Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 5 December 2019[1]

Case C-564/18

LH
v
Bevándorlási és Menekültügyi Hivatal

(Request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary))

(Preliminary reference — Common policy on asylum and subsidiary protection — Common procedures for granting international protection — Directive 2013/32/EU — Article 33 — Grounds for inadmissibility — Exhaustive nature — Article 46(3) — Article 47 of the Charter of Fundamental Rights of the European Union — Right to an effective remedy — Time limit of 8 days for the court or tribunal to decide)

I. Introduction

1. Directive 2013/32/EU[2] specifies five situations in which an application for international protection may be considered inadmissible. Two of those situations are relevant for this case: when a third country can be considered as a 'first country of asylum' or as a 'safe third country' in respect of the applicant concerned.

2. Can a Member State adopt a rule allowing its authorities to regard as inadmissible applications filed by applicants who arrive into that Member State through a third country that is considered a 'safe transit country', thus effectively adding another category to the list in Article 33 of Directive 2013/32?

3. Furthermore, can the judicial examination of administrative decisions that consider applications inadmissible be made subject to a time limit of 8 days?

1 Original language: English.

2 Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

II. Legal Framework

A. EU law

4. According to recital 43 of Directive 2013/32, 'Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies for international protection in accordance with Directive 2011/95/EU, except where this Directive provides otherwise, in particular where it can reasonably be assumed that another country would do the examination or provide sufficient protection. In particular, Member States should not be obliged to assess the substance of an application for international protection where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to that country.'

5. Recital 44 of Directive 2013/32 states that 'Member States should not be obliged to assess the substance of an application for international protection where the applicant, due to a sufficient connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country, and there are grounds for considering that the applicant will be admitted or readmitted to that country. Member States should only proceed on that basis where that particular applicant would be safe in the third country concerned. In order to avoid secondary movements of applicants, common principles should be established for the consideration or designation by Member States of third countries as safe.'

6. Article 33 of Directive 2013/32 concerns 'inadmissible applications'. It reads as follows:

'1. In addition to cases in which an application is not examined in accordance with Regulation (EU) No 604/2013, Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive 2011/95/EU where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for international protection as inadmissible only if:

(a) another Member State has granted international protection;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; or

(e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.'

7. Article 35 of Directive 2013/32 is about 'the concept of first country of asylum'. It states that:

'A country can be considered to be a first country of asylum for a particular applicant if:

(a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or

(b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*,

provided that he or she will be readmitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant, Member States may take into account Article 38(1). The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances.'

8. Article 38 concerns 'the concept of safe third country'. It states:

'1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) there is no risk of serious harm as defined in Directive 2011/95/EU;

(c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;

(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. The application of the safe third country concept shall be subject to rules laid down in national law, including:

(a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

…'

9. Article 46 deals with 'the right to an effective remedy'. It reads as follows:

'1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

…

(ii) considering an application to be inadmissible pursuant to Article 33(2);

…

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

…

10. Member States may lay down time limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.

…'

B. National law

10. Under Article 51(2)(f) of the menedékjogról szóló 2007. évi LXXX. törvény (Law No LXXX of 2007 on the right to asylum) ('the Law on the right to asylum'), an application is inadmissible when the 'applicant has arrived in Hungary via a country where he is not exposed to persecution within the meaning of Article 6(1) or the risk of serious harm, within the meaning of Article 12(1), or in which a sufficient degree of protection is guaranteed'.

11. Article 53(4) of the Law on the right to asylum provides that the judicial stage of the asylum procedure is to last no longer than 8 days in the case of applications declared inadmissible.

III. Facts, national proceedings and the questions referred

12. The applicant in the main proceedings is a Syrian national of Kurdish ethnicity, who made an application for international protection on 19 July 2018.

13. The competent asylum authority, the Bevándorlási és Menekültügyi Hivatal (Immigration and Asylum Office, Hungary) ('the Immigration Office'), held that the application was inadmissible, and declared the principle of *non-refoulement* inapplicable to the applicant's case. It directed that the applicant be returned from the territory of the European Union to the territory of the Republic of Serbia and ordered that the decision be enforced by removal. It also imposed a two-year ban on entry and residence on the applicant.

14. The applicant brought an action challenging that decision before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary), the referring court.

15. The applicant submits that the decision of the Immigration Office is unlawful and must be annulled. He further submits that a ruling must be given on the substance of his application for refugee status, given that Article 51(2)(f) of the Law on the right to asylum, pursuant to which the Immigration Office classified his application as inadmissible, infringes EU law. This is because it constitutes a new ground of inadmissibility based on the concept of 'safe transit country', which is not provided for in Article 33 of Directive 2013/32.

