EROSION ON THE PROCEDURAL RIGHTS OF THE DEFENDANT IN THE FIGHT AGAINST THE IRREGULAR MIGRATION

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ABSTRACT

International migration has intensified during the last two decades. The number of irregular migrants entered the Europen Union reached unprecedented levels between 2015 and 2017. It shall be emphasized that irregular migration as a phenomenon is defined by the Member States in different ways in the EU. In 2015, when Hungary was in the centre of the migratory flow, a decision on stopping the irregular migration was adopted by the Hungarian Government. In connection with this political standpoint, the legal and technical conditions were created by the legislator as well. The legal response concerned not only the criminal law, but also the criminal procedural law. In our paper, we would like to deal with only the criminal procedural focus seeing that the special criminal procedure on crimes against the closing of the border has been inserted into the new Hungarian Code on Criminal Procedure (Act XC of 2017). Although this special criminal procedure was known by the Hungarian Act on Criminal Procedure (Act XIX of 1998) as well, the new legal solutions with special reference to the rights of the defendant can be criticized. The aim of this paper is to present these new regulations concern the fundamental procedural rights of the defendant with the analytical method, and to make de lege ferenda proposal. The topic of our analysis concerns only the Act XC of 2017 will come into force on 1 July 2018 and the mentioned special criminal procedure.

Keywords: Hungarian Code on Criminal Procedure, Hungarian Act XC of 2017, defendant, criminal procedural rights, irregular migration, Directive 2010/64/EU, special criminal procedure, crimes against the closing of border.

INTRODUCTION

Generally, it can be underlined that an irregular migrant can be defined as an individual who crosses a border without proper authority or violating conditions for entering a country [6]. The irregular migrants usually use the following ways entering the territory of EU: (a) border-crossing „without proper authority, either through clandestine entry or with fraudulent documents; (b) entering with authorisation, but overstaying it; (c) deliberately abusing the asylum system; (d) under the control of smugglers and traffickers" [8], [12]. In connection with the mentioned thoughts, it shall be emphasized that international migration has intensified during the last two decades, Europe has been receiving an increasing number of migrants from developing countries [11]. The record number of the

detected irregular border-crossing was in 2015. Although after this year the Member States reported a significant decrease in the number of detections, the problem is not solved yet. The number of irregular migrants entered the EU is still very high. It shall be underlined that the paper does not deal with the irregular stay as a consequence of the irregular migration. The following table [3] shows the number of detections in the last two years:

Table 1.

Routes	Eastern border	Western Balkan	Black See	Circular route from Albania to Greece
2016	1349	130.261	1	5121
2017	776	12.178	537	6396

Routes	Eastern Mediterranean	Central Mediterranean	Western Mediterranean	Western African
2016	182.277	181.376	9900	671
2017	42.305	118.962	23.143	421

The above-mentioned data clearly proves that there is high migratory pressure in the EU, therefore „the politics of migration has become increasingly prominent as a site of struggle on the political scene" [10]. Irregular migration as a phenomenon is defined by the Member States in different ways. It is defined as a petty offence, however, there are other Member States who solve the problem on the level of the administrative law. It shall be emphasized that the degree of *de jure* criminalisation is limited – in most Western countries illegal residence as such is not a crime [4]. However, irregular migration is often described as a threat to state sovereignty and to public security [7]. This unfavourable effect was recognized by the Hungarian Government in 2015, therefore a decision on using criminal tools in the fight against the irregular migration was accepted by the Hungarian legislator.

In Hungary the Act CXL of 2015 adopted on 4 September 2015 amended the relevant acts in relation to stopping the irregular migration. As consequence, after the mentioned amendment a legal and a technical closing of border has been set up. In order to protect on the one hand the technical closing of border and the other hand the security of the country it was necessary to create „*sui generis*" statutory definitions with reference to the closing of border, and to ensure that criminal procedures in connection with the referred crimes can be finished rapidly. Therefore three statutory definitions – so-called crimes against the closing of border summarized by the table 2. – were created into the Hungarian Criminal Code, and in connection with it the Act on Criminal Procedure in force was amended as well. A new procedural legal frame was inserted into the Chapter

titled „Special criminal procedures". In this chapter many special procedural rules are regulated by the legislator, where the reason of the special regulations is either the special character of the defendant, or the special character of the concrete criminal case. In connection with our paper the latter one is of importance. Namely, the mentioned special rules can be applied only for the sake of the crimes against the closing of border. Creating of the new special procedural rules enabled for the authorities to conduct the procedure started because of a crime against closing of border very rapidly. After the amendment of the Hungarian Criminal Code, many criminal procedures started for the crime against the closing of border in Hungary. The following table [13] summarizes the crimes against the closing of border were known to the authorities between 15 September 2015 and 31 December 2017, clearly shows that the special procedural rules were applied by the authorities many times:

Table 2.

