INSTITUTE OF RESEARCH &TRAINING ON EUROPEAN AFFAIRS

EUROPA.S. 2023

European Court of Justice

EUROPA.S.

PROMOTING EXCELLENCE, POLITICAL INNOVATION AND LEADERSHIP IN EUROPE

EUropa.S. 2023
7-10 April
University of Piraeus
Organized by:
Institute of Research & Training on European Affairs

STUDY GUIDE

Topic: The Commission Refers Hungary to the ECJ for Failing to Comply with EU Laws on Asylum

Table of Contents

Greeting of the Board

Honorable Advocates and Judges,

It is with utmost pleasure to welcome you in this year's Europa.S. Conference and in particular in the European Court of Justice, arguably the most fundamental institution of the European Union. As such, it was first established in 1952 and pursues a concrete mission; to ensure that "the law is observed" the same way, in every member state when interpreting and applying the Treaties. This year's case concerns an action for infringement, brought before the ECJ by the European Commission against Hungary for violations concerning the European Asylum Policy. During the procedures, the Court will deliberate on the adequacy of Hungarian Legislation on the matter, will rule on the validity of the Commission's claims on the matter and the counter arguments brought forth by the Hungarian Advocates and rule, ultimately, whether there has indeed been violation of EU Law on the asylum policy area.

In this Study Guide you will find useful information about the functioning of the Court and the case at hand. The second part encircles a legal analysis of principal articles of the Treaty of the European Union (TEU) and the Treaty of the Functioning of the European Union (hence TFEU), the European Union's Charter of Fundamental Rights (hence EUCFR) and secondary EU law related to the case, which we hope to be a stimulus for your own further research.

Should you require further assistance, all members of the Board are more than eager to answer your questions.

We would like to thank you in advance for expressing your interest in the European Court of Justice and assure you that we will have a superb four-day long simulation experience.

Kindest Regards,

The Board of the European Court of Justice

Composition of the European Court of Justice

The European Court of Justice (ECJ) or Court of Justice of the European Union (CJEU) was first established in 1952 under the Treaty of Rome (1951), so as to ensure the effective implementation of the legal framework of the European Coal and Steel Community (ECSC). Since then, the ECJ's powers have been gradually expanded, covering the broader legal remit of the EU. The ECJ constitutes the most vital judicial European institution, as it interprets EU law, aiming to ensure its uniform application among member states and resolves legal disputes occurring between European institutions and national governments. The European Court of Justice consists of the Court, which is composed of one Judge from each member state, as well as the General Court, which is composed of two Judges from each EU state and specialized Courts (Article 19 TEU).

The Court of Justice consists of 27 Judges and 11 Advocates General, appointed for a renewable term of office of six years, through a common accord of the governments of the member states[1]. Both the Judges and the Advocates General are chosen from among individuals whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence (Article 253 TFEU). The President as well as the Vice-President of the Court of Justice are elected from among the Judges for a term of three years, which is renewable. The President, who presides at the hearings and deliberations of the Court, is responsible for the direction and supervision of the procedure followed by the Court, while the Vice-President assists the President with the performance of their duties and can even take their place occasionally. The Advocates' General duty is to assist the Court and present an impartial and independent 'opinion' in the cases they are assigned.

Moreover, a Registrar is appointed who serves as the Secretary General of the Court and manages its departments under the authority of the President. A Judge Rapporteur is also assigned for each case of the Court, who is responsible for marshaling and organizing the arguments of the

[1] Court of Justice. Court of Justice of the European Union. Available at: https://curia.europa.eu/jcms/jcms/Jo2_7024/en/. [Accessed: 12/12/2022]

parties as well as forming a draft judgment prior to the final judgment according to the deliberations of the Court.

The Court may sit as a full court, as a Grand Chamber consisting of 15 Judges, or in smaller Chambers of 3 or 5 Judges (Article 251 TFEU). If the Statute of the Court prescribes particular cases or if the Court considers a case to be of exceptional significance, the Court sits as a full court. In addition, the Court sits as a Grand Chamber either when a member state that constitutes a party to the proceedings' requests so, or when the assigned case is characterized by high complexity or importance. Thus, in most cases, the Chamber of 5 Judges rules the disputes.

In EUropa.S. 2023 the Court of Justice will sit as a Grand Chamber, following the respective rules of procedure.

