her life and physical safety are in imminent danger. In comparison, the majority of people engaging in illegal migration are motivated by completely different considerations.

It is worth revisiting the fact that even Article 31 of the Geneva Convention, which is imbued with a humanist approach, exempts only people, who have come directly from a territory where their life or freedom was threatened, from the penalties to be imposed on account of illegal entry or presence. This condition has become completely receded in recent years.

When looking into the push and pull factors behind the migratory flows, a number of reasons can be noted that understandably motivate people concerned to set out on a journey in the hope of a better and safer life. In case of a number of such reasons it can be argued that the respective reasons

may be legitimate grounds for recognition as a refugee, such as the horrors of war or persecution for reasons of race or religion. Nevertheless, it can also be conceded that the majority of reasons for migration do not constitute grounds for recognition as a beneficiary of the refugee status. Reasons that do not constitute valid grounds for asylum application include poverty, less developed health care systems, economic underdevelopment, lack of social security or the hope for a better life in general.

The conflict arises here, with masses of migrants seeking to enter the EU under the guise of applying for recognition as a beneficiary of the refugee status. Whether or not they are granted recognition as a refugee is, as per a somewhat far-fetched concept, secondary, since once they have reached the territory of the EU, the chances are great that they can remain there, even if they are not granted recognition as refugee. The reason thereof is, as the letter of the 15 minsters of migration-related affairs also underlined it, the return of people not in need of international protection is insufficient.

The system, which is in line with the rules of the EU, encourages both real refugees and people who simply set out on a journey in the hope of a better life to reach the territory of the European Union, or at least its borders, at any cost. The reason thereof is that an application for recognition as a refugee can be submitted at the border, which gives the right to enter and remain in the territory while the application is being processed, and to receive accommodation and care during this period. According to Article 3 of the Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, it applies both to applications submitted at the border and to the applications submitted in the territory of the Member States. Under Article 8, where there are indications that a person intends to apply for international protection at a border crossing point of an external border, Member States shall provide him/her with information on the possibility of submitting an application for international protection.

And if the conditions for recognition as a refugee are not met, the applicant will vanish in the melting pot of the European Union, if (s)he has not

already vanished and waited for completion of the procedure at all. Given the insufficient return policies and practices, the chances that an applicant, whose application has been refused, will actually have to leave the territory of the EU are poor.

Indeed, it can be established as a fact that, in practice, the return of refused applicants is of scarce effectiveness. In addition, due to the increase in the number of applications, the procedure is also lengthy, which places an increasingly unbearable burden on the Member States of the EU as countries of destination.

According to the report referred to above by the European Union Agency for Asylum, countries of the European Union took slightly more than 677,000 first-instance decisions, which number represents the highest since 2017. On one hand, out of the decisions taken, 294,000 held that the respective application was well-founded, which is approximately 43% of the cases. On the other hand, 383,000 applications were unfounded. The underlying question is: What has happened to the applicants concerned who are present in the territory of the European Union, risking their lives, relinquishing their livelihoods at home and often paying their entire fortunes to migrant smugglers. It seems hardly imaginable that, saddened by refusal of their application, they would voluntarily return home en masse.

Regarding the effectiveness of efforts towards returns, it is worth recalling that 39,235 people were affected by Frontex assisted returns by air in the year of 2023.

According to Frontex data, by application of the EU-Turkey statement, in 179 operations, 2,246 third-country nationals' return has been implemented since April, 2016. Within the framework of the EU-Turkey statement, return operations were suspended in the year of 2020 by the Turkish party. No such operations have been implemented either between 2021 and 2023 or in 2024 so far.

These numbers can be juxtaposed with the 383,000 refused applications and the 385,000 illegal border crossings detected at EU external borders in the year of 2023. Even if we assume that individual Member States have

also managed to encourage the return of a few tens of thousands of people illegally staying in the EU, we can still conclude that the vast majority of the people concerned have remained within the territory of the EU.

