Reports of Cases

OPINION OF ADVOCATE GENERAL
PRIIT PIKAMÄE
delivered on 23 April 2020[1]

Joined Cases C-924/19 PPU and C-925/19 PPU

FMS,
FNZ (C-924/19 PPU)
SA,
SA junior (C-925/19 PPU)
v
Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság,
Országos Idegenrendészeti Főigazgatóság

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

(Reference for a preliminary ruling — Area of freedom, security and justice — Common procedures for granting and withdrawing international protection — Directive 2013/32/EU — Application for international protection — Article 33(2) — Grounds of inadmissibility — National legislation according to which the application is inadmissible if the applicant arrived in the Member State concerned via a country in which he is not exposed to persecution or the risk of serious harm or if that country affords sufficient protection — Article 35, Article 38(4) and Articles 40 and 43 — Directive 2013/33/EU — Article 2(h) and Articles 8 and 9 — Asylum procedure — Return measure — Procedural requirements — Detention — Period of detention — Lawfulness of detention — Examination — Appeal — Right to an effective remedy — Article 47 of the Charter of Fundamental Rights of the European Union)

1. The two Joined Cases C-924/19 PPU and C-925/19 PPU afford the Court a further opportunity to consider the legal situation of applicants for international protection staying in the Röszke transit zone on the Serbian-Hungarian border. The many questions referred to the Court for a preliminary ruling have involved various issues relating to the interpretation of Directive 2013/32/EU[2] and Directive 2013/33/EU[3], in particular as regards the consequences of a third country refusing to re-admit migrants whose application for international protection has been found to be inadmissible; how the accommodation provided to those applicants in the transit zone is classified under the provisions of EU law governing detention; and the right of those applicants to effective judicial protection, in particular by the adoption of interim measures by the national courts.

1 Original language: French.

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).

3 Directive of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96).

2. Given the current migratory movements and the recent judgment of the Grand Chamber of the European Court of Human Rights in *Ilias and Ahmed v. Hungary*,[4] which concerns precisely the situation of third country nationals who have stayed in the Röszke transit zone, these references for a preliminary ruling are highly sensitive, and the answers to be given by the Court are of undeniable interest from both a legal and a humanitarian perspective.

I. Legal context

A. EU law

1. Directive 2013/32

3. Article 6 of Directive 2013/32, headed 'Access to the procedure', provides:

'1. When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.

…

2. Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. Where the applicant does not lodge his or her application, Member States may apply Article 28 accordingly.

3. Without prejudice to paragraph 2, Member States may require that applications for international protection be lodged in person and/or at a designated place.

…

5 Where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it very difficult in practice to respect the time limit laid down in paragraph 1, Member States may provide for that time limit to be extended to 10 working days.'

4. Article 26 of that directive, headed 'Detention', provides:

'1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with [Directive 2013/33].

2. Where an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with [Directive 2013/33].'

4 ECtHR, 21 November 2019, CE:ECHR:2019:1121JUD004728715.

5. According to Article 33 of that directive, headed 'Inadmissible applications':

'1. In addition to cases in which an application is not examined in accordance with Regulation (EU) No 604/2013,[5] Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive 2011/95/EU[6] 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] 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.'

6. Article 35 of Directive 2013/32, headed 'The concept of first country of asylum', reads as follows:

'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.'

7. Article 38 of that directive, headed 'The concept of safe third country', provides in paragraph 4:

'Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.'

5 Regulation 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).

6 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).

8. Article 43 of that directive, headed 'Border procedures', provides:

'1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on:

(a) the admissibility of an application, pursuant to Article 33, made at such locations; and/or

(b) the substance of an application in a procedure pursuant to Article 31(8).

2. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 1 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive.

3. In the event of arrivals involving a large number of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practice to apply there the provisions of paragraph 1, those procedures may also be applied where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.'

2. Directive 2013/33

9. Article 8 of Directive 2013/33, headed 'Detention', is worded as follows:

'1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive [2013/32].

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;

(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;

(d) when he or she is detained subject to a return procedure under Directive [2008/115/EC[7]], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

(e) when protection of national security or public order so requires;

(f) in accordance with Article 28 of [Regulation No 604/2013].

7 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

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

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.'

10. Article 9 of that directive, headed 'Guarantees for detained applicants', reads as follows:

'1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

2. Detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based.

3. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* and/or at the request of the applicant. When conducted *ex officio*, such review shall be decided on as speedily as possible from the beginning of detention. When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review ex officio and/or the judicial review at the request of the applicant shall be conducted.

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

4. Detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

5. Detention shall be reviewed by a judicial authority at reasonable intervals of time, *ex officio* and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.

…'

B. Hungarian law

1. The Law on the right to asylum.

11. Paragraph 5(1) of the A menedékjogról szóló 2007. évi LXXX. törvény (Law No LXXX of 2007 on the right to asylum; 'Law on the right to asylum') provides:

'A person seeking asylum is entitled:

(a) to reside — in accordance with the conditions set out in this Act — in the territory of Hungary, or to receive an authorisation to reside — in accordance with specific other legislation — in the territory of Hungary;

…'

12. Paragraph 51(2)(f) of the Law on the right to asylum, as amended on 1 July 2018 establishes a new ground of inadmissibility, defined as follows:

'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'.

13. Paragraph 71/A(1) to (7) of the Law on the right to asylum. governing border procedures. is worded as follows:

'(1) Where an alien lodges an application in a transit zone

(a) before being authorised to enter the territory of Hungary, or

(b) after being taken to the entrance of the facility serving to protect order at the border, as referred to in the államhatárról szóló törvény (Law on State borders), having been intercepted inside a strip of 8 km from the line of the external border of Hungarian territory as defined in Article 2(2) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 establishing a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [OJ 2016 L 77, p. 1] or of the signs indicating the border

this chapter shall apply subject to the following provisions.

(2) In border procedures, the applicant does not have the rights under Paragraph 5(1)(a) and (c).

(3) The refugee authority shall decide as to the admissibility of an application in priority proceedings, at the latest within eight days from the time of submission thereof. The refugee authority shall promptly communicate the decision adopted upon the procedure.

(4) If a decision has not been taken within four weeks from submission of the application, the aliens policing authority shall grant entry in accordance with the applicable provision of the law.

(5) If the application is admissible, the aliens policing authority shall grant entry in accordance with the applicable provision of the law.

(6) If the applicant has been authorised to enter the territory of Hungary, the refugee authority shall conduct the procedure in accordance with the general rules.

(7) The rules governing border procedures shall not apply to vulnerable persons.'

14. Chapter IX/A. of the Law on the right to asylum contains provisions relating to the crisis caused by mass immigration, including Paragraph 80/I(i) and Paragraph 80/J(4), which exclude the application of Paragraph 71/A and Paragraph 5(1)(a) and (c).