16. The Immigration Office contends, in essence, that Article 51(2)(f) of the Law on the right to asylum has to be assessed in its historical context: the legislature sought to devise rules that, among other things, responded to the difficulties stemming from considerable numbers of applicants.

17. Moreover, the referring court harbours doubts about the adequacy of the 8-day time limit within which it must complete the review of the Immigration Office's decision declaring the applicant's application inadmissible.

18. In those circumstances, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court) suspended the proceedings and referred the following questions to the Court:

'(1) May the provisions on inadmissible applications in Article 33 of [Directive 2013/32] be interpreted as not precluding a Member State's legislation pursuant to which an application is inadmissible in the context of the asylum procedure when the applicant has arrived in that Member State, Hungary, via a country where he is not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed?

(2) May Article 47 of the Charter of Fundamental Rights [of the European Union] and Article 31 of [Directive 2013/32] — having regard also to the provisions of Articles 6 and 13 of the European Convention on Human Rights — be interpreted as meaning that a Member State's legislation complies with those provisions when it lays down a mandatory time limit of eight days for the administrative-law proceedings before a court in respect of applications declared inadmissible in asylum procedures?'

19. The referring court requested that the present request for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court. By decision of 19 September 2018, the designated chamber of the Court decided not to grant that request.

20. The applicant, the German Government, the French Government, the Hungarian Government and the European Commission submitted written observations. With the exception of the French Government, they also participated in the hearing that took place on 11 September 2019.

IV. Assessment

21. In the first part of this Opinion, I will suggest that the list of (substantive) inadmissibility grounds in Article 33(2) of Directive 2013/32 is an exhaustive one. Since the additional ground of 'safe transit country' cannot be subsumed under the existing concepts of either 'first country of asylum' or 'safe third country', I am bound to conclude that Member States are indeed precluded from adopting such an additional ground of inadmissibility (A).

22. As for the second question, in a similar vein to my parallel Opinion in *PG* v *Bevándorlási és Menekültügyi Hivatal* (Case C-406/18) ('*PG*'), in the present case I will suggest that whether the prescribed 8-day time limit is adequate depends on whether it allows for the procedural rights of the applicant to be guaranteed. That must be assessed by the national court in the light of the specific circumstances of the case, having regard to its obligation to conduct a full and *ex nunc* examination,

but also within the overall circumstances and conditions under which that court is called upon to carry out its judicial functions. Should the national court conclude that having regard to those considerations, the time limit at issue cannot be met, that court must disapply the applicable time limit and complete the examination as swiftly as possible after that time limit has expired (B).

A. The first question: Grounds of inadmissibility

23. Under Article 51(2)(f) of the Law on the right to asylum, introduced as of 1 July 2018, an application is considered inadmissible when the applicant arrives in Hungary through a third country where he is not exposed to persecution or a risk of serious harm or in which '*a sufficient degree of protection is guaranteed*'.[3] Throughout this Opinion, I shall refer to this as the 'safe transit country' ground, similar to the shorthand used by the referring court, the applicant and the interested parties.

24. The Hungarian Government considers that this ground is compatible with the concept of 'safe third country' under Articles 33(2)(c) and 38 of Directive 2013/32. It emphasises the discretion of the Member States when transposing a directive and notes that in its previous version, the national legislation followed the text of Directive 2013/32 closely, which, however, proved unsatisfactory, especially during the migration crisis. The Hungarian Government further states that the current legislation aims at preventing forum shopping in asylum matters. According to that government, an asylum seeker must apply for asylum in the first country that is safe for him and not necessarily in the country that he considers the best for him. The new ground at issue reflects the fact that the asylum seeker cannot choose not to apply for international protection in a third country in which he sojourned.

25. All the other interested parties (as well as the referring court) point out that the 'safe transit country' ground for inadmissibility is not provided for in Article 33(2) of Directive 2013/32. They submit that the list in that article is clearly exhaustive and does not allow Member States to add additional categories.

26. I agree. It is nonetheless important to clarify at the outset that the concept of 'inadmissibility' in Article 33 of Directive 2013/32, discussed in the present case, refers to what might best be called 'substantive' inadmissibility as opposed to 'procedural' inadmissibility.