Jurisdiction of the European Court of Justice

The Court of Justice issues rulings concerning the interpretation of EU law for national courts of EU member states and hears actions involving states and institutions. Since the three-pillar structure introduced by the Treaty of Maastricht has disappeared, the jurisdiction of the Court extends to the law of the EU, unless the Treaties provide otherwise (Article 19 TEU). The competences of the Court vary from direct proceedings against member states to indirect proceedings, when the validity of an EU law is questioned.[2]

In order to fulfill its task, the ECJ has been given defined jurisdiction, which is exercised in a wide variety of proceedings:

i) Proceedings against member states for failure to fulfill an obligation

These actions can be brought by:

a. The Commission

"If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the

[2] Competences of the Court of Justice of the European Union. European Parliament. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union. [Accessed: 12/12/2022].

matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union." (Article 258 TFEU)

b. A member state against another member state

"A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union. Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission. The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court." (Article 259 TFEU)

ii) Proceedings against the EU institutions for annulment and for failure to act

This category of proceedings concerns cases where the applicant aims at the abolition of an adopted measure, which they consider to be contradictory to EU law (Article 263 TFEU), or in cases of violation of EU law, where an institution, body, office or agency has failed to act accordingly. These actions can be brought by the member states, the EU institutions or any natural or legal person, as long as the action refers to a measure (regulation, directive or decision) that has been adopted by the EU and directly affects them. The Court may declare that an institution either has failed to act, violating the Treaties, or its act was considered void. Hence, the Court may demand the adoption of all the necessary measures so as to comply with its judgment (Article 266 TFEU).

iii) Indirect proceedings: question of validity raised before a national court or tribunal (preliminary rulings, Article 267 TFEU)

National courts are normally responsible for the effective application of EU law in each member state. Nevertheless, in a lot of cases an issue

concerning the interpretation of EU law has been raised in front of national courts or tribunals, which may then refer to the Court of Justice for a preliminary ruling. When it comes to a last instance Court, it is mandatory to refer the matter to the Court. This proceeding enables national courts to clarify certain aspects regarding the interpretation of EU law so as to ensure that any decision taken will comply with the EU legal framework. The preliminary rulings contribute to the uniform interpretation and application of EU law among member states.

iv) Responsibility at second instance

The Court has the jurisdiction to review appeals limited to points of law in rulings and orders of the General Court. The appeals do not have a suspensory effect. If the appeal is considered admissible and well-founded, the Court of Justice sets aside the General Court's decision and decides the case itself, or else must refer the case back to the General Court, a reference binding for the latter.

The Preliminary Reference Procedure

The preliminary ruling procedure is an institutionalized cooperation between the ECJ and the national courts of the EU member states. This procedure has been extended to acts of EU bodies, offices or agencies. At the request of national courts or tribunals of the member states, the Court can interpret and examine the validity of these acts in accordance with EU law. In order to refer an issue relating to the interpretation or validity of a provision of EU law to the Court of Justice, the national court has to submit the question(s), usually in the form of a judicial decision, in consonance with the national rules of procedure. Afterwards, the Registry informs the parties of the national proceedings, as well as the rest of the member states and the EU institutions about the request. There is a deadline of two months, during which any written observation can be submitted to the Court of Justice.

It is necessary that the EU law applies in the case, which is to be referred to the Court, in order for the latter to be able to proceed with the preliminary ruling, resolving only the legislative issue and leaving the final ruling of the case to the national court's discretion. Furthermore, the preliminary ruling

of the Court has the force of *res judicata*, meaning that it is binding not only for the referring national court, but for all national courts of the EU member states. Hence, the Court through the preliminary reference procedure not only serves the purpose of assisting the national courts with the interpretation of EU law, but also plays a determining role in the uniform application and compliance with the EU legal framework among the member states.

According to Article 267 TFEU, "the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties" as well as "the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union". Moreover, a national court or a tribunal may request a preliminary ruling from the Court, if it considers that a decision on the question is necessary for the final judgment. Similarly, if there is no judicial remedy under national law [3], the national court of tribunal shall refer the question to the Court of Justice.

The Importance of Jurisprudence

The Court of Justice of the European Union is hailed as the guardian of EU Law and ensures that in the interpretation and the application of the Treaties, *"the law is observed"* [4]. As part of its mission to interpret and apply primary and secondary EU Law, the Court is constantly asked to give rulings on cases that are brought before it, either concerning the interpretation of the law via the preliminary reference procedure as enshrined in Article 267 of the Treaty on the Functioning of the European Union, enforcing the law via the infringement proceedings for failure to comply with EU law under Article 258 TFEU, annulling EU legal acts via actions for annulment under Article 263 TFEU or ensuring the action of the EU via actions for failure to act under Article 265 TFEU[5]. The law of the European Union, in contrast to the majority of national legal systems in Europe, may be found and is developed through the Court's decisions. The Court of Justice has established several areas of EU Law by deciding on

[3] EUR-Lex - L14552 - en - EUR-lex - Europa. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/preliminary-ruling-proceedings-recommendations-to-national-courts.html. [Accessed: 12/12/2022].

