

Lege et fide  
Ünnepi tanulmányok Szabó Imre 65. születésnapjára



A handwritten signature in black ink, appearing to be 'Imre Szabó'. The signature is stylized and cursive, written on a light-colored background.

Készült a Szegedi Tudományegyetem  
Állam- és Jogtudományi Kara  
Polgári Jogi és Polgári Eljárásjogi Tanszékén.

Tanszékvezető:  
Szabó Imre  
egyetemi tanár

***LEGE ET FIDE***

***Ünnepi tanulmányok  
Szabó Imre 65. születésnapjára***

Szerkesztette:  
*Gellén Klára – Görög Márta*

Iurisperitus Kiadó  
Szeged, 2016

A Pólay Elemér Alapítvány Könyvtára

Sorozatszerkesztő:

*Balogh Elemér*  
egyetemi tanár

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# THE PROCEDURAL RULES AND THEIR PRACTICAL ADAPTATION OF THE CRIMES CONNECTED TO THE TEMPORARY BORDER FENCES

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## **Introduction**

As of 15 September 2015 the Hungarian Parliament has introduced three new criminal offences to the Hungarian Penal Code in connection to the temporary border fence: illegal border crossing through the temporary border fences (§ 352/A), vandalism to the temporary border fence (§ 352/B), and obstruction of the construction of the temporary border fence (§ 352/C).

A person, who illegally enters the territory of Hungary through the border fences located on the state border, commits the illegal border crossing through the border fences. The sanction of it shall be up to 3 years of imprisonment. A qualified case is accomplished, if the illegal border cross through border fence is committed armed, equipped with a deadly weapon, as a participant of a mess attack, or if it is resulting death. (Aggravating circumstances.)

A person commits the vandalism of the temporary border fences, if he destroys or damages it. The aggravating circumstances, which establish the qualified matter in this crime are the same, as in the previous crime.

A person commits obstruction of the construction of the temporary border fences, if he/she hinders the work in construction or maintenance of the border fences.

The Hungarian Parliament has also significantly aggravated the criminal sanctions connected to illegal human trafficking on the 15th of September 2015.

If the court orders the execution of the imprisonment or the imprisonment on parole, the sanction named banishment can not be set aside. The duration of the banishment is at least 2 years.

The legislative power has broadened the options connected to the imprisonment on parole since 15th of September, 2015. Thus as an exception, if a person, who commits the crimes connected to the temporary border fences and is sentenced for no more than 5 years of imprisonment, the execution can be suspended on probation for a term between 2 to 10 years. At the same time the imprisonment on parole must be executed, if the banished convict returns to the territory of Hungary.

Connected to the amendment of the Hungarian Code of the Penitentiary system, based on the application submitted by the convict, in case of significant reason – especially personal or familial circumstances of the convict – the court may give a permission for the postponement of the initiation of the execution of the banishment for maximum 3 months. The execution of the banishment also should be postponed ex officio, if the convict looks after his/her child, who is under the age of 1, or if she is pregnant with a 12 weeks or older fetus, but until the 12th month's end, counted from the due date.



Chapter XXVI/A of our Act on Criminal Procedure currently in force, the Act XIX of 1998 (in the following: Be.) regulates the criminal procedure relating to the crimes of the border fences. This is a specific procedure, which was regulated in the Act CXL of 2015. The reason is the multitudinous immigration, which causes crisis and this requires a specific type of criminal procedure. The occurrence of this amendment results that in the competence of the Municipal Court („járásbíróság”), the exclusively entitled authority is the Municipal Court in Szeged („Szegedi Járásbíróság”), who issues the case, and in the competence of the County Court („Törvényszék”), the County Court in Szeged („Szegedi Törvényszék”) is exclusively entitled to issue the case. (If the capturing did not only occur in the region belonging to the competence of the courts in Szeged, it became more difficult to realize this specific provision. That is why currently the courts from Pécs and Zalaegerszeg are also empowered to proceed from the 8th of October from 2015.)

The judges of the Municipal Court in Szeged, as first instance court hear the cases as single-judges, while the County Court in Szeged, as second instance court hear the cases in a panel consisting of three professional judges. The participation of a defence counsel, prosecutor and interpreter is compulsory in both first instance and appellate procedures.