27. Article 33(2) of Directive 2013/32 provides that the Member States may consider an application for international protection inadmissible (and thus not examine it on the merits) in certain circumstances. The scenarios provided for in subparagraphs (a) to (e) of that article all aim at situations in which no (or no new) assessment of the merits of the application is necessary.[4] Such 'substantive' inadmissibility nonetheless differs from issues of general procedural inadmissibility, which can arise in various circumstances. In other words, the fact that the grounds for 'substantive' inadmissibility have been harmonised by means of Directive 2013/32 does not mean that the Member States are prevented from maintaining or introducing rules concerning different aspects of *procedural* (in)admissibility, such as those relating to the applicable time limits within which an action must be filed, the conditions for doing so, the capacity of persons to act, and so on.

3 Emphasis added.

4 See above, point 6.

28. Turning specifically to the grounds of substantive inadmissibility, I am indeed bound to conclude that Article 33(2) of Directive 2013/32 represents an exhaustive list in that regard. That conclusion clearly stems not only from the text of that provision ('Member States may consider an application for international protection as inadmissible only if …'), but also from the logic and the system of the directive,[5] and was recently confirmed by the Court, albeit in a slightly different context.[6]

29. Therefore, the question that remains to be considered is whether the 'safe transit country' ground can be subsumed under one of the inadmissibility grounds already listed in Article 33(2) of Directive 2013/32. Out of the five grounds provided for, only the following two could potentially come into play in the present context: 'first country of asylum' and 'safe third country', as further defined in Articles 35 and 38 of Directive 2013/32 respectively.

30. I shall now examine each of those two grounds in turn.

1. First country of asylum

31. The concept of 'first country of asylum' is defined in Article 35 of Directive 2013/32. It applies to two situations.

32. First, under Article 35(a) of Directive 2013/32, it covers a country in which the particular applicant has been recognised as a refugee and can still avail himself of that protection. That situation, involving refugee status already granted and still available to the applicant, clearly does not apply to the safe transit country ground and, based on the information available, is not relevant to the situation of the applicant.

33. Second, under Article 35(b) of Directive 2013/32, the concept of first country of asylum can concern a country in which the particular applicant 'enjoys sufficient protection', 'including benefiting from the principle of *non-refoulement*, provided that he or she will be readmitted to that country'.

34. Directive 2013/32 does not specify what is meant by 'sufficient protection'. The Court's judgment in *Alheto* nonetheless provides some guidance in that regard. In that case, the concept of 'sufficient protection' within the meaning of Article 35(b) of Directive 2013/32 was applied by the Court to the situation of a Palestinian applicant, registered with UNRWA,[7] who had left her place of habitual residence in the Gaza Strip for the Hashemite Kingdom of Jordan. She stayed there for a short time[8] before travelling to a Member State and filing an application for international protection there. UNRWA operates and is recognised on the territory of Jordan and the question essentially was whether Jordan could be considered as the applicant's first country of asylum.

35. In that specific context, the Court held that 'sufficient protection' within the meaning of Article 35(b) of Directive 2013/32 can be considered as provided to a person benefiting from effective protection or assistance from UNRWA if the given country 'agrees to readmit the person concerned after he or she has left its territory in order to apply for international protection in the European Union' and if that country 'recognises that protection or assistance from UNRWA and supports the principle of *non-refoulement*, thus enabling the person concerned to stay in its territory in safety under dignified living conditions for as long as necessary in view of the risks in the territory of habitual residence'.[9]

5 Systemically, as confirmed by recital 43 of Directive 2013/32, 'Member States should examine all applications on the substance …', which indicates that the cases in which it is possible to refrain from meeting that obligation must be treated as exceptions and interpreted restrictively.

6 Judgment of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 76).

7 United Nations Relief and Works Agency for Palestine Refugees in the Near East.

8 23 days. See Opinion of Advocate General Mengozzi in *Alheto* (C-585/16, EU:C:2018:327, point 85).

9 Judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 143).

36. Thus, similar to the situation under Article 35(a) of Directive 2013/32, the situation under paragraph (b) of the same provision relies on the premiss that the particular applicant can *already* benefit from some degree of protection, which can still be made available to him. [10]

37. That somewhat 'retrospective' dimension to the international protection already provided (and still available) to the applicant within the meaning of Article 35(b) is further confirmed by the title of the entire provision (*first* country of *asylum*) and by the explanations provided in that respect in recital 43 of Directive 2013/32.

38. Those elements make clear that the concept of 'first country of asylum' under Article 35(b) of Directive 2013/32 aims at something quite different from the notion of 'safe transit country'.