2. The Law on State borders

15. Paragraph 15/A. of the Az államhatárról szóló 2007. évi LXXXIX. törvény (Law No LXXXIX of 2007 on State borders; 'Law on State borders') provides, as regards the rules relating to the establishment of a transit zone:

'…

(2) An applicant for asylum who is in a transit zone may enter Hungarian territory:

(a) if the competent asylum authority issues a decision granting him or her international protection;

(b) if the conditions are satisfied for an asylum procedure to be conducted, in accordance with the general rules, or

(c) if Paragraph 71/A(4) and (5) of the Law on the right to asylum applies.

(2a) In a crisis caused by mass immigration, an applicant for asylum who is in a transit zone may be authorised to enter Hungarian territory in the situations referred to in Paragraph 15/A(2)(a) and (b).

…'

3. The Law on the entry and residence of third-country nationals

16. Paragraph 62 of the A harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény (Law of 2007 on the entry and residence of third-country nationals; 'Law on the entry and residence of third-country nationals') provides as follows as regards designating a particular place of stay:

'(1) The aliens policing authority may order a third-country national to reside in a particular place where:

…

(f) the third-country national in question is subject to a return decision and lacks both sufficient means of subsistence and accommodation,

…

(3) Where the third-country national is not able to meet his or her needs and does not have suitable accommodation, adequate material resources or income or an invitation from a person who is bound to be responsible for that national or any family members who may be obliged to provide for his or her subsistence, that national may be designated a mandatory place of stay in an accommodation centre or reception centre.

(3a) In a crisis caused by mass immigration, a transit zone may also be designated as a mandatory place of stay.'

II. The facts giving rise to the disputes, the proceedings and the questions referred

A. Case C-924/19 PPU

17. The applicants in the main proceedings are a married adult couple of Afghan nationality, who arrived in the Röszke transit zone in Hungary via Serbia.

18. On 5 February 2019 they submitted an application for asylum to the asylum authority, in the transit zone.

19. In support of their application, the applicants in the main proceedings stated that they had left Afghanistan for Turkey approximately three years previously, for political reasons, holding valid one-month visas, and that the Turkish authorities had extended those visas by six months. They also stated that they passed through Bulgaria and Serbia before entering Hungary for the first time, and that they had not applied for asylum or been mistreated or harmed in any other country.

20. On the same day, the asylum authority designated the Röszke transit zone as the place of accommodation for the applicants in the main proceedings. They are still there.

21. By an administrative decision of 25 April 2019, the asylum authority rejected the asylum application of the applicants in the main proceedings as being inadmissible, without examining the substance of the application, and held that the principle of *non-refoulement* did not apply in their case in relation to the Islamic Republic of Afghanistan. The authority ordered the removal of the applicants in the main proceedings, in a decision that also imposed a one-year ban on entry and residence and an alert for refusal of entry and stay in the Schengen Information System.

22. The application for asylum of the applicants in the main proceedings was declared inadmissible on the basis of Paragraph 51(2)(f) of the Law on the right to asylum on the grounds that the applicants in the main proceedings arrived in Hungary via a country where they were not exposed to persecution justifying the recognition of refugee status or a risk of serious harm justifying the grant of subsidiary protection or that they were guaranteed adequate protection in the country by which they reached Hungary (the 'safe transit country' concept).

23. The applicants in the main proceedings brought an action against the decision of the asylum authority, which was rejected by a decision of 14 May 2019 of the Fővárosi Közigazgatási és Munkaügy Bíróság (Budapest Administrative and Labour Court, Hungary), which did not give a ruling on the substance of their application for asylum. That court also indicated that the consequences of any refusal by the Republic of Serbia to readmit the applicants should be determined as part of the aliens police procedure.

24. Subsequently, by a decision of 17 May 2019, the first instance aliens policing authority ordered the applicants in the main proceedings to stay in the aliens sector of the Röszke transit zone, from the date of that decision, under Paragraph 62(3a) of the Law on the entry and residence of third country nationals. According to the referring court, no reasons for that decision are stated, and the right to challenge the decision before a court is limited since the only objection of illegality that can be brought before the ordinary courts is that the policing authority failed to comply with its obligation under the legislation to provide information.

25. On the same day, the first instance aliens policing authority contacted the police body responsible for deportation to Serbia so that it could take the steps necessary for the applicants in the main proceedings to be readmitted to Serbia.

26. On 23 May 2019, the competent police body reported that the Republic of Serbia had not readmitted the applicants in the main proceedings into its territory because, since they had not entered Hungarian territory illegally from Serbian territory, the conditions for the application of Article 3(1) of the Agreement between the European Union and the Republic of Serbia on readmission were not satisfied.

27. The asylum authority did not examine the substance of the applicants' asylum application, despite the Republic of Serbia's refusal to readmit them, on the grounds that, under Paragraph 51/A of the Law on the right to asylum, the asylum authority is to examine the substance only if the ground of inadmissibility is based on the 'safe country of origin' concept or the 'safe third country' concept, whereas the decision rejecting the applicants' asylum application as being inadmissible was based on a different ground of inadmissibility, that is to say, the 'safe country of transit' ground, as defined in Paragraph 51(2)(f) of that law.

28. By decisions of 3 and 6 June 2019, the first instance aliens policing authority amended the return decisions issued by the asylum authority in respect of the country of destination, and ordered the applicants in the main proceedings to be removed under escort to Afghanistan.

29. The applicants in the main proceedings lodged an objection to those decisions before the asylum authority, acting as the aliens policing authority. Their objection was dismissed by orders of 28 June 2019. Under Paragraph 65(3b) of the Law on the entry and residence of third country nationals, no appeal lies against decisions on objections.

30. The applicants in the main proceedings brought before the referring court, first, an action seeking annulment of the orders rejecting their objection to enforcement of the decisions amending the country of return and an order that the first instance aliens police authority conduct a new procedure, claiming, in the first place, that those orders are return decisions that must be open to challenge before the courts so that they can be examined on the substance in the light of the principle of *non-refoulement* and, in the second place, that the return decisions are unlawful. According to the applicants, the asylum authority should have examined the substance of their application for asylum because the Republic of Serbia had refused to readmit them and because Paragraph 51(2)(f) of the Law on the right to asylum infringes EU law.

31. Second, the applicants in the main proceedings brought before the referring court an administrative action for failure to act against the asylum authority, seeking a declaration that the authority failed to discharge its obligations by not assigning them a place of stay outside the transit zone.

32. The referring court joined the two actions.

33. That court notes that the Röszke transit zone, where the applicants in the main proceedings have been since they made their application for asylum, is on the border between Hungary and Serbia.

34. The referring court notes that the asylum authority did not examine the substance of the application for asylum lodged by the applicants in the main proceedings because, according to the authority, no such examination is required when an application for asylum is rejected on the grounds of inadmissibility relating to a safe transit country. That court also observes that neither the first instance aliens policing authority nor the court that ruled at first instance on the applicants' action against the refusal of the application for asylum examined the substance of that application.