[4] Article 19 - TEU | Lex - 12016M019 - en - EUR-lex EUR. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M019 (Accessed: December 20, 2022).
[5] [Court of Justice of the European Union (CJEU)]

individual cases and then expanding on those judgements in subsequent cases.[6]

Fundamental principles and aspects of EU Law have been established by the Court's case-law. This includes the autonomy of the European Legal Order, the principle of supremacy, the principle of conferral and the principle of Direct Effect. These constitute the cornerstones of the European Legal Order and thanks to the Court's jurisprudence now form an integral part of EU Law.

In conclusion, The Court's jurisprudence lies at the heart of EU Law. Without it, the Treaties would simply be a complicated acquis without any room for interpretation and, even more so, practical application on cases that concerns citizens and Member States alike.

Basic Principles of EU Law

a) *Principle of Conferral*: Enshrined in Article 5 of the Treaty on the European Union, under this fundamental principle the European Union can only act within the limits of the competences that the Member States have conferred upon it in the Treaties. Essentially, this means that the Union, basically, has no competences by inherent right and, thus, an area not explicitly agreed upon in the Treaties falls out of the scope of the Union's competences and lies within the jurisdiction of the Member States. [7]

b) *Principle of Autonomy:* The EU is an autonomous legal order. This was established by the European Court of Justice already in the 60s in the landmark Van Gend en Los and Costa/ENEL cases where it explicitly came to the conclusion that: *"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system, which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a community of unlimited duration, having its own institutions, its own legal capacity and capacity of representation on the international plan, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member*

[6] (Lindholm, The European Court of Justice´s case law and its importance as a source of law, 2014)
[7] (Commission, *Conferral*)

States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves. …. the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

The autonomy of EU law is, thus, governed by two different dynamics. Negatively, it attempts to define exactly what does not constitute EU Law, namely ordinary public international law. It is something different, it is something new. Positively, it seeks to establish an operational, self-sufficient system of norms, that, however, isn't closed, but regularly interacts, co-exists and exchanges elements with the national and international legal orders.[8]

c) *Principle of Supremacy:* The principle of Supremacy describes the capacity of a norm of Union Law to overrule inconsistent or conflicting norms of national law in domestic court proceedings. The principle was established in the famous Costa/ENEL case, par. 594 where it was explicitly mentioned that ". . . *the law stemming from the Treaty, an* ***independent source of law***, ***could not***, *because of its* ***special*** *and* ***original*** *nature, be* ***overridden by domestic provisions***, ***however framed***, *without being deprived of its character as Community law and without the legal basis of the Community itself being called into question*." This was later repeated in the Internationalle Handelsgesellschaft case par. 3 and was solemnly expressed in Opinion 1/91 par. 21 and Opinion 1/09 par. 65 of the Court: "*… The* ***essential characteristics*** *of the European Union legal order thus constituted are in particular its* ***primacy*** *over the laws of the Member States and the* ***direct effect*** *of a whole series of provisions which are applicable to their nationals and to the Member States themselves (see Opinion 1/91 [1991] ECR I-6079, paragraph 21)".*

The gravity of this principle was taken a step further by the Court in the Melloni Case where it declared that even norms of constitutional level cannot undermine the EU primary Law. In paragraph 59 it was made abundantly clear: "*It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91…and Opinion 1/09),* ***rules of national law, even of a***

[8] (Editore, 2019)

constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State *(see, to that effect, inter alia, Case 11/70 Internationale Handelsgesellschaft...)*".[9]

In conclusion, the principle of Primacy can be summed up in the prevalence of EU norms in a conflict with national laws.

d) *Principle of Direct Effect:* In perhaps the most important judgment the Court has ever produced, the Van Gen en Los judgment, it enshrined the direct effect of European Union Law. As per the Court's exact wording, "*in addition the task assigned to the court of justice under article 177, the object of which is to secure uniform interpretation of the treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community*".

This is of paramount importance, because it acknowledges the fact that not only Member States, but also individuals are subjects of EU Law and the latter can apply to them directly as well. [10]

Legal Framework

Primary EU Legislation

The Founding Treaties of the European Union attach paramount importance to the area of freedom, security and justice, once belonging to

[9] [European Commission, Primacy of EU law (*precedence, supremacy*)]
[10] (European Commission, *The direct effect of european union law*)

the so-called pillar-system of the European Union which was abolished. The legal basis for this is Article 3(2) of the Treaty of the European Union.

Title V of the Treaty on the Functioning of the European Union (TFEU) – Articles 67 to 89 – is devoted to the AFSJ. General provisions aside, it contains specific chapters among other things on the Asylum Policy of the European Union, which sets out to develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to all non-EU nationals who need international protection, and to ensure that the principle of non-refoulement is observed.

Article 18 of the EU Charter of Fundamental Rights: The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.

Secondary EU Legislation

Directive 2013/32 on common procedures for granting and withdrawing international protection

Article 6 under the heading 'Access to the procedure' under paragraph 1 states:

When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made. If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

Article 8 under the heading 'Information and counseling in detention facilities and at border crossing points' paragraph 2: Member States shall ensure that organizations and persons providing advice and counseling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organizations and persons

in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible.