39. First, it is true that the rather general term 'sufficient protection', which is one of the defining elements of a 'first country of asylum' under Article 35(b) of Directive 2013/32, is also mentioned in the definition of 'safe transit country' under the national provision at issue. That being said, Article 51(2)(f) of the Law on the right to asylum does not explicitly require the *non-refoulement* principle to be guaranteed in the third country in question.

40. Second, and more fundamentally, I find it difficult to see how the mere fact of being able to transit through a country would confer any effective protection on the applicant, upon which the applicant could rely again when (and if) readmitted. The mere possibility of that applicant applying prospectively for international protection in that country is very different from protection already provided and that can still be made available, which is inherent in the concept of first country of asylum.

41. In the light of the foregoing, I conclude that the concept of 'safe transit country' cannot be considered as falling under or complying with the concept of 'first country of asylum' within the meaning of Articles 33(2)(b) and 35 of Directive 2013/32.

2. Safe third country

42. The application of the concept of 'safe third country' under Articles 33(2)(c) and 38 of Directive 2013/32 is subject to three general categories of conditions that can essentially be described as *principles*, *rules* and *guarantees*.

43. First, pursuant to Article 38(1)(a) to (e) of Directive 2013/32, the Member State must be satisfied that explicitly stated *principles* will be respected vis-à-vis the given applicant. They are: that life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; that there is no risk of serious harm as defined in Directive 2011/95/EU; [11] respect for the principle of *non-refoulement* in accordance with the Geneva Convention; [12] respect for the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law; and the existence of a possibility to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

10 See also Opinion of Advocate General Mengozzi in *Alheto* (C-585/16, EU:C:2018:327, point 84).

11 Directive of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

12 The Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951 (United Nations Treaty Series, vol. 189, p. 137, No 2545 (1954)), which entered into force on 22 April 1954. Supplemented and amended by the Protocol relating to the Status of Refugees, done at New York on 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention').

44. Second, the Member States are to provide for *rules* specifying that, under Article 38(2)(a), there must be *a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country*. Under Article 38(2)(b) of Directive 2013/32, those rules must also specify the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Finally, under Article 38(2)(c), rules must be put in place which comply with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant.

45. Third, as regards the *guarantees*, Article 38(2)(c) states that 'as a minimum', the rules in place must permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his particular circumstances. The applicant must also be allowed to challenge the existence of a connection between him and the third country. Furthermore, under Article 38(3), where a Member State takes a decision based solely on the concept of safe third country, it must inform the applicant accordingly and provide him with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance. Finally, under Article 38(4), where the third country does not permit the applicant to enter its territory, Member States must ensure that access to a procedure is given in accordance with the basic principles and guaranties described in Chapter II of Directive 2013/32.

46. During the course of the oral hearing, there was some discussion of whether the fact of transiting through a specific country may be considered as 'a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country' within the meaning of Article 38(2)(a).

47. I do not think that it can.

48. I admit that the text of Article 38(2)(a) of Directive 2013/32 does not provide much guidance on the meaning of the term 'connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country'. Recital 44 refers to a definition to be adopted by national law.

49. However, examining the immediate context of that concept of 'connection', I note that Article 38(2)(a) and (b) of Directive 2013/32 imposes an obligation on the Member States to adopt rules requiring that connection to exist, and to establish a methodology to assess the situation with respect to a particular applicant. If the mere fact of simple transit were enough to establish such a connection, why the elaborate requirements on principles, rules or guarantees?

50. As regards the broader context of Article 38(2)(a), I note that the concept of 'safe third country' is one of the three categories of countries (together with 'another Member State' and 'first country of asylum') to which an applicant may be directed to have his application for international protection examined. In other words, those concepts allow the Member States' authorities having received an application for international protection to shift the responsibility for the examination of the international protection needs of the applicant to another country.

51. First, this is an exception to the general rule according to which, in principle, all applications should be examined.[13] Like any other exception, it should be construed restrictively.[14]

13 See footnote 5 above.

14 See also Opinion of Advocate General Mengozzi in *Alheto* (C-585/16, EU:C:2018:327, point 78) concerning the legal predecessor of Directive 2013/32.

52. Second, the three categories of countries are not *any other* countries, but countries that offer specific guarantees, the existence of which is either presumed (as regards the Member States) [15] or verified according to the specified rules. Considering the rather detailed procedural regime put in place by Article 38(2) of Directive 2013/32, I am of the view that if the legislature wished to define the connection that is a key element of the 'safe third country' concept by reference to mere transit, such an intention would have been clearly stated. Again, if that were the case, the detailed procedural regime currently in place would be entirely redundant.