35. The referring court notes that the list of grounds set out exhaustively by Directive 2013/32 does not include the ground of inadmissibility — founded on the 'safe transit country' concept within the meaning of Paragraph 51(2)(f) of the Law on the right to asylum — that underpinned the rejection of the application for asylum made by the applicants in the main proceedings. In consequence, the referring court considers that ground to be contrary to EU law and refers in that respect to the Opinion of Advocate General Bobek in *LH (Tompa)* (C-564/18, EU:C:2019:1056).

36. According to the referring court, in the case of the applicants in the main proceedings, there is no rule of law that expressly requires examination of their application for asylum to be resumed. Article 38(4) of Directive 2013/32, in common with Paragraph 51/A of the Law on the right to asylum that transposes it into Hungarian law, relates only to a situation in which the applicant cannot be returned to a safe country of origin or to a safe third country, but not to a situation in which the applicant cannot be returned to a safe transit country.

37. It also notes that as a result of the Republic of Serbia's refusal to take charge of the applicants in the main proceedings, the ground of inadmissibility under Paragraph 51(2)(f) of the Law on the right to asylum had ceased to have legal effect, which should result in the asylum authority being obliged to re-examine their application for asylum.

38. The referring court draws attention to the fact that, during that new examination, the asylum authority can rely on a ground of inadmissibility under Article 33(1) and Article 33(2)(b) and (c) of Directive 2013/32. Nevertheless, having regard to Articles 35 and 38 of that directive, interpreted in the light of Article 18 of the Charter of Fundamental Rights of the European Union ('the Charter'), that court believes that an application can only be found to be inadmissible on that basis where the person concerned is readmitted by the third country. It follows that if it is beyond doubt that the country to which the applicant must be removed will not readmit that person, the asylum authority cannot declare his or her application to be inadmissible. In that situation, the referring court takes the view that the application cannot be considered to be a subsequent application within the meaning of Article 40 of Directive 2013/32.

39. In the light of the foregoing, the referring court is of the view that, at the present time, the applicants in the main proceedings still fall within the scope of Directive 2013/32. The referring court is therefore uncertain whether the applicants in the main proceedings should be considered to be in detention within the meaning of that directive and, if they are, whether that detention is lawful, given that the detention in this case has exceeded the four-week period under Article 43(2) of that directive.

40. However, even should it not be appropriate to find that the applicants in the main proceedings are entitled to have their application for asylum re-examined, the referring court is uncertain whether they should be considered to be in detention within the meaning of Directive 2008/115 and, if they are, whether that detention is compatible with Article 15 of that directive.

41. The referring court finds that the situation of the applicants in the main proceedings can be distinguished from that in *Ilias and Ahmed v. Hungary*, in which the Grand Chamber of the European Court of Human Rights delivered its judgment on 21 November 2019.[8]

8 ECtHR, 21 November 2019, *Ilias and Ahmed v. Hungary*, CE:ECHR:2019:1121JUD004728715.

42. The referring court is therefore disposed to find that detaining the applicants in the main proceedings in the sector of the transit zone reserved for foreign nationals whose applications for asylum have been rejected constitutes detention that is not compliant with the requirements of EU law. It is therefore of the view that, under Article 47 of the Charter, it should be able to require the competent national authority, by means of an interim measure, to assign the applicants in the main proceedings a place of stay, situated outside the transit zone, which is not a place of detention, until the administrative proceedings come to an end.

43. Last, the referring court is uncertain as to the effectiveness of the remedy against the decision in which the first instance aliens policing authority amended the country of destination in the return decision concerning the applicants in the main proceedings and which that court finds to be a new return decision under Articles 3(4) and 12(1) of Directive 2008/115.

44. Indeed, the objection to that decision was heard by the asylum authority, even though that authority does not offer the guarantees of impartiality and independence required by EU law given that it is part of central government, operates under the authority of the minister for policing and is therefore part of the executive. Furthermore, the relevant Hungarian legislation does not allow the referring court to review the administrative decision on the objection to enforcement of the decision amending the return decision.

45. That circumstance means that the decision amending the country of return could, ultimately, remain in place even though, in the event that a new asylum procedure had to be conducted in relation to them, the applicants in the main proceedings would no longer fall within the ambit of Directive 2008/115, but would be covered by Directive 2013/32.

46. In those circumstances, the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged, Hungary) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) [New ground of inadmissibility]

May the provisions on inadmissible applications in Article 33 of [Directive 2013/32] be interpreted as 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) [Conduct of an asylum procedure]

(a) Must Article 6 and Article 38(4) of [Directive 2013/32], and recital 34 thereof, which imposes an obligation to examine applications for international protection, read in the light of Article 18 of the Charter of Fundamental Rights (“the Charter”), be interpreted as meaning that the competent asylum authority of a Member State must ensure that the applicant has the opportunity to initiate the asylum procedure if it has not examined the substance of the application for asylum by relying on the ground of inadmissibility mentioned in Question 1 above and has subsequently ordered the return of the applicant to a third country which has, however, refused to readmit him?

(b) If the answer to question 2(a) is in the affirmative, what is the exact extent of that obligation? Does it imply an obligation guaranteeing the possibility to submit a new application for asylum, thereby excluding the negative consequences of subsequent applications referred to in Articles 33(2)(d) and 40 of [Directive 2013/32], or does it imply the automatic start or conduct of the asylum procedure?

(c) If the answer to Question 2(a) is in the affirmative, taking account also of Article 38(4) of [Directive 2013/32], can the Member State — the factual situation remaining unchanged — re-examine the inadmissibility of the application in the context of that new procedure (thereby giving it the possibility of applying any type of procedure provided for in Chapter III, for example reliance once again on a ground of inadmissibility) or must it examine the substance of the application for asylum in the light of the country of origin?

(d) Does it follow from Article 33(1) and (2)(b) and (c) and Articles 35 and 38 of [Directive 2013/32], read in the light of Article 18 of the Charter, that readmission by a third country is one of the cumulative conditions for the application of a ground of inadmissibility, that is to say, for the adoption of a decision based on such a ground, or is it sufficient to verify that that condition is satisfied at the time of the enforcement of such a decision?

(3) (Transit zone as a place of detention in the context of an asylum procedure)

The following questions are relevant if, in accordance with the answer to Question 2, an asylum procedure must be conducted.

(a) Must Article 43 of [Directive 2013/32] be interpreted as precluding legislation of a Member State under which the applicant may be detained in a transit zone for more than four weeks?

(b) Must Article 2(h) of [Directive 2013/33], applicable pursuant to Article 26 of [Directive 2013/32], read in the light of Article 6 and Article 52(3) of the Charter, be interpreted as meaning that accommodation in a transit zone in circumstances such as those in the main proceedings (a zone which an applicant cannot lawfully leave on a voluntary basis regardless of his destination) for a period exceeding the four-week period referred to in Article 43 of [Directive 2013/32] constitutes detention?