Article 12 under the heading "Guarantees for applicants" paragraph 1C: '1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees: ..... (c)They shall not be denied the opportunity to communicate with [the United Nations Refugee Agency (UNHCR)] or with any other organization providing legal advice or other counseling to applicants in accordance with the law of the Member State concerned.

Article 22 under the heading "Right to legal assistance and representation at all stages of the procedure" paragraph 1: 'Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counselor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.'

Article 33, under the heading 'Inadmissible applications' paragraph 2: Member States may consider an application for international protection as inadmissible only if: (a) another Member State has granted international protection; (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35; (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38; (d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of [Directive 2011/95] have arisen or have been presented by the applicant; or (e) a dependent of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependent's situation which justify a separate application.'

Article 43, under the title 'Border Procedures' states: 1. Member States may provide for procedures, in accordance with the basic principles and

guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on:

(a) the admissibility of an application, pursuant to Article 33, made at such locations; and/or

(b) the substance of an application in a procedure pursuant to Article 31(8).

Paragraph 2 specifies: Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 1 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive.

Article 46 paragraph 5: Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

Directive 2013/33

Article 10 under the heading 'Conditions of detention' paragraph 4: 'Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organizations recognized by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.'

Directive 2002/90/EC

Article 1 defining the facilitation of unauthorized entry, transit and residence: '1. Each Member State shall adopt appropriate sanctions on: (a) Any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

2. Any Member State may decide not to impose sanctions with regard to the behavior defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behavior is to provide humanitarian assistance to the person concerned.'

Directive 2008/115/EC "The Return Directive":

Article 5, titled "**Non-refoulement, best interests of the child, family life and state of health" provides:**

When implementing this Directive, Member States shall take due account of:

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.

Article 6, titled 'Return Decision' provides as follows: Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

Article 12 under the title Procedural Standards, paragraph 1: "Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies". Paragraph 2: Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.

Article 13 paragraph 1: The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

Hungarian law

Law No LXXX (80) of 2007 on the right to asylum of 29 June 2007:

Paragraph 51(2)(f) introduced a new ground of inadmissibility of applications for asylum, worded as follows: 'The application shall be inadmissible where the applicant has arrived in Hungary via a country in which he or she is not exposed to persecution within the meaning of Paragraph 6(1) or to the risk of serious harm, within the meaning of Paragraph 12(1), or in which a sufficient level of protection is guaranteed.' In accordance with Paragraph 51(12) of the Law on the right to asylum: 'If subparagraph (2)(f) applies, the applicant may, when given notice thereof, and in any event within three days following such notice, declare that in his or her particular case the conditions laid down in subparagraph (2)(f) were not satisfied in respect of the relevant country.

Law No C of 2012 establishing the Criminal Code

Paragraph 353/A under the heading 'Facilitating illegal immigration', provides: (1) Anyone who carries out organizing activities with a view to (a) enabling asylum proceedings to be brought in Hungary by a person who is not persecuted in his or her country of nationality, country of habitual residence or any other country via which he or she arrived, for reasons of race, nationality, membership of a particular social group, religious or political beliefs, or who does not have a well-founded fear of direct persecution, or (b) assisting a person who is entering or residing in Hungary illegally to obtain a residence permit, shall be placed in confinement, unless he or she has committed a more serious criminal offence.

Brief History of the Dispute

In 2015 and 2017 Hungary adopted legislation concerning its asylum policy and the returning of non-European illegal migrants, creating some transit zones at the border between Serbia and Hungary. This legislation initiated

the so-called "crisis situation caused by mass immigration" and enabled Hungary to detract from specific rules mentioned in the Asylum Procedures, Reception Conditions and Return Directives so as to preserve its public order and internal security. The application procedure made it impossible for third-country asylum seekers to enter the EU through the Serbian-Hungarian border and as a result failed to serve its humanitarian purpose. The European Commission initiated infringement procedures against Hungary in December 2015, while the latter continued breaching EU law on asylum.

In addition, in June 2018 the Hungarian Parliament passed the "Stop Soros" package, named after the well-known American-Hungarian businessman George Soros, who has been a government target for several years. According to this law, asylum seekers had the right to enter Hungary and receive international help only under the condition that they came directly from an unsafe country. The number of first-time asylum applicants in EU member states had drastically decreased since its peak of nearly 1.3 million in 2015. In 2019, the 27 countries of the EU collectively received just under 700,000 first-time asylum applications, of which only 500 were filled in Hungary [11]