53. Third, the last sentence of Article 38(2)(c) provides that the applicant must be able 'to challenge the existence of a connection between him or her and the third country'. If that right is to have any meaning, the connection at issue must amount to something more than the fact of transiting, as otherwise the discussion would likely be limited to what kind of transit is decisive, whether by foot, by car, by bus or by plane and whether, for instance, a twenty-minute stopover in the course of which the potential applicant could have approached the officials of the country in question is enough to create the relevant connection.

54. There is a further aspect to the concept of 'safe transit country' under Article 51(2)(f) of the Law on the right to asylum, namely the requirement of 'sufficient protection'.

55. As already mentioned, unlike the concepts of first country of asylum and safe third country, Article 51(2)(f) of the Law on the right to asylum does not explicitly require that 'safe transit countries' guarantee the principle of *non-refoulement*, respect for which is required under the Geneva Convention and thus logically also under EU law. [16]

56. Therefore, the safe transit country ground as defined by the national law at issue relaxes the applicable standards on two accounts: as regards the strength of the link that must exist between the applicant and the third country concerned, and the level of protection that that country must offer. I am of the view that for both of those reasons, the 'safe transit country' ground provided for under Article 51(2)(f) of the Law on the right to asylum cannot be considered as corresponding to the concept of 'safe third country' listed in Article 33(2) of Directive 2013/32.

57. That conclusion is not affected by the fact that the recent proposal of the European Commission for an asylum procedure regulation [17] to replace Directive 2013/32 suggests, in draft Article 45(3)(a) concerning the concept of safe third country, that 'the determining authority shall consider a third country to be a safe third country for a particular applicant, after an individual examination of the application, only where it is satisfied of the safety of the third country for a particular applicant in accordance with the criteria established in paragraph 1 and it has established that: (a) there is a connection between the applicant and the third country in question on the basis of which it would be reasonable for that person to go to that country, *including because the applicant has transited through that third country which is geographically close* to the country of origin of the applicant …'. [18]

58. First, that text remains a legislative proposal. It is not (yet) a binding act of EU law.

59. Second, taking into account the content of the draft text on the concept of safe third country, the proposal tabled can hardly be seen as a clarification or codification of the current law on the matter. Rather, and the Commission conceded as much at the oral hearing, if adopted it would represent a clear change in the legal regime.

15 Judgment of 19 March 2019, *Ibrahim and Others* (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 85 and the case-law cited).

16 Article 33 of the Geneva Convention. See Article 78(1) TFEU and Article 21 of Directive 2011/95.

17 Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016)0467).

18 Emphasis added.

60. Third, the fact that the proposed version contemplates a substantial change going beyond a mere clarification of the existing concept appears to have resonated in the legislative process, during which doubts have been expressed as to whether the Commission's proposal fits well with the overall logic that underlies the concept of safe third country.

61. In that respect, I note that the relevant Committee of the European Parliament has proposed amending the draft text quoted above as follows: '(a) there is a sufficient connection between the applicant and the third country on the basis of which it would be reasonable for that person to go to that country; that means the existence of a previous residence or stay in that country, where, given the duration and nature of that residence or stay, an applicant may reasonably be expected to seek protection in that country, and there are grounds for considering that the applicant will be readmitted to that country; …' [19]

62. Similarly, the United Nations High Commissioner for Refugees ('UNHCR') considers that the 'safe third country' concept should not be defined in the way suggested by the Commission in the proposal. [20] UNHCR acknowledges that while 'international law does not require the existence of a meaningful link or connection, UNHCR has consistently been advocating for such a meaningful connection to exist that would make it reasonable and sustainable for a person to seek asylum in another country.' [21] It further suggests that 'taking into account the duration and nature of any sojourn, and connections based on family or other close ties increases the viability of the return or transfer from the viewpoint of both the individual and the third country. As such, it reduces the risk of irregular onward movement, prevents the creation of "orbit" situations and advances international cooperation and responsibility sharing.' [22]

63. The view that such a link may be considered to exist in the presence of some ties specific to the applicant, but certainly going beyond mere transit, is also reflected in previous positions that UNCHR has adopted on the matter. [23]

64. It is not the role of this Court to provide opinions on draft legislation. However, if the concept of safe third country is to have any independent meaning, the interpretation of that concept cannot lead to the quasi-automatic removal of applicants to countries through which they have travelled, producing a domino effect whereby the merits of a given application would never be examined anywhere. [24]

65. Thus, in the light of the above, my first interim conclusion is that Article 33(2) of Directive 2013/32 precludes national legislation of a Member State stating that an application is to be considered inadmissible when the applicant has arrived in that Member State through a third country where he is not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed.

