Flagrant Breach of the Right to Defence in National Security Cases, and the Systematic Denial of the Right to Family Life within the Hungarian Legal System

Updated Information Note by the Hungarian Helsinki Committee (HHC)

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Marly from Lebanon is married to a Hungarian woman with whom he has two children. He has been living and working legally in Hungary for five years. He wanted to extend his residence permit but was denied because he was suddenly considered a risk to national security. Meanwhile, his residence permit expired. Thus having no legal status, he was issued an expulsion order and was taken to the immigration detention facility in Nyírbátor. At no stage during the procedure was he given any information as to why he was considered a national security risk, nor were his family links considered in the expulsion decision.

In the hypothetical illustration above, the case of Marly could be experienced by any person with international protection, a residence permit for the purpose of family reunification or other purposes, or permanent residence. All these circumstances share two common features. Firstly, those who are currently being expelled have been **residing lawfully in the country**. Secondly, they **all have Hungarian family members** (children and/or spouse).

1. **The scope of the problem and the recent increase of such cases**

The Hungarian Helsinki Committee (HHC) has recently received an increasing number of complaints from Hungarian family members whose spouses have been suddenly expelled and eventually detained by the National Directorate-General for Aliens Policing (NDGAP) Several third-country national detainees in similar legal situations also contacted the HHC and complained not only about their upcoming deportation and the fact that they are detained, but also about the **lack of information and the poor detention conditions**.

There are several cases where the rejection of the status' extension or, granting a legal status to third-country nationals is based on the opinion of the executive authorities, namely the Counter Terrorism Centre (CTC) and/or the Constitution Protection Office (CPO), declaring that the applicants pose a risk to national security. These rejections were not based on reasoned opinions. Moreover, the underlying data is classified. Therefore, the **applicant was not informed about the grounds of why they pose a national security risk**.

The HHC requested information from both executive authorities a) to understand the frequency of the problem, b) to find out how many foreigners actually file requests to access the underlying classified data, and c) what percentage of them are granted access. Among applicants for permanent residence permits, the Counter Terrorism Centre found 0.085% a risk to national security in 2019 and the first half of 2020 when they examined 5738 cases. During the same period, the Constitution Protection Office examined 2927 such cases and determined an even greater and increasing number of applicants as a risk: 1.15% in 2019 and 3.65% during the first half of 2020. This growth between 2019 and 2020 seems to confirm the HHC's perception of a rapidly increasing use of this argument as a **blanket reason for expelling otherwise lawfully staying refugees and foreigners**. The number of requests filed to access the underlying classified data is extremely low, which demonstrates that most persons concerned are not even aware of their right to request access to such data. CTC received 11 requests during this period, while CPO only 61 requests. In fact, most legal advisors do not even attempt to help their clients submit such claims. Both agencies are in full alignment regarding the number of granted requests: zero. Significantly, this means that **none of the applicants had the opportunity to access the data that formed the basis of the NDGAP's decision against them**.

The above-mentioned problems escalated, and eventually resulted in a **hunger strike** between 5-12 August 2020 in the immigration detention centres in Nyírbátor and Győr. Due to the hunger strike, the issue reached the attention of the Hungarian media and gained greater publicity, which was one the aims of the hunger strike.

During this time, most of the 52 detainees in the Nyírbátor immigration detention centre went on a hunger strike, and 12 detainees in the Győr immigration detention centre joined for a few days. Many of the

detainees have Hungarian family members. The HHC is aware of third-country nationals who were detained during the hunger strike, whose *residence card, subsidiary protection status* or *residence permit got withdrawn*. There are others who ended up in detention centres on the same grounds. In other cases, their detention was a result of the rejection of their application for *residence permit for the purposes of family reunification* based on their Hungarian family members. Similar expulsions are also recorded by the HHC in cases of third-country nationals who were not detained but just expelled from the country.

2. Legal issues

A. The right to family life not taken into account during expulsion decisions

As of 1 January 2019, the procedure that aimed to legalise the status of third-country nationals with Hungarian family members was incorporated into Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (TCN Act). As opposed to the prior regulation where family members of Hungarian nationals could have been expelled only in exceptional cases, as of 2019 the general rules of expulsion of third-country nationals apply to them as well.[1] Section 45(1)[2] of **the TCN Act ensures that the alien policing authority takes into account the family relationship of the third-country national before issuing an expulsion order.** However, this provision is only applicable to those who, until the issuance of the expulsion order, are residing lawfully and their status is based on the grounds of family relations.[3] HHC's experience, even when applying Section 45(1) of the TCN Act, indicates that family relations are not properly taken into account. As a consequence, despite the efforts of a third-country national to legalise their stay, they will be denied and family relations will not be examined before expulsion if they are deemed a national security risk by the authorities. Therefore, those with Hungarian family, who used to fall under Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence (FMR Act), and were provided with (permanent) residence cards, are now denied further legal status under the TCN Act. The same applies to those beneficiaries of international protection whose status were withdrawn but have Hungarian family members. Section 45(1) is not applicable as their residence permit was not issued on the grounds of family reunification but based on the need for international protection. It follows that even if the third-country national has Hungarian children or a Hungarian spouse, under the current national alien policing legislation the **alien policing and the asylum authority are not obliged to consider the best interests of the Hungarian family members**. The absence of such a national regulation is in **clear violation** of their **right to family life** under Article 8 of the European Convention on Human Rights (ECHR) and, in cases where minors are involved, **the best interest of the child** as set out by Article 3 of the UN Convention on the Rights of the Child.

