



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 4 May 2017¹

Case C-18/16

K.

v

Staatssecretaris van Veiligheid en Justitie

(Request for a preliminary ruling from the rechtbank Den Haag zittingsplaats Haarlem (District Court, The Hague, sitting at Haarlem, the Netherlands))

(Asylum policy — Standards for the reception of applicants for international protection — Directive 2013/33/EU — Article 9 — Detention — Points (a) and (b) of the first subparagraph of Article 8(3) — Verification of identity or nationality — Verification of elements on which application for international protection is based — Charter of Fundamental Rights of the European Union — Articles 6 and 52 — Proportionality)

1. By this request for a preliminary ruling the rechtbank Den Haag zittingsplaats Haarlem (District Court, The Hague, sitting at Haarlem, the Netherlands), asks the Court whether points (a) and (b) of the first subparagraph of Article 8(3) of Directive 2013/33/EU laying down standards for the reception of applicants for international protection² are valid. Essentially, the referring court wishes to know whether those provisions are compatible with the right to liberty and security enshrined in Article 6 of the Charter of Fundamental Rights of the European Union.³ That question has arisen in a dispute concerning a decision of 17 December 2015 ordering the detention in the Netherlands of Mr K., an asylum applicant who had been stopped and detained at Schiphol airport for using a false passport while en route to the United Kingdom.

¹ Original language: English.

² Directive of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 180, p. 96) ('the Reception Directive').

³ OJ 2010 C 83, p. 389 ('the Charter').

International law

The Geneva Convention relating to the status of refugees

2. Article 31(1) of the Geneva Convention⁴ prohibits the imposition of penalties on refugees coming directly from a territory where their life or freedom was threatened on account of their illegal entry or presence (or where they are present without authorisation), provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Article 31(2) states that restrictions must not be applied to the movements of refugees other than those which are necessary. Any such restrictions must only be applied until the refugee's status in the country is regularised or the refugee obtains admission elsewhere.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

3. Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵ guarantees the right to liberty and security of person. That right is qualified by a number of exceptions also laid down in Article 5(1), each of which must be 'subject to a procedure prescribed by law'. At issue in the present matter is whether the right to liberty is here, properly to be regarded as being qualified by the exception in Article 5(1)(f), which applies in cases of 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.

4. Interference with the right to personal liberty and security on the basis of the exceptions listed in Article 5(1)(a) to (f) must, in order to be legitimate, also comply with the guarantees laid down in Article 5(2) to (5) of the ECHR. In relation to an applicant for asylum, those guarantees include the prompt provision of information on arrest; the entitlement to take promptly proceedings challenging detention before the courts which are capable of securing his release (if that detention is unlawful); and an enforceable right to compensation where the provisions of Article 5 of the ECHR are contravened.⁶

EU law

The Charter

5. Article 6 of the Charter corresponds to Article 5(1) of the ECHR. It states that 'everyone has the right to liberty and security of person'.

⁴ The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, which entered into force on 22 April 1954 (United Nations Treaty Series, Vol. 189, p. 150, No 2545 (1954)), as supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 (together, 'the Geneva Convention'). The Protocol is not relevant to answering the present request for a preliminary ruling.

⁵ Signed at Rome on 4 November 1950 ('the ECHR').

⁶ See, respectively, Article 5(2), (4) and (5). Article 5(3) concerns individuals arrested or detained in accordance with Article 5(1)(c) where there is a reasonable suspicion that they have committed an offence or when it is necessary to prevent crimes from being committed. The European Court of Human Rights ('the Strasbourg Court') has ruled that that provision applies only in the context of criminal proceedings (see judgment of 31 July 2000, *Jėčius v. Lithuania*, CE:ECHR:2000:0731JUD003457897, §50). It is clear from the order for reference that Mr K.'s detention did not relate to criminal proceedings (see points 24 to 28 below). Therefore neither Article 5(1)(c) nor Article 5(3) of the ECHR is relevant to the present proceedings.

6. Article 52 of the Charter is entitled ‘Scope and interpretation of rights and principles’. It states:

‘1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

...

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.’

The Return Directive

7. Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals⁷ aims to provide a horizontal set of rules that apply to all third-country nationals who do not meet the conditions for entry, stay or residence in a Member State.⁸ Pursuant to Article 1, the directive ‘sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of [EU] law as well as international law, including refugee protection and human rights obligations’.

8. Article 2(1) states that the Return Directive applies to third-country nationals staying illegally within the territory of a Member State. A ‘third country national’ is defined in Article 3(1) as ‘any person who is not a citizen of the Union within the meaning of [Article 20(1) TFEU] and who is not a person enjoying the [EU] right of free movement as defined in Article 2(5) of the Schengen Borders Code’.⁹ A ‘return decision’ is defined in Article 3(4) as ‘an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return’.

⁷ Directive of the European Parliament and of the Council of 16 December 2008 (OJ 2008 L 348, p. 98) (‘the Return Directive’).

⁸ Recital 5.

⁹ The categories of individuals enjoying the right to freedom of movement within EU territory for the purposes of Article 3(1) of the Return Directive are defined in Article 2(5) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1). That act repealed and replaced the provisions of Regulation (EC) No 562/2006, which was the earlier version of that code. Those categories include EU citizens within the meaning of Article 20 TFEU and their third-country national family members where the EU citizen concerned exercises rights to freedom of movement. They also include third-country nationals and their family members who, under agreements between the European Union and its Member States and the relevant third-country, enjoy rights to freedom of movement equivalent to those of EU citizens (those countries are Iceland, Liechtenstein, Norway and Switzerland).

The Qualification Directive

9. Directive 2011/95/EU¹⁰ lays down the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.¹¹ Under Article 2(h), an application for international protection is defined as ‘a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of [that directive], that can be applied for separately’.