## **1. The main provisions of the legal regulation**

### *1.1. Priority*

It is an essential rule, that these cases should be tried prior to every other cases, because of the crisis caused by the multitudinous immigration.

The compulsory use of the priority may cause a problem, when the defendant has applied for asylum procedure. In the Hungarian Penal Code, the 59 § (2) forbids the banishment against the person, who is entitled for asylum, but the 60 § (2) regulates, that the banishment can not be ignored, if the court ordains the execution of the imprisonment, or the imprisonment on parole for the crimes, which shall be the subject to the penalty of up to 5 years of imprisonment for the crimes of the border fences.

In practice this is solved by Be. 542/E. §, which says, that the rule of priority shall be applied against the asylum procedure in favour of the criminal procedure. Even so a well-grounded decision can only be issued in the criminal procedure, if the Office of Immigration and Nationality has previously conducted the asylum procedure and the court is aware of the contingent obstacle of the banishment. However, this necessarily means the suspension of the criminal procedure (on the ground, that a preliminary question needs to be decided first) and it can lead to the reasonable protraction of the criminal procedure.

In the criminal matters related to the crimes of the border fences, the prosecution initiates summary proceedings. In this proceeding, if the perpetrator confessed, the prosecutor brings him to justice within 15 days of the first hearing as a suspect or within 8 days if caught in the act. By then, because of the increased protection of the infant’s interest should be taken into consideration, the main coercive measure against the adults should be the house arrest, which shall take place in the statal institution of allocation and alimentation.

However it is unclear, what does the legislator mean under the term of „infant”. The infant –from a criminal procedural perspective – can be a juvenile with criminal responsibility, or just a person involved in the criminal procedure. It is an important issue, because the different procedural roles have different outcomes. That is why it would be necessary to differentiate the legal status of the infant without criminal liability, possibly

of the infant with the lack of the parental custody. Additionally, to harmonize the procedural rules of the crimes relating to the border fences with the rules of the juvenile procedures.

In the criminal procedure the interests of the infant should be taken into consideration. That is why the purpose – if it does not violate the interests of the investigation – is that the infant without custody should stay with the arrested person, who takes care of him/her, if the circumstances allow so. In accordance with the provision 542/H § (1) in Be. those person, who is the subject to the act of the asylum and the admission and abstention of third-country citizens, should be accommodated in the statal institutions of allocation, alimentation and detention. The act of admission and abstention of third-country citizens (Act II of 2007) 2 § (u) define the term of guarded accommodation: an institution established in order to lodge aliens, whose liberty is restricted in the aliens policing proceeding and to advance the fulfilment of the purposes of the commanded custody. The term and conditions of the aliens policing custody are defined in the Act II of 2007, 54 § and the preparatory custody of the banishment is included in 55 §. (Both types of custody are restricted, because they must not be applied against third-country infant citizens. However, there is an exception: it is possible to ordain custody as ultima ratio against the family with infant family member – with the infant’s interests taken into consideration all above everything – for a maximum up to 30 days, if the aliens policing authority proves, that the purpose of the ordainment of custody would not be ensured by taking away the travel documents or appointing the appointed residence.

The Hungarian Helsinki Committee has observed,<sup>1</sup> that if an institution is appointed as an institution for the purpose of detention, it actually means pre-trial detention. This may be possible, but only if some conditions apply: if the people under house arrest are actually guarded by the authorities and they are hindered in leaving. In order to distinguish the pre-trial detention from house arrest in the special procedure, it would be practical not to appoint the guarded, but the communal accommodation as the place of the execution of the house arrest, if an asylum procedure is in process.<sup>2</sup>

Based on the Be. 542/H § (2) the pre-trial detention can be executed in police custody or in the scope of the act of the asylum and the admission and abstention of third-country citizens it can be realized in statal institutions of allocation, alimentation and detention. In the criticism of the Hungarian Helsinki Committee and the Committee against torture of the Council of the European Union the Hungarian cells are inadequate for long-term detention. Furthermore, in case of pre-trial detention, the officer in charge should be enabled to accommodate family members together, if it does not harm the interests of the investigation.