The Commission, after expressing its doubts concerning the compatibility of the new Hungarian asylum laws, referred Hungary to the ECJ in 2020. The Court, in its judgment, held that Hungary had failed to fulfill its obligation to ensure effective access to the procedure for granting international protection and thus condemned Hungary's policy. Hungary, on the other hand, claimed that the Court's ruling was contrary to the Hungarian Constitution. In 2021, the Hungarian government brought the matter before the Hungarian Constitutional Court stating that it cannot comply with the judgment of the ECJ. However, the Commission persisted that the primacy of EU law is a necessary requirement for a state's European membership and suggested that the ECJ should impose financial penalties to Hungary.[12]

[11] Tidey, A. (2020) Hungary Asylum Policies 'failed' to fulfill EU obligations, ECJ Rules, euronews. Available at: https://www.euronews.com/my-europe/2020/12/17/hungary-asylum-policies-failed-to-fulfill-eu-obligations-ecj-rules. [Accessed: 12/12/2022].
[12] Migration: Commission refers HUNGARY to the Court of Justice of the European Union over its failure to comply with Court judgment. European Commission. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5801. [Accessed: 12/12/2022].

Topic Analysis

The Continuous Conflicts with the Union/ Brussels Reaction

Hungary and the EU have been clashing for years on issues regarding the relocation of applicants requesting international protection, the rights of refugees and the asylum procedures. Commissioner Mijatović, on 31 August 2022, in her submission to the Committee of Ministers in the context of the supervision of the execution of the judgment of the European Court of Human Rights of 21 November 2019 in the case of *Ilias and Ahmed v. Hungary,* mentioned that "access to asylum and to international protection in Hungary has become virtually impossible due to multiple measures taken by the Government since 2015."[13] Furthermore, The Asylum Information Database (AIDA) Country Report on Hungary in 2021 stated how "access to the asylum procedure had become significantly difficult after the introduction of a new asylum system in May 2020. Throughout the year, only 38 people managed to apply for asylum in Hungary. Altogether, only 12 persons arrived via Embassy procedure since this system was introduced". [14] Despite the several European Court of Justice's rulings condemning Hungary's practice, the national asylum authorities refuse to change their practice. Hungary has been put in the spot for numerous violations of the EU law and the Union law's precedence over the national Member-States' legislation leading to the imposition of sanctions and day penalties on her even though she keeps claiming that she follows the EU Directives and prefers to pay those fines than to adjust to its obligations.

The Anti-Refugee Stance of Victor Orbán

Even though Hungary agrees on the importance of democratic values, its anti-refugee stance goes without saying and it is mostly found under the premiership of populist Victor Orbán. Hungary's right-wing prime minister has been very vocal about being against refugees and immigrants entering Hungarian territory. In 2018, in an interview with the German daily newspaper *Bild*, Victor Orban replied to a Bild reporter on why it was fair that Germany accepted hundreds of thousands of refugees and migrants

[13] Council of Europe (2022) Hungarian authorities should refrain from arbitrary removals of refugees, asylum seekers and migrants to Serbia and ensure access to a fair and effective asylum procedure in Hungary - commissioner for human rights - publi.coe.int, Commissioner for Human Rights. Available at: https://www.coe.int/en/web/commissioner/-/hungarian-authorities-should-refrain-from-arbitrary-removals-of-refugees-asylum-seekers-and-migrants-to-serbia-and-ensure-access-to-a-fair-and-effecti (Accessed: December 15, 2022).

[14] AIDA 2021 Update: Hungary (2022) European Council on Refugees and Exiles (ECRE). Available at: https://ecre.org/aida-2021-update-hungary/ (Accessed: December 15, 2022).

while Hungary accepted none, by saying: "*The difference is, you wanted the migrants, and we didn't*."[15]

The Reaction of The International Community

Even though Hungary found some allies in the Member-States of Czech Republic and especially Poland - countries who also violated the European Union law regarding the asylum seekers[16] - various countries and international bodies have condemned its practice, inter alia, some United Nations factors. In particular, on 17 September 2015, the UN Human Rights Commissioner Zeid Ra'ad Al Hussein said that "he was appalled at the recent actions and attitudes displayed by the Hungarian Government and authorities in relation to refugees and migrants. *This is an entirely unacceptable infringement of the human rights of refugees and migrants. Seeking asylum is not a crime, and neither is entering a country irregularly.*"[17] Moreover, in 2021, UNHCR's Europe Bureau Director, Pascale Moreau, said "*We urge the Government of Hungary to withdraw these legislative provisions and ensure that people who wish to seek international protection, many of whom are fleeing war, violence and persecution, have effective access to its territory and to the asylum procedure. UNHCR stands ready to support the Government of Hungary to review its asylum system to bring it in line with international refugee and human rights law*".[18]

[15] Nikolaus Blome, C.S. (2018) Interview with Hungary's Viktor Orban - *„ You wanted the migrants – we didn't!"*, bild.de. BILD. Available at: https://www.bild.de/politik/ausland/viktor-orban/exclusive-interview-with-viktor-orban-54405140.bild.html (Accessed: December 15, 2022).
[16] EU Court rules three member states broke law over refugee quotas (2020) The Guardian. Guardian News and Media. Available at: https://www.theguardian.com/law/2020/apr/02/eu-court-rules-three-countries-czech-republic-hungary-poland-broke-law-over-refugee-quotas (Accessed: December 15, 2022).

