Recent Challenges of Public Administration 4

Papers presented at the conference of
'4th Contemporary Issues of Public Administration'
on 10th December 2021

Lectiones Juridicae
29

The background picture of the online conference.

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National Security and its Implication on Expulsion Decisions in Hungary during the Pandemic

I. Introduction

National security is a core value for all States at all times, however, the global pandemic has turmoiled it just as it had done for almost all aspects of life. Shutting down of borders and pandemic measures from curfews to serious restrictions to the freedom of movement of persons were ordered to protect national health and security. Pandemic has, pandemics have a range of negative social, economic and political consequences and it is generally considered a threat to national security.[1] Besides these obvious consequences, the presence of national security issues in an administrative authority procedure has serious procedural law guarantee concerns: the dichotomy of State security and individual procedural rights. It is especially visible in expulsion cases of third-country nationals. According to a recent comparative study of 2021, it is not only a Hungarian but also a Polish and Cyprian practice.[2]

The present article is based on the study[3] of national security-related expulsion cases of 2020 and the first part of 2021 before the Hungarian Constitutional Court as the competent organ to review constitutional complaints in case of the alleged unconstitutional nature of court decisions; the Curia judgments as of the final and binding decision in case of an appeal against significantly problematic lower court decisions and the Metropolitan Court judgments as reviews of expulsion decisions of immigration authorities.[4] Ironically, during the highest waves of the pandemic, the core of the cases was not the health-related problem but procedural ones. In the following lines, the paper will explore States rights and obligations in the question of who to welcome in their territories and what are the acknowledged means of expulsing an alien; and later the Hungarian practice is shown during 2020–21 in the view of national security concerns and the identified legal challenges.

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[1] Oshewolo, Segun – Nwozor, Agaptus: COVID-19: Projecting the National Security Dimensions of Pandemics. *Strategic Analysis*, Vol. 44. No. 3. 2020. 269–275.

[2] Matevžič, Gruša – Białas, Jacek – Charalambidou, Nicoletta – Barcza-Szabó, Zita: *The Right to Know. Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland*. Hungarian Helsinki Committee, 2021. https://helsinki.hu/en/wp-content/uploads/sites/2/2021/03/Advocacy-Report-Right-To-Know.pdf (05.01.2022.)

[3] The study is to be published in Niziol, Krystyna – Maksymowicz-Mróz, Natalia – Peno, Michael (eds): *Covid-19 Pandemic. The Response of the State of Central Europa. Legal, Sociological and Economic Aspects*. PIE Lang, 2022.

[4] The above-mentioned Constitutional Court decisions and the judicial decisions are available for the public in an anonymized version [see: Alkotmánybíróság. Ügykereső. https://www.alkotmanybirosag.hu/ugykereso and Bírósági Határozatok Gyűjteménye https://birosag.hu/birosagi-hatarozatok-gyujtemenye] Administrative authority decisions are not public.

II. Do States have legal obligations towards unwanted foreigners on their territory?

II.1. The nature of *national security* as a legal fact in brief

Threats to national security may vary in character and be unanticipated or difficult to define in advance,[5] and States are recognized to have a relatively large measure of discretion when evaluating threats to national security and when deciding how to combat these.[6] Meantime, State authorities and intelligence communities no longer have 'the last word' when invoking national security and using intelligence data in their actions and decisions: their practice shall meet their international and EU law obligations. According to the European Council requirements expressed in the legal practice enshrined in the case-law of the European Court of Human Rights (ECtHR), the requirement of foreseeability in substantive law does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to expel an individual on national security grounds.[7] The basic standard when assessing national security information is the so-called "*in accordance with the law*" *test*, consolidated by both the ECtHR and the CJEU. This test requires national law to meet several essential quality requirements: the law must thus be adequately accessible, clear and foreseeable.[8]

The pandemic has caused serious challenges for States and many of them including Hungary declared a *state of emergency*.[9] Meantime, it shall be noted that a foreigner's qualification of being a threat to national security or public order, and those kinds of threats to national security that give rise to the declaration of *public emergency* with all its consequences as putting aside the ordinary legal order, has no overlapping scope of application. Overall, the threat that gives rise to the declaration of the state of emergency is of a larger volume than that kind of threat that may give rise to the expulsion of a foreigner. Meantime, the qualification of a foreigner's presence on

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[5] *C.G. and others v. Bulgaria*, App. no. 1365/07, ECtHR, 24 July 2008. 40.

[6] *National security and European case-law*. Research Division, Council of Europe, European Court of Human Rights, Strasbourg, 2013. 2. In 2014 a study was made on the conceptual features of national security in selected EU Member States and it pointed out that it would be very difficult to propose a common EU definition of national security given that Member States use different terminology such as "state interests", "state privilege" or "secret défense" in French. Instead, participants considered that it would be wiser to propose a definition of what national 'should not be'. For instance, national security should never be invoked when a criminal act has been committed. Bigo, Didier – Carrera, Sergio – Hernanz, Nicholas – Scherrer, Amandine: *National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges. Study for the LIBE Committee*. Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs Justice, Freedom and Security. PE 509.991. Brussels, 2014. https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf (17.11.2021.) 85.

[7] *Ljatifi v. the former Yugoslav Republic of Macedonia*, App. no. 19017/16, ECtHR, 17 May 2018. 35–53.

[8] Bigo et al. 2014. 45–46.