10. Article 4(1) provides that Member States may consider it to be the duty of applicants to submit as soon as possible all elements needed to substantiate an application for international protection. In accordance with Article 4(2), those elements consist of the applicant’s statements and ‘all the documentation at his disposal regarding his age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection’. Under Article 4(3), the assessment of applications for international protection is to be carried out on an individual basis and is to take account of: relevant facts relating to the country of origin at the time of taking a decision on an application; relevant statements and documents presented by an applicant; and his individual position and personal circumstances, including background, gender, and age.¹² In that regard, recital 22 states that ‘consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status’.

11. The grounds for exclusion from refugee status are listed in Article 12. The effect of applying those grounds is to deprive an applicant of the protection of refugee status. They therefore constitute an exception to the right to asylum in relation to a person who would otherwise fall within the scope of that protection.¹³

The Procedures Directive

12. Pursuant to Article 9(1) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection,¹⁴ applicants must be allowed to remain in a Member State pending examination of requests for such protection.

13. Article 10 lays down certain requirements for that examination. These include the need to examine, first, whether applicants qualify as refugees and, if not, whether they are eligible for subsidiary protection; to ensure that there is an appropriate examination of the application; and to ensure that any such examination and subsequent decision is taken individually, objectively and impartially.¹⁵

14. In accordance with Article 13, Member States must impose on applicants an obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) of the Qualification Directive.

15. Particular guarantees are provided for certain applicants by Article 24, and the position of unaccompanied minors is covered by Article 25.

¹⁰ 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) (‘the Qualification Directive’).

¹¹ Article 1.

¹² See Article 4(3)(a),(b) and (c) respectively.

¹³ I have not listed the individual grounds, since only the concept of exclusion from refugee status is relevant to the case at issue.

¹⁴ Directive of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 180, p. 60) (‘the Procedures Directive’).

¹⁵ See, in particular, Article 10(2) and (3)(a).

16. Article 26(1) echoes Article 31 of the Geneva Convention, in so far as the general position is that Member States are prohibited from holding a person in detention for the sole reason that he is a third-country national requesting international protection while any such application remains pending. Where an applicant is detained, the grounds and conditions for his detention and the guarantees available must be in accordance with the Reception Directive.

17. Pursuant to Article 33 of the Procedures Directive, Member States may consider an application for international protection to be inadmissible in certain circumstances, including where another Member State has already granted international protection as set out in Article 33(2)(a).

The Reception Directive

18. The following statements are made in the recitals to the Reception Directive:

- A common policy on asylum, including a Common European Asylum System ('the CEAS'), is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the territory of the European Union.¹⁶
- The CEAS is based on the full and inclusive application of the Geneva Convention.¹⁷
- Member States are bound by obligations under instruments of international law to which they are party in respect of the treatment of persons falling within the scope of the Reception Directive.¹⁸
- The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both the manner and the purpose of such detention. Where an applicant is held in detention, he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.¹⁹
- The notion of 'due diligence' requires as a minimum that the administrative procedures relating to the grounds for detention are carried out in the shortest possible time, particularly as regards taking 'concrete and meaningful steps' to verify the grounds for detention. An applicant's detention should not exceed the time reasonably needed to complete the relevant procedures.²⁰
- In order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants.²¹
- The Reception Directive respects the fundamental rights and observes the principles recognised in particular by the Charter.²²

¹⁶ Recital 2.

¹⁷ Recital 3.

¹⁸ Recital 10.

¹⁹ Recital 15.

²⁰ Recital 16.

²¹ Recital 20.

²² Recital 35.

19. Article 2(a) incorporates the definition of an ‘application for international protection’ set out in the Qualification Directive into the Reception Directive. An ‘applicant’ is defined in Article 2(b) as ‘a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken’.²³ Article 2(h) defines ‘detention’ as the ‘confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement’.

20. Pursuant to Article 3(1), the directive applies to ‘all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law’.

21. In accordance with Article 8:

‘1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with [the Procedures Directive].

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

- (a) in order to determine or verify his or her identity or nationality;
- (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

...

The grounds for detention shall be laid down in national law.

...’

22. Certain guarantees for detained applicants are provided by Article 9. These include requirements that:

- applicants must be detained only for as short a period as possible and kept in detention only for as long as the grounds in Article 8(3) are applicable (Article 9(1));
- the detention of applicants must be ordered in writing by the competent authorities and the detention order must state the reasons in fact and in law on which it is based (Article 9(2));
- Member States must provide for a speedy judicial review of the lawfulness of detention pursuant to (Article 9(3));
- detained applicants must be immediately informed in writing in a language which they understand (or might be supposed to understand) of the reasons for detention and the procedures for challenging such decisions (Article 9(4));

²³ The same definition is also used in Article 2(i) of the Qualification Directive and Article 2(c) of the Procedures Directive.

- detention is subject to review by a judicial authority (Article 9(5)); and
- applicants should be entitled to free legal assistance and representation in order to lodge a challenge under Article 9(3) (Article 9(6) and (7)).

National law

23. Article 59b(1)(a) and (b) of the Vreemdelingenwet 2000 (Law on Foreign Nationals of 2000; ‘the Vw’) states:

‘1. A foreign national who is legally resident on the grounds of Article 8(f) ..., [²⁴] in so far as it relates to an application for the issue of a residence permit of limited duration issued to persons granted asylum, may be detained by [the Minister for Security and Justice], if:

- (a) detention is necessary in order to determine the identity or nationality of the foreign national;
- (b) detention is necessary in order to determine those elements required for the assessment of an application for the issue of a residence permit of limited duration as ... in particular if there is a risk of absconding;

...

