



People Smuggling in Hungarian Criminal Law



Gyula Gaál

PhD, Head of Office, senior police adviser,
police colonel
Baranya County Police Headquarters
gaalg@baranya.police.hu



Abstract

Aim: By providing a detailed analysis of the current legal framework for smuggling of human beings, the study may help to improve the practical application of the law.

Methodology: The study presents, describes and interprets the legal definition of the crime of people smuggling.

Findings: In Hungarian criminal law, the regulation of the offence of people smuggling is part of a permanent legislative process, which cannot be completed even today. The legislator, based on the principle of protection of society, has criminalised the activity of people smuggling as human behaviour dangerous to society and provides for a penalty to be imposed on persons committing this crime.

Value: The value of the study is that, by presenting Hungarian criminal legislation, it can serve as an example for other states.

Keywords: people smuggling, financial gain, criminal law, state border

Introduction

In the process of Hungarian legislation, people smuggling as a *sui generis* crime was regulated in the Criminal Code in the middle of the 20th century. The legislator classified the form of facilitating illegal border crossing as an independent crime and penalised it more severely than the offence from which it originated.

The Hungarian version of the publication was published in *Belügyi Szemle* 2023/11. DOI: <https://doi.org/10.38146/BSZ.2023.11.11>. The publication was submitted to the Editorship in Hungarian.

Criminal Law Interpretation of People Smuggling

People smuggling first appeared as a separate offence against public safety in section 204 of Act V of 1961. The reason for making it an autonomous offence is that facilitating an illegal border crossing is more dangerous to society than the illegal border crossing itself, since on the one hand there is a risk of further criminal activity on the part of the abettor and on the other hand the person who engages in such conduct usually obtains substantial unlawful benefits without performing socially useful work (Földvári, 1972).

The definition of people smuggling has changed several times over the past decades. The new Criminal Code, promulgated by Act C of 2012, entered into force on 1 July 2013 and included people smuggling among the offences against the rules of public administration.

Act CXL of 2015, which was enacted in response to mass immigration, ensures the ordered conditions at Hungary's state border by introducing three new offences into the Criminal Code (illegal crossing of a border barrier: Section 352/A, damaging a border barrier: Section 352/B and obstruction of the construction work related to a border barrier: Section 352/C).

Furthermore, the Act, which entered into force on 15 September 2015, has significantly aggravated both the basic and the qualified cases of people smuggling. *'Section 353 (1) Any person who assists another person to cross a state border in violation of the provisions of law shall be punished for the offence by imprisonment for a term of one to five years.*

- (2) The punishment shall be imprisonment for a term of two to eight years if the people smuggling is committed*
 - a) for pecuniary gain,*
 - b) assisting several persons in crossing a state border, or*
 - c) by destroying or damaging a facility or means for the protection of the legal order at the state border.*
- (3) The penalty shall be imprisonment for a term of five to ten years if the people smuggling is committed*
 - a) by tormenting the smuggled person,*
 - b) armed,*
 - c) carrying a deadly weapon,*
 - d) in a business-like manner or*
 - e) in a criminal conspiracy.*
- (4) The penalty shall be imprisonment for a term of five to fifteen years if*
 - a) the people smuggling within the meaning of paragraph (3)(a) is committed in the manner set out in paragraphs (b) to (e)*

- b) the people smuggling within the meaning of paragraph (3)(b) is committed in the manner set out in paragraphs (a) or c) to (e).*
- (5) The person organising or controlling the offence under subsection (3) or (4) shall be punishable with imprisonment for a term of ten to twenty years.*
- (6) Whoever commits preparation for people smuggling shall be punished with imprisonment for a term of up to three years.’ (Criminal Code)*

The legal object of the offence is the state’s interest in the inviolability of the state border and the enforcement of border policing regulations, so that everyone should cross the state border only if they meet the conditions (authorisation) laid down by law or an international treaty.