[9] Of the 17 Member States with a constitutional emergency clause suitable to respond to a pandemic, only 10 chose to activate it in the first wave of the pandemic (Bulgaria, Czechia, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain), although often in combination with other arrangements. Seven Member States (Croatia, Germany, Lithuania, Malta, the Netherlands, Poland and Slovenia) chose not to declare a state of emergency. States of emergency were initially declared between 11 and 19 March and lifted between 13 May and 24 June 2020. Crego, Maria Diaz – Kotanidis, Silvia: *States of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic*. EPRS | European Parliamentary Research Service, 2020. https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf (17.11.2021.) I.; see an overview of constitutional/statutory framework of the containment measures at the national (not regional) level during the first wave of the pandemic at 11–14.

the territory of a State can be qualified as a threat to national security independently from the actual situation of the State, whether it is a state of emergency or not.

At the same time, being in a state of emergency when the national security concerns are extremely high, States not just only tend to act in a more precautious way when security issues arise but if the nature of problems leads to the introduction of an extraordinary legal order, States are empowered to put aside or restrict the prevailing human rights including certain procedural guarantees. It is acknowledged by the *European Convention on Human Rights* (ECHR, Article 15), the *International Covenant on Civil and Political Rights* (Article 4) and also by the *American Convention on Human Rights* (Article 27), so eventually, a general standard is seen,[10] however, all derogations shall be formulated and applied under strict limitations.[11] It includes the guarantee of those human rights that are not subject to derogation and as the Venice Commission also found, the rights to a fair trial and effective legal remedies, as enshrined in Articles 6 and 13 of the ECHR, continue to apply during a state of emergency.[12]

Apart from the dichotomy of ordinary functioning and the state of emergency, a common feature of national security-related documents is that they fall under special legislation such as enhanced data protection rules including *classification*. As national security can be invoked to determine the classification of information and make evidence as *state secrets* in proceedings, the fundamental rights and rule of law compliance may give an impression to be in danger. Therefore, the legal instruments in the frames of procedural guarantees have a crucial role in avoiding arbitrary decisions. Applicants who are deemed to pose a threat to national security by the national authorities do not receive any reasoning (or the reasoning is insufficient) because of the classified documents on why and how they threat national security, and then they are not in a position to submit arguments to contest its findings.

The following subchapter briefly explores them in the view of individual rights, especially foreigners.

II.2. National security implication as a ground for expulsion

According to the *European Court of Human Rights* (ECHtR), expulsion is an autonomous concept that is independent of any definition contained in domestic legislation and, except for extradition, any measure compelling the alien's departure from the territory where (s)he was lawfully resident,

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[10] See and compare the parties to these conventions: Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, 213 UNTS 221. https://treaties.un.org/pages/showDetails.aspx?objid=0800000028014a40b (17.11.2021.); International Covenant on Civil and Political Rights New York, 16 December 1966, 999 UNTS 171. https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (17.11.2021.); American Convention on Human Rights. San José, 22 November 1978, 1144 UNTS 123. https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f10e1 (17.11.2021.)

[11] Schreuer, Christoph: Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights. *Yale Journal of World Public Order*, Vol. 9. No. 1. 1982. 116.; https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)018-e (17.11.2021.)

[12] European Commission for Democracy Through Law (Venice Commission), Interim Report on the Measures Taken in the EUMember States as a Result of the Covid-19 Crisis and Their Impact on Democracy, the Rule of Law And Fundamental Rights Adopted by the Venice Commission at its 124th online Plenary Session (8–9 October 2020.) https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)018-e (17.11.2021.) 21. point 77.

constitutes 'expulsion'.[13] This definition coincides with the EU concept of expulsion as a process of a third-country national going back whether in voluntary compliance with an obligation to return, or enforced.[14] Concerning expulsion based on being a threat to national security is a general clause against all non-nationals, but EU citizens and their family members enjoy a wider range of protection against the discretion of the State, while ordinary third-country nationals are in a less favourable situation when national security concerns emerge.[15] Several categories of third-country nationals can be distinguished according to the extent of EU law protection,[16] but even in the case of the least protected group, despite the wider discretionary powers of the State, automatic decision-making is prohibited and decisions are bound by the principle of proportionality. Member States also must ensure the right to effective judicial protection as included in Article 47 of the EU Charter of Fundamental Rights, also concerning immigration decisions where national authorities have wide discretionary powers.[17]

Although (Member) States have discretionary power to decide whether to expel an alien but based on human rights approach, this power must be (a) exercised in such a way as not to infringe the *human rights* (under the ECHR) of the person concerned;[18] and (b) practised after examining *personal circumstances* of an alien and, consequently, enabling them to put forward their arguments against the measure taken by the relevant authority;[19] and (c) taken by the competent authority following the *provisions of substantive law and with the relevant procedural rules*".[20]

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[13] Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights. Procedural safeguards relating to expulsion of aliens. First edition – 30 April 2021. Council of Europe/European Court of Human Rights, Strasbourg. https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_7_ENG.pdf (17.11.2021.) [ECtHR Guide] 8.

[14] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348, 24.12.2008. 98–107. Article 3.3.