2. The detention under paragraph 1(a) [or] (b) ... shall not last longer than four weeks ...’

Facts, procedure and questions referred

24. The main proceedings concern Mr K. (‘the applicant’), an Iranian national. He arrived at Schiphol Airport, Amsterdam (the Netherlands), on 30 November 2015 on a flight from Vienna (Austria). His intention was to fly to Edinburgh (United Kingdom) on the same day. Checks at passport control carried out before he boarded the Edinburgh flight raised suspicions that he was using a false passport. Those suspicions were confirmed by further checks which established that his passport was indeed false.

25. He was placed in detention whilst criminal proceedings were taken against him in relation to the false passport that he had presented to the Netherlands’ authorities. The referring court states that there is nothing to suggest that he was placed in detention in order to prevent his unlawful entry into the Netherlands. Rather, his initial detention related to his arrest on suspicion of having committed a criminal offence (or criminal offences). The exact nature of the charge(s) against him is not set out in the order for reference. Nonetheless the referring court does explain that the criminal proceedings were based on the following: irregular entry into the Netherlands; contravention of the immigration legislation; failure to cooperate or a lack of cooperation as regards establishing identity and nationality; failure to demonstrate good reason for discarding travel and identification documentation; and use of false or falsified documents. Those reasons are described as ‘substantial grounds’. The following ‘insubstantial grounds’ relating to Mr K. are also cited: failure to comply with one or more of the other obligations applicable under Chapter 4 of the Vreemdelingenbesluit 2000 (Decree on Foreign Nationals 2000); being of no fixed abode; not having adequate financial resources; and being suspected, or having been found guilty of, an offence.

²⁴ I understand from the order for reference that under Article 8(f) of the Vw a third-country national who applies for asylum is considered to be lawfully resident in the Netherlands while a decision on his application for a residence permit is pending, and that, on the basis of his application (or a court order), his deportation is to be deferred until a decision on the asylum request is taken.

26. While in detention, Mr K. indicated that he intended to apply for asylum in the Netherlands because he feared for his life in Iran. According to his account, that request was made on 9 December 2015.

27. On 15 December 2015, the national criminal court declared that Mr K.'s criminal prosecution was inadmissible. It appears that, as a result, the competent authorities decided not to proceed against him.²⁵ By virtue of an 'Immediate release' order dated 16 December 2015, the public prosecutor ordered his release from detention. On 17 December, Mr K. made a formal application for asylum. On the same date, he was detained pursuant to Article 59b(1)(a) and (b) of the 'Vw' ('the detention decision').

28. The detention decision was based on the grounds, *first*, that detention was necessary in order to determine the identity or nationality of the applicant²⁶ and, *second*, that it was required for the purpose of obtaining data necessary for the assessment of his application for asylum. It was considered in particular that there was a risk that he might abscond.²⁷

29. On 17 December 2015, Mr K. lodged an appeal against the detention decision and requested compensation at the same time. Mr K. argues that, in the light of the Court's judgment in *N.*,²⁸ his detention was contrary to Article 5 of the ECHR, that the provisions of Article 8(3)(a) and (b) of the Reception Directive are contrary to that rule and also contravene Article 6 of the Charter.

30. The referring court makes the following observations. First, Mr K. is not subject to a return decision. Second, Article 9(1) of the Procedures Directive lays down the basic rule that an applicant (within the meaning of that directive) must be allowed to remain in the Member State concerned until a decision has been made regarding his request for international protection. Thus, such a person cannot be considered to be illegally staying in the territory of a Member State within the meaning of the Return Directive. Third, both the Procedures Directive and national law appear to preclude the deportation of an applicant in such circumstances. Fourth, that position is confirmed by the decision of the Strasbourg Court interpreting Article 5(1)(f) of the ECHR in *Nabil and Others v. Hungary*.²⁹ Fifth, detention on the basis of the grounds set out in Article 8(3)(a) and (b) of the Reception Directive ('the provisions at issue') would appear not to be aimed at the removal of a third-country national. The referring court is of the view that the position described would be incompatible with Article 5(1)(f) of the ECHR. It therefore considers that it is necessary to examine the validity of Article 8(3)(a) and (b) of that directive.

31. The referring court acknowledges that it follows from the judgment in *Foto-Frost*³⁰ that a national court does not have the power to declare the acts of the EU institutions invalid. Accordingly, it has referred the following question to the Court for preliminary ruling:

'Is Article 8(3)(a) and (b) of the Reception Directive valid in the light of Article 6 of the Charter:

- (1) in a situation where a third-country national is detained under Article 8(3)(a) and (b) of the Reception Directive and, under Article 9 of the [Procedures Directive], has the right to remain in a Member State until a decision on his asylum application has been made at first instance, and

²⁵ From my own research based on the national file, it seems that the finding of 'inadmissibility' was because Mr K. had applied for refugee status. The Netherlands authorities therefore treated him as being subject to protection under the Geneva Convention, in particular pursuant to Article 31 thereof.

²⁶ Article 59b(1)(a) of the Vw.

²⁷ Article 59b(1)(b) of the Vw.

²⁸ Judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84.

²⁹ Judgment of 22 September 2015, CE:ECHR:2015:0922JUD006211612 ('*Nabil*').

³⁰ Judgment of 22 October 1987, 314/85, EU:C:1987:452, paragraphs 15 and 16.

(2) given the Explanation (OJ 2007 C 303, p. 17) that the limitations which may legitimately be imposed on the rights in Article 6 of the Charter may not exceed those permitted by the ECHR in the wording of Article 5(1)(f), and the interpretation by the [Strasbourg Court] of the latter provision in, inter alia, [*Nabil*], that the detention of an asylum-seeker is contrary to the aforementioned Article 5(1)(f) if such detention was not imposed with a view to deportation?’