19 Report on the proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Committee on Civil Liberties, Justice and Home Affairs, 22 May 2018 (COM(2016)0467 — C8-0321/2016 — 2016/0224(COD)).

20 UNHCR Comments on the European Commission Proposal for an Asylum Procedures Regulation (COM(2016)0467), April 2019. As the Court noted in the context of Directive 2011/95, 'documents from the [UNHCR] are particularly relevant in the light of the role conferred on the UNHCR by the Geneva Convention'. Judgment of 23 May 2019, *Bilali* (C-720/17, EU:C:2019:448, paragraph 57 and the case-law cited). See also judgment of 30 May 2013, *Halaf* (C-528/11, EU:C:2013:342, paragraph 44 and the case-law cited).

21 UNHCR Comments on the European Commission Proposal for an Asylum Procedures Regulation (COM(2016)0467), April 2019, p. 42.

22 Ibid.

23 See, for instance, UNCHR, 'Legal Considerations regarding access to protection and a connection between the refugees and the third country in the context of return or transfer to safe countries', April 2018, and 'Guidance note on bilateral and/or multilateral transfer agreements of asylum-seekers', May 2013.

24 See also recital 44 of Directive 2013/32, warning against secondary movements of applicants (which occurs when applicants for international protection move from the country in which they first arrived to seek protection in another country).

B. The second question: the adequacy of the 8-day time limit

66. By the second question, the referring court asks in substance whether Article 46(3) of Directive 2013/32, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'),[25] precludes legislation laying down a mandatory time limit of 8 days for a court or tribunal to complete its review of an administrative decision declaring an application for international protection inadmissible.

67. I deal with the issue of the time limits applicable to review by a court or tribunal in matters of international protection in general in my parallel Opinion in *PG*, delivered on the same day as the present Opinion. In my view, the propositions articulated therein with regard to a time limit of 60 days for review of decisions in matters of international protection on the merits are equally applicable, and in many instances even a fortiori, to a time limit of 8 days for decisions on inadmissibility.

68. In the present Opinion, I shall therefore focus only on the elements *that differentiate* the present case from *PG*, while referring, for the rest, to my analysis offered in that Opinion. I shall underline in particular that even when adopted in specific and accelerated proceedings, a decision applying one of the inadmissibility grounds cannot lead to a 'relaxed' standard of review (1). That fact, together with structural considerations similar to those in *PG*, leads me to the conclusion that should the referring court observe that, in the case in the main proceedings, the time limit of 8 days makes it impossible to complete a full and *ex nunc* review while guaranteeing that the applicant enjoys his rights flowing from Directive 2013/32 in particular, that court must disapply the relevant provision of national law and complete the judicial examination as quickly as possible after the time limit has expired (2).

1. The (limited) specific features of review on grounds of inadmissibility

69. In its order for reference, the national court notes that on many occasions the 8-day time limit cannot be observed, or can be observed only with great difficulty. It does not allow the court to clarify the facts to the requisite standard. It thus leads to an infringement of the requirement to conduct an exhaustive review. Completing the procedure within the period at issue is particularly difficult in the context of applications held inadmissible because the burden of proof rests almost exclusively on the applicants, who are already in a vulnerable position. The referring court also stresses the fact that its decision is not open to appeal.

70. In their written observations, the parties express divergent views on whether the 8-day time limit is adequate.

71. The applicant agrees with the referring court that the time limit at issue is impossible to respect in practice. He points out that the application in the main proceedings was processed under specific rules applicable in a crisis situation, and that other aspects of the procedure make it difficult to enforce the applicant's rights. He refers to the 3-day time limit to file an action and to the fact that, in practice, it is impossible to obtain an interview with the judge because such an interview has to be conducted in the transit zone via means of telecommunication that the judge does not have at his disposal. The applicant further stresses that an appeal against an administrative decision does not have suspensive effect unless applied for, which is not feasible without legal assistance. He also points to the need for the applicant to be given sufficient time to submit facts and to the fact that there may be just one interpreter in the whole country in respect of some languages. He also notes that the court must

25 The Court refers in its second question to Article 31 of Directive 2013/32, as well as to Articles 6 and 13 of the European Convention on Human Rights ('ECHR'). However, in view of the facts of the case (a case before a court) and the fact that the European Union is not a party to the ECHR, I shall understand that question as referring to Article 46 of Directive 2013/32 (which concerns the examination conducted by a court) and not to Article 31 (which concerns the examination at the administrative level), and to Article 47 of the Charter, read, by virtue of Article 52(3), in the light of the relevant provisions of the ECHR and the case-law of the European Court of Human Rights ('ECtHR').

make sure that the negative decision and the removal of the applicant do not lead to the violation of Article 3 ECHR. He concludes that while the time limit at issue is not as such incompatible with the requirement of effective judicial protection, incompatibility stems from the fact that it cannot be extended.