[15] There is a distinction: the r*eal and actual threat* v. the *potential threat* to public security. In case of EU citizens and family members, the threat to the public security be based on personal conduct and it must be a genuine, present and serious one to be qualified enough reason for expulsion. For a third country national, the potential threat to the public security is enough and although it must be due to a personal conduct, there are several factors that the authority shall deliberate before the decision is taken. There is a difference on the procedural guarantees and the requirements for the judicial review. See, C-165/14, *Alfredo Rendón Marín v Administración del Estado*, paragraph 84; and of 13 September 2016, EU:C:2016:675. 56.; 84–86. cf. C-544/15, *Sahar Fahimian v Bundesrepublik Deutschland*, CJEU 4 April 2017, ECLI:EU:C:2017:255. 50. See also, Stehlík, Václav: Discretion of Member States vis-à-vis Public Security: Unveiling the Labyrinth of EU Migration Rules. *International and Comparative Law Review*, Vol. 17. No. 2. 2017. 137–138.

[16] As categorised by Boeles et al., the first group consists of third-country nationals covered by Article 27(2) Citizens Directive, or by an EU legal instrument on the basis of which the CJEU has applied this provision by analogy. The second group consists of third-country nationals covered by the Family Reunification Directive. The third group consists of third-country nationals who apply for a visa or are covered by the Schengen Borders Code. Boeles, Pieter – Brouwer, Evelien – Groenendijk, Kees – Hilbrink, Eva – Hutten, Willem: *Public Policy Restrictions in EU Free Movement and Migration Law. General Principles and Guidelines*. Meijers Committee, Amsterdam, 2021. https://www.commissie-meijers.nl/wp-content/uploads/2021/10/meijers_committee_-_public_order_in_eu_migration_law.pdf (17.11.2021.) 33.

[17] Boeles et al. 2021. 57.

[18] *Bolat v. Russia*, App. no. 14139/03, ECtHR 5 October 2006. 81, and *Nowak v. Ukraine*, App. no. 60846/10, ECtHR 31 March 2011, 81.; *cf*. Art. 1. of Directive 2008/115/EC which declares that the Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, *in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations*. [emphasise added by author]

[19] See, ECtHR Guide 2021. 5.

[20] *Bolat v. Russia*, supra, 81.

This latter includes, inter alia, that the expulsion is regulated and exercised with sufficient minimum safeguards against arbitrary action by the authorities.[21] On procedural grounds, it means, according to Article 1 of *Protocol No. 7 to the ECHR*, that the alien concerned must be able to *submit reasons against* his expulsion; to have his case *reviewed*, and to be *represented* for these purposes before the competent authority or a person or persons designated by that authority. These are cumulative conditions of a rightful procedure of expulsion.[22]

EU has a common immigration and asylum policy that frames measures against aliens and the procedural guarantees coincide with the requirements of the ECtHR. Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a *fair and transparent procedure*. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that *consideration should go beyond the mere fact of an illegal stay*.[23] Decisions shall be issued in writing and *give reasons in fact and law* as well as information about available legal remedies. However, the information on reasons may be limited where national law allows for the right to information to be restricted, in particular, to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences. Meanwhile, Member States shall provide, upon request, a written or oral translation of the main elements of decisions including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.[24] The third-country national concerned shall be afforded an *effective remedy* to appeal against or seek review of decisions, where the authority or body shall have the power to review decisions including the possibility of temporarily suspending their enforcement unless a temporary suspension is already applicable under national legislation. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.[25]

III. The Hungarian practice of national security-related expulsion

During the examined period of 2020 and the first half of 2021, the cases can be divided into two main groups: (a) classical cases of before immigration authority and (b) cases that emerged upon the police proposal to expel foreigners based on ongoing criminal proceedings for (alleged) breach of pandemic control measures.

III.1. Cases of the immigration authority

According to the legislation in force, when the immigration (and also the asylum) authority decides upon the presence of a foreigner in Hungary, it shall consult either the *Agency for Constitutional Protection* or the *Counter-Terrorism Centre*. These are special authorities to investigate the risk posed by the presence of the foreigner, their professional statement is binding upon the immigration

[21] *Ahmed v. Romania*, App. no. 34621/03, 13 July 2010. 53–55.

[22] Schabas, William A.: *The European Convention on Human Rights. A Commentary*. Oxford University Press, Oxford, 2017. 1130–1131.

[23] Directive 2008/115/EC, preamble (6).

[24] Directive 2008/115/EC, Article 12.1–3.

[25] Directive 2008/115/EC, Article 13.

authority when it decides whether to issue permits to stay or to expel a foreigner.[26] The *Police* can also be involved as such as investigating authority during the procedure.[27]

III.1.1. Rules of aliening policy in case of threat of national security

(a) Procedure of the first instance

According to Article 5 point g) of Act CXXV of 1995 on national security services, it is primarily the task of the *Agency for Constitutional Protections* to pursue the inspection of aliens, and to formulate a position whether the alien threats the *public order, public and national security* of Hungary. If so, the alien is a *persona non grata*; such documentation of its activity is classified[28] and can be consulted by special authorisation granted by the classifier upon request.[29] Disclosure and abuse of classified documents is otherwise a crime.[30] The access permit is the manifestation of the right to information self-determination, so if it is denied, it shall be is subject to legal remedy.[31] This legal remedy shall go beyond formal examination and ensure a substantive examination of the justification as expressed in 2004 by the Constitutional Court.[32] Neither the immigration authority nor the trial court is in a position to decide to reveal the classified information; the permission to get access is subject to a separate and independent procedure opened before the classifier. The court may examine the file to ensure the effective legal protection of the foreigner and shall verify that the information contained therein is a sufficient reason for the action of the immigration authority. The court may not review the data and conclusions of the national security audit, it may only decide whether the contents of the *proposal are sufficiently supported* by the data.[33]