32. Written observations have been submitted by Belgium, Estonia, Ireland, and the Netherlands, as well as the Council of the European Union, the European Parliament, and the European Commission. No hearing was requested and none was held.

Assessment

Admissibility

33. The Parliament is of the view that the referring court’s question is inadmissible. It argues that the question posed and the underlying reasons are in substance identical to the issues raised by the Raad van State in *N*.³¹ In essence, the applicant in that case was subject to a return decision, whereas Mr K. is not. The Parliament submits that the matters set out in the order for reference here are not relevant to determining whether the provisions at issue are in conformity with the Charter.

34. I disagree with the Parliament’s view for the following reasons.

35. First, it is settled case-law that where a national court has doubts as to the validity of an EU act, it is incumbent upon it to make a reference to the Court for a preliminary ruling.³² Second, when a question on the validity of an EU measure is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and consequently, whether it should request the Court to rule on that question. Accordingly, where the national court’s questions relate to the validity of a provision of EU law, the Court is obliged in principle to give a ruling. It is possible for the Court to refuse to give a preliminary ruling on a question submitted by a national court only where, inter alia, it is quite obvious that the ruling sought by that court on the interpretation or validity of EU law bears no relation to the actual facts or purpose of the main action or where the problem is hypothetical.³³

36. Third, the referring court explains in the opening paragraph of its order for reference concerning the ‘Grounds’ for the request for a preliminary ruling that if the provisions at issue are invalid, Mr K.’s detention is without any legal basis and his appeal must succeed. The outcome of the present proceedings is also relevant to his claim for compensation for an alleged illegal detention. It is therefore clear that the validity of the provisions at issue has a direct bearing on the proceedings before the national court.

37. Fourth, Article 6(3) TEU confirms that fundamental rights recognised by the ECHR constitute general principles of EU law. In that regard, the Explanations to the Charter make it clear that the rights laid down in Article 6 of the Charter correspond to those guaranteed by Article 5 of the ECHR.³⁴ Thus, if the provisions at issue are incompatible with the Charter as seen through the prism of the ECHR, they cannot be valid; and Mr K.’s detention which was based on the national rules implementing Article 8(3)(a) and (b) of the Reception Directive cannot be lawful.

31 Judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84.

32 Judgment of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraphs 30 and 31.

33 Judgment of 12 July 2012, *Association Kokopelli*, C-59/11, EU:C:2012:447, paragraphs 28 and 29 and the case-law cited.

34 Article 6(1) TEU and Article 52(7) of the Charter. See also, the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) (‘the Explanations’).

38. Fifth, the referring court essentially requests a preliminary ruling because it reads the judgment of the Strasbourg Court in *Nabil* as meaning that the detention of persons (including asylum seekers) will be justified within the meaning of Article 5(1)(f) of the ECHR only for as long as deportation or extradition proceedings are in progress. The referring court is of the view that Article 9(1) of the Procedures Directive precludes the removal of an asylum applicant during the period while his request for international protection is pending. It points out that Mr K. is not subject to a return decision within the meaning of the Return Directive. The referring court states that his detention under the provisions at issue is not based on reasons relating to his removal from EU territory.

39. Given that the rights in Article 6 of the Charter are also those guaranteed by Article 5 of the ECHR and that in accordance with Article 52(3) of the Charter, they have the same meaning and scope,³⁵ I consider that it is necessary to examine the Strasbourg Court's decision in *Nabil* in order to assess whether that case has implications for the interpretation and validity of Article 8(3)(a) and (b) of the Reception Directive. It is clear that that assessment relates to the facts set out in the order for reference, as do the reasons given for the request for a preliminary ruling. The Court's answer will be decisive for the issue at the crux of the main proceedings — whether Mr K.'s detention was lawful. The question posed by the referring court is also manifestly not hypothetical. The reference for a preliminary ruling is therefore admissible.

Preliminary remarks

40. As Article 78(1) TFEU makes clear, the common policy on asylum must be in accordance with the Geneva Convention and other relevant treaties. Pursuant to Article 78(2)(c) and (f) TFEU, the EU legislature is empowered to adopt measures for that system which comprise, inter alia, 'standards concerning the conditions for the reception of applicants for asylum ...'.

41. Article 31 of the Geneva Convention prohibits the imposition of penalties imposed, on account of their illegal entry or presence, on refugees coming from a territory where their life or freedom was threatened. That principle applies where refugees enter or are present without authorisation, provided the persons concerned present themselves without delay to the authorities and are able to show good cause for their illegal entry or presence. The United Nations High Commissioner for Refugees' Detention Guidelines³⁶ state that 'detention in the migration context is neither prohibited under international law per se, nor is the right to liberty absolute'. The following general principles are set out in those guidelines: detention in that context must (i) be in accordance with and authorised by law; (ii) not be arbitrary and be based on assessment of the particular circumstances of the individual concerned; (iii) be used as an exceptional measure and can only be justified for a legitimate purpose, including for initial verification of identity and to establish the elements on which an application for international protection is based that could not be obtained in the absence of detention; and (iv) be proportionate.³⁷

³⁵ Explanation on Article 6 — Right to liberty and security, p. 19 of the Explanations.

³⁶ *Detention Guidelines — Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, published by the United Nations High Commissioner for Refugees (2012) ('the UNHCR Detention Guidelines').

³⁷ See further the United Nations General Assembly Report of the Working Group on Arbitrary Detention published on 4 May 2015, 'Guideline 21. Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons'.