72. According to the Hungarian Government, in the absence of any common rules, it is for the Member States to lay down the applicable time limits, in accordance with the principle of procedural autonomy. There is an overall objective to deal with applications quickly. Moreover, dealing quickly with cases such as the present one makes it possible for the courts to focus more on those cases examined on the merits. That government considers that the time limit at issue is reasonable because in admissibility cases, the merits are not discussed and the questions dealt with do not require lengthy evidence to be produced.

73. The Commission observes that because Directive 2013/32 contains no common rules on time limits, the matter falls within the procedural autonomy of the Member States. In that context, it considers that the requirement of effectiveness is not complied with because the time limit at issue does not allow for individual circumstances to be taken into account. The Commission refers more specifically to draft Article 55 contained in its proposal for a regulation to replace the current Directive 2013/32,[26] in which it suggests, for situations such as the one in the main proceedings, a 2-month time limit that can be extended by a further 3 months. It is in the light of that proposal that the Commission considers 8 days to be inadequate.

74. First, it appears that the 8-day time limit is of the same procedural nature as the 60-day time limit at issue in *PG*.[27]

75. Second, the time limit at issue is different from and significantly shorter than the time limit of 60 days at issue in *PG*. That difference, regardless of the exact length, is not in itself problematic. In a similar context, the Court has acknowledged that the Member States may provide for different time limits in which the applicant has to bring an action, depending on whether the given type of decision is adopted in an ordinary or accelerated procedure.[28]

76. That observation can be applied *mutatis mutandis* to differences that may exist between the time limits for the court to complete its examination of a case depending on whether the court reviews the assessment made by the administrative body on the merits or on inadmissibility grounds only. Indeed, not all cases are the same.

77. Third, and perhaps most importantly in the context of the present case, the Court has acknowledged that by providing for grounds of inadmissibility, the legislature sought to 'relax the obligation of the Member State responsible for examining an application for international protection'.[29] Equally, the Court has stated that '… the full and *ex nunc* examination to be carried out by the court [under Article 46(3) of Directive 2013/32] need not necessarily involve a substantive examination of the need for international protection and may accordingly concern the admissibility of the application for international protection, where national law allows pursuant to Article 33(2) of Directive 2013/32.'[30]

26 COM(2016)0467. Currently pending as procedure 2016/0224(COD).

27 See further clarifications in my Opinion in *PG*, points 43 to 47.

28 The Court acknowledged that there might be an intention to process inadmissible applications for asylum more quickly, so that 'applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently'. Judgment of 28 July 2011, *Samba Diouf* (C-69/10, EU:C:2011:524, paragraphs 65 to 66).

29 Judgment of 17 March 2016, *Mirza* (C-695/15 PPU, EU:C:2016:188, paragraph 43).

30 Judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 115).

78. However, it is one thing to agree that the examination of administrative decisions might not involve a full examination of the merits where the challenge concerns the specific issue of the admissibility of an application. It is quite another thing to suggest that, in such a case, the standard of review and the procedural rights that applicants enjoy under Directive 2013/32 no longer apply.

79. Thus, when it comes to the right to have one's case examined by a court or tribunal within the meaning of Article 46 of that directive, in principle, applicants enjoy the same rights whether their application is reviewed as to its admissibility or on the merits.[31] Subject to the specific provisions of Directive 2013/32, the only matter that changes is what may be reviewed, but not the quality of that review.

2. A rights-oriented approach to assessing the adequacy of the time limit

80. In line with the suggestion in my Opinion in *PG*,[32] the time limit of 8 days ought to be examined in the context of the required standard of review and the specific procedural rights that applicants must be able to enjoy under EU law.

81. In the context of the present case, the applicant suggests that the time limit at issue should be assessed in the context of the whole procedure. He stresses in particular the 3-day time limit within which applicants must introduce an action before the court while in a transit zone. That additional fact further limits, in his view, the possibility of obtaining legal assistance or a personal interview with the judge, which in practice never happens because the court is not equipped with the necessary means of communication.