[17] Hungary violating international law in response to migration crisis: Zeid (2015) OHCHR. Available at: https://www.ohchr.org/en/press-releases/2015/09/hungary-violating-international-law-response-migration-crisis-zeid (Accessed: December 15, 2022).
[18] United Nations High Commissioner for Refugees (2021) UNHCR concerned by Hungary's latest measures affecting access to asylum.. UNHCR, The UN Refugee Agency. Available at: https://www.unhcr.org/news/press/2021/3/6048976e4/unhcr-concerned-hungarys-latest-measures-affecting-access-asylum.html (Accessed: December 15, 2022).

The Jurisprudence regarding the case

A. CASE C-718/17 [C-647/15[19]]

B. CASE C-808/18

C. CASE C-821/19

A. C-718/17 European Commission v Republic of Hungary (Temporary mechanism for the relocation of applicants for international protection)

Relevant Documents: A) Opinion of Advocate General Sharpston, delivered on 31 October 2019 regarding the case[20], B) Judgment of the Court (Third Chamber) on 2 April 2020[21].

BRIEF CASE PRESENTATION:

On 14 and 22 September 2015 respectively, the Council adopted two decisions for the benefit of Italy and of Greece due to the continuing conflict in Syria which led to a dramatic increase in the overall number of persons seeking international protection within the European Union: the Council Decision (EU) 2015/1523 and the Council Decision (EU) 2015/1601. The above Decisions established the relocation scheme as they put in place detailed arrangements for the relocation of, respectively, 40.000 and 120.000 applicants for international protection. Both decisions used Article 78 §3 TFEU as their legal basis. On 2nd and 3rd of December 2015 respectively, Slovakia and Hungary brought actions against the Council seeking the annulment of Decision 2015/1601. The challenge to the legality of Decision 2015/1601 was unsuccessful according to the Judgment of the Court (Grand Chamber) of 6 September 2017 on the case C-647/15.

[19] C-647/15 - Hungary v Council CURIA. Available at: https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-647%252F15&for=&jge=&dates=&language=en&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3BALL&avg=&lgrec=el&lg=&page=1&cid=13769 (Accessed: December 15, 2022).

[20] C-718/17 - Commission v Hungary (Temporary mechanism for the relocation of applicants for international protection) (no date) CURIA. Available at: https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-718%2F17 (Accessed: December 15, 2022).

[21] C-715/17 - Commission v Poland (Temporary mechanism for the relocation of applicants for international protection) (no date) CURIA. Available at: https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-715%252F17&for=&jge=&dates=&language=en&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3BALL&avg=&lgrec=el&lg=&page=1&cid=10653 (Accessed: December 15, 2022).

After the adoption of the above decisions, also known as "Relocation Decisions", the Commission stated (without being contradicted by Hungary) that Hungary, which did not participate in the voluntary relocation measure provided for in Decision 2015/1523, had not pledged to the Commission to accept any applicants under the Relocation Decisions. However, by letters of 10 February 2016, the Commission called on the Republic of Hungary to communicate at least every three months information concerning the number of applicants for international protection who could be relocated to their territory and to relocate such applicants at regular intervals in order to comply with her legal obligations.

In its Communications, with a wealth of reports from May 2016 to May 2017, the Commission required that the Member States that had not relocated any applicants for international protection or had not indicated for over a year a number of applicants for international protection which could be relocated from Greece and Italy to their territory should carry out such relocations or make such commitments immediately or, at the latest, within one month. The Commission specifically required the Republic of Poland, Hungary and the Czech Republic to comply with their relocation obligations under Decision 2015/1523 and/or Decision 2015/1601. Moreover, it indicated that it reserved the right to initiate proceedings for failure to fulfill obligations against those Member States if they did not comply with their obligations without delay.

By letters of formal notice dated 15 June 2017, so far as concerns Hungary, the Commission initiated infringement proceedings under Article 258(1) TFEU against her. In those letters, the Commission maintained that Hungary had complied with neither her obligations under Article 5(2) of Decision 2015/1523 and/or Article 5(2) of Decision 2015/1601 nor, as a result, their subsequent relocation obligations provided for in Article 5(4) to (11) of Decision 2015/1523 and/or Article 5(4) to (11) of Decision 2015/1601.

Not being persuaded by the reply of the Republic of Hungary to those letters of formal notice, the Commission, on 26 July 2017, sent a reasoned opinion, maintaining its position that Hungary, since 25 December 2015 had failed to fulfill her obligations while calling upon her to take the necessary measures to comply with those obligations within four weeks, that is, by 23 August 2017 at the latest. Hungary, by letter of 23 August 2017, replied to the reasoned opinions.