	2015	2016	2017
Damaging the closing of border	22	1543	863
Irregular crossing the closing of border	914	2843	22
Obstruction the building on closing of border	-	-	-

The data raised in 2016 can originate in the closing of the Slovenian-Croatian and the Croatian-Serbian Boders. The reduced data relating to 2017 clearly proves that the Western Balkanian migratory route was closed successfully by the authorities [5].

In line with the above-mentioned amendment of the Act XIX of 1998, the codification of the new Hungarian Code on Criminal Procedure (Act XC of 2017, hereinafter: new Code) was also in process. Considering that (a) the irregular migration will be an important topic of the European politics, and (b) the main directives of the mentioned codification were also the rapidity and the efficiency [9], the special procedural regulations on crimes against the closing of border had been left in the new Code. Although the already cited rapid political and legal answer to the migratory pressure was acceptable, many procedural regulations are open to criticism with special reference to the fundamental procedural principles, or the rights of the defendant. The aim of this paper to deal with the latter one, and to highlight the substandard regulations concern: (a) the right to defense; (b) the right to inspect the documents of the investigation; (c) the right to use of native language.

DESCRIPTION OF THE LEGAL PROBLEM

The right to defense

As it was mentioned above, according to the Hungarian criminal procedural law the criminal procedure started because of a crime against the closing of the border can regard as a special criminal procedure. Therefore special rules are regulated by the legislator in the chapter concerns it. It means that in a criminal procedure conducted based on the mentioned crime, the provisions set forth in the new Code shall be applied with the derogations stipulated in the chapter concerns the crimes against the closing of the border. These special rules are declared between the Sec. 827 and the Sec. 836. of the new Code.

The right to defense is regulated as a fundamental principle of the criminal procedure not only by the Hungarian Constitution but also the new Code. The efficiency of the mentioned right is highlighted by the new Code. It means that there are many rules regulated by the new Code which open the door to practice the defense counsel's rights efficiently during the criminal procedure. It concerns for example the right to inspect the documents, or the right to establish the contact – before the procedural action concerning the defendant - without delay with the defendant for the purpose of the compliance on the defense. The right to defense is regulated by the Article XXVIII of the Hungarian Constitution as a fundamental procedural principle, furthermore its' efficiency is declared as an important feature by the decisions of the Hungarian Constitutional Court concerning the mentioned right (Decision no. 25/1991, and Decision no. 6/1998) [2].

It can be emphasized that the above-mentioned principle prevails in the judicial procedure, however, during the investigation does not generally. Towards the efficient defense, the participation in the person of the defense counsel in the course of the relevant investigatory actions is necessary. These relevant procedural actions determine the way of the defense can be in the investigation the following: the questioning of the defendant, or if the defendant is involved in the confrontation, or other evidentiary procedures concerning the defendant. Contrarily, there are only a few instances when the participation in the person of the defense counsel is obligated as early as the investigation. The rules of the criminal procedure against juvenile offenders are good examples of the mentioned question, namely according to the Sec. 682 par. (2) of the new Code before the accusation the participation in person of the defense counsel is statutory in the above-mentioned investigatory actions.

However, according to the Sec. 829 the participation of the defense counsel is statutory in the criminal procedure conducted based on the above-mentioned crime. However, participation is not equivalent to the attendance during the procedural action. Namely, participation in person in the course of relevant investigatory actions is not obligatory for the defense counsel according to the general rules. It shall be underlined that there are no rules among the criticized regulations on the mentioned special criminal procedure which concern the attendance of the defense counsel during the several investigatory actions. Namely, it is obligatory for the investigating authority and the prosecutor to appoint officially a defense counsel for the defendant who committed a crime

against the closing of the border before the questioning, however, according to the new Code the attendance of this defense counsel during the questioning and the other relevant investigatory actions is not obligatory. It shall be emphasized that this legal situation seriously damages the fundamental right to the efficient defense, therefore it shall amend in the near future. Regarding to the mentioned claim, our de lege ferenda proposal can be found in the conclusions.

