

## Parallel realities: refugees seeking asylum in Europe and Hungary's reaction

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by *Boldizsár Nagy, Central European University*

Hungary has lost touch with reality in several ways in recent months. It pretends people arriving into Europe are not refugees. It acts as if any EU Member State can free itself from the obligations flowing from international and EU law. It behaves as if its words and deeds were in harmony. This entry will look at the legislative changes of recent months in Hungary as well as at the discursive attitudes of the dominant political forces. In order to situate the observations it starts with a brief statistical summary and a narrative of recent events.

### 1. Factual frame

*Source: own collection based on [Office of Immigration and Nationality data](#)*

From 2002 until 2012, Hungary received between 1,000 and 4,000 applications for international protection annually. The number of persons recognised as in need of some sort of protection fluctuated between 200 and 400 each year, with most cases terminated because of the non-availability of the applicant.

The arrival of Kosovar asylum seekers in 2013 and 2014, followed by an enormous increase in the number of Syrian, Afghan and other non-European refugees, has dramatically changed the landscape. Authorities tried to register applications until mid-summer of 2015, though no hearings took place; officials instead simply recorded the mere wish to apply for asylum. Due to a lack of systemic controls within the Schengen area, asylum-seekers in practice remained free to leave Hungary for other Schengen countries. But in August, state authorities no longer allowed migrants to board trains bound for Austria and Germany. That led to tumultuous scenes at the railway stations of Budapest, with refugees and other migrants depending on the mercy of NGO activism.

On 4 September, stranded refugees started to walk on the highway to Austria, facing a 240-kilometre march, which was interrupted after a few hours. The government sent buses and transported the crowd to the border with Austria, where they walked across with the approval of Austrian officials. The average number of irregular border crossers through the Serbian-Hungarian border by this point had reached some 2,000 per day, a figure that sharply increased just before the barbed-wire fence along the 175 km long border section was completed on 15 September. It took three days for the irregular migrants to alter their routes, arriving into the Schengen area across the Croatian-Hungarian border after 18 September. That entry option was closed off by a similar barbed-wire fence erected a month later, on 16

October. Before that, in late September and early October roughly 6,000 persons per day arrived to Hungary. After the closure of the border with Croatia, the number of irregular entries dropped to around a dozen per day.

In September and October the government transported all who came from Croatia to Szentgotthárd at the Hungarian-Austrian border, officially with a view to register them, but in reality, to enable their crossing into Austria. According to the border-police data, a total of 390,831 persons were subject to aliens law measures at Hungary's external borders between 1 January and 23 October 2015. The gap between the submitted asylum applications and the total number of persons apprehended at the external borders (around 200,000) indicates the order of magnitude of those assisted to travel onward without any registration.

## **2. Legislative changes**

2015 witnessed two major overhauls and several minor changes in Hungary's asylum legislation, including amendments to the "Act on Asylum", in force since 1 January 2008, and to many other laws, including the Penal Code.

### *2.1. Safe third country rules*

The first change was the entitlement of the government by the parliament to adopt a list of safe third countries. On July 21 Government Decree 191/2015 promulgated two identical lists of safe third countries and safe countries of origin. It determined as safe countries of origin and as safe third countries "Member States and candidate states of the European Union – except for Turkey, Member States of the European Economic Area, and those States of the United States of America that do not apply death penalty, furthermore: 1. Switzerland 2. Bosnia and Herzegovina 3. Kosovo 4. Canada 5. Australia 6. New-Zealand". Nobody in the government noted that "safe third countries" may not refer to an EU Member State, only to a state outside the EU, or that by failing to designate Japan and many other countries as safe countries of origin, those left out may feel hurt. There was widespread resistance in the NGO and academic sector against designating Serbia as a safe third country.

### *2.2. Revamping the refugee status determination procedure*

Also in July 2015 came the first major overhaul of the refugee status determination procedure with a view to accelerate and simplify the procedures in connection with the establishment of a physical barrier at the Serbian-Hungarian border. The prime goal of the amendment, which entered into force on 1 August, was to combine the safe third country rule (in the government's view applicable to Serbia) with a procedure conducted and completed right at the border in specifically established installations. The amendment had a dual character. On the one hand, it had the effect of transposing the content of the 2013 recasts, including on accelerated asylum procedures, ineligible applications, reception conditions and enhanced protection of minors. On the other, it revealed that recent changes to asylum policy in Hungary were based in a securitization logic.