(c) Is the fact that the detention of the applicant for a period exceeding the four-week period referred to in Article 43 of [Directive 2013/32] takes place only because he cannot meet his needs (accommodation and food) due to a lack of material resources to cover those needs compatible with Article 8 of [Directive 2013/33], applicable pursuant to Article 26 of [Directive 2013/32]?

(d) Is the fact that (i) accommodation which constitutes de facto detention for a period exceeding the four-week period referred to in Article 43 of [Directive 2013/32] has not been ordered by a detention order, (ii) no guarantee that the lawfulness of the detention and its continuation may be challenged before the courts has been provided, (iii) the de facto detention takes place without any examination of the necessity or proportionality of that measure, or whether there are any alternative measures and (iv) the exact duration of the de facto detention is not fixed, including the date on which it ends, compatible with Articles 8 and 9 of [Directive 2013/33], applicable pursuant to Article 26 of [Directive 2013/32]?

(e) Can Article 47 of the Charter be interpreted as meaning that, when a manifestly unlawful detention is brought for consideration before a court of a Member State, that court may, as an interim measure, until the administrative proceedings come to an end, require the authority to designate for the benefit of the third-country national a place of stay outside the transit zone which is not a place of detention?

(4) (Transit zone as a place of detention in the context of an asylum procedure)

The following questions are relevant if, in accordance with the answer to Question 2, there is a need to conduct not an asylum procedure but a procedure within the field of competence of the aliens police:

(a) Must recitals 17 and 24 and Article 16 of [Directive 2008/115], read in the light of Article 6 and Article 52(3) of the Charter, be interpreted as meaning that accommodation in a transit zone in circumstances such as those in the main proceedings (a zone which an applicant cannot lawfully leave on a voluntary basis regardless of his destination) constitutes deprivation of liberty for the purposes of those provisions?

(b) Is the fact that the detention of an applicant, national of a third country, takes place solely because he is subject to a return order and cannot meet his needs (accommodation and food) due to a lack of material resources to cover those needs compatible with Recital 16 and Article 15(1) of [Directive 2008/115], read in the light of Articles 6 and 52(3) of the Charter?

(c) Is the fact that (i) accommodation which constitutes de facto detention has not been ordered by a detention order, (ii) no guarantee that the lawfulness of the detention and its continuation may be challenged before the courts has been provided and (iii) the de facto detention takes place without any examination of the necessity or proportionality of that measure, or whether there are any alternative measures, compatible with Recital 16 and Article 15(2) of [Directive 2008/115], read in the light of Articles 6 and 47 and Article 52(3) of the Charter?

(d) Can Article 15(1) and (4) to (6) and recital 16 of [Directive 2008/115], read in the light of Articles 1, 4, 6 and 47 of the Charter be interpreted as precluding detention from taking place without its exact duration being fixed, including the date on which it ends?

(e) Can EU law be interpreted as meaning that, when a manifestly unlawful detention is brought for consideration before a court of a Member State, that court may, as an interim measure, until the administrative proceedings come to an end, require the authority to designate for the benefit of the third-country national a place of stay outside the transit zone which is not a place of detention?

(5) [effective judicial protection with regard to the decision amending the country of return]

Must Article 13 of [Directive 2008/115], under which a third-country national is to be afforded an effective remedy to appeal against or seek review of 'decisions related to return', read in the light of Article 47 of the Charter, be interpreted as meaning that, where the remedy provided for under domestic law is not effective, a court must review the application lodged against the decision amending the country of return at least once?'

B. Case C-925/19 PPU

47. The applicants in the main proceedings are a father and his minor child, both Iranian nationals, who arrived in the Röszke transit zone in Hungary via Serbia.

48. On 5 December 2018, they submitted an application for asylum to the asylum authority, in the transit zone.

49. In support of their application, the father stated that he had left Iran two and a half years previously because he had divorced his wife and had become interested in Christianity, although he had not been baptised, and because, during his childhood, he had suffered sexual violence by members of his family. He also stated that the reasons that had obliged him to leave his country of origin were not political or linked to belonging to any minority ethnic or religious community and that he had reached Hungary via Turkey, Bulgaria and Serbia.

50. The father also stated that, after leaving Iran for Turkey and spending 10 days in Turkey, without applying for asylum in that country, he had stayed for some three months in Bulgaria. He also indicated that, after being informed that he would be sent back to Iran if he did not make an application for international protection in that Member State, he made an application for asylum in Bulgaria, against his wishes. He stated furthermore that he also resided in Serbia for more than two years, although he did not make an application for asylum in that country.

51. On 5 December 2018 the asylum authority designated the Röszke transit zone as accommodation for the applicants in the main proceedings. They are still there.

52. By an administrative decision of 12 February 2019, under Paragraph 51(2)(f) of the Law on the right to asylum, the asylum authority rejected the asylum application of the applicants in the main proceedings as being inadmissible, without examining the substance of the application, and held that the principle of *non-refoulement* did not apply in their case. The authority ordered that the applicants in the main proceedings be removed from the territory of the European Union to Serbia, holding that they were not exposed to a risk of serious harm or persecution in Turkey, Bulgaria or Serbia and that they were guaranteed a sufficient degree of protection in those countries. That decision also imposed a one-year ban on entry and residence.

53. The applicants in the main proceedings brought an action against the decision of the asylum authority, which the Fővárosi Közigazgatási és Munkaügy Bíróság (Budapest Administrative and Labour Court) rejected by a decision of 5 March 2019, without ruling on the substance of their application for asylum. That court also indicated that the consequences of any refusal by the Republic of Serbia to readmit the applicants should be determined in the aliens police procedure.

54. Subsequently, by a decision of 27 March 2019, the first instance aliens policing authority ordered the applicants in the main proceedings to stay in the aliens sector of the Röszke transit zone, from the date of that decision, under Paragraph 62(3a) of the Law on the entry and residence of third country nationals. According to the referring court, no reasons for that decision are stated and the only objection of illegality that can be brought before the ordinary courts is that the policing authority failed to comply with its obligation under the legislation to provide information.

55. On the same day, the first instance aliens policing authority contacted the police body responsible for deportation to Serbia so that it could take the steps necessary for the applicants in the main proceedings to be readmitted to Serbia.

56. On 1 April 2019, the competent police body reported that the Republic of Serbia had not readmitted the applicants in the main proceedings into its territory because, since they had not entered Hungarian territory illegally from Serbian territory, the conditions for the application of Article 3(1) of the Agreement between the European Union and Serbia on readmission were not satisfied.

