

BRIEFING

# Legal Analysis of Hungary's anti-NGO Bill

JULY 2018

On June 20, 2018 the Hungarian Parliament adopted a law that criminalises the work of lawyers and NGO workers assisting migrants, and aims to prevent people from seeking asylum. The law entered into force on July 1, 2018. Prosecutions can be initiated at any time, exposing lawyers and NGO staff to prison sentences.

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On June 20 the Hungarian Parliament adopted a law that criminalises the work of lawyers and NGO workers assisting migrants, and aims to prevent people from seeking asylum. The law entered into force on July 1, 2018.<sup>1</sup>

The law violates EU and international law, with the proclaimed objective '*of preventing Hungary from becoming a migrant country*'.<sup>2</sup> Prosecutions can be initiated at any time, exposing lawyers and NGO staff to prison sentences.

We call on the European Institutions, member states and international and regional organisations to publically condemn the Law and press the Hungarian Government to respect EU and international law. In particular, we call on:

**The European Commission to:**

- immediately launch infringement proceedings;
- establish an accelerated timeframe for the proceedings and recommend that the Hungarian government suspend the law; and
- in the event that the infringement proceeds to the Court of Justice of the European Union (CJEU), request the court to order interim measures.

**Members of the European Parliament to:**

- vote in support of the European Parliament's Article 7(1) report on Hungary in the plenary session on September 11, 2018.<sup>3</sup>

**The Council of the European Union and EU member states to:**

- support the Commission to immediately launch infringement proceedings, and intervene if the case proceeds to the CJEU;
- support the European Parliament's Article 7(1) report on Hungary and put the breakdown of the rule of law in Hungary on the Council's agenda;
- use all diplomatic channels to hold the Hungarian Government to account and openly support the work of civil society.

## BACKGROUND

The passage of the law in the Hungarian Parliament fulfils the campaign commitments of Fidesz and Prime Minister, Viktor Orbán. Its adoption, immediately after elections confirms the government's determination to crackdown on independent civil society and consolidate its legal arsenal against migrants and NGOs.

This is part of a systematic attack over the last years that has created an intimidating and unpredictable environment. Authoritative warnings have been disregarded,<sup>4</sup> and it has become impossible to ensure proper democratic scrutiny of laws, due to last minute amendments and manipulation of legal procedures. Key steps include:

- The adoption in April 2017 of a law targeting the Central European University (CEU). The European Commission concluded that the law violates EU law and referred the case to the CJEU.<sup>5</sup> Despite the fact that the CEU complied with all new

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conditions set out by the Hungarian Government, the legal status of the university remains uncertain.<sup>6</sup>

- In June 2017 the Hungarian Parliament adopted a law stigmatising foreign funded NGOs. The European Commission also referred the case to the CJEU.<sup>7</sup> Nevertheless, the law could be used against NGOs at any time, potentially resulting in the dissolution of organisations.<sup>8</sup>
- A few months after the 2017 NGO law was adopted, the government announced the 'STOP-Soros' package, containing further far-reaching restrictions against civil society. The government tabled two entirely different drafts within a period of four months. The initial version used administrative measures to restrict the work of organisations, namely a licensing procedure for organisations working on migration and a 25% tax on foreign funding.<sup>9</sup>
- The final version, tabled on May 29, 2018 takes a different approach using criminal law.<sup>10</sup> At the last minute, on June 19, a new amendment was introduced to the tax code. It re-imposes the 25% tax, targeting all '*immigration activities*'.
- These legislative steps are combined with an intensive smear-campaign against NGOs, individual human rights defenders and migrants.<sup>11</sup> This puts organisations under immense pressure, at a time when their day-to-day work, to promote and protect human rights, is ever more pressing.

Attacks against NGOs and their funders are part of a wider attempt to dismantle the checks and balances essential in a democratic society. Over the last years, the independence of the media and the judiciary have been consistently undermined.<sup>12</sup> Continuing on this path the Government tabled new Constitutional amendments, with further reviews planned for September.<sup>13</sup> **This re-affirms the Government's determination to continue to cross red lines in defiance of EU and international law.**

## LEGAL ANALYSIS

Act VI 2018 amending certain laws relating to measures to combat illegal immigration was adopted on June 20 2018.

Whilst the title of the law is no longer the 'STOP Soros' package, the general reasoning section of Act VI 2018 states '*In order to protect Hungary, an action plan is needed, this is the STOP Soros Act package*' and goes on to detail the purpose of the package to prevent '*Hungary from becoming a migrant country*'.