## *1.2. The use of motherlanguage*

In case of the crimes connected to the border fences, it is possible to disclaim the translation of the indictment or the judgement.

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<sup>1</sup> <http://helsinki.hu/wp-content/uploads/fizikai-hatarzar-btk-modositasrol.pdf> (27 June 2016.)

<sup>2</sup> The edict (114/2007. (V.24), 131. § (1)) which is the execution of the Act II of 2007 defines the term of the communal accomodation, which is maintained by the Office of Immigration and Nationality. It was sat for the following persons: the aliens under the alien policing proceeding, the fugitives, hosted aliens or for the aliens who are acknowledged as refugees or who asked for acsery defence from the asylum authority, those who have humanitarian residence permission, which is compulsively engrossed, based on their life situatuion, or for the third-country citizens, who became the vistims of the illegal human trafficking.

This provision was criticized by both the European Commission and the Hungarian Helsinki Committee, raising the question of its correspondence with the Directive 2010/64/EU. However, Article 3. (8) makes it possible to disclaim the translation as well. This regulation can be applied only with the following conditions: the suspects and defendants need to get prior legal advice or they need to acquire the full legal knowledge in any other way of the consequences of the waiver. It needs to be clear and based on free-will. A further requirement is that the waiver must be registered in the minutes. (Article 7.)

In accordance with the previously mentioned provision, after the final judgement has been orally delivered and verbally reasoned by the presiding judge in court, having been interpreted, the judge asks the defendant about the remedy, and he also lets the defendant declare, whether he demands the previously delivered and reasoned final judgement to be translated to his native language. The occurrence of the brief, as well as the answer of the defendant shall be registered in the minutes.

### *1.3. Bringing to justice*

The conditions of the bringing to justice (Chapter XXIV. Be.) check up with the general rules, that it occurs in the simpler cases, if the evidence is available, furthermore, if the defendant was caught in the act (in this case it is obligatory) or the defendant confessed his guilt (in this case it is elective.)

Compared to the general rules there are two differences: (1) in case of crimes which shall be the subject of over 8 years of imprisonment the defendant can also be brought to justice, and (2) the statutory deadlines are shorter (in case of catching in the act, the defendant shall be brought to justice 8 days from the hearing, in case of confessing guilt it should happen within 15 days.)

The Hungarian Helsinki Committee interpreted as an objection, that there was no guarantee rule connected to sentencing tariff, and the lack of it may cause serious violations of the law, because it became possible to get a penalty of deprivation of the liberty up to 20 with bringing to justice.

Against this opinion, we can bring up an argument, that the main purpose of the bringing to justice is to cut down the process of the investigation and the preparation of the trial, besides the court decides the criminal liability according to the general rules in the trial. Should the court become aware of the fact that the conditions of bringing to justice do not exist, or should the accusation be expanded or should the case become more complex, the court shall send the documents back to the prosecutor. The proceeding does not violate the due process merely because - despite of the extent of the sentencing tariff the preliminary proceedings become shorter. The court's decision about the criminal liability have to be based on fully conducted probation, if there is no opportunity to carry this out in summary proceeding, the court must convert to general proceeding.

While bringing to justice - because of the oral accusation (charge) and the exclusion of preparation of the trial - a real chance shall be guaranteed for the defendant to prepare his defence. The defendant and his/her defender receive a simplified, written draft of the indictment („vádfejljegyzés”), which contains the criminal charge, that is why the information about the prosecution and the preparation for the defence is given in the simpler matters, as for other cases bringing to justice can not occur.<sup>3</sup>

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<sup>3</sup> The European Court of Human Rights marked in the case *Dallos vs. Hungary*, that the requirement in the 6. Article (3) of the Treaty does not require the certain form of the informations about the prosecution. (Even in

## 2. Practical difficulties

### 2.1. Statistics

It has occurred in the middle of September in 2015, in the department of the Police office in Szeged, which elaborates the matter connected to the cases of the border fences, that they had to take action against 80 trespassers per day. This number has decreased to 20-30 invades per day later that year. Until 31th of December (when it was shut down) the department has conducted 846 criminal procedures, mainly connected to the illegal border crossing.