42. The Court referred to an earlier version of those Guidelines in its decision in *N*.³⁸ In that case, however, the applicant was detained under Article 8(3)(e) of the Reception Directive (on grounds of protection of national security and public order). He was subject to a return order (that is, an order to leave the European Union) and a 10-year entry ban which had been issued following the rejection of an earlier asylum application. Those measures had been imposed pursuant to national rules implementing the Return Directive.³⁹ Mr N. was indeed detained at the time when his case was referred to this Court for preliminary ruling.

43. Mr K.'s circumstances are very different. It is not at issue that his detention constituted a deprivation of liberty.⁴⁰ However, the grounds for detention in his case were Article 8(3)(a) and (b) of the Reception Directive. The referring court does not suggest that measures pursuant to the Return Directive were ever taken in his case. He is not subject to an order to leave EU territory, nor has an entry ban been issued against him; and no such measure is therefore in abeyance pending the outcome of his request for international protection.

44. That said, I consider that the Court should apply the same methodology in the present case as it followed in *N*. Thus, the assessment should be undertaken solely by reference to fundamental rights guaranteed by the Charter.⁴¹

Validity in the light of Article 52(1) of the Charter

45. All parties submitting written observations to the Court in the present proceedings — which did not, however, include Mr K. — agree that the validity of Article 8(3)(a) and (b) of the Reception Directive is not in doubt.

46. I am of the same view.

47. According to the order for reference, the applicant was initially detained on suspicion of having committed a criminal offence. Recital 17 of the Reception Directive states that the grounds for detention laid down in Article 8(3) are without prejudice to other grounds, such as detention within the framework of criminal proceedings. Thus, the applicant's initial detention by the Netherlands authorities on the ground that he was suspected of having committed a criminal offence — presenting a false passport — is not at issue in the present proceedings.

48. After the criminal prosecution was declared inadmissible, Mr K. was detained in the context of his request for asylum. It is common ground that his confinement constituted detention within the meaning of the Reception Directive.⁴² The Netherlands authorities gave two reasons for detaining Mr K: first, in order to determine his identity and/or his nationality and, second, because his detention was necessary to establish those elements required for assessing his application and it was considered that there was a risk that he might abscond.

³⁸ United Nations High Commissioner for Refugees' Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers of 26 February 1999.

³⁹ In the light of Mr N.'s pending application for asylum, his expulsion from the Netherlands remained in abeyance under national law and in accordance with Article 9 of the Procedures Directive.

⁴⁰ Judgment of the Strasbourg Court of 23 February 2012, *Creangă v. Romania*, CE:ECHR:2012:0223JUD002922603, § 92.

⁴¹ Judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 46.

⁴² See Article 2(h) of the Reception Directive.

49. The fundamental right to liberty guaranteed in Article 6 of the Charter has the same meaning as in Article 5 of the ECHR, although the latter does not form part of the EU *acquis*.⁴³ The ‘... limitations which may legitimately be imposed on the exercise of the rights laid down in Article 6 of the Charter may not exceed those permitted by the ECHR’.⁴⁴ It is also a general principle of interpretation that an EU measure must be construed, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter.⁴⁵

50. In as much as Article 8(3)(a) and (b) allow Member States to detain applicants for asylum, those provisions authorise a limitation on the exercise of the right to liberty enshrined in Article 6 of the Charter.⁴⁶ That limitation is derived from a directive — a legislative act of the European Union. It is therefore provided by law for the purposes of Article 52(1) of the Charter.⁴⁷

51. Are the provisions at issue compatible with the right to liberty laid down in Article 6 of the Charter?

52. In my view the answer is ‘yes’.

53. First, the starting point set out in Article 8(1) of the Reception Directive is that Member States are prohibited from detaining individuals for the sole reason that they have made a request for international protection.⁴⁸ Second, under the Reception Directive detention is regarded as being a particularly ‘drastic measure against an applicant for international protection’,⁴⁹ which may be adopted only in ‘clearly defined exceptional circumstances’.⁵⁰ Third, in accordance with Article 8(2), detention is permissible in prescribed circumstances: (i) when it proves necessary; (ii) on the basis of an individual assessment of the case concerned; and (iii) if other less coercive alternative measures cannot be applied effectively. Fourth, an applicant may be detained only where one of the grounds listed in Article 8(3) exist. Each ground meets a specific need and is self-standing.⁵¹

54. Those strict conditions are also subject to the requirement that the grounds for detention must be laid down in national law and the procedural guarantees for detained applicants are met.⁵² Those guarantees include the condition that if an applicant is detained it must be for as short a period as possible and that his liberty can be restricted only for as long as the grounds set out in Article 8(3) are applicable (Article 9(1)).

55. The actual wording of Article 8(3)(a) and (b) of the Reception Directive as such, is not contrary to the right to liberty enshrined in Article 6 of the Charter.⁵³

56. It follows from Article 78 TFEU that the establishment and the proper functioning of the CEAS is an objective of general interest recognised by the European Union.

43 Judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 45 and the case-law cited.

44 Judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 47.

45 Judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 48 and the case-law cited.

46 See, by analogy (in respect of Article 8(3)(e)), judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 49.

47 See, by analogy (in respect of Article 8(3)(e)), judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraphs 50 and 51.