The right to inspect the documents of the investigation

According to the Sec. 352. Par. (1) of the new Code the laced documents of the investigation shall be handed to the defendant and the defense counsel by the prosecutor or the investigating authority no later than one month before the accusation. In accordance with the mentioned rule the defendant and the defense counsel shall be enabled to inspect all documents – with the exceptions declared by the new Code – that were issued during the investigation. It shall be emphasized that this is the general rule of the new Code. The reason of this regulation is to ensure the right to efficient defense. However, according to the Sec. 828. Par. (5) the above-mentioned term can be shortened or skipped by the prosecutor if the object of the criminal procedure is a crime against the closing of border. We think that it is a causeless regulation. It shall be emphasized that most of the criminal procedure related to a crime against the closing of border is an arraignment. It means that the prosecutor arraigns the defendant who committed the above-mentioned crime to the court within fifteen days from the questioning of the defendant. The reason of this that the defendant is either caught in the act or admits the commission of the mentioned crime. Namely, the criminal case is before the court no later than fifteen days after the questioning. Therefore, the opportunity to shorten the term on inspection of the investigatory documents is understandable in that criminal procedure started because of a crime against the closing of the border. However, to skip this mentioned term is not respectable. Namely, by means of this regulation, it might that the defendant and the defense counsel do not have any opportunity to inspect the documents of the investigation – except. the minutes on the questioning of the defendant and the expert opinion – before the court procedure. Therefore, the opportunity on skipping the mentioned term is unjustifiable, it shall amend in the near future. Our de lege ferenda proposal of this topic can be found in the conclusions.

The right to use of native language

According to the Article 6. Par. (3) of the European Convention on Human Rights "everyone charged with a criminal offence has the minimum right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". The mentioned principle can be found in the Article of the Charter on Fundamental Rights of the European Union as well. This rule – in connection with the principle of fair trial – clearly shows that the defendants have the right to use their native language or other spoken language during the criminal procedure. Moreover, the aim of the European Union is to enhance the mutual cooperation between the Member States and the principle of fair trial and the mutual recognition of the judgments and other judicial decisions

in the civil and criminal matters can be found in the center of it. The ground of the mutual recognition is to ensure that the Member States have trust in each other's criminal justice system which requires to set minimum standards concerning the fundamental procedural principles – among others the right to use of the native language.

In the European legislation the Directive 2010/64/EU of the European Parliament and of the Council on the right the interpretation and translation in criminal proceedings was adopted on 20 October 2010 (hereinafter: Directive) set minimum standards for the Member States referring to the mentioned procedural right. The Directive concerns three questions: the right to the qualitative interpretation, the right to the qualitative translation of essential documents, and the other procedural obligations [1]. To show the legal problem with reference to the special criminal procedure mentioned by our paper, the right to translation of essential documents shall be highlighted. According to the Article 3. Par. (1) of the Directive: "*Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation"* of all essential documents. These documents which guarantee the fair trial are the following: any decision depriving a person of his liberty, any charge or indictment, and any judgment.

The general rules referring to the right on the use of the native language meet the above-mentioned requirements in the new Code. According to the Sec. 8. Par. (3) and the Sec. 78. Par. (1)-(2) of the new Code the meaning of this principle can be summarized by the following. Not knowing the Hungarian language shall not be ground for discrimination. In the criminal procedure all those involved may use, both verbally and in writing as well their native, or their regional or minority language, or another language defined by the party concerned as a language spoken. It shall be emphasized that the scope of this principle is wider in the Hungarian law than in the Directive, and - in accordance with the Directive – waiver the right to the written translation is not allowed for the defendant with reference to the following documents: the accusation and all of the conclusive decisions /Sec. 423. Par. (2) and Sec. 455. Par. (6) of the new Code/.

However, there is a special rule concerning the procedure started because of a crime against the closing of the border. According to the Sec. 833 of the new Code the defendant has the right to waiver the translation of the accusation and the judgment. It shall be emphasized that the above-mentioned amendment of the new Code fits for the requirement of the Directive. Namely the right to waiver the written translation is declared by Article 3. Par. (8) of the Directive. However, the mentioned new rule is not coherent and makes – causeless - difference between the court's conclusive decisions concerning the right to translation. Namely, the mentioned rule deals with only the judgment and does not deal with the other conclusive decisions, for example decision on termination of the procedure, conclusive decisions of the court of appeal, decision made in procedure based on the omission of the trial, etc. Namely, the obligation of the authorities on the translation will be shared as the decision on the waiver the translation of the

defendant may be which can be regarded as unjustified. If the defendant will exercise the right of the waiver, it will not be obligatory to translate the accusation and the judgment (See Sec. 833 of the new Code) in contrast with the other conclusive decisions /See Sec. 455. Par. (6) of the new Code).