The conditions for crossing the state border are regulated partly by an international treaty, the Convention Implementing the Schengen Agreement, and partly by Hungarian law, namely Act LXXXIX of 2007 on the state borders and Act II of 2007 on the entry and residence of third-country nationals.

The state border defines the area of state sovereignty, within which the state exercises its unlimited and indivisible supreme power. The territory of Hungary is delimited by a set of imaginary planes passing vertically through the surface of the Earth (hereinafter referred to as the ‘state border’). The line of the state border on the surface of the Earth is defined by international treaties, which must be promulgated by law.¹ The border line is the intersection of the state border and the surface of the Earth.² The border of Hungary is marked by border markers placed on the terrain.

The wrongful conduct in question is assisting another person to cross the state border in violation of the provisions of the law, i.e., aiding and abetting and is a criminal offence under section 14(2) of the Criminal Code. The legislator regulates the act of the abettor related to the minor offence of illegal border crossing as a separate delict because of its increased danger to society.

Assistance is any conduct that may be used to establish aiding and abetting. Assistance may be physical or psychological. For example, physical assistance is when the offender transports the person intending to cross the border to a point near the state border or when this person reports for crossing at the border crossing point hidden in the abettor’s vehicle. Psychological assistance is for example the provision of appropriate information, advice or guidance to the person planning to cross the border illegally.

1 Act LXXXIX. of 2007 on the state border, Section 1, subsections (1)-(2).

2 Act LXXXIX. of 2007 on the state border, Section 1, subsection (3).

The wrongful conduct can only be an active performance. It can be accomplished by crossing the state border either by entering or by exiting a country. The legal fact is such that it is irrelevant which country's border is crossed.

Anyone who assists a third-country national who does not hold a valid travel document authorising him to cross a state border to enter another Schengen Member State commits the crime of people smuggling, regardless of whether or not there is border control at this 'internal' border.³ The smuggling of human beings is completed when the offence is committed, irrespective of whether the border was actually crossed or of how far the assistance was provided from the border (Erdősy et al., 2002).

An attempt to commit this offence can be established if the offender has already contacted the persons concerned for the purpose specified in the law but has not yet provided further assistance (Belovics et al., 2002).

Anyone can be a subject of this offence. There is also no obstacle to establishing complicity if several persons, knowing of each other's activities and complementing each other's activities, assist somebody in crossing the state border illegally.

In principle, there is also no obstacle to establishing incitement. Such a qualification may be made if someone persuades the person providing the assistance to assist in the above manner. The instigator must of course also know how the border was (is going to be) crossed (Erdősy et al., 2002).

The offence can only be committed intentionally. The perpetrator must be aware of all the objective elements of the offence, i.e. a person or several persons intend to cross the border of any country unlawfully, and he or she assists in this by his or her conduct.

The offence comprises eleven qualifying circumstances altogether, at four levels of seriousness (CC 353. §).

- The aggravated case referred to in paragraph (2)(a) is the offence of intent to obtain property gain, in the light of which this aggravated offence may be committed with direct intent. In the case of people smuggling, intent to obtain property gain includes any activity aimed at enrichment, whether it is the demand for active property or the reduction of passive property. An intent to obtain property gain can be established where the offender provides assistance in return for financial consideration or benefit, or in exchange for the remission of a debt. However, its actual acquisition is not necessary for the commission of the completed offence. It is irrelevant for the establishment of the offence whether the material benefit was actually obtained.

