


## Hungary, Budapest Regional Court, 38.K.707.688/2020/23. (C-528/21), ordinary, 19 July 2021

### Member State

 Hungary

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### Topic

rule of law, right to a fair trial

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### Sector

Judicial Interaction Techniques, Use of the Preliminary Reference Procedure

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### Deciding Court Original Language

F?városi Törvényszék

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### Deciding Court English translation

Budapest Regional Court (Budapest High Court)

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### Registration N

38.K.707.688/2020/23

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### Date Decision

19 July 2021

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### ECLI (if available)

ECLI:EU:C:2023:341

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### National Follow Up Of (when relevant)

N/A

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### EU legal sources and CJEU jurisprudence

Article 20 TFEU; Articles 7, 20, 24, 47 EU Charter; Directive 2004/38/EC, Directive 2008/115/EC.

C-82/16, K.A. and Others, 8 May 2018, CLI:EU:C:2018:308

Case 283/81, CILFIT, 6 October 1982, ECLI:EU:C:1982:335

C-112/20, M. A. v État belge, 11 March 2021, ECLI:EU:C:2021:197

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### Subject Matter

Hungarian authorities ordered a ban on entry and stay regarding a third-country national living for almost 20 years in Hungary and having a family and a minor child, dependents of him, for national security concerns. The authorities failed to consider the personal and family circumstances of the applicant by referring to a new law that the national court found in breach of EU law. While the court decided to suspend the enforcement of the entry ban, the Immigration Authority failed to give effect to this decision on the ground that the decision had already been subject to an alert in SIS II.

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### Legal issue(s)

right to a fair trial, right to an effective remedy, an effective remedy against a decision on entry ban, non-execution of a final court decision granting interim relief

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### Request for expedited/PPU procedures

YES - The referring court requested the CJEU to decide in an urgent procedure as M.D., who had a dependent minor child and provided for his family's livelihood, had already left Hungary and was unable to return as an alert on banning entry and stay was registered in the SIS II. For the same reasons, his residence permit cannot be extended by the Slovak authorities either. Furthermore, while the court granted interim relief and suspended the enforcement of the entry ban, the Immigration Policy Authority refused to execute the final court decision. Also, the court argued that the urgent procedure is justified in the best interest of the child. The request for an urgent procedure was dismissed; however, the CJEU reviewed the case in a priority proceeding.

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### Interim Relief

N/A

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### National Law Sources

Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence; Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals

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### Facts of the case

The Serbia-Kosovo citizen had legally resided in Hungary since 2002 with his family, including a minor child born in 2016. He ran four bakeries in the country and established a business in Slovakia. In 2018, he requested a permanent residence card, but his application was rejected, and his residence permit was revoked for posing real, immediate and serious risks to the national security of Hungary after being convicted of human trafficking. Then, authorities imposed an entry and stay ban on him for 3 years. In these proceedings, Hungarian authorities did not consider the personal and family circumstances of the applicant by relying on a 2018 amending law, which subjected the applicant as a third-country national family member of an EU citizen to a new, much less favourable regulation. The amending law, in force since 2019, also applied to proceedings re-started after its entry into force. According to this law, in case of withdrawing residence permits or ordering a ban on entry and stay for national security concerns, the Immigration Authority is bound

by the opinion of specialised expert authorities and has no room for manoeuvre to consider the family and personal circumstances of those affected. The applicant challenged the entry and stay ban before the courts in the main proceeding. The court granted interim relief and suspended the enforcement of the ban, which the Immigration Authority failed to execute on the ground that an alert had already been registered in SIS II. The court referred 4 questions to the CJEU.

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### Reasoning (role of the Charter or other EU, ECHR related legal basis)