Regarding to the court data,<sup>4</sup> the Municipal Court in Szeged had conducted 2386 alien's cases in the period between 15. 09. 2015 - 31. 03. 2016, connected to the crimes of the border fences. The cases were conducted in summary proceedings, in the form of bringing to justice.<sup>5</sup> Thereof 2382 persons were brought to justice for committing illegal border cross through the temporary border fences and 4 other because of the impairment of it. The criminal liability was determined in point of 2353 persons in the first mentioned crime and of 4 persons in the second crime. Due to illegal border crossing 1331 persons were banished for 1 year, 943 for two years, 33 for 3 years, and 1-1 for 4 and 5 years. The court has suspended a sentence on probation in two defendant's cases and it gave reprimand for 4 defendants. The court has ordered the execution of the imprisonment in 2 cases, while the execution was suspended in case of 36 persons. In 26 cases the files were sent back to the prosecutor, and against 3 persons the court terminated the procedure. 25 defendants have appealed, which is merely 1% of the cases. The reason of it is the ambiguous execution of the banishment. Namely the banishment can be avoided if they apply for asylum, and if the person came from a country, where to the principle of non-refoulment is applicable, furthermore the person does not have such a citizenship (Albanian, Kosovar, Serbian) in point of which the refoulment by Serbia is accepted.

### 2.2. The suspicion

In relation to the illegal border crossing the existence of the suspicion necessary for the initiation of the investigation can be problematic. If an alien is captured in the territory of Hungary, it does not necessarily mean that he/she has crossed the border through the fence, illegally.<sup>6</sup> The existence of the suspicion is unambiguous in two cases. Catching in the act (1) can happen physically, namely directly by a police officer, or by discovery with a thermo-camera, which is later also followed by police capture. In the so called „in depth procedure” („mélységi eljárás”) the perpetrator is not captured in close proximity of the temporary border fence, but in the inner (deeper) territory of the country. In such cases their confession in the aliens policing proceeding establishes the suspicion.

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the case of the defendant who does not know the language of the proceeding, does not necessary the translation in written form, the oral form is enough.)

<sup>4</sup> HAUZINGER Zoltán: *Idegen a büntetőjogban*. AndAnn Kiadó, Budapest, 2016. 111-112.

<sup>5</sup> During the writing of this study, the number of the proceedings are above 3000 with not mentioning the fact that in reality 4 times more people entered the territory of Hungary.

<sup>6</sup> It happen, when the person under the proceeding arrived Hungary by swimming in the river Tisza, or another who was captured 50km from the temporary border fences, and he had the purpose to leave Hungary towards Serbia and he had the legal status, proved by certification, imposed by the Austrian authority.

The general course of the proceeding is, that after the capturing arrest,<sup>7</sup> custody occurs and after the summary proceeding (bringing to justice), the sentence is banishment. Regarding the fact, that from the part of Serbia the readmission is not common,<sup>8</sup> the refugees usually get into open-reception centres (such as in Bicske, Vámoszabadi, Körmend, Balassagyarmat) from where they are free to leave without obstacles. Is there an aliens policing procedure also in course, they will be accommodated in a checked reception centre, which they can leave freely as well.

In general we can say, that the perpetrators of the illegal border crossing co-operate with the authorities and the confession is fairly common. However in case of damage to the border fences, the criminal procedure is usually launched against unknown perpetrators and results in the suspension of the procedure, providing only a temporary (provisory) solution. The assumed perpetrators of the above mentioned offence are the human traffickers, who - after damaging (for example cutting) the fence - do not cross the Hungarian-Serbian border, do not enter the Hungarian territory. Despite of their acts being proven by crime scene examination and reports, their identity usually remains unknown.

### *2.3. Collateral procedures and problems of the execution*

The suspects usually apply for asylum during their hearing or in the alien policing procedure. Commonly until the continuance of the asylum procedure the banishment is not executed, and the convicts disappear to unknown places.

If the identity of the perpetrator is known and the findings of fact are proven, the prosecutor brings them to justice within 72 hours. After arresting, the ordainment of house arrest rarely occurs. It is usually applied, if the prosecutor does not have enough evidence to bring the perpetrator to justice (for example 6 of 12 person captured in „in depth procedure” („mélységi eljárás”) confessed to illegal border crossing through the temporary border fences, but the other 6 deny coming through the fence.)