57. The asylum authority did not examine the substance of the applicants' asylum application, despite the Republic of Serbia's refusal to readmit them, on the grounds that, under Paragraph 51/A of the Law on the right to asylum, the asylum authority is to examine the substance only if the ground of inadmissibility is based on the safe country of origin concept or the safe third country concept, whereas the decision rejecting the applicants' asylum application as inadmissible was based on a different ground of inadmissibility, that is to say, the 'safe country of transit' ground, as defined in Paragraph 51(2)(f) of that law.

58. By a decision of 17 April 2019, the first instance aliens policing authority amended the expulsion decision contained in the asylum authority's decision of 12 February 2019 in respect of the country of destination, and ordered the applicants in the main proceedings to be removed under escort to Iran.

59. The applicants in the main proceedings lodged an objection to that decision with the asylum authority, acting as the aliens policing authority. Their objection was dismissed by an order of 17 May 2019. Under Paragraph 65(3b) of the Law on the entry and residence of third-country nationals, no appeal lies against decisions on objections which, as such, are not subject to review by the courts.

60. The applicants in the main proceedings brought before the referring court, an action seeking annulment of the orders rejecting their objection to enforcement of the decisions amending the country of return and an order that the first instance aliens police authority conduct a new procedure, claiming, first of all, that those orders are return decisions that must be open to challenge before the courts so that they can be examined on the substance in the light of the principle of *non-refoulement* and, secondly, that the return decisions are unlawful. According to the applicants, the asylum authority should have examined the substance of their application for asylum because the Republic of Serbia had refused to readmit them and because Paragraph 51(2)(f) of the Law on the right to asylum infringes EU law.

61. Further, the applicants in the main proceedings brought an administrative action for failure to act before the referring court against the asylum authority, seeking a declaration that the authority failed to discharge its obligations by not assigning them a place of stay outside the transit zone.

62. The referring court joined the two actions and, on the same grounds as set out in points 33 to 45 of this Opinion, stayed the proceedings and referred to the Court of Justice for a preliminary ruling the same questions that it put before the Court in Case C-924/19 PPU.

III. Procedure before the Court of Justice

63. The referring court has requested that the reference for a preliminary ruling in these two joined cases be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice.

64. By a decision of 22 January 2020 the Court granted that request.

65. The applicants in the main proceedings, the Hungarian Government and the European Commission submitted written observations. The parties and the Commission also presented oral argument at the hearing held on 13 March 2020.

IV. Analysis

A. Admissibility of the questions referred

66. According to the Court's settled case-law, the procedure established in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute concerning EU law. [9]

67. In the present instance it is important to note that all the applicants in the main proceedings have brought two actions before the referring court, which differ in their subject matter but have nevertheless been joined under a procedural order, namely:

– an action claiming that the order dismissing the objection to the decision amending the country of destination should be annulled and, subsequently, that the competent national authority should be required to undertake a new asylum procedure;

– an action for failure to act seeking a finding that the national asylum authority failed to discharge its obligations by not designating a place of stay for the applicants in the main proceedings outside the transit zone.

68. That is the specific context in which the Court must assess whether the questions posed, rather imprecisely, by the referring court are relevant to resolving the disputes in the main proceedings, as described above.

69. There is no doubt in my mind that the referring court's fifth question is relevant to resolving the dispute in the action for annulment referred to above, enquiring of the Court as it does whether the remedy sought against the amending decision is effective given that, under domestic law, the action is heard by the administrative authority that made the decision in question and there is no possibility of judicial review of any dismissal of that action solely at the initiative of the person to whom the decision is addressed. [10]

70. Assuming the answer to Question 5 to be in the affirmative, the first and second sets of questions can also be considered relevant in the light of what the applicants in the main proceedings submit as regards the lawfulness of the amending decision. The applicants in the main proceedings claim that the amending decision was made on the basis of a finding that their application for asylum was inadmissible on a ground, which is contrary to EU law, founded on the 'safe transit country' concept within the meaning of Paragraph 51(2)(f) of the Law on the right to asylum. [11]

9 Order of 17 December 2019, *Di Girolamo* (C-618/18, not published, EU:C:2019:1090, paragraph 25) and judgment of 27 February 2014, *Pohotovosť* (C-470/12, EU:C:2014:101, paragraph 29).

10 It should be noted that the questions referred to the Court of Justice for a preliminary ruling have been referred by a court that is hearing, among other matters, an action for annulment not provided for in domestic law. That observation does not in my view undermine the admissibility of those questions because the first question addresses precisely whether the national legislation concerned satisfies the requirements arising from the right to an effective judicial remedy as guaranteed by Article 47 of the Charter and Article 13 of Directive 2008/115, with the effect that the Court is required to give an answer when it assesses the substance of the first question (see, to that effect, judgment of 17 January 2019, *KPMG Baltics*, C-639/17, EU:C:2019:31, paragraph 11 and the case-law cited).

11 The applicants also advance an argument based on the fact that the Republic of Serbia refused to readmit them and the consequences attaching to that stance.

71. When the referring court comes to assess what appears to amount to a plea of illegality in respect of Paragraph 51(2)(f), and the corresponding obligation on the competent national authority to conduct a new asylum procedure, the referring court may take into account the Court's answers concerning the issue of whether the abovementioned ground of inadmissibility is compatible with EU law and the consequences of any incompatibility on the conduct of the asylum procedure, as those issues are referred to in the first and second sets of questions referred for a preliminary ruling.

72. Whilst the requests for a preliminary ruling are admittedly hardly precise as regards the provisions of Hungarian procedural law applicable in such a context, it should nevertheless be borne in mind that, according to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. [12]

73. As regards the questions set out in the alternative in the third and fourth sets of questions, those seek to determine whether the fact that the applicants in the main proceedings are accommodated in a sector of the transit zone constitutes detention satisfying the conditions under the relevant provisions of Directives 2013/32 and 2013/33 or of Directive 2008/115, according to whether the situation falls within the scope of the first two directives or of Directive 2008/115.

74. Those questions obviously have a bearing on resolution of the disputes in the main proceedings concerning the failures of the competent national authority when it determined the place of stay of the applicants in the main proceedings. Furthermore, to my mind, those questions can only be answered, and those disputes thereby be resolved once the legal status of the applicants in the main proceedings, as described in the preceding point, has been determined, and I therefore conclude that the first and second sets of questions are relevant to the outcome of the disputes in the main proceedings, considered from the perspective of the action for failure to act that is also being heard by the referring court.

75. It is therefore necessary to give a ruling on all the questions referred, [13] starting with Question 5, since the answer to be given to that question will determine whether the referring court has jurisdiction to hear the action for annulment of the decision amending the country of destination.

B. Right to an effective remedy against the decision amending the country of return

76. By its fifth question, the referring court asks, in essence, whether Article 13 of Directive 2008/115, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation which, whilst it does provide for an appeal against the decision of the competent administrative authority amending the country of destination indicated in the return decision, entrusts the hearing of the appeal to that same authority, with no possible judicial review solely at the initiative of the addressee of that decision.