Not only does expulsion interfere with the right to family life of third-country nationals, but in many cases the decision is followed by detention.[4] Despite the fact that the aliens policing authority may designate a compulsory place to stay during procedure under the TCN Act[5]– a person's own home or where they live with their family - it instead applies detention. This is a **clear breach of the authority's obligation to order detention as a last resort**, and further infringes upon his/her rights protected by Article 8 of the ECHR.[6]

B. "Binding," non-reasoned opinions of national security agencies and no access to classified data

The HHC's recent experience demonstrates that there are an **increasing number** of cases where third-country nationals who were **lawfully residing with their Hungarian family members** (based on various legal grounds) are being **expelled on the grounds of national security**. The assessment regarding national security belongs to the competency of the special executive authorities, namely the CTC and the CPO. In the case that these authorities establish that there is a national security risk, the applicant, in

[1] See Section 33 of the Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence ('FMR Act')

[2] The immigration authority shall have regard for the following factors before adopting an expulsion order under immigration laws concerning a third-country national who is holding a residence permit issued on the grounds of family reunification:
a) the duration of stay;
b) the age and family status of the third-country national affected, possible consequences of his/her expulsion on his/her family members;
c) links of the third-country national to Hungary, or the absence of links with the country of origin.

[3] i.e. The status must be based on family relations but it is not limited to the residence permit for the purpose of family reunification. It might be also residence permit for other purposes e.g. issued for the spouse of a refugee getting married after the refugee obtained the status in Hungary.

[4] Section 54(1) of the TCN Act

[5] Section 62(1) h) of the TCN Act

[6] Section 62(1) h) of the TCN Act

practice, is never informed about the grounds of such a conclusion. Therefore, they are **unable to challenge the decision before the court**. This results from the fact that (1) the special authorities are not obliged to provide any justification for their decision regarding their assessment of a national security risk, and (2) the underlying data from which the CTC/CPO draws their conclusion is classified.[7] Even though the applicant theoretically might submit a request to access the classified data on which the opinion is based, the HHC is not aware of any case where such a request has ever been granted.[8] Additionally, (3) according to NDGAP's interpretation of the law, the **CTC/CPO opinion is binding upon the decision-making of the NDGAP**.[9] It follows that in any case the special authorities establish there is a risk to national security, the alien policing or asylum authority must rely on their assessment and do not have any power to defer from it in cases of arbitrariness. Neither can they take into account all the individual circumstances of the third-country national in the specific case. Finally, (4) such persons often end up in detention with **very slim chances to effectively challenge their deprivation of liberty**.

3. Conclusion

The Hungarian law and its implementation questions its compliance with the relevant EU legislation and established case law of the Court of Justice of the European Union (CJEU) and the ECtHR.[10]

Thus, such cases raise questions regarding the conformity with:

- the right to adversarial proceedings, principle of equality of arms, right of access to files;[11]
- the rights corresponding to the national authorities' duty to state reasons in fact and in law;[12]
- the right to defence and to be heard;[13]
- the right to an effective remedy;[14]
- the right to family life;[15]
- the right to liberty and effective judicial review of detention,[16] and
- the right to a competent authority deciding on exclusion/withdrawal.[17]

The aim of this Information Note is to highlight the serious breach of third-country nationals' procedural rights where family unity is disrespected by the Hungarian authorities in instances where they national security is at stake. The HHC uses strategic litigation and international advocacy to strive for legislative change and in the practice of the Hungarian authorities. Therefore, we **urge the EU and international actors to** raise their voice in order to **protect the procedural rights and the right to family life of third-country nationals in Hungary**, and to take the necessary and relevant actions against these unlawful practices by the Hungarian authorities.

[7] Section 87/B(8) of the TCN Act [Section 57(6) of the Act LXXX of 2007 on asylum regarding the cases concerning beneficiaries of international protection (Asylum Act)]

[8] Section 11 of the Act CLV of 2009 on the protection of classified data.

[9] Section 87/B(4) of the TCN Act and Section 57(3) of the Asylum Act

[10] For example CJEU cases: C-300/11, 4 June 2013, joined cases C-584/10, C-593/10 and C-595/10, 18 July 2013, C-57/09, 9 November 2010 and ECtHR cases: Al-Nashif v. Bulgaria, Appl. no. 50963/99, 20 June 2002, C.G. v. Bulgaria, Appl. No. 1365/07, 24 April 2008, A. and others v. UK, Appl. no. 3455/05, 19 February 2009, Kaushal and Others v. Bulgaria, Appl, no. 1537/08, 2 September 2010, Ozdil and Others v. the Republic of Moldova, Appl. no. 11 June 2019.

[11] Article 23 of Asylum Procedures Directive and Right to good administration established as a general principle of EU law in C-604/12 H. N., 8 May 2014, Paras 49-50 and in joined cases C-141/12 and C-372/12, 17 July 2014, para. 69.

[12] Article 11 of Asylum Procedures Directive and Right to good administration established as a general principle of EU law in C-604/12 H.N., 8 May 2014, Paras 49-50 and in joined cases C-141/12 and C-372/12, 17 July 2014, para. 69.

[13] Article 47 and 48 of the Charter, CJEU, C-349/07, 18 December 2008, C-277/11, 22 November 2012, joined cases C-129/13 and C-130/13, 3 July 2014, C-166/13, 5 November 2014, C-249/13, 11 December 2014.

[14] Article 47 of the Charter and Article 13 of the ECHR, joined cases C-584/10. P., C-593/10. P. and C-595/10. P., 18 July 2018, T-53/03, 8 July 2008, C-300/11, 4 June 2013.

[15] Article 8 of the ECHR and Article 7 of the Charter; see the relevant case law referred under footnote no. 8.

[16] Article 5 of the ECHR and 6 of the Charter; see the relevant case law referred under footnote no. 8.

[17] Article 4 of Asylum Procedures Directive; C-473/16, 25 January 2018, C-369/17, 13 September 2018, C-57/09, 9 November 2010, C-573/14, 31 January 2017.