For that reason, the court ensures legal protection by inspecting the file containing classified information and verifying whether the opinion of the *Agency for Constitutional Protections* proved the existence of a risk to national security. However, because of the classified nature of the documents, to court is not entitled to disclose to the foreigner the classified information or to check its adequacy and it is not entitled to override it in substance. The judicial review is limited to verifying the existence of an opinion of the *Agency for Constitutional Protections*

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[26] According to Gov. Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals [Executive Decree] Article 97, in proceedings for the issue or withdrawal of the interim permanent residence permits, national permanent residence permits and EC permanent residence permits of third-country nationals, in order to determine as to whether the residence of a third-country national is considered a threat to the national security of Hungary, the Government shall appoint the *Agency for Constitutional Protections* and the *Counter-Terrorism Centre* to function as the competent authority in the first instance, and the minister in charge of supervising the national security services in the second instance. As Article 165, the Government shall appoint the *Agency for Constitutional Protections* and the *Counter-Terrorism Centre* to function as the competent authority in proceedings for the recognition of stateless status.

[27] According to Executive Decree Article 97/A, in proceedings for the issue or withdrawal of the interim permanent residence permits, national permanent residence permits and EC permanent residence permits of third-country nationals, in order to determine as to whether the residence of a third-country national is considered to constitute a threat to the public security of Hungary, the Government shall appoint the relevant county police headquarters to function as the competent authority in the first instance, and the National Police Headquarters in the second instance.

[28] Act CLV of 2009 on the protection of classified data [Act CLV of 2009] Article 5. § (1) c).

[29] Act CLV of 2009, Article 11 (1).

[30] *Cf.* Act C of 2012 on the Criminal Code, Article 265.

[31] See the Supreme Court statement: Kúria Kfv.I.37.381/2017/6., repeated in Kfv.II.37.983/2020/10.

[32] CC Decision 12/2004. (IV. 7.) ABH 2004. 225.

[33] Kúria Kfv.VI.37.640/2018/9., Kfv.III.37.039/2013/6.; and 15.K.701.318/2020/18. esp. [15]

and a finding of a risk to national security as a fact. The judicial practice is unequivocal that the sovereignty of the State gives national security a priority over the right to information of the alien and it is the prerogative of the *Agency for Constitutional Protections* to examine and evaluate the facts related to it. Therefore, the court is not entitled to reconsider the Agency's statements and has no competence to review the classified information either, it is merely entitled to ascertain whether the information contained in the classified documents supported the proposal of the Agency and its conclusions, or not.[34]

(b) Legal remedy against the factuality of an expulsion decision

As expressed in the *ZZ case* of 2013 by the CJEU if the parties to the procedure an opportunity cannot have to examine the facts and documents on which decisions concerning them are based, and on which they are therefore unable to state their views, their right to an effective legal remedy is infringed.[35]

The court's examination may include whether the formal and substantive requirements have been fully complied with during the procedure: that is, (a) the classification and restrictions on the communication were imposed only because of a procedure specified by law, and (b) whether the restriction is necessary and proportionate to the aim pursued by the restriction.[36]

Following the legal interpretation of the Constitutional Court established in 2014, in deciding whether to classify data in the public or public interest, the classifier shall consider not only the public interest in the classification but also the public interest in disclosing the data to be classified and may decide on the classification only if the purpose of the classification is proportionate to the public interest in the classified information.[37]

According to the Act on classified data, the classification aims to protect the following category of public interest of Hungary: sovereignty, territorial integrity; constitutional order; defence, national security, law enforcement and crime prevention activities; justice, central financial, economic activity; foreign or international relations; and the insurance the smooth operation of a public body free from unauthorized external influences.[38] Data can only be protected by the classification (1) if the protection covers any of the above-mentioned public interest, (2) if the maladministration[39] of the data damages the protected public interest which could be avoided by classification; and (3) it is necessary to limit the disclosure of the data and their disclosure to authorized persons for a specified period. Data can only be protected with classification if all these legal conditions are met and only for the most necessary time.[40]

The Act on classified data provides for the usage of the test of *necessity and proportionality* when the right to information self-determination is restricted.[41] The control over the classification is ensured by the judicial review by also applying the same test. The court examines the existence of the above-mentioned conditions and for that end, the court has accession to the classified

[34] Kúria Kfv.II.37.983/2020/10. [16].
[35] C-300/11, *ZZ v Secretary of State for the Home Department*, CJEU 4 June 2013, ECLI:EU:C:2013:363. 56.
[36] Kúria I.Kfv.37.468/2021/7/II. [30].
[37] See, CC Decision 29/2014. (IX. 30.) ABH 2014. 1297–1315.
[38] Act CLV of 2009, Article 5 (1).
[39] Maladministration is done by the disclosure, unauthorized acquisition, modification or use of the data, making it available to an unauthorized person and making it inaccessible to the person entitled to it. Act CLV of 2009, Article 5. (2) b).
[40] Act CLV of 2009, Article 5 (2)–(3).
[41] Act CLV of 2009, Article 2 (1).