The below looks at the key provisions and provides a summary of the concerns under EU law and international law. The areas covered are not exhaustive but are elaborated in a more detailed [legal briefing](#) available on our website.

## 1. NEW CRIMINAL LAW ON SUPPORT AND PROMOTION OF ASYLUM AND RESIDENCE APPLICATIONS

The new offence of '*supporting and facilitating illegal immigration*' in Section 11 of the Law amends section 353/A (S353/A) of the Hungarian Criminal Code. The new provision:

- criminalises any '*organisational activities*' to assist asylum-seekers - already in Hungary or at Hungary's border - to exercise their *legal rights* to submit an asylum procedure or to obtain a residence permit;
- provides that such offences may be committed by a person directly assisting an individual migrant, but also by preparing, or distributing informational materials or by creating or operating a network to carry out these activities;
- criminalises a person who organises border monitoring; and
- criminalises anyone who provides financial means for the above activities.

S353/A is aimed at the work of NGOs and lawyers: advising and assisting third country nationals in Hungary on their rights under Hungarian and international law. It also applies to anyone assisting such third country nationals, for example by providing interpretation, publishing a leaflet or funding the stated activities.

**It is clear that the law is not aimed at individuals who knowingly assist fraudulent applications – which is already a crime - but at acts that are legal, and even required, under international law.**

### a. Violations of EU law

The EU asylum *acquis* guarantees specific rights to third country nationals, who are in Hungary or at the border. S353/A violates a number of provisions of **EU asylum law**, in particular:

- **International Protection Procedures Directive 2013/32** stipulates that asylum seekers have a right to communicate with any organisation providing legal or other counselling advice, including at border crossing points and transit zones.
- **Reception Directive 2013/33** provides for the rights to material assistance until an asylum claim is decided. Asylum seekers should enjoy the right to information on asylum procedures and to contact groups providing legal assistance. They should also enjoy the right to free legal assistance and representation in asylum appeals and the freedom to receive information and advice from organisations and persons other than the Government.
- **International Protection Qualification Directive 2011/95** provides for the right to a residence permit if the conditions for asylum or subsidiary protection are met.
- **Citizens Directive 2004/38** requires that third-country national family members of EU citizens are issued with a residence permit.

S353/A further violates rights enshrined in the **EU Charter of Fundamental Rights** (the

Charter), read in conjunction with the above Directives. The relevant Charter provisions include:

- Articles 11 and 12 that guarantee the rights to freedom of expression and association.
- Article 18 that guarantees the right to asylum in accordance with the Geneva Convention.
- Article 19 that prohibits expulsion of a migrant to a state where they risk death, would be subject to the death penalty or to torture or other inhuman or degrading treatment or punishment.
- Article 47 that guarantees the right to an effective remedy.

#### b. Violations of International and European Human Rights Law

Under international human rights law S353/A interferes with:

- The **right to freedom of expression** by criminalising the '*production or dissemination of informational materials*', and other '*organizational activities*' such as advocacy, concerning the procedures for initiating an asylum application or obtaining a residency permit.
- The **right to freedom of association** by criminalising the core functions of organizations that assist migrants, including funding, legal assistance, building a network or working in coalitions, and travelling about in border areas.

Human rights law requires that any restrictions are prescribed by law, advance a legitimate aim, and are necessary in a democratic society and proportionate to the legitimate aim sought to be protected. The restrictions under S353/A do not comply with the above test:

- criminal laws must be precisely stated and must not be vague or overly broad. S353/A establishes a broad criminal offence, which covers an open-ended list of '*organisational activities*' and criminalizes the imparting and reception of information;
- the law pursues illegitimate aims, primarily to prevent Hungary from becoming a migrant country and to impede the work of organisations, such as those funded, in part, by the Open Society Foundations; and
- the restrictions are not necessary or proportionate to any legitimate aims. Hungarian law already imposes significant sanctions for any activities, and assistance to such activities, that could be considered to constitute, or contribute to, illegal migration.

S353/A further violates the principle of *non-penalisation* under article 31.1 of the **United Nations Refugee Convention**. This prohibits the imposition of a penalty on a refugee by reason of illegal entry or presence. While S353/A does not impose a *criminal* penalty on the asylum-seeker, it does impose on them a penalty, by threatening criminal sanctions on those who would assist them to make their asylum claim.

### c. Practical application

With the adoption of the law, police and prosecutors have the power to, for example:

- arrest, charge and remove from Hungary's border zones any lawyer, advisor or volunteer suspected of assisting a person to make an asylum claim and or obtain a residence permit;
- raid and arrest the staff of NGOs who provide advice to third country nationals;
- arrest and prosecute leaders of organisations who publish information about asylum procedures on their websites; and
- arrest and prosecute staff and board members of foundations that fund the above activities.