3 Curia of Hungary ruling in principle regarding criminal law No. 14/2013.

- Paragraph (2)(b) establishes a single criminal offence (*delictum complexum*) for the case where the offender accomplishes people smuggling by assisting several persons to cross the state border. This qualifying circumstance is met if at least two persons are assisted in crossing the border illegally. Where the offender assists several persons to cross the state border, a single count offence shall be established as defined in this paragraph, rather than a multiple counts offence.
- A qualified case within the meaning of paragraph (2)(c) is an offence committed by destroying or damaging a facility or means for the protection of ordered conditions at the state border. According to section 5 subsection (1) of Act LXXXIX of 2007 on the state border, *'the 60-metre strip of the territory of Hungary from the border line or border marker marking the external border as defined by Article 2 paragraph (2) of the Community Code may be used for the construction, installation and operation of facilities ensuring the protection of ordered conditions at the state border, including facilities pursuant to section 15/A, and for the performance of defence, national security, disaster management, border surveillance, asylum and aliens policing tasks pursuant to this Act.'*
- The cases punishable more severely are set out in subsection 3. Paragraph (3)(a) covers the offender who commits the offence of people smuggling by tormenting the smuggled person. The offence is committed by tormenting if the offence causes the smuggled person physical or mental suffering or distress. This includes starvation, deprivation of water or liquids, keeping somebody in inhumane conditions such as in a dark, unheated room, threats to life, or communication of untrue information about relatives which is likely to cause terror or grief.
- Under subsection 3, paragraph (b), an offence committed with a weapon is similarly serious. Section 459 subsection (1) paragraph (5) of the Criminal Code provides that an offence is committed by an armed person if he possesses a functioning firearm, explosive material, blasting agent or a device intended for the use of a blasting agent. The provisions relating to armed offences shall also apply where the offence is committed by threatening with the imitation of any of the foregoing. The definition of a firearm is laid down in section 2 subsection (16) of Act XXIV of 2004 on firearms and ammunition, which defines a firearm as a gun or an air weapon from which a solid projectile with muzzle energy of more than 7.5 joules can be discharged. Explosive material shall mean any substance, mixture or compound specially produced for the purpose, which, under the action of any mechanical, thermal, electrical, chemical action or signal, is transformed

in a very short time by the application of intense heat, light, sound, pressure or tension, and thus produces a destructive effect. A blasting agent is a substance or mixture of substances which stores a very large amount of chemical energy and is capable of releasing a large amount of energy in a very short time during combustion, i.e., of exploding.

- Under paragraph (3)(c), offences committed while carrying a deadly weapon are also punishable as serious offences. Section 459 subsection (1) paragraph (6) of the Criminal Code provides that a person who possesses an instrument capable of taking life in order to overcome or prevent resistance commits this offence.
- Paragraph (3)(d) assesses the offence committed in a business-like manner in the same way as in the previous cases. The concept of business-like conduct is defined in section 459 subsection (1) paragraph (28) of the Criminal Code, according to which a person who seeks to obtain a regular profit by committing the same or similar offences commits an offence in a business-like manner. According to judicial practice, people smuggling is committed in a business-like manner if the offender commits the offence as a member of an organisation formed for this purpose, albeit for the first time.
- Paragraph (3)(e) criminalises committing the offence in conspiracy. According to section 459 subsection (1) paragraph (2) of the Criminal Code, a criminal conspiracy is formed when two or more persons commit or agree to commit criminal offences in an organised manner and attempt to commit at least one criminal offence, but no criminal organisation is formed.
- Pursuant to paragraph (4)(a) the offence of people smuggling completed by tormenting the smuggled person shall be punishable with an even more severe penalty if committed armed, carrying a deadly weapon, in a business-like manner or in a criminal conspiracy.
- Paragraph (4)(b) assesses armed people smuggling in the same way as in the previous cases, if it is carried out by tormenting the smuggled person, carrying a deadly weapon, in a business-like manner or in criminal conspiracy.
- Under subsection (5), the most serious punishment shall be imposed on the organiser or controller of the offence of people smuggling.

The preparation for people smuggling is also punishable, so it applies to anyone who, with a view to committing the offence, provides the necessary or facilitating conditions, invites, offers, undertakes or agrees to commit the offence jointly. Preparation for people smuggling, as defined in both the basic and the qualified cases, is subject to punishment. According to judicial practice, a person who undertakes to escort others across the state border (but these persons

are apprehended when attempting to cross the border illegally) is a person who performs the preparations for people smuggling.