information.[42] Although the judicial decision shall not reveal any of the classified information, it must include a justification showing the causal link between the disclosure of the data and the public interest protected by the classification.[43] The *right to a fair procedure* is thus ensured by allowing the court to a substantial review of the claim but not revealing the classified information.[44]

The *protected public interest* can be embodied in several ways, its classic case is when it applies to a specific person, but sometimes it protects the technique, method, and direction of the procedure itself. When the authority or the court carries out the *necessity-proportionality test*, only these can be considered and cannot include the personal circumstances of the claimant's claim. In the statement of reasons for its decision, it cannot even indicate whether they were involved. Consequently, the reasons for a decision and judgment may not go beyond a reference to the legal text, an indication of the public interest to be protected based on which the access request is refused and disclosure, unauthorized acquisition, modification or use of the data by unauthorized persons, and whether making it inaccessible to the person entitled to it is detrimental to the public interest which may be protected by the classification.[45] At least the detailed explanation on the accessibility of classified information is significantly different from the one-sentence reasoning in the *Iranian cases (see below)* with a reference to the obligatory nature of police recommendation that makes the expulsion legally based.

The reasoning of the immigration authority decision may not include the description of the data and specific conclusions contained in the classified document, however, as it follows from the second sentence of Section 11 (2) of the Act on classified data, *the reasoning must contain an explanation* which shows the *causal connection* of the knowledge of the data with the damage to the public interest protected by the classification.[46] The restriction on the publicity of the data thus stays in conformity with the effective judicial review as the court may study the classified data and can compare the claims of the alien and the reasons of classification in the particular case to verify the deliberation on the restriction of publicity.[47]

The request of the alien to study the reason why (s)he is a threat to national security may be then refused and the court has the power to review only the causation between the refusal and the national interest to be protected. The review checks whether the formal and substantive requirements have fully complied with the course of the proceeding of classification and the classification is well-grounded or not.[48] This interpretation of grounding conforms with the EU requirements of effective legal remedy expressed in Article 47 of the Charter and also in the judicial practice. If the judicial review is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken concerning him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and to put the latter fully in a position in which it may review the lawfulness of

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[42] Act CLV of 2009, Article 11 (3).
[43] Act CLV of 2009, Article 11 (2) cf. Kúria I.Kfv.37.086/2021/9 [27].
[44] Kúria I.Kfv.37.086/2021/9 [28].
[45] CC Decision 29/2014. (IX. 30.) ABH 2014. 1309–1310. [57], [61], [63] and Kúria I.Kfv.37.468/2021/7/II. [31]; Kúria I.Kfv.37.086/2021/9 [25].
[46] Kúria I.Kfv.37.468/2021/7/II. [32].
[47] Kúria I.Kfv.37.468/2021/7/II [32]–[33].
[48] Kúria I.Kfv.37.086/2021/9 [24]; Metropolitan Court (Fővárosi Törvényszék)15.K.701.318/2020/18. [16].

the national decision in question.[49] If in exceptional cases, a national authority opposes precise and full disclosure to the person concerned of the grounds by invoking reasons of State security, the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle.[50] The relevant Hungarian law is in harmony with these requirements,[51] however, many claims reveal that foreigners have general problems with the independent nature of the procedure of access to classified documents. It seems to be a procedure is in vain[52] or the circumstances make it impossible to open it,[53] or simply the explanation of the courts' argumentation concerning the availability of the classified information by the Act CLV of 2009 when the reasons of being categorised as a threat to national security are claimed for legal remedy,[54] suggests that probably the administrative procedure did not pay (enough) attention to inform the foreigner on this aspect of the procedure.

Therefore, the right to information self-determination and the right to know the reasons for an administrative decision is subordinated to the national interest of the state to its security and also fulfils the requirements of effective legal remedy,[55] at least formally.[56] A case with the same core issue is pending before the Court of Justice of the European Union.[57]

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[49] C-300/11, supra, 53–54; Joined Cases C-372/09 and C-373/09 *Peñarroja Fa*, CJEU 17 March 2011, ECLI:EU:C:2011:156. 63. and C-430/10 *Hristo Gaydarov v Direktor na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite raboti*, CJEU 17 November, 2011ECLI:EU:C:2011:749. 41; C-222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, CJEU 15 October 1987, ECLI:EU:C:1987:442. 15. and Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, CJEU 3 September 2008. ECLI:EU:C:2008:461. 337.

[50] C300/11, *supra*, 57.; see also Rák-Fekete, Edina: A tisztességes hatósági ügyintézéshez való jog érvényesülése a gyakorlatban. *Közjogi Szemle*, Vol. 13. No. 3. 2020. 96.

[51] *Cf. Muhammad and Muhammad v. Romania*, Appl. no. 80982/12, ECtHR 15 October 2020, 44–45.

[52] Metropolitan Court 49.K.703.152/2021/8 [7]. See also: Kfv.I.37.127/2021/10.; Kfv.I. 37.468/2021/7. According to the information received through Hungarian Helsinki Committee Freedom of Information requests to the Counter-Terrorism Office and the Constitutional Protection Office on 8 October 2020 and 4–5 August 2021, none of the access requests submitted to the agencies were granted in 2019, 2020 and first half of 2021. National Security Grounds for Exclusion from International Protection as a Carte Blanche: Hungarian asylum provisions not compliant with EU law Information Update by the Hungarian Helsinki Committee 20 December 2021. https://helsinki.hu/en/wp-content/uploads/sites/2/2022/01/Info-Note_national-security_exclusion_FINAL.docx.pdf (05.01.2022.) 1. footnote 5.