77. It should be recalled that, by a measure of 12 February 2019, the competent national authority refused the application for asylum of the Iranian applicants in the main proceedings as being inadmissible, ordered their removal to Serbia under escort to the Serbian-Hungarian border and imposed a one-year entry ban. A decision in identical terms was made in relation to the Afghan

12 Judgment of 19 September 2019, *Lovasné Tóth* (C-34/18, EU:C:2019:764, paragraph 40). The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 37).

13 For clarification, only Question 3(c) may give rise to doubts as to its relevance, to which I will refer when examining Question 3.

applicants in the main proceedings on 25 April 2019. In both cases, what is involved is a single complex administrative measure which combines a refusal of the application for international protection and a return and removal decision accompanied by an entry ban, which in principle complies with Article 6(6) of Directive 2008/115.

78. Following the Republic of Serbia's refusal to readmit the applicants in the main proceedings, both the measures at issue were amended as regards the country of destination, replacing the reference to Serbia with that of Iran or Afghanistan depending on the nationality of the persons concerned. The removal decision was similarly modified. I believe that each amending decision should be found to constitute a new return and removal decision against which the applicants in the main proceedings must have an effective remedy, in accordance with Article 12(1) in conjunction with Article 13(1) of Directive 2008/115.

79. On the assumption that a third country national is the person to whom a decision imposing on him a return obligation and forced removal, in the present case transportation under escort to the Serbian-Hungarian border, is addressed, the designation of the country of destination is an essential and mandatory element of that decision. Indeed, which country is indicated must inform the assessment of whether there is compliance with the principle of *non-refoulement* which, according to Article 5 of Directive 2008/115, the Member States must take into account when implementing that directive. Bearing that obligation in mind, removal (physical transportation out of the Member State) cannot be to an indeterminate destination, but only to a defined country of return. By changing the country of destination indicated in the return and removal decision, the competent national authority made a new decision that adversely affects its addressee and must, therefore, be open to challenge in accordance with Article 13 of Directive 2008/115.

80. Domestic law does in fact provide for such a challenge, specifically in Paragraph 65(3b) of the Law on the entry and residence of third country nationals, in the form of an objection that must be made to the administrative authority that issued the amending decision within 24 hours of that decision being notified, with the proviso that, according to that paragraph, 'no appeal lies against the decision issued on the objection to enforcement'. [14]

81. Can that objection be regarded as an effective remedy within the meaning of Article 13(1) of Directive 2008/115? That provision states that 'the third-country national concerned is to be afforded an effective remedy to appeal against or seek review of decisions related to return before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.'

82. The wording of that article raises questions, in so far as it is arguable that the requirement that the remedy must be effective is satisfied simply by the fact that an appeal can be brought against a return decision and/or decision on removal or a review of that decision can be sought before the competent administrative authority, and that the proviso relating to the requirement for impartiality and independence relates only to the members of the 'competent body', the third and last entity to which the article refers. [15]

14 That wording, and specifically the use of the word 'enforcement', could suggest that the amending decision at issue is a procedural rather than a substantive measure.

15 The proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals of 1 September 2005 (COM(2005) 391 final) provided only for a judicial remedy.

83. In its French version, Article 13(1) of Directive 2008/115 can be interpreted literally, the proviso relating to each of the appeal bodies referred to or only to those last two, because it uses the coordinating conjunction 'ou' ('or' in English) which serves to link elements having the same function, not in the sense of an addition but of a choice. Here, that conjunction is used to link reference to three appeal bodies, as alternatives, each of which is able to hear the appeals concerned, suggesting therefore that the phrase starting with the word 'composée' ['composed'] can relate to each authority or body referred to, taken in isolation. [16]

84. Whilst the versions of Article 13(1) of Directive 2008/115 in English ('before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence') and Spanish ('… ante un órgano jurisdiccional, una autoridad administrativa u otro órgano competente compuesto por miembros imparciales y con garantías de independencia') are similar to the French version, the versions in Estonian ('pädevas kohtu- või haldusasutuses või pädevas organis, mis koosneb liikmetest, kes on erapooletud ja kelle sõltumatus on tagatud') and Italian ('… dinanzi ad un'autorità giudiziaria o amministrativa competente o a un organo competente composto da membri imparziali che offrono garanzie di indipendenza'), in contrast, seem to attach the requirement of impartiality and independence only to the members of the third appeal body listed. It seems therefore that a literal interpretation of Article 13(1) of Directive 2008/115 cannot provide an unambiguous answer to the referring court's question, bearing in mind that a differing language version cannot prevail by itself against the other language versions. [17] It is therefore necessary to look at the general scheme of the text containing the provision at issue and the aim pursued by the EU legislature. [18]

85. Construing the article contextually, it should be noted that Directive 2008/115 aims to take into account the 'Twenty guidelines on forced return' adopted by the Committee of Ministers of the Council of Europe, which is referred to in recital 3 of that directive. Paragraph 1 of Guideline 5, headed 'Remedy against the removal order', provides that 'in the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence.' [19]

86. Furthermore, under Article 6(6) of Directive 2008/115, Member States are required to ensure that all return decisions are consistent not only with the procedural safeguards set out in Chapter III of that directive but also with 'other relevant provisions of EU and national law' which, to my mind, necessarily include the provisions of the Charter, in particular Article 47 on the right to an effective remedy discussed in this Opinion. That requirement is explicitly laid down in a situation where a return decision is adopted at the same time as the competent national authority rejects the application for international protection at first instance. That requirement must also apply in a situation, such as that at issue in the main proceedings, in which an amending return decision was adopted by the same authority in a separate administrative act. [20]

16 If the legislature wished to single out the situation of the third appeal body alone, this would have led, moreover, to the addition of a comma before the reference to that body, as follows '… devant une autorité judiciaire ou administrative compétente, ou une instance compétente composée de membres impartiaux et jouissant de garanties d'indépendance' (' … before a competent judicial or administrative authority, or a competent body composed of members who are impartial and who enjoy safeguards of independence').

17 Judgment of 17 July 1997, *Ferriere Nord* v *Commission* (C-219/95 P, EU:C:1997:375, paragraph 15).

18 Judgment of 13 September 2017, *Khir Amayry* (C-60/16, EU:C:2017:675, paragraph 29 and the case-law cited).

19 Paragraph 2 of Guideline 5 states that the remedy must offer the required procedural guarantees and present certain characteristics, including that the time limits for exercising the remedy must not be unreasonably short, whereas in the present case that time limit is only 24 hours.