The mentioned anomaly can be summarized by the following. According to the general rule translation of the decisions and other official documents to be served is obligatory for the defendant who does not know the Hungarian language excepting if the defendant takes advantage of the right to waiver the written translation. This exception is not applicable concerning the accusation and the conclusive decisions. However, the criticized regulations can be found in the chapter of special procedural rules on crimes against the closing of borders inserted into the new Code connected with the fight against irregular migration. Although the most relevant anomaly that can be found in the Act in force was detected by the legislator during the codification of the new Code, the regulations which will come into force on 1 July 2018 can not be regarded as perfect. Namely, according to the new Code, the defendant will have the right to waiver the translation concerning the accusation and the judgment, however, the translation in writing of the other conclusive decisions will be obligatory. Therefore, a groundless difference will be made by the new Code which will have to be modified in the near future – if it is possible before the coming into force.

The next table summarizes the mentioned question:

Table 3.

	new Code
General procedural rules	Translation of the decisions and other official documents to be served is obligatory excepting the right to waiver the written translation. This exception is not applicable concerning the following essential documents: accusation and the conclusive decisions
Special procedural rules on crimes against the closing of border	The defendant has right to waiver the translation concerning the accusation and the judgment, however the translation in writing of the other conclusive decisions is obligatory.

CONCLUSIONS

In our paper, three legal problems have been highlighted regarding the special criminal procedural regulations on the crimes against the closing of the border regulated by the new Hungarian Code on Criminal Procedure. Seeing that on the one hand a lot of criminal procedures were started because of the mentioned crimes, and on the other hand, these criticized rules concern basically the fundamental procedural rights and principles, according to our opinion the mentioned rules shall amend or delete in the near future.

In respect to the mentioned legal problem on the right to the efficient defense, it would be necessary to declare unequivocally that investigatory actions which the defense counsel shall participate in person during the whole period of the action in. The efficiency of the defense would be guaranteed by the legislator with this amendment. Therefore, our *de lege ferenda proposal* relating to the Sec. 829 of the new Code – as a conclusion of the mentioned topic – is the following: *"In the criminal procedure started because of a crime against the closing of border the participation of the defense counsel is obligatory. The presence of the defense counsel is obligatory during the whole period of the following investigatory actions: (a) the questioning of the defendant; (b) the evidentiary procedure if the defendant takes part in it as well."*

In connection with the right to inspect the documents of the investigation, it shall be underlined that the opportunity on skipping the mentioned term is unjustifiable. The legislator shall open the door for the defendant and the defense counsel to inspect the investigatory documents before the court procedure. Therefore, according to our opinion, the mentioned opportunity shall delete in the new Code. Considering that in most cases the prosecutor shall arraign the defendant committed a crime against the closing of the border to the court within fifteen days from the questioning of the defendant, the opportunity to shorten the general term (no later than one month before the accusation) on handing the investigatory documents to the defendant and the defense counsel is undisputed.

According to our opinion the mentioned special regulations on the right to the writing translation shall rethink concerning the new Code. The amendment could be two possible ways. At first, it is worth considering to repeal the mentioned special procedural rule referring to the right to the translation. Namely, the first possible solution is deleting of the criticized regulations, thereby it could be clarified that the general rules shall be applied by the authorities during the criminal procedure on crimes against the closing of border as well.

The second legal solution is if the legislator will amend the criticized regulation of the new Code and clarify that there is no difference between the conclusive decisions concerning the defendant's right to waiver the translation. It would be necessary in accordance with the Directive and the obligation on implementation of the Hungarian State as well. According to our opinion clarifying that the right to waiver the translation concerns only the writing translation would be also necessary. Therefore our *de lege ferenda proposal* relating to the Sec. 833.§ of the new Code – with reference to the criminal procedure on crimes against closing of border - is the following: *"The defendant has right to waiver the writing translation concerning the accusation and the conclusive decisions".*

It shall be underlined that the legislator often uses the criminal law and the criminal procedure law to solve a social problem. Therefore, it often appears that the rapid legislation serves mainly political aims and the practice shows the anomalies in the system of the new regulations. We hope that the legal problems mentioned in our paper will be solved by the Hungarian legislator in the near

future, and the criticized regulations will be repealed or amended in accordance with our legal traditions and our European commitments.

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