[53] The procedure does not allow representation, it shall be claimed in person. See, Kúria Kfv.II.37.075/2021/9. [16].

[54] See the following Metropolitan Court cases for example: 49.K.703.152/2021/8.; 16.K.702.875/2021; 15.K.701.241/2020/27.; 15.K.701.318/2020/18.; 13.K.701.350/2021/7.; 16.K.702.875/2021.; 16.K.707.269/2020/18.; 9.K.707.924/2020/10. Kúria cases: Kfv.II.37.064/2021/9.; Kfv.II.37.075/2021/9.; Kfv.I. 37.086/2021/9.; Kfv.I.37.127/2021/10.; Kfv.II.37.862/2020/11.; Kfv.II.37.863/2020/15.; 37.533/2020/9.; Kfv. 38.329/2018/10.

[55] *Cf.* C-362/14, *Maximillian Schrems v Data Protection Commissioner*, CJEU 6 October 2015. ECLI:EU:C:2015:650. 95.; Gutman, Kathleen: The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come? *German Law Journal*, Vol. 20. No. 6. 2019. 893–894. https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-the-fundamental-right-to-an-effective-remedy-and-to-a-fair-trial-in-the-caselaw-of-the-court-of-justice-of-the-european-union-the-best-is-yet-to-come/B52CC437EF039A8A478C901B29A51C59 (17.11.2021.)

[56] In this context, compare the development of the legal framework: Kerekes, Zsuzsa: State of play – az információszabadság Magyarországon 2015 őszén. *Infokommunikáció és jog*, Vol. 12. No. 64. 2015. 140–141.

[57] The request for a preliminary ruling from the Fővárosi Törvényszék (Metropolitan Court) refers to the application of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for

(c) (Un)contestability of the qualification as a threat to national security?

The court has no jurisdiction over the qualification of the data; however, it may request the review by the *National Data Protection and Freedom of Information Authority* (National Data Protection Authority), which is entitled to pursue an authority procedure to review the legality of classification of the data if it is probable that the classification of the classified information concerned is unlawful. At the request of *the National Data Protection Authority*, the classifier must provide detailed reasons for the classification of the data in writing.[58]

The Act on the right of informational self-determination and on freedom of information ensures the legal contestability of the classification by the *administrative proceedings for the control of secret (titokfelügyeleti hatósági eljárás)*[59] Even upon judicial request or the case of notification, the procedure of the National Data Protection Authority is *ex offitio*.

In the administrative proceedings for the control of secrets, the classifier is construed as the client and the witness, the expert and the holder of the evidence may be questioned in the process of ascertaining the relevant facts of the case even if (s)he was not released from the obligation of confidentiality relating to classified national security information.[60] The length of the procedure is set for ninety days.[61]

The National Data Protection Authority (a) may order the classifier to modify the level of secrecy or declassify the information or (b) may establish that the classifier acted in compliance with the regulations on the classification of national security information.[62] The decision may be challenged by the classifier within sixty days from the time of delivery and the claim for review. The legal remedy claim has a suspensive effect on the decision of the National Data Protection Authority.[63]

granting and withdrawing international protection (Asylum Procedure Directive) in view of Article 47 of the Charter of Fundamental Rights of the European Union. The question is where the exception for reasons of national security referred to in Article 23(1) of the directive applies, the Member State authority that has adopted a decision to refuse or withdraw international protection based on a reason of national security and the national security authority that has determined that the reason is confidential must ensure that it is guaranteed that in all circumstances the applicant, a refugee or a foreign national beneficiary of subsidiary protection status, or that person's legal representative, is entitled to have access to at least the essence of the confidential or classified information or data underpinning the decision based on that reason and to make use of that information or those data in proceedings relating to the decision, where the responsible authority alleges that their disclosure would conflict with the reason of national security? If the answer is in the affirmative, what precisely should be understood by the 'essence' of the confidential reasons on which that decision is based, for the purposes of applying Article 23(1)(b) of the Asylum Procedure Directive in the light of Articles 41 and 47 of the Charter? C-159/21 *Request for a preliminary ruling from the Fővárosi Törvényszék (Hungary) lodged on 11 March 2021 – GM v Országos Idegenrendészeti Főigazgatóság and Others*. Case in progress, see: https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-159/21&jur=C (17.11.2021.)

58 Act CLV of 2009, Article 6 (8).

59 Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information [Act CXII of 2011] Article 62.

60 Act CXII of 2011, Article 62 (4)–(5).

61 Act CXII of 2011, Article 62 (6).

62 Act CXII of 2011, Article 63 (1).

63 If the classifier did not seek legal action in the court of law within sixty days following the date of delivery of the resolution, the information classified at the national level shall be considered declassified on the sixty-first day following the date of delivery of the resolution, or the level or term of classification shall be modified in accordance with the resolution. The court shall hear and determine the action in closed session and the presiding judge must have security clearance accorded under the Act on National Security Agencies. Persons other than the judge, the plaintiff and the defendant shall be allowed access to the said classified information only if they have personal security clearance according to the security classification level of the information in question. Act CXII of 2011. Article 63 (2)–(7).