For among the practical difficulties, the cases concerning families are considerable. Namely the term of the family has another meaning in culture of the refugees, as in European culture. Even though we try to avoid the separation of the strict-sense family (father, mother, child), it can rarely be realized, mostly because of the collateral procedures.

Let's see an imaginary example, in which a family crosses the temporary border seal illegally together. A criminal procedure is launched against the father; he is taken into police custody. Another criminal procedure is launched against the mother, but she is not taken into custody. Neither is the juvenile perpetrator, and an alien policing proceeding or custody is initiated against the infants. The criminal procedures against the parents are in progress, but under separate case numbers, and the different sentences are quite common (such as 2 years banishment for the father, 1 year for the mother, and the juvenile's case does not even go to court, he is given a reprimand by the prosecutor.)

### *2.4. The interpreter*

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<sup>7</sup> The ordainment of the custody has occurred in 80% of the cases. They don't command custody against juvenile, infant, or the follower of the infant. The typical sanction against the juvenile is the reprimand, imposed by the prosecutor, ergo they are not usually sentenced to banishment. Most of them under the proceeding are aware of this fact, that is why they rather define themselves as juvenile in order to avoid banishment.

<sup>8</sup> Serbia is considered as a safe third-country, based on the edict 191/2015 (VII.21), where the refoulment of the refugees is possible, but Serbia is not willing to do that. That is why the execution of the banishment is almost impossible, so the penitentiary group determine the existence of exclusive reason. So the assurance of the conditions of the banishment is essential. The system look alike the fine against the homeless persons, despite the court has no doubt connected the unexecution.

The essential requirement of the due process is the use of the native language, and this entails liability on the authorities. The number of languages spoken in the criminal procedures is above 100, not to mention the different dialects in the same language.<sup>9</sup> The right to use one's native language is not only a fundamental principle and requirement in the criminal procedures, but the effective communication with the defendants is also necessary in these matters. Namely, during the hearings it can come about a confession of guilt – easing and hastening the course of justice – and the defendant declares for the asylum procedure as well. Nowadays, given the intensive technological development, the long-distance interpreting would be more effective and would give more guarantee and could solve the current problem, when sometimes there is only one interpreter for 50-100 defendants.

At the beginning of the criminal procedure, the authorities give information to the defendants about their procedural rights. It is usually provided in more languages, but we cannot be sure about, that the defendants can interpret the included information. In practice the court does not have time neither opportunity to explain them in which procedure, what kind of rights they are entitled for.

### *2.5. Public defender*

In the proceedings, which were initiated because of crimes connected to the border fences, the legal defence is obligatory. In point of the public defenders the list of the voluntary defenders, supervised by the Bar Association in Szeged, is exemplary. There are approximately 50 defenders on the mentioned list, but in reality only 3-5 of them act upon the order of the authority. Their interest is to issue the matter as soon as possible, that is why typically they don't file substantive comments, proposals. However the communication between the defendant and defender is even harder, if the defendant does not speak the English language. According to the stories of the defendants, it has occurred several times, that the defence was so formal, that the defendants did not even know, which person is the defender in their case on the trial.

## **Conclusion**

The matters connected to the crimes of the border fences demand extremely quick and focused proceedings. The race against the time appears in three levels. The Act on the Police<sup>10</sup> demands 8+4 hours in accordance with the short-term arrest, but it is difficult to carry out in case of capturing masses of people, especially if an alien policing proceeding was also initiated against the person of interest prior the criminal procedure.<sup>11</sup> After this, the person, who is captured shall be interrogated as a suspect within 24 hours. Finally the arrest can last up to 72 hours.

The special proceeding connected to the crimes of the border fences is justified and is to be sustained because the crisis caused by the multitudinous immigration still exists. The summary criminal proceedings entail massive liability on the authorities, but they always have to take the requirement of the due process into consideration.

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<sup>9</sup> For example, the pakistani language has 3-4 known and used dialects.

<sup>10</sup> XXXIV. Law from 1994.: About the Police, 33. § (3)

<sup>11</sup> The deadline of the alien policing proceeding adds in the deadline of the capturing arrest.