As a supplementary punishment, expulsion may also be imposed under section 364 of the Criminal Code. Under section 57 of the Criminal Code, in cases provided for by law, a person whose presence there endangers the public interest may be expelled from one or more settlements or from a specified part of a settlement or of the country. The shortest duration of the expulsion is one year and the longest is five years. As a supplementary punishment, the expulsion restricts the offender's right to choose his place of residence. There are two main limits to the application of the expulsion. Firstly, it can be used as a secondary punishment only for certain offences defined by law. The other significant limitation is that it cannot be imposed as a secondary punishment to punishments other than imprisonment. The imprisonment does not necessarily have to be enforceable; the expulsion may be imposed in addition to a suspended custodial sentence.

Regarding single or multiple counts issues, people smuggling can be cumulated with other offences, such as the offence of forgery of documents.

The offence is cumulative if the assistance constitutes an offence other than smuggling of human beings, for example, the offences of falsifying a passport for the purpose of facilitating the departure of a person abroad for consideration, the offences of bribery of a public official in breach of duty and of forgery of a document by a public official, will also be qualified as people smuggling if the person has left the country using the falsified passport.

If the smuggled person dies or suffers bodily injury in the course of the smuggling, depending on the offence, the cumulative offence of intentional or negligent homicide or bodily harm may be established together with the basic case of people smuggling.

People smuggling is distinguished from the facilitation of unlawful stay (Criminal Code, section 354). While the latter is committed for property gain, only for the purpose of unlawful stay in the country, but does not in any way facilitate entry, people smuggling, which does not in principle involve property gain, not only facilitates stay in the country, but also the crossing of the state border, either on the entry or the exit side, in an illegal or unauthorised manner. The offender's act may also facilitate the unlawful crossing of the border by a person whose stay in the country is not otherwise unlawful.

Summary

In Hungarian criminal law, the regulation of people smuggling is part of a permanent legislative process, which cannot be concluded at present. Based on the principle of the protection of society, the legislator has criminalised the activity of people smuggling, an act subject to punishment as a human behaviour dangerous to society.

This migration-based illegal activity should be expected in the coming years. The fight against people smuggling requires not only a strong legal framework, but also more coordinated and effective international cooperation, including systematic security checks by EU Member States against relevant databases, in particular SIS II, INTERPOL, VIS and the national police databases, with the support of Frontex and Europol.⁴

References

- Belovics, E., Molnár, G. & Sinku, P. (2002). *Büntetőjog Különös Rész* [Criminal Law, Special Part]. HVG-ORAC.
- Erdős, E., Földvári, J. & Tóth, M. (2002). *Magyar Büntetőjog Különös Rész* [Hungarian Criminal Law, Special Part]. Osiris Kiadó.
- Földvári, J. (1972). *Büntetőjog Különös Rész* [Criminal Law, Special Part]. Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kar, Tankönyvkiadó.

Laws and Regulations

- Act V of 1961 on the Criminal Code of the People's Republic of Hungary
- Act XXIV of 2004 on firearms and ammunition
- Act II of 2007 on the entry and residence of third-country nationals
- Act LXXXIX of 2007 on the state borders
- Act C of 2012 on the Criminal Code
- Curia of Hungary ruling in principle regarding criminal law No. 14/2013
- Council conclusions on migrant smuggling – Council conclusions (10 March 2016)

Reference of the article according to APA regulation

- Gaál, Gy. (2023). People Smuggling in Hungarian Criminal Law. *Belügyi Szemle*, 71(SI3), 121–128. <https://doi.org/10.38146/BSZ.SPEC.2023.3.11>

4 See the Council of the European Union conclusions on trafficking in human beings of 10 March 2016.