The Constitutional Court in its guiding decision of 2014 call attention to the *administrative proceedings for the control of secret* as a legal tool to contest the legality of classification, however, in the ordinary legal practice expressed in the available and examined case law, the mentioning of this possibility hardly emerges in the reasonings.[64]

III.2. The police proposal during its investigation in a criminal proceeding

In more than a dozen constitutional complaints, the scenario was the same: ongoing criminal procedure, expulsion based on being a threat to national security within a couple of days, then a few months later, the closure of the criminal procedure without conviction and the withdrawal of the ban on entry. All of the expelled foreigners were Iranian citizens who had been studying in Hungary for years.[65]

Legal practice acknowledges an ongoing criminal proceedings enough factual basis for the qualification of an alien's presence in the country as a threat to national security.[66] Therefore, it may give rise to the ordering of expulsion. However, the procedural steps leading to the expulsion in the above-mentioned cases raised concerns of another reason. The immigration authority ordered the expulsion upon the recommendation of the police made during the procedure. The expulsion and the ban on entry to the country were ordered, however, a couple of months later, all the criminal proceedings were closed without conviction and the ban on entry was abolished.

The police recommendation and its determinant nature on the expulsion decisions was a core element of the legal remedy and also in the constitutional complaint. Considering the procedural role of the police, the legislator has introduced the possibility to propose to the immigration authority 2010 but before 1st January 2018,[67] the proposal of the investigating authority was indeed a recommendation and not a binding order. Currently, the *Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals* [Act on TCN] expressly states that the competent immigration authority shall not derogate from the proposal;[68] it is not entitled to override it, neither the necessity of expulsion nor the recommended time of the ban on re-entry.[69]

The immigration authority proceeds *ex officio*, whereas another authority gave an 'obligatory order' to open and pursue the procedure to expel the foreigners.[70] Besides, the immigration authority decision did not contain any information on the factuality of the case; it simply invoked the legal provisions that supported the procedure, namely Article 43 (3) of the Act on TCN that empowers the police to recommend the expulsion which binds the proceeding immigration authority. Thus,

[64] Metropolitan Court 106.K.700.322/2019/15.; 106.K.700.049/2019/7.; 106.K.700.046/2019/7.

[65] See press news on the cases: Another 13 Iranian students expelled from Hungary and the EU for violating quarantine rules. March 16 2020 https://abouthungary.hu/news-in-brief/coronavirus-update-another-13-iranian-students-expelled-from-hungary-and-the-eu-for-violating-quarantine-rules (17.11.2021.) *cf.* Iranian Students Expelled from Hungary During Epidemic Likely to be Let Back in. by Péter Cseresnyés 2020.07.17. https://hungarytoday.hu/iranian-students-expelled-hungary-epidemic-let-back/ (17.11.2021.)

[66] CC Order 3171/2020. (V. 21.) ABH 2020. 898–900.; 899. [9]; CC Order 3093/2020. (IV. 23.) ABH 2020, 543–547; 544. [5]; [7]; CC Order 3417/2020. (XI. 26.) ABH 2020, 2363–2365; 2364 [10]; CC Order 3416/2020. (XI. 26.) ABH 2020, 2360–2362; 2361. [9].

[67] It was Article 38 of the *Act CXLIII of 2017 on amending certain acts related to migration* inserted the provision into the Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals.

[68] Act II of 2007, Article 43 (3); KGD2019.105.

[69] Act II of 2007 Article 43 (3); legislative motifs to Act CXLIII of 2017, Article 38.

[70] Commentary on Act CXL on the General Rules of Administrative Proceedings and Services, Article. 104. para. 1. [accessed from National Legal Database]

the authority decision was called a non-personalised, 'template decision' and during the hearing, no information was shared on the proceedings.[71] In other constitutional complaints, the lack of substantial judicial supervision was highlighted among other reasons. They argued the factuality and the causality between the behaviour and its qualification and stated that these elements of the procedure were not reviewed by the court therefore the legal remedy was not effective,[72] while at the same time others even expressly denied committing the behaviour they were accused with.[73]

It is a *sui generis* legal phenomenon in the Hungarian legal practice: the proposal maker authority (police) does the fact-finding, the evaluation of the facts and the deliberation and thus *de facto* the decision-making, while the competent proceeding authority ensures the *de iure* format of decision-making when it orders the expulsion. In the present cases, the full documentation (the detailed matter of facts, and the reasoning of the argumentation that led to the final consequences of expulsion) of this kind of cooperation does not appear in the proceeding authority's decision. Here, the mere legal provision of the Act on TCN that makes the police recommendation an order for the immigration authority to impose the expulsion and the ban on entry in its decision was the reasoning. The court that reviewed these decisions found such a solution correct; the court stated that the provision of the Act on TCN is cogens, therefore no further (factual) reasoning is needed.[74] However, on the other hand, the legal practice is clear: the lack of proper factual and legal grounding of an authority decision is a serious breach of procedural law that makes the decision unsuitable for a substantive review, therefore it shall be annulled.[75] This ambiguity leads to further questions related to the nature of police recommendation and the role of the police as a procedural actor which is beyond the scope of this study. In the Iranian student cases of expulsion, no information occurred on the possible classified nature of any data related to the police documents. Moreover, the only available Metropolitan Court judgment in one of the Iranian cases, there is an acknowledged reference that claims that during the hearing, the police made the evidence available for the foreigner[76] which also supports that assumption that these cases, the factual reasoning embodied in the police documents was not of classified nature.