Major blows to the rule of law were delivered by:

- curtailing deadlines for the authorities to decide an asylum-seeker's case and for the applicant to legally challenge a negative decision;
- denying suspensive effect of any appeal in most of the accelerated procedures and in respect of the ineligible applications – with the exception of the application of the safe third country rule, meaning that in a great number of cases persons may be removed from the country before the first judicial review even starts;
- expanding possible places of detention.

After 1 August authorities must decide within 15 days in the case of both accelerated procedures and inadmissible applications. Appeal in both groups must be submitted within 3 calendar days. The courts are supposed to decide in 8 days, and hold a personal hearing only "when it is necessary".

Whereas this amendment did not introduce any element which is unknown in EU law, legislators chose the options least favourable for the asylum seeker and assumed in bad faith that Serbia as a safe third country should process the applications of hundreds of thousands of person reaching the EU via the Western Balkan route, the next round of amendments adopted by the Hungarian Parliament at an extraordinary session on 4 September went far beyond this and essentially introduced a specific regime for asylum-seekers coming across the fenced external border. These amendments deprived the asylum-seeker of elementary human rights guarantees, and in essence introduced a state of the exceptional, entitling authorities to disregard laws on the environment, on construction of new buildings and on criminal procedures, just to name a few areas in which the government secured exceptional powers for itself .

### *2.3. Securitisation en large: barbed wire, transit zones, border procedures, criminalisation*

This eminent showcase of the securitizing logic has the following main features:

- The second major amendment to the Act on Asylum, which entered into force on 15 September designated the barbed wire dual fence, which was about to be completed at the Serbian-Hungarian border, a "temporary security border closure", the illegal crossing of which was made a criminal act by introducing Articles 352 A, B and C into the Criminal Code (Act C. of 2012). A maximum of three years of imprisonment threatens all who cross the fence illegally (Article 352A). The damaging of the fence is a separate crime under Article 352 B, punishable with a maximum of five years of imprisonment. (How can it be crossed without damaging it?). Even obstructing the construction of the fence was made a separate crime (Article 352 C). Absurdly, crossing at sections where no fence has been erected remains a minor offence, so whoever managed to cross the fence from Croatia before the completion of that section on 16 October did not face penalties under the Criminal Code. Of course the fight remains to be fought in the courts clarifying whether those "coming directly" to a country of refuge, are exempted from punishment in accordance with Article 31 of the Geneva Convention, as is the general international practice with the use of false documents.

– It introduced a new notion, the “crisis situation caused by mass immigration”. The situation may be (and was on 15 September) declared in a government decree (269/2015 (IX. 15) Korm rend), to apply to parts or the whole of the country if certain statistical conditions are met in terms of flow or stock data of asylum seekers. (Arrivals: on average in excess of 500 per day for a month, 750 per day for two weeks or 800 per day for a week. Stock: the number of applicants in the special “transit zone”, established by the same amendment. If on average the number of persons in the zone exceeds 1,000 per day for one month, 1,500 per day for two weeks, or 1,600 per day for one week, see Article 80/A of the Asylum Act).

– So-called “transit zones” have been established, actually as parts of the fence. They consist of a series of containers which host actors in a refugee status determination procedure. The chain of authorities inhabiting the linked containers starts with the police who record the flight route, then, if an asylum application is submitted, a refugee officer to accept it, and finally, a judge (or a court clerk!) in a “court hearing room”, who may only be present via an internet link.

– A new border procedure was introduced (Article 71/A of the Asylum Act), only applicable in the transit zone, which combines detention without court control with an extremely fast procedure entailing no real access to legal assistance and reducing legal remedies to a farce. (Hungary had not applied border procedures on land before, only an “airport procedure” was part of the Asylum Act.) The new procedure is based on a fiction which is untenable after *Amuur v France*: namely that the person in the transit zone has not yet entered Hungary. The procedure may only extend to the admissibility phase: once the application is found to be admissible the applicant is allowed to enter the country and the normal reception centres must be provided. However, before that, the authority must decide on the admissibility in 8 days. The person who is detained in the transit zone may request a judicial review of the decision declaring the application inadmissible within 7 days, which review must be completed in 8 days. The court may exercise discretion on whether to hold a hearing.

– A number of criminal procedural rules have been changed in a manner that removes guarantees protecting those accused of a crime related to the irregular crossing of the fence.

The border procedure does not extend to persons with special needs, they are allowed to enter and have both their admissibility procedure and the in-merit phase conducted according to the “normal” rules.