If convicted, an individual may be sentenced to up to one year in prison. An association or foundation may be fined, and a court could bar it from conducting certain activities. Ironically, the law also criminalises work hailed as a best practice. S353/A (5) criminalizes a person who organises border monitoring. In 2012, under a Tripartite Agreement, the Hungarian Helsinki Committee, the National Police Headquarters and the United Nations High Commissioner for Refugees (UNHCR) carried out a Border Monitoring Project. A joint report summarises the experiences gathered during the course of the project, which were promoted as a best practice by UNHCR.<sup>14</sup>

## 2. DENIAL OF ASYLUM TO REFUGEES ARRIVING FROM UNSAFE COUNTRIES

Act IV 2018 amends the 2007 Asylum Act and the 2007 Act on the State Border. Together with the new provisions under the Constitutional Amendment (T332),<sup>15</sup> they impose further restrictions to the rights of asylum-seekers and refugees. Section 7 of the law states that an asylum application is inadmissible if the applicant arrived via a third country where they were not subject to persecution or to serious harm. The changes to the 2007 State Border Act, bars anyone from staying in Hungary who is under criminal proceedings, launched on the basis of a criminal offence of the unlawful crossing of the border.

### a. Violations of EU law

The **International Protection Procedures Directive 2013/32** provides for the right to make an asylum claim. Whilst, under certain conditions, EU law permits Member States to refuse an asylum claim as inadmissible on *safe* third country grounds, it prohibits countries to adopt a rule for *unsafe* third countries.

Hungary already has a safe third country rule under the Asylum Act, section 51 (2)(e). The new rule under Section 7 of the Law therefore appears to apply to countries that would be found *not safe* under the safe third country rule, in violation of EU law.

## b. Violations of the Refugee Convention and European Convention on Human Rights

In addition to the *non-penalisation* point discussed above, the changes to the Asylum and State Border Acts violate the prohibition on *refoulement* in Article 33.1 of the Refugee Convention. They expose individuals to be returned to countries where they would face a real risk of death, torture, inhuman or degrading treatment, slavery, servitude or forced labour, contrary to articles 2, 3 and 4 of the European Convention on Human Rights.

## c. Practical application

The changes highlighted above make it unreasonably difficult, if not virtually impossible, for persons in the territory and at the border to effectively submit asylum claims and to regularise their migratory status.

<sup>1</sup> [Act VI of 2018 on amending certain laws relating to measures to combat illegal immigration](#) and unofficial [English translation](#)

<sup>2</sup> See Act IV 2018 General reasoning 'In order to protect Hungary, an action plan is needed, this is the STOP Soros Act package ... With the Law, we want to prevent Hungary from becoming a migrant country.'

<sup>3</sup> [Report](#) on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

<sup>4</sup> For example, [Venice Commission Opinion](#) 25 June 2018 and [UN Human Rights Committee Concluding Observations](#) 9 May 2018

<sup>5</sup> [Commission press release](#) 7 December 2017

<sup>6</sup> [CEU press release](#) 15 May 2018 CEU Complies with Lex CEU on U.S. Educational Activities, Calls on Hungarian Government to Sign Agreement with New York State

<sup>7</sup> [Commission press release](#) 7 December 2017

<sup>8</sup> [Legal Opinion](#) Hungarian NGO funding law in breach of EU fundamental freedoms and Charter rights, Matrix Chambers, June 2017

<sup>9</sup> [Hungarian Government press release](#) 18 January 2018

<sup>10</sup> [Hungarian Government press release](#) 6 June 2018 'The essence of the Stop Soros legislative package is to make the organisation of illegal migration a punishable offence...He stressed the goal is to punish organisational activities...'

<sup>11</sup> In this climate, the [Open Society Foundations announced](#) the transfer its international operations outside Hungary: In the last days, media outlets reported that István Hollik, the spokesman of the Fidesz-KDNP faction, [placed stickers](#) on the door of Amnesty International office which read 'pro-migration organization'.

<sup>12</sup> [Human Rights Watch Report](#) Wrong Direction on Rights: Assessing the Impact of Hungary's New Constitution and Laws, May 2013 and [Hungarian Helsinki Committee Report](#) Attacking the Last Line of Defense, June 2018.

<sup>13</sup> [Hungarian Government press release](#) 8 June 2018

<sup>14</sup> [Joint Report](#) Access to Territory and Asylum Procedure in Hungary 2012

<sup>15</sup> [No. T332](#) Seventh amendment of the Basic Law of Hungary