20 See, to that effect, judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 60).

87. As regards a teleological interpretation, the objective of Directive 2008/115 is, in accordance with Article 79(2) TFEU, and as can be seen from recitals 2 and 11 of that directive, to establish an effective removal and repatriation policy, based on common standards and common legal safeguards, for persons to be returned in a humane manner and *with full respect for their fundamental rights* and dignity. [21]

88. Turning, specifically, to the remedies established in Article 13 of Directive 2008/115 against decisions related to return, the characteristics of such remedies must be determined in a manner that is consistent with Article 47 of the Charter, whose first paragraph provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. [22]

89. Furthermore, the second paragraph of Article 47 of the Charter provides that everyone is entitled to a fair and public hearing. Upholding that right presupposes that where a decision by an administrative authority does not itself satisfy the conditions of independence and impartiality, it must be subject to subsequent review by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues. The concept of 'independence', which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision. [23] In the present case the body in question manifestly does not act as a third party, since the action brought against the decision amending the country of destination fell to be examined by the administrative authority which adopted that decision.

90. That interpretation is supported by the explanations relating to Article 47 of the Charter, according to which the first paragraph of that article is based on Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('ECHR') which guarantees the right to 'an effective remedy before a national authority'. [24] Indeed, the European Court of Human Rights, whose case-law must be taken into account, under Article 52(3) of the Charter, has held, in *de Souza Ribeiro v. France*, [25] that where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, Article 13 of the Convention, in conjunction with Article 8 thereof, requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality.

91. It should be noted that, according to the information provided by the referring court, national law does indeed provide for the possibility of judicial review of decisions by an administrative authority ruling on objections lodged against decisions amending a country of destination. Accordingly, it is stated that the public prosecutor's office reviews the lawfulness of final or enforceable individual administrative decisions or measures by the administrative authorities or other non-judicial bodies responsible for implementing the law, where they have not been subject to judicial review. In the event of an infringement of the law that affects the substance of an administrative decision, a member of the public prosecutor's office can invite the national aliens policing authority to put an end to that infringement and, if it does not do so, can bring legal proceedings against the final decision issued in the case, but is not authorised to re-examine the decision of the national aliens police authority.

21 See judgments of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 38) and of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 48).

22 See, to that effect, judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 52).

23 See, by analogy, judgment of 13 December 2017, *El Hassani* (C-403/16, EU:C:2017:960, paragraphs 39 and 40).

24 See, to that effect, judgment of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 51).

25 ECtHR, 13 December 2012, *de Souza Ribeiro v. France*, EC: ECHR:1213JUD002268907 § 83 and the case-law cited. The ECtHR stated in that judgment that the applicant had been able to seek a remedy before an administrative tribunal that 'fulfilled the requirements of independence, impartiality and competence to examine the complaints under Article 8' (§ 92).

92. It is nevertheless important to recall that Article 47 of the Charter on the right to effective judicial protection, which is sufficient in itself and does not need to be given concrete expression by provisions of EU or national law, confers on individuals a right which they may rely on as such.[26] In view of that subjective right conferred on the person concerned, national legislation that gives power to initiate judicial review of the decision of an administrative authority amending a country of destination not to the person to whom that decision is addressed but to a third body does not, to my mind, satisfy the requirements in order for a remedy to be effective under Article 13 of Directive 2008/115, read in the light of Article 47 of the Charter.

93. That being so, out of respect for the fact that the wording of Article 13 of Directive 2008/115 is unambiguous when it lists the appeal bodies, I propose that it should be found that the effective remedy required by that article, read in the light of Article 47 of the Charter, is also ensured in a situation where an appeal is brought before a non-judicial body, provided that body is composed of members offering guarantees of independence and impartiality.[27]

94. Having come this far in my analysis, I believe it is necessary to draw the Court's attention to a difficulty arising from the relationship between the solution advocated above and that arrived at in recent judgments on the interpretation of Article 46 of Directive 2013/32 in conjunction with Article 13 of Directive 2008/115, both read in the light of Article 18, Article 19(2) and Article 47 of the Charter, seeking to determine the extent of the right to an effective remedy where, first, an appeal is brought against a return decision, adopted immediately after rejection of the application for international protection, in a separate administrative act[28] and, secondly, in the case of an appeal against a first instance judgment confirming a decision that rejected an application for international protection and imposed an obligation to return.[29]

95. In those judgments, the Court holds that the effective judicial protection that those texts confer on an applicant for international protection against a decision rejecting an application for international protection and imposing an obligation to return necessarily includes a judicial remedy,[30] together, where necessary, with automatic suspensory effect where the person concerned would be exposed to a risk of inhuman treatment or treatment contrary to the applicant's dignity, and precludes any obligation to set up a second level of jurisdiction or to give automatic suspensory effect to appeal proceedings.

26 Judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraph 56).

27 Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (OJ 2017, L 339, p. 83) states as follows: 'Nature of reviewing body: in line with Articles 6 and 13 ECHR and Article 47 [of the Charter], the appeal body must in substance be an independent and impartial tribunal. Article 13(1) of the Return Directive is closely inspired by [Council of Europe] Guideline 5.1 and it should be interpreted in accordance with relevant European Court of Human Rights ("ECtHR") case-law. In line with this case-law, the reviewing body can also be an administrative authority provided that this authority is composed of members who are impartial and who enjoy safeguards of independence and that national provisions provide for the possibility to have the decision reviewed by a judicial authority, in line with the standards set by Article 47 [of the Charter] on the right to an effective remedy.'

28 See judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465).

29 See judgments of 26 September 2018, *Belastingdienst* v *Toeslagen (Suspensory effect of the appeal)* (C-175/17, EU:C:2018:776) and of 26 September 2018, *Staatssecretaris van Veiligheid en justitie (Suspensory effect of the appeal)* (C-180/17, EU:C:2018:775).

30 Although the judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 58), refers to the right to an effective remedy 'before at least one judicial body', an expression which suggests that the appeal can be heard by a non-judicial body although under the supervision of a judicial body, the Court has stated in its judgments of 26 September 2018, *Belastingdienst* v *Toeslagen (Suspensory effect of the appeal)* (C-175/17, EU:C:2018:776, paragraph 37) and of 26 September 2018, *Staatssecretaris van Veiligheid en justitie (Suspensory effect of the appeal)* (C-180/17, EU:C:2018:775, paragraph 33) that effective judicial protection 'is confined to the existence of a single judicial remedy', without further clarification.

96. It emerges from that case-law that 'all that matters is that there should be a remedy before a judicial body' capable of satisfying the requirement of an effective remedy enshrined in Article 47 of the Charter, and it seems to me that this is difficult to reconcile with the wording of Article 13 of Directive 2008/115, which is explicit at least in so far as it indicates that the appeal body should be an administrative authority or a competent body, and that, given those circumstances, this raises doubts as to whether that provision of secondary law is in fact valid.