48 See also Article 9 of the Procedures Directive.

49 See my View in *N*, C-601/15 PPU, EU:C:2016:85, point 113, see also recital 20 of the Reception Directive.

50 See recital 15 of the Reception Directive.

51 Judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 59.

52 See Articles 8(3) in fine and 9 of the Reception Directive.

53 See, by analogy, judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 52.

57. It is then necessary to examine whether the interference with the right to liberty permitted by the provisions at issue exceeds the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question. That is because the disadvantages caused by the legal rules must not be disproportionate to the aims pursued.⁵⁴

58. The elements of the CEAS include provision for a uniform status for persons eligible for international protection based on the full and inclusive application of the Geneva Convention.⁵⁵ The system is based on the concept that Member States should apply common criteria to identify persons genuinely in need of such protection.⁵⁶

59. As regards Article 8(3)(a) of the Reception Directive, determining or verifying an applicant's identity or nationality is a key part of ascertaining whether that applicant meets the conditions for obtaining refugee status. It is necessary to ascertain for the purposes of the definition of 'a refugee' in Article 2(d) of the Qualification Directive whether an applicant has a '... well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or [is] a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it ...'. An applicant's nationality is an important criterion that is taken into account in the assessment conducted pursuant to Article 4(3) of that directive. Information as to the situation in the applicant's country of origin is precisely the sort of detail that Member States might seek to verify with organisations such as the UNHCR.⁵⁷ Such enquiries cannot, however, be made unless the applicant's nationality (or stateless status) is known.

60. Furthermore, it is also necessary for Member States to consider whether the person concerned does not merit international protection because he is excluded from the benefits of refugee status by virtue of Article 12 of the Qualification Directive. That cannot happen unless the person's identity is first established.

61. More generally, an applicant's identity is a significant element under the CEAS and is particularly relevant as regards the operation of what is known as 'the Dublin system'.⁵⁸ That system provides a process for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national. Without information as to an applicant's identity, it would not be possible for Member States to apply the criteria laid down in Regulation No 604/2013 for establishing the responsible Member State in any particular case.

62. Identity is also relevant to establishing whether an application is inadmissible pursuant to Article 33 of the Procedures Directive. A request for asylum would be barred under Article 33(2)(a) of that directive where another Member State has already granted international protection.

63. Finally, an applicant's identity is also relevant to the issue of whether special procedural guarantees should apply in accordance with Article 24 of the Procedures Directive or in the case of unaccompanied minors (Article 25 of that directive).

⁵⁴ Judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 54 and the case-law cited.

⁵⁵ See Article 1 of the Qualification Directive and recital 3 of the Reception Directive.

⁵⁶ Article 4 of the Qualification Directive.

⁵⁷ See recital 22 of the Qualification Directive.

⁵⁸ The 'Dublin system' refers, inter alia, to the rules in Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31). There is specific provision in Article 28 of that regulation for detaining applicants for the purposes of transfer. That provision, however, is not relevant here.

64. Given those systemic features of the CEAS, it seems to me that detaining an applicant in order to verify his identity or nationality on the basis of Article 8(3)(a) of the Reception Directive may, in a particular case, be an appropriate measure.

65. Article 8(3)(b) of the Reception Directive relates to determining the ‘elements on which the application for international protection is based which could not be obtained in the absence of detention.’ Here, I recall that Article 4(1) of the Qualification Directive provides that, for the purposes of assessing the facts and circumstances relating to an application for international protection, Member States may consider it to be the duty of an applicant to submit as soon as possible all elements necessary to substantiate his request. In many cases it will be the applicant himself who is the main source of information, as the Member States’ assessment is primarily to be based on his account of his history, which may be verified by reference to other sources.⁵⁹ Member States are required to examine all applications for international protection individually, objectively and impartially.⁶⁰ In so doing, Member States must also verify the credibility of an applicant’s account.⁶¹

66. Thus, if an individual claims asylum based on fear of persecution because of his political opinions, Member States’ authorities are required to verify such claims in accordance with the Qualification Directive and the Procedures Directive. Article 13 of the latter also, in effect, imposes on applicants an obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) of the Qualification Directive.

67. If an applicant does not cooperate with the competent authorities and *a fortiori* if he refuses to make himself available for interview or if he absconds, that assessment cannot take place.

68. I therefore consider that, in order to achieve the general CEAS objective of applying common criteria for identifying those who are genuinely in need of international protection and distinguishing them from applicants who do not qualify for such protection, Article 8(3)(b) of the Reception Directive is an appropriate measure.

69. The Court has stressed that, in view of the importance of the right to liberty enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is strictly necessary.⁶²

70. Both of the provisions at issue are subject to compliance with a series of conditions whose aim is to create a strictly circumscribed framework in which each measure may be used.⁶³

71. Article 8(3)(a) and (b) are each self-standing grounds for detention. I shall therefore examine each measure separately to see whether it satisfies the necessity test.

72. Given that applicants for asylum are in flight from persecution, it can be expected that many will travel with false or incomplete documents. It is implicit in the wording of Article 8(3)(a) of the Reception Directive, read together with Article 8(1) and (2), that detention of an applicant based on that ground is to take place only where he does not give his identity or nationality or if the competent authorities do not accept his account. Not every applicant may be detained in order to verify his identity or nationality. Moreover, Article 8(3)(a) must be applied by reference to the aims of the Reception Directive. These include the principles of proportionality and necessity and the objective that the time needed to verify the grounds for detention should be as short as possible.⁶⁴

⁵⁹ Article 4 of the Qualification Directive.

⁶⁰ Article 10(2) and (3)(a) of the Procedures Directive.

⁶¹ See, for example, judgment of 2 December 2014, *A and Others*, C-148/13 to C-150/13, EU:C:2014:2406, paragraph 55 et seq.

⁶² Judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 56 and the case-law cited.

⁶³ See, by analogy (in relation to Article 8(3)(e)), judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 57.

⁶⁴ See, respectively, recitals 15 and 16 of the Reception Directive.