The practical consequence of the new scheme was that persons without special needs were supposed to wait for the outcome of the admissibility procedure in the transit zone. All the applications submitted by persons who came through Serbia were declared inadmissible on safe-third-country grounds. Only less than half a dozen persons asked for judicial review. All others were expelled and physically “accompanied” by a police officer to the Serbian border, a few meters from the door of the “transit zone” container, expecting the refused persons to illegally cross the green border in the return direction and re-enter Serbia.

That is clearly an illegal practice: according to the Procedures Directive (and the

corresponding Hungarian rule) people to be returned to a safe third country must be equipped with a document in the language of the destination country explaining that no in-merit examination of the case took place. Also, the return should only occur once its terms have been agreed upon with the country taking back the applicant.

The legislation has been changed on many further points, exempting the fence and the transit zone from environmental impact assessment and other – otherwise obligatory – administrative procedures, ordering the military to assist the police guarding the border, permitting the requisitioning of “any movable item or real property owned or managed by the State or the local government” or owned or used by a company the majority of which is owned by these. Police are entitled to enter private homes in order to ensure measures against epidemics.

The new legal constellation is incompatible with EU law on many points, from the very concrete rules on access to information and legal assistance to the very abstract principles of effective remedy and due process. The Commission has noted this and even before it was officially informed about the changes, on 6 October 2015 addressed a [12-page long letter to the Hungarian Government](#) sharing its concerns about the compatibility of the new rules with EU law.

### **3. Refugees or not? An attack on rational discourse and the total misrepresentation of reality**

In a well-orchestrated campaign which started with [anti-immigration rhetoric](#), continued with a letter from the Prime Minister to every adult citizen containing a “[questionnaire](#)” about “terrorism and immigration” (described as “national consultation”), and was later crowned by a poster campaign which had three slogans and cost one million Euro, the government has intentionally generated xenophobic and anti-refugee feelings. The “questionnaire”, which had been condemned by practically the entire Hungarian professional community, included leading questions like: “Do you think that Hungary could be the target of an act of terror in the next few years?”; “We hear different views on the issue of immigration. There are some who think that economic migrants jeopardise the jobs and livelihoods of Hungarians. Do you agree?”; “Do you agree with the view that migrants illegally crossing the Hungarian border should be returned to their own countries within the shortest possible time?” The term refugee was not used in any of the questions, but all the framing (including the introductory letter), made it clear that “migrant” and “illegal immigrant” refer to those people who reached Hungary through the Western Balkan route. The billboards appearing in summer showed three messages: “If you come to Hungary, you must respect our laws”, “If you come to Hungary, you must respect our culture” and, finally “If you come to Hungary, you must not take the jobs of the Hungarians”. In a clear indication of their intended audience, all of the billboards that popped up at every corner were in Hungarian. In September, a new set of the billboards and advertisements in print and online media appeared, referring back to the “results” of the “national consultation”, with the following text: “The people have decided: the country must be defended”.

In a similar tenor the Hungarian Parliament adopted a resolution on 22 September with the ambitious title “Message to the leaders of the European Union”, which among other things claims that “Waves of illegal immigration threaten Europe with explosion... The European Union is responsible for the emergence of this situation... We have the right to defend our culture, language, values... Therefore we call upon the leaders of the European Union to finally hear the voice of the people, return to the road of sober mind and defend Europe and the European citizens.”

With all these moves, the Government and the Parliament intentionally replaced the figure of the refugee in need of protection with the (imagined) illegal migrant, who is arriving in an unlawful manner and only has sinister intentions, against whom “Hungary has to be defended”. Their ‘logical’ response: a fence, criminalisation, ignorance, exposure to the harshest conditions, and a total lack of support, except for the support provided by civil society. That civil society is now under attack, accused of being a vehicle for unfettered “immigration” threatening the destruction of Europe.

So the parallel reality is now complete: there were “illegal migrants”, who only came to destroy Hungary and Europe, but due to the strong will of the people and the equally strong action of the government erecting the fence Hungary has been defended, while “every EU rule is respected” as it is a task to protect external borders – so the government narrative goes.

In the reality on the ground, the brutal violation of all refugee-related obligations is coupled with the most myopic political move of diverting the arriving people to neighbouring countries and pretending that the “refugee problem” has been “solved”.

The words uttered are about “defending Europe”, but the deeds actually destroy it.

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