The qualification of data is the targeted result of a procedure,[77] and the classification of the data (a document that contains it) is a result of it; so, the documents of the police in connection

[71] CC Order 3045/2021. (II. 19.) ABH 2021. 342–343.[8]–[9]; CC Order 3046/2021. (II. 19.) ABH 2021. 345–346. [8]–[9]; CC Order 3047/2021. (II. 19.) ABH 2021. 348–349. [8]–[9], CC Order 3048/2021. (II. 19.) ABH 2021. 351–352. [8]–[9], CC Order 3049/2021. (II. 19.) ABH 2021. 354–355. [8]–[9], CC Order 3050/2021. (II. 19.) ABH 2021. 357–358. [8]–[9].

[72] See esp. CC Order 3487/2020. (XII. 22.) ABH 2020. 2738. [11]; CC Order 3486/2020. (XII. 22.) ABH 2020, 2734–2735. [3]; [12]–[13]; CC Order 3485/2020. (XII. 22.) ABH 2020. 2730. [12]; CC Order 3492/2020. (XII. 22.) ABH 2020. 2753 [7]; CC Order 3493/2020. (XII. 22.) ABH 2020. 2756. [7]; CC Order 3490/2020. (XII. 22.) ABH 2020. 2747. [7]; CC Order 3489/2020. (XII. 22.) ABH 2020. 2744 [7]; CC Order 3488/2020. (XII. 22.) ABH 2020. 2741 [7].

[73] CC Order 3487/2020. (XII. 22.) ABH 2020. 2737. [3]

[74] CC Order 3487/2020. (XII. 22.) ABH 2020. 2738. [6]; CC Order 3488/2020. (XII. 22.) ABH 2020. 2741. [4]; CC Order 3489/2020. (XII. 22.) ABH 2020. 2744. [4]; CC Order 3490/2020. (XII. 22.) ABH 2020. 2744 [4]; CC Order 3491/2020. (XII. 22.) ABH 2020. 2750 [4]; CC Order 3492/2020. (XII. 22.) ABH 2020. 2753. [4].; CC Order 3493/2020. (XII. 22.) ABH 2020. 2756. [4].

[75] Csatlós, Erzsébet: Remarks on the Reasoning: The Morals of a Hungarian Expulsion Decision in Times of Pandemic. *Central European Public Administration Review*, Vol. 19. No. 1. 2021. 185–186.

[76] Metropolitan Court 15.K.701.176/2020/4. None of the Metropolitan Court judgments of the Iranian students are available in the database at the time of writing of this paper, the cited judgment was handled by the Hungarian Helsinki Committee.

[77] It is monitored by the National Security Authority. Juhász, Zsolt – Virányi, Gergely – Hegedűs, Tamás – Visztra, Tímea: A Nemzetbiztonsági Szakszolgálat hatósági feladatai. *Nemzetbiztonsági Szemle*, Vol. 8. No. 1. 2020. 145.

with the investigation and the evidence is not *de iure* classified. Even if the data to be classified engenders by the same authority that is entitled to decide upon the qualification, the classification shall be grounded, and the classified nature of the data and the level of classification shall be visible on the document that contains such information.[78] No later than the commencement of the first procedural act affecting him/her, the person under criminal procedure shall be duly informed of his/her rights and shall be warned of his obligations including the data management rules of classified data.[79]

IV. Concluding remarks

In a strict sense, none of the publicly available expulsion cases of 2020 and the first half of 2021 was related to the pandemic or health issues therefore the interesting features echoed in the examined cases show the general picture of expulsion practice when national security concerns prevail. The legal guarantees connecting to the factual and legal grounding of both administrative and judicial decisions as well as their relationship with the effective judicial review emerged in a surprisingly high number of the examined cases. The rule of law requirements and also the relevant international and even Hungarian legal practice is on the same side of the argumentation that supports the unlawful nature of the practice seen in the Iranian Student's case: the immigration authority decision should have incorporated the factual elements of the police initiation and ensure proper reasoning to the court could have endured an effective review. If it is missing, according to the laws in force, the court should have declared the nullity of the authority resolution for serious procedural law violation (lack of proper factual grounding and legal reasoning).

In cases where the debate focused on the nature of classified information, the same problem arose: the (apparent) lack of reasoning. As the legal norm ensure the necessary tool for having the possibility to gain access to classified documents, however, the experiences taken from the cases examined, the information on its availability may be questioned. Unfortunately, the authority decisions are not available to get further to the source of the problem, although, as a general conclusion stemming from the studied cases, the reason for expulsion seems to be indisputable and shadowy under the cover of national security. In the view of the foreigner, such a situation is, however, confronting with the right to *effective* legal remedy and makes the whole procedure from the beginning until the end of the judicial phase a formal one. The authority's obligation to give information on the procedural rights and obligations should be given a stronger role that may lead to a comprehensible and deeper understanding of the foreseeable reasons and the process of expulsion, irrespective of the global pandemic. However, deeper analysis on the discretion of the State related to national security implications and the transparency of the procedure including the right to effective legal remedy is beyond the scope of the present paper.

[78] Act CLV of 2009, Article 6.

[79] Gov. Decree 100/2018. (VI. 8.) on the detailed rules of investigation and preparatory procedure, Article 42 (4) h).

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