73. Article 8(3)(b) is expressly limited to cases where the information in support of the application ‘could not be obtained in the absence of detention’. Thus, the wording used indicates that the legislature wished to emphasise that Member States cannot make arbitrary use of that ground. That limitation is underlined by the words ‘in particular when there is a risk of absconding of the applicant’. Likewise, the aims set out in recitals 15 and 16 confirm that that provision should be used only when strictly necessary.

74. Furthermore, the statutory safeguards set out in Article 8(1) and (2) both reflect Recommendation Rec(2003)5 of the Committee of Ministers of the Council of Europe and the UNHCR Detention Guidelines that detention must be reserved to exceptional cases.

75. It should also be remembered that the Reception Directive is to be read together with the procedural requirements laid down in the Procedures Directive. Article 26 of the latter prohibits detention for the sole reason that the person concerned is an applicant. The wider context of the CEAS also makes it clear that the provisions on detention in Article 8(3) of the Reception Directive are intended for exceptional cases, rather than the general rule.

76. The legislative history of the Reception Directive confirms that the issue of detention was considered by reference to the general scheme and objectives of the CEAS and that detention is only permissible where it is consistent with fundamental rights and where it is necessary and proportionate.⁶⁵

77. Lastly, it seems to me that the provisions at issue strike a fair balance between the individual interest and the general interest of providing for a properly functioning CEAS which grants international protection to those third-country nationals who meet the criteria, rejecting claims that do not satisfy the criteria, and that they enable Member States to deploy their limited resources in meeting their international obligations, including the requirements of EU law which have evolved in the light of the principles laid down in the Geneva Convention as well as the ECHR.⁶⁶

Validity in the light of Article 52(3) of the Charter

78. As I have indicated above, Article 6 of the Charter corresponds to Article 5(1) of the ECHR.⁶⁷ In accordance with Article 52(3) of the Charter, the meaning and scope of the right to personal liberty and security guaranteed by Article 6 of the Charter are therefore the same as those laid down in the ECHR.⁶⁸ The Court must therefore take account of Article 5 of the ECHR as interpreted by the Strasbourg Court in examining the validity of the provisions at issue in the light of Article 6 of the Charter.

79. Article 5 of the ECHR has provided a rich seam of case-law from that Court. The right to liberty and security guaranteed by that provision is not absolute. It is subject to an exhaustive list of permissible grounds on which persons may be deprived of their liberty.⁶⁹ Article 5(1)(f) has been described as the ground that allows States to detain ‘a foreigner’ (or a third-country national) in the context of exercising functions in relation to immigration or asylum. There are two limbs to that particular ground. First, detention may be permitted to prevent an unauthorised entry into a country. Second, a third-country national may be detained with a view to deportation or extradition.

⁶⁵ See Commission proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers COM(2008) 815 final, pp. 6 and 8; see also recital 35 of the Reception Directive.

⁶⁶ See, by analogy, judgment of 15 February 2016, *N*, C-601/15 PPU, EU:C:2016:84, paragraph 68.

⁶⁷ See point 5 above.

⁶⁸ See points 49 and 50 above.

⁶⁹ See *Nabil*, § 26.

80. Given the facts set out in the order for reference, it seems to me that it is necessary to examine the validity of the provisions at issue in relation to the first limb of Article 5(1)(f) of the ECHR alone.

81. The Strasbourg Court interpreted that limb for the first time in *Saadi*.⁷⁰ It recalled that ‘subject to their obligations under the Convention, States enjoy an “undeniable sovereign right to control aliens’ entry into and residence in their territory” ... It is a necessary adjunct to this right that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. It is evident that ... the detention of potential immigrants, including asylum-seekers, is capable of being compatible with Article 5(1)(f) [of the ECHR]’.⁷¹

82. The Strasbourg Court went on to state that ‘... until a State has “authorised” entry to the country, any entry is “unauthorised” and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to “prevent his effecting an unauthorised entry”. [The Grand Chamber] does not accept that as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an “authorised” entry, with the result that detention cannot be justified under the first limb of Article 5(1)(f). To interpret the first limb of Article 5(1)(f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above.’⁷² The Strasbourg Court expressed the view that such an interpretation would be inconsistent with Conclusion no. 44 of the Executive Committee of the United Nations High Commissioner for Refugees’ Programme, the UNHCR’s Guidelines and Recommendation Rec (2003)5 of the Committee of Ministers of the Council of Europe.⁷³ Those texts accept that applicants for asylum may be detained in certain circumstances, in order for identity checks to be carried out or to establish the elements on which the request for international protection is based.

83. It follows that the first limb of Article 5(1)(f) is capable of applying as an exception to the general rule which guarantees liberty in cases concerning applicants for asylum who are not subject to an order expelling them from the territory of the European Union. In principle, it is not incompatible with that provision, and therefore with Article 6 of the Charter, to detain an applicant for asylum at the point when he attempts to enter EU territory in order to determine or verify his identity (Article 8(3)(a) of the Reception Directive). It is likewise not incompatible with that provision to detain an applicant in order to determine the elements on which his application is based which could not be obtained without his detention, in particular where there is a risk of absconding (Article 8(3)(b) of the Reception Directive).

84. In relation to the possibility that an applicant might abscond, it seems to me that it is not imperative to show that detention is necessary to prevent the individual’s flight.⁷⁴ What is required is that the action be taken to ensure that the competent authorities are able to discharge their functions under Article 4 of the Qualification Directive and Article 10 of the Procedures Directive in order to assess the application for international protection, and that there should be a *possible risk* that the applicant may otherwise abscond.

⁷⁰ Judgment of the Strasbourg Court of 29 January 2008, *Saadi v. The United Kingdom*, CE:ECHR:2008:0129JUD001322903 (*‘Saadi’*).

⁷¹ *Saadi*, § 64.

⁷² *Saadi*, § 65.