In its Communication of 6 September 2017 to the European Parliament, the European Council and the Council the Commission again noted that the Republic of Poland and Hungary were the only Member States not to have relocated any applicant for international protection. It requested that those Member States make relocation commitments and start relocating immediately. It also referred in that communication to the judgment of 6 September 2017, Slovakia and Hungary v Council (*C-643/15 and C-647/15*), stating that, by that judgment, the Court had confirmed the validity of Decision 2015/1601.

The ruling

Having received no response to those letters, the Commission decided to bring the case to the European Court of Justice, which ruled on the 2nd of April 2020 that "by failing to indicate at regular intervals, and at least every three months, an appropriate number of applicants for international protection who can be relocated swiftly to its territory, Hungary has, since 25 December 2015, failed to fulfil its obligations under Article 5(2) of Decision 2015/1601 and has consequently failed to fulfil its subsequent relocation obligations under Article 5(4) to (11) of that decision".

B. C-808/18 European Commission v Hungary (Reception of applicants for international protection/ Asylum procedures and return of illegally staying third-country nationals)

Relevant Documents: A) Opinion of Advocate General Priit Pikamäe, delivered on 25 June 2020 regarding the case, B) Judgment of the Court (Grand Chamber) on 17 December 2020.[22]

BRIEF CASE PRESENTATION:

In 2015 and 2017, Hungary adapted its legislation on the right to asylum and on the return of non- EU nationals who do not have the right to remain in the EU. The laws created transit zones situated at the Serbian-Hungarian border allowing the Hungarian authorities to contest certain rules of EU

[22] *C-808/18 - Commission v Hungary (Accueil des demandeurs de protection internationale) CURIA.* Available at: https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-808%252F18&for=&jge=&dates=&language=en&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3BALL&avg=&lgrec=el&lg=&page=1&cid=12863 (Accessed: December 15, 2022).

law in order to preserve law, order and internal security as the Article 72 TFEU mentions.

Hungary's Practice

In particular, Hungary required the third-country nationals or stateless people arriving from Serbia, who wished to access the international protection procedure, to report to one of the transit zones of Röszke and Tompa in order to activate the procedure for granting asylum, while adopting, since the migration crisis began, a consistent practice of drastically limiting the number of applicants authorized to enter those transit zones daily. Hungary did not dispute the accuracy of the data contained in reports drawn up by various international bodies, according to which, in September 2015 the maximum number of admissions to the transit zone was set at 100 persons per day, a number that was subsequently reduced to 50 (February 2016), then 30 (March 2016), then 10 (November 2016) then 5 (2017) people per day who were allowed to enter the transit zone, a number which was afterwards reduced since January 2018, even to only a single person per day. This progressive limitation on access to the transit zones, led to people wishing to apply for international protection to wait several months (between 11 and 18 months) before being admitted to those zones. Taking everything into consideration, Hungary established a system of constant custody of applicants for international protection in the transit zones, without observing the guarantees provided for in Directive 2013/32 and Directive 2013/33. At the same time, it permitted, without following the anticipated procedures and protective measures of Directive 2008/115, the removal of all third-country nationals staying illegally in its territory, with the exception of those of them who are suspected of having committed a crime while converting in general the application for international protection made by people who are included in the Directive 2013/32 regarding their right to remain in its territory, an exercise contrary to the EU law.

On 11 December 2015, the Commission sent Hungary a letter of formal notice concerning the Member State's infringement of Article 46 (§1,3,5,6) of Directive 2013/32 and Article 3 (§8) of Directive 2010/64/EU. Hungary replied to the letter of formal notice asserting that the relevant Hungarian legislation was compatible with EU law.

The new legislation - Law No XX of 2017

On 7 March 2017, Hungary adopted Law No XX of 2017 amending the Law on the right to asylum. The Commission believed that the new law gave rise to further concerns, in addition to those set out in the letter of formal notice of 11 December 2015, in relation to matters such as the removal of illegally staying third-country nationals contrary to the procedures laid down in Directive 2008/115, the failure to ensure effective access to the asylum procedure, the generalized detention of asylum applicants, the misapplication of the safe third country principle and the non-payment of the daily allowance to applicants for international protection. On 18 March 2017, the Commission sent a supplementary letter of formal notice to Hungary complaining that it had not complied with its obligations to which Hungary replied by correspondence of 18 July 2017, before supplementing its reply on 20 October 2017 and 20 November 2017 mentioning that it considered the Hungarian legislation at issue to be compatible with EU law while having brought that legislation into line with EU law on a number of specific points. After the sending of a reasoned opinion by the Commission and the corresponding reply of the Republic of Hungary and