In the first and second questions, the Hungarian judge raised concerns about the 2018 amendment's compliance with Articles 5 and 11 of Directive 2008/115/EC and Article 20 TFEU, read in conjunction with Articles 7, 20, 24 and 47 of the Charter. In particular, she stressed that the new rules, which also apply to retrials ordered in previous proceedings, exclude consideration of personal and family circumstances of third-country nationals, especially the fact of having a dependent minor child, in deciding to withdraw the resident permit and impose a ban on entry and stay with regard to third-country nationals, representing a real, immediate and serious threat to national security. The referring judge claimed first that the correct interpretation of EU law is not obvious in the main proceeding, so according to the CILFIT decision, the preliminary ruling on the interpretation of the relevant provisions of EU law is needed. She noted that the ban on entry and stay imposed on the applicant by the Hungarian authorities must be interpreted as an entry ban under Article 11 of Directive 2008/115. She argued that the Hungarian framework for third-country nationals who are family members of EU citizens changed, and the previous regime was replaced by a less favourable one, establishing more stringent conditions for their return and entry. As a result, if a residence permit is revoked for national security concerns, authorities must decide on the ban on entry and stay without considering personal and family circumstances. The new law also applies to proceedings re-started after the amendments entered into force. By invoking case C-82/16 of the CJEU, the court noted that the refusal to grant the right to residence for third-country nationals might undermine the effective enforcement of EU citizenship under certain circumstances. Also, forcing a third-country national to return without taking into account that his dependents (his minor child and wife) might be compelled to follow him and leave the territory of the EU contradicts Article 20 TFEU. Furthermore, several CJEU judgments, including case C-112/20, highlighted that Article 5 of Directive 2008/115/EC, read in conjunction with Article 24 of the Charter, must be interpreted as meaning that before adopting a return decision accompanied by an entry ban, the authorities must give due account of the best interest of the child. However, these CJEU judgments are not enforced in domestic jurisprudence. Hungarian courts and authorities tend to disregard personal and family circumstances by relying on the 2018 amendment. Still, the Supreme Court case law is not uniform on this issue. In similar cases in the past, the same judicial panel set aside the Hungarian law for its failure to comply with EU law. However, since the Supreme Court has rendered several decisions in which it did not find the new domestic legislation in breach of EU law, the court could not decide to disapply national law in the case concerned; therefore, the judgment of the CJEU is needed. The first and second questions concerned the 2018 amendment's compliance with EU law. The CJEU found these questions admissible only in the context of the decision banning the entry and stay of the applicant, as the withdrawal of his residence permit was not the subject of the main proceeding. The CJEU argued that Article 20 TFEU precludes such national practice that fails to examine the relationship of dependency between the third-country national and his family member with EU citizenship, and in case of the existence of such relationship, the ban on entry and stay can be decided after all relevant circumstances, in particular, the best interest of the child has been considered. The CJEU also noted that the scope of Directive 2008/115 applies to the case in the main proceeding. As a result, safeguards laid down by that Directive must be ensured, namely taking into account the best interest of the child and the third-country national's family life and state of health before

banning his entry into the territory of the EU. In the third question, the referring court asked whether the Directive itself or the previous domestic legislation can provide a legal basis for the decision in the main proceeding if the relevant Hungarian law and jurisprudence, based on the decision of the CJEU, is found to be contrary to EU law. The CJEU argued that Article 5 of Directive 2008/115 is sufficiently precise and unconditional to have a direct effect. Therefore, the referring court must base its decision directly on Article 5 and disapply national legislation that cannot be interpreted in conformity with this provision of EU law. However, the referring court is not required to apply previous national legislation that provides additional safeguards to those ensured by the directive. The fourth question was whether the authorities' non-execution of the temporary protection provided by the court complies with the right to a fair trial declared by Article 47 of the Charter and the right to effective remedy regarding return decisions provided by Article 13 of Directive 2008/115. The referring court argued that the Immigration Authority refused to execute the final court decision ordering the temporary suspension of the entry ban on the ground that an alert related to the ban had already been registered in SIS II. Consequently, the applicant, who already left Hungary, could not enter Hungary and exercise his right to legal remedy in person. In relation to the fourth question, the CJEU argued that Article 13 of Directive 2008/115 explicitly provides the power for competent authorities to suspend the enforcement of decisions related to return. Also, Member States can freely delete data from SIS II on account of final court decisions. The CJEU noted that the right to an effective remedy enshrined in Article 47 of the Charter would be illusory if a national authority could refuse to enforce a final court decision on the temporary suspension of an entry ban. Furthermore, the CJEU added that the effectiveness of judicial cooperation under Article 267 TFEU would also be compromised if a court could not grant interim relief while referring questions to the CJEU and if national authorities could disregard the interim relief.

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#### Relation of the case to the EU Charter

The referring judge used the EU Charter as a legally binding document to argue that the relevant Hungarian legislation and judicial practice violate fundamental rights, namely respect for private and family life (Article 7), equality before the law (Article 20), the rights of the child (Article 24) and the right to an effective remedy and to a fair trial (Article 47). The referring court invoked Article 47 of the Charter in the first, third and fourth questions. However, the CJEU referred to Article 47 of the Charter only in relation to the fourth question to argue that the right to an effective remedy precludes the non-execution of a final court decision ordering the temporary suspension of an entry ban.

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#### Relation between the EU Charter and ECHR

N/A

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#### Use of Judicial Interaction technique(s)

Preliminary reference

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#### Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

N/A

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#### Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external –

with European supranational courts)

INTERNAL: The referring court cited several judgments of the Hungarian Supreme Court (Kúria). First, to demonstrate that there is a lack of a uniform interpretation of the EU law compliance of the relevant Hungarian legislation, so the correct interpretation of the EU law is not obvious. Second, to highlight that the referring court could not set aside domestic law, as the Supreme Court will decide on this issue in a review procedure, which did not find the domestic law in breach of EU law. EXTERNAL: The referring court relied on the acte clair doctrine and the CILFIT judgment to demonstrate that the Hungarian jurisprudence does not meet the acte claire doctrine. Furthermore, the referring court invoked CJEU judgements to argue that the current Hungarian legislation, by excluding the examination of personal circumstances before deciding on the entry ban of a third-country national, violates EU law.

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Strategic use of judicial interaction technique (purpose aimed by the national court)

The referring court used the preliminary reference procedure to solve a conflict of norms between Hungarian and EU law and also to solve a conflict of judicial interpretations between Hungarian courts on the question of whether a conflict of norms exists or not.

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