The main question as per the question formulated in the title of the presentation is: how to distinguish between refugees and illegal migrants setting out on a journey in the hope of a better life.

A substantial part of the work of the border policing and asylum authorities requires focusing on the identification of third country-nationals who have been subject to actual, personal and individual persecution within the masses of migrants. Particular attention should be devoted to the people who are not just people arriving with the masses having set out on a journey in the hope of a better life, but are downright violent and ill-intentioned individuals in hiding, posing a risk to public policy and/or national security.

However, we also need to address and answer a further question, namely where and how long this identification should take place, and under what guarantees. The following should be considered: if people applying for recognition as refugees shall be entitled to entry to and right of residence within the territory of the EU without having to meet further conditions, and during this period the people's personal liberty shall not be restricted in any way, due to the current insufficient return system, there is a strong chance that they will consequently remain within the territory of the EU, in worse cases, illegally, which can serve as a breeding ground for vulnerability, victimisation and committing criminal activities, and thus result in deterioration in the state of public security in the countries of destination.

An attempt to resolve this puzzle has been made by the Pact on Migration and Asylum, which does indeed introduce progressive elements, including mandatory pre-screening and the definition of people to be subject to a procedure at the border. However, if we were to believe the ministers of the 15 EU Member States, this legislation would not be able to solve the problems caused by mass illegal migration, as well as prevent migration and the related negative social consequences that it entails. After all, we can claim that asylum affairs are not equivalent to the import of labour. The problems arising from this in the aging societies of Europe are evidently

needed to be addressed. For this purpose, immigration or guest worker programmes can be developed to facilitate, under controlled legal conditions, the entry to the Schengen area of third-country nationals who wish to work, their integration into the labour market, and, not least, into the society of the host country. There is already a tradition of this in Western Europe, for this purpose, it will suffice to briefly recall by reference the employment of guest workers, which began in the 1960s, as a result of which a significant number of Turkish nationals got a job and earned a livelihood in Germany.

In conclusion, I will not present the position of Hungary which has been criticised by many and deemed, by the CJEU, to be incompatible with EU law in several respects, but the proposals set out in the letter by the 15 EU ministers.

The proposals strive for:

- preventing illegal migration, and managing it locally, as well as along the respective migratory route;
- providing protection, as well as means of subsistence and livelihood for refugees in their regions of origin;
- developing mutually beneficial partnerships with countries situated along migratory routes and supporting them in reception;
- dismantling hives that encourage dangerous journeys to Europe;
- transferring those rescued from the sea to safe third countries following models similar to the Italy-Albania agreement;
- efficient return of people who are not in need of international protection, eliminating the conditions that encourage illegal entry thereby;
- with the aim of establishing a more effective return system, review of the Return Directive, cooperation with third countries, establishing return centres;
- reconsidering the concept of safe third countries;
- addressing threats posed by the instrumentalisation of migrants;

- reinforcing the fight against migrant smuggling by all possible means.

In comparison with the above, Hungary included the following essential areas among the priorities of the Hungarian EU Presidency in the second half of 2024:

- paying particular attention to the external dimension of migration, close cooperation with countries bordering the EU, as well as with countries of origin and transit is of essence;
- the importance of guarding the external borders, with EU funding;
- restraining illegal migration;
- curbing migrant smuggling;
- increasing efficiency of the implementation of returns;
- applying innovative solutions in the asylum system.

In my opinion, the resemblance is pronounced. In the light of this, the question is what the response to the CJEU judgment should be. The judgment is in line with current applicable EU standards. However, it sanctions the Hungarian legislation, elements of which are increasingly being cited as effective - and therefore desirable - practice, and which will also appear in the provisions of the Pact, applicable in less than two years' time. However, many days will pass before the due date of the application of the Pact in two years, and pursuant to the CJEU judgement, each will be ”rewarded” by a penalty payment of €1 million per a day, unless the national legislation changes.