The ruling

After failing to be persuaded by the arguments put forward by the Member-State, the Commission brought the case to the Court on 21 December 2018. "On 17 December 2020, the Grand Chamber of the CJEU ruled in case C-808/18, Commission v. Hungary, that Hungary had failed to fulfil its obligations under EU law. In particular, the Court found that Hungary's legislation on the rules and practice in the transit zones was contrary to EU law. The legal basis of the above was the Procedures Directive *(Directive 2013/32),* [Articles 6, 24 §3, 43 and 46 §5] regarding the granting and withdrawing of international protection, the Reception Directive *(Directive 2013/33)* (Articles 8, 9 and 11) regarding the laid-down standards for the reception of applicants for international protection and Qualification Directive *(Directive 2008/115)* [Article 13§1] regarding the returning of illegally staying third-country nationals".

The Aftermath of the Judgment

The Commission considered that Hungary had not taken the necessary measures to comply with the judgment. The Hungarian Government maintained that the implementation of the judgment pertaining to access to international protection and removal of non-EU nationals who do not

have the right to remain in the EU would be contrary to the Hungarian Fundamental Law (Constitution). On 25 February 2021, the Hungarian government brought the matter before the Hungarian Constitutional Court stating that it cannot comply with the judgment of the Court of Justice of the European Union pending the ruling of the Constitutional Court. The Commission recalled that, according to long-established jurisprudence, the primacy of Union law constitutes an essential feature of the EU legal order and that Union law takes precedence over rules of national law, even of a constitutional order.

On 12 November 2021 the European Commission decided to refer Hungary to the Court of Justice of the European Union requesting that the Court order the payment of financial penalties for Hungary's failure to comply with a Court ruling in relation to EU rules on asylum and return. The above decision was taken in view of the continued non-compliance with the Court's judgment. In particular, on 9 June 2021, the Commission sent Hungary a letter of formal notice under Article 260(2) TFEU and since Hungary did not change its practices, the Commission asked the Court to impose financial sanctions in the form of a lump sum and a daily penalty payment.

C. C-821/19 European Commission v Hungary (Criminalization of assistance to asylum seekers)

Relevant Documents: A) Opinion of Advocate General Rantos, delivered on 25 February 2021 regarding the case, B) Judgment of the Court (Grand Chamber) on 16 November 2021.[23]

On 20 June 2018, Hungary adopted Law No VI of 2018, also known as the "Stop Soros" legislation. That law introduced among others Article 51 §2f of the Law on the right to asylum, Article 353/A of the Criminal Code and Article 46/F of the Law on the police.

On 19 July 2018 the Commission sent a letter of formal notice to Hungary, as it considered that the Hungarian legislation stipulated that an application for international protection is inadmissible if the applicants

[23] C-821/19 - Commission v Hungary (Incrimination de l'aide aux demandeurs d'asile) CURIA. Available at: https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-821%252F19&for=&jge=&dates=&language=en&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3BALL&avg=&lgrec=el&lg=&page=1&cid=14164 (Accessed: December 15, 2022).

have arrived in Hungary via a country in which, they were not exposed to persecution or the risk of serious harm or and a sufficient degree of protection was also guaranteed. Moreover, it claimed that through the new law, Hungary criminalized the organizing actions aiming to make the asylum proceedings possible for the people who do not meet the criteria for the granting of international protection. Last, but not least, it argued that by means of Article 46/F of the Law on the police, Hungary had taken measures in order to restrict the people who have been accused of or punished for the above offense from their right to freedom and movement.

Hungary replied to that letter of formal notice by a letter in which it asserted that the Hungarian legislation abided by EU law. On 24 January 2019, the Commission issued a reasoned opinion in which it claimed that Hungary had failed to fulfill its obligations under Directive 2013/32 and Directive 2013/33. Hungary replied to that reasoned opinion on 23 March 2019, repeating its position that the relevant Hungarian law followed the EU law and the new provisions were justified in the light of the crisis caused by mass immigration to its territory.

The ruling

"Unconvinced by Hungary's arguments, the Commission decided to bring the case to the Court on 8 November 2019. On 16 November 2021. the Court declared that Hungary has failed to fulfill its obligations under Article 33(2) of Directive 2013/32/EU regarding the prohibition of an application for international protection because it was considered inadmissible, Article 8 §2 and Article 22 §1 of Directive 2013/32 and Article 10 §4 of Directive 2013/33/EU regarding the criminalization in Hungary's national law of the actions of any person who contributed in the submission of an application for asylum in Hungary, where it can be proved beyond all reasonable doubt that the person was aware that the application could not be accepted under that law and Article 8 §2, Article 12 §1 c and Article 22 §1 of Directive 2013/32 and Article 10 §4 of Directive 2013/33 by preventing any person who is suspected of having committed such an offense from the right to approach its external borders."

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