⁷³ *Saadi*, §§ 34, 35 and 37.

⁷⁴ See, by analogy, judgment of the Strasbourg Court of 15 November 1996, *Chahal v. The United Kingdom*, CE:ECHR:1996:1115JUD002241493, § 112.

85. However, the Strasbourg Court has ruled on several occasions that any deprivation of liberty must, in addition to falling within one of the listed exceptions in Article 5(1)(a) to (f), be ‘lawful’. In that regard, the ECHR ‘refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law’.⁷⁵

86. Detention under Article 5(1)(f) cannot be compatible with the ECHR if it is arbitrary.⁷⁶ There is no global definition as to what might constitute arbitrary conduct on the part of national authorities. A key concept applied in a case-by-case examination is whether the detention, despite complying with the letter of national law, has an element of bad faith or deception on the part of the authorities.⁷⁷ Where an applicant for asylum is detained, his detention ‘must be closely connected to the purpose of preventing his unauthorised entry to the country’. The Strasbourg Court has also stated that the place and conditions of detention should be appropriate, bearing in mind that ‘the measure is applicable not to those who have committed criminal offences, but to aliens who, often fearing for their lives, have fled from their own country’. Thus, the length of the detention should not exceed that reasonably required for the purpose pursued.⁷⁸

87. It follows from my examination of Article 8(3)(a) and (b) of the Reception Directive in relation to Article 52(1) of the Charter that I consider the use of detention to be a proportionate restriction of the right to liberty in an appropriate case in the circumstances stipulated in those provisions. That assessment applies equally for the purposes of Article 52(3).⁷⁹

88. I would add that the restrictions set out in Article 8(3)(a) and (b) of the Reception Directive must also be read in the light of Article 9 thereof, which reflects the safeguards for applicants which Article 5(2) to (5) of the ECHR provide. These comprise prompt provision of the reasons for arrest, prompt judicial scrutiny of arrest or detention, an entitlement to take proceedings challenging the lawfulness of detention and an enforceable right to compensation for wrongful arrest or detention. Corresponding guarantees are provided in Article 9 of the Reception Directive, in particular in paragraphs 1 to 5. As I stated in my View in *N.*, although there is no equivalent to Article 5(5) of the ECHR in that directive, it nonetheless ‘leaves Member States all the leeway necessary to comply with the requirement to provide for an enforceable right to compensation’.⁸⁰

89. Thus, the restrictions on the right to liberty set out in Article 8(3)(a) and (b) of the Reception Directive, read together with the safeguards guaranteed for detained applicants, ensure that the right to liberty, which has been described as being ‘of the highest importance in a “democratic society”’⁸¹ applies in accordance with both the meaning and the spirit of Article 5 of the ECHR.

90. Finally, I would observe that the referring court frames its question by reference to the judgment of the Strasbourg Court in *Nabil*. In that case, the applicants for asylum were subject both to an order expelling them from Hungary and to an entry ban. The two measures had been issued before they filed claims for asylum. The applicants’ cases were examined in order to determine whether the use of detention was compatible with the right to liberty on the basis of the second limb of Article 5(1)(f) — detention in relation to a person against whom action is being taken with a view to deportation or extradition.⁸²

⁷⁵ *Saadi*, § 67.

⁷⁶ *Saadi*, § 67.

⁷⁷ *Saadi*, §§ 69 to 73.

⁷⁸ *Saadi*, § 74.

⁷⁹ See points 57 to 77 above.

⁸⁰ See my View in *N.*, C-601/15 PPU, EU:C:2016:85, point 136.

⁸¹ See judgment of the Strasbourg Court of 29 March 2010, *Medvedyev and Others v. France*, CE:ECHR:2010:0329JUD000339403, § 76.

⁸² *Nabil*, §§ 28 and 38 et seq.

91. As Mr K.'s asylum application remains pending and because there is no information in the order for reference indicating that any action has been taken against him under the Return Directive, there is nothing to suggest he is at present subject 'to deportation or extradition'. He is therefore in a very different position to the applicants in *Nabil*. That being the case, and in the light of the account of the facts given by the referring court, his circumstances cannot fall within the second limb of Article 5(1)(f) of the ECHR. Accordingly, the interpretation of that provision by the Strasbourg Court in *Nabil* has no bearing on the assessment of the validity of Article 8(3)(a) for present purposes.

92. I would add for the sake of good order that, in view of this Court's ruling in *N.* to the effect that it does not necessarily follow from *Nabil* that a pending asylum case means that the detention of a person who has made such a claim is no longer detention 'with a view to deportation', the position is in any event more nuanced than the referring court suggests.⁸³

Conclusion

93. In the light of all the above considerations I am of the opinion that the Court should declare that:

Consideration of the question put by the rechtbank Den Haag zittingsplaats Haarlem (District Court, The Hague, sitting at Haarlem, the Netherlands) to the Court of Justice of the European Union has disclosed no factor of such a kind as to affect the validity of points (a) and (b) of the first subparagraph of Article 8(3) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection in the light of Articles 6 and 52(1) and (3) of the Charter of Fundamental Rights of the European Union.

⁸³ All that is required is that action should be being taken with a view to deportation or extradition (see judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraphs 79 and 80). That position is confirmed by the case-law of the Strasbourg Court (see, for example, judgment of the Strasbourg Court of 23 October 2008, *Soldatenko v. Ukraine*, CE:ECHR:2008:1023JUD000244007, § 109). That Court has also ruled that detention may be justified under the second limb of Article 5(1)(f) of the ECHR even if a formal request or an order for extradition has not been issued, see Decision of the European Commission on Human Rights of 9 December 1980, *X. v. Switzerland*, CE:ECHR:1980:1209DEC000901280.