82. While those elements are for the referring court to assess, it is clear that such conditions, whereby an applicant's case is subject not just to one, but apparently to a string of strict time limits, will necessarily affect the quality of the submission. That in turn affects the work of the court,[33] which is nonetheless obliged to conduct a full and *ex nunc* review.[34]

83. Furthermore, applicants must be given the opportunity to challenge the application of the concepts of 'first country of asylum' or 'safe third country' to their particular circumstances,[35] which means that the application of those concepts must always be assessed on a case-by-case basis in the light of the specific situation of the applicant.

84. Fourth, and finally, in this case the referring court does not mention whether any of the rights guaranteed, in particular under Articles 12(1)(b) to (e), read in combination with Article 12(2) of Directive 2013/32, or under Articles 20, 22, 24 or 25 of the same directive have been infringed as a result of the time limit at issue.[36]

31 See, in this sense, judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 115).

32 See points 59 to 63 of that Opinion.

33 See, in this sense, ECtHR, 2 February 2012, *I.M. v. France*, (CE:ECHR:2012:0202JUD000915209, § 155).

34 See judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 115).

35 As regards the concept of 'first country of asylum', the last sentence of Article 35 of Directive 2013/32 states that 'the applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances.' As regards the concept of 'safe third country', pursuant to Article 38(2)(c) of Directive 2013/32, the Member States are to lay down rules 'in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a)'.

36 See my Opinion in *PG*, point 64.

85. Taking all of those elements together, my suggested answer to the second question posed in the present case is therefore similar to that given in *PG*: if, in the light of those elements, the national court observes that it is impossible to carry out the required review within the prescribed time limit, while respecting the applicant's rights guaranteed under EU law, that court must disapply the relevant provision of national law and complete the review as quickly as possible after the time limit has expired. [37]

86. Nonetheless, it ought to be added that in *PG*, under certain conditions (such as where the docket of the court or judge in question is light and all the technical means necessary are available to the court), the adequacy of the time limit of 60 days could be a matter for debate. [38] By contrast, a time limit of 8 days gives rise to more serious doubts as to its adequacy, even if a judge 'merely' has to review the assessment made by the determining authority in respect of one of the five inadmissibility grounds.

87. Indeed, the simple registration of a case with a court takes time, followed by the time necessary for the judge to familiarise himself with the file and give the necessary instructions, such as securing legal assistance and interpretation when necessary, organising an interview if needed, as well as obtaining the necessary information about the relevant third countries and the particular circumstances of the applicant. While I certainly do not doubt the efficiency of well-run judicial procedures, an ability to do all of that together with the subsequent examination of the case to the appropriate standard within 8 days, while of course having a number of other cases running in parallel, would be enough to make even Judge Hercules suffer from an inferiority complex.

88. In the light of those considerations, my second interim conclusion is that Article 46(3) of Directive 2013/32, read in the light of Article 47 of the Charter, is to be interpreted as meaning that whether the time limit for the review laid down by the national legislation is adequate in the case pending before the national court is a matter for the national court to assess, having regard to its obligation to conduct a full and *ex nunc* examination, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95, while guaranteeing the applicant's rights as defined, in particular, in Directive 2013/32. If the national court considers that those rights cannot be guaranteed, in the light of the specific circumstances of the case or the overall conditions under which that court has to carry out its tasks, such as a particularly high number of applications being lodged simultaneously, that court must disapply the applicable time limit as necessary and complete the examination as swiftly as possible after that time limit has expired.

V. Conclusion

89. In the light of the considerations above, I suggest that the Court reply to the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) as follows:

1. Article 33 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection is to be interpreted as precluding legislation of a Member State pursuant to which an application is inadmissible when the applicant has arrived in that Member State via a country where he is not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed.

37 With the clarifications provided in point 71 of that Opinion also being applicable here. I note that both Article 46(3) of Directive 2013/32 and Article 47 of the Charter have direct effect. See judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraphs 56 and 73), or (as regards only Article 47 of the Charter) judgments of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 78), and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 162).

38 See my Opinion in *PG*, points 65 to 69.

2. Article 46(3) of Directive 2013/32, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, is to be interpreted as meaning that whether the time limit for the review laid down by the national legislation is adequate in the case pending before the national court is a matter for the national court to assess, having regard to its obligation to carry out a full and *ex nunc* examination, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, while guaranteeing the applicant's rights as defined, in particular, in Directive 2013/32. If the national court considers that those rights cannot be guaranteed, in the light of the specific circumstances of the case or the overall conditions under which that court has to carry out its tasks, such as a particularly high number of applications being lodged simultaneously, that court must disapply the applicable time limit as necessary and complete the examination as swiftly as possible after that time limit has expired.