97. That being so, I believe the two approaches can be reconciled simply by adding a clarification to the Court's recent case-law, cited above, indicating that the protection conferred by Article 13 of Directive 2008/115, read in the light of Article 47 of the Charter, on an applicant for international protection against a decision rejecting an application for international protection and which, in the same administrative act or subsequently in a separate administrative act, imposes an obligation to return implies that there must be at least one judicial remedy, where the administrative authority or competent body called upon under national law to consider the remedy in question is not composed of impartial members who enjoy safeguards of independence. [31]

98. It is apparent from the foregoing that Article 13 of Directive 2008/115, read in the light of Article 47 of the Charter, must be interpreted as meaning that it imposes an obligation on Member States to establish a remedy against a decision amending the country of destination indicated in a return decision at least before one judicial body, where the administrative authority or competent body called upon to consider the remedy in question is not composed of impartial members who enjoy safeguards of independence.

99. It will be for the referring court, which is charged, within the exercise of its jurisdiction, to apply and give full effect to the provisions of EU law, when it hears the action brought by the applicants in the main proceedings, to verify whether the national legislation at issue in the main proceedings can be interpreted in conformity with those requirements of EU law, and to disapply any provision of the Law on the entry and residence of third-country nationals, in particular Paragraph 65(3b), that is contrary to the intended outcome of Directive 2008/115.

C. The safe transit country ground of inadmissibility

100. It is common ground that the competent national authority declared the applications for international protection of all the applicants in the main proceedings to be inadmissible under Paragraph 51(2)(f) of the Law on the right to asylum, which came into force on 1 July 2018 and reads as follows:

'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 Paragraph 6(1) or the risk of serious harm, within the meaning of Paragraph 12(1), or in which a sufficient degree of protection is guaranteed.'

101. By its first question, the referring court enquires whether that paragraph is compatible with EU law. A different Hungarian court has in fact already put that question to the Court of Justice in *LH (Tompa)* (C-564/18) and it is noted that, in its observations in the present case, the Hungarian Government states that it wishes merely to confirm the point of view it expressed in that case.

31 The proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals of 2 September 2018 (COM(2018) 634 final), still pending, provides in Article 16, on remedies, that the third-country national concerned is to be afforded an effective remedy to appeal against or seek review of decisions related to return before a competent judicial authority, and has the right to appeal, before a single level of jurisdiction, against the return decision where that decision is based on a decision rejecting an application for international protection that was subject to an effective judicial review in accordance with the provision of secondary law governing that application. There is therefore no longer any mention of an appeal body consisting of an administrative authority or competent body composed of impartial members who enjoy safeguards of independence.

102. In its judgment of 19 March 2020, in which it followed the Opinion of Advocate General Bobek, [32] the Court held that Article 33 of Directive 2013/32 is to be interpreted as precluding national legislation, in that case Paragraph 51(2)(f) of the Law on the right to asylum, pursuant to which an application for international protection can be rejected as being inadmissible on the ground that the applicant arrived in the territory of the Member State concerned through 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. After recalling that the list of grounds of inadmissibility set out in Article 33(2) of Directive 2013/32 is exhaustive, the Court stated that the national legislation in question cannot be found to be giving effect to any of those grounds. That finding must apply in the present case.

D. Legal status of the applicants

1. Scope of the second question referred

103. In its second question the referring court seeks, in essence, to determine the procedural outcome for the applicants in the main proceedings in a situation in which their applications for international protection were rejected on the 'safe transit country' ground of inadmissibility, and the competent authorities of that country subsequently refused to readmit those applicants into their territory.

104. The referring court enquires whether, in that context and in accordance with Article 6 and Article 38(4) of Directive 2013/32, read in the light of Article 18 of the Charter, the competent national authority has an obligation to conduct an asylum procedure (Question 2(a)) and, if it does, whether that obligation means that the authority has a duty merely to give the applicants in the main proceedings an opportunity to submit a new application for asylum, which cannot be considered to be a subsequent application, or whether it must automatically start a new asylum procedure (Question 2(b)) and whether, in that procedure, it can rely on other grounds of inadmissibility or must examine the merits of the application for international protection (Question 2(c)). The Court is also invited to clarify the legal regime governing the condition, referred to in Articles 35 and 38 of Directive 2013/32, that the applicant will be admitted or readmitted by the third country concerned (Question 2(d)).

105. In the light of the wording of the various parts of that question referred, and in particular the wording of the articles of Directive 2013/32 to which they refer, read in the light of the referring court's explanations in respect of those parts, it does not seem to me that the Court is being asked about the consequences of a possible annulment of the decision amending the country of destination, following a decision upholding the plea of illegality referred to above. In other words, my view is that the Court has been invited only to clarify the effect of the Serbian authorities' refusal to readmit the applicants in the main proceedings on the procedural outcome of their application for international protection, in the light of the relevant provisions of Directive 2013/32, irrespective of any finding that the ground of inadmissibility under Paragraph 51(2)(f) of the Law on the right to asylum is unlawful and the consequences of that finding.

106. I note that, in its observations, the Hungarian Government confines itself to stating that the fact that a removal has failed because the third country concerned did not readmit the applicants cannot give rise to an obligation to conduct an asylum procedure, once the procedure has been definitively closed as a result of a national judicial decision confirming that the applications for international

32 Judgment *LH (Tompa)* (C-564/18 EU:C:2020:218), Opinion in Case *LH (Tompa)* (C-564/18, EU:C:2019:1056).

protection are inadmissible. The sole purpose of that mere assertion is, in my view, to avoid any legal discussion of the consequences of the refusal to readmit which, by definition, can only occur after it has been expressly requested, once the finding that the applications for international protection are inadmissible has become final.[33]

2. Consequences of Serbia's refusal to readmit the applicants in the main proceedings

107. I note that, as the order for reference observes, the requirement that applicants will be readmitted or admitted is contained in Articles 35 and 38 of Directive 2013/32. Reasoning by analogy with Article 38, the referring court submits that Serbia's refusal to readmit the applicants should reinstate the obligation on the competent Hungarian authority to conduct a procedure for examination of the application for international protection.

108. In order to ascertain whether that may be so, it is necessary to make a few preliminary remarks on the context of the readmission requirement, starting with the position and the wording of Articles 35 and 38 of Directive 2013/32.

109. Forming part of Section III of Chapter III of Directive 2013/32 (procedures at first instance'), those articles define the concepts 'first country of asylum' and 'safe third country' for the purposes of applying the grounds of inadmissibility of applications for international protection under Article 33(2)(b) and (c) of that directive.

110. Article 35 of Directive 2013/32 provides that the 'first country of asylum' ground applies where an applicant has already been recognised in that country as a refugee and can still avail him- or herself of that protection or where 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. Article 38 of Directive 2013/32 provides that the 'safe third country' ground applies, in essence, where, due to a sufficient connection to a third country as defined by national law, Member States can reasonably expect the applicant to seek protection in that third country, with the proviso that the applicant must be safe in that country. Where the 'safe third country' does not permit the applicant to enter its territory, Member States must ensure that access to a new procedure is given so that the application for international protection can be examined.

111. The requirement that it is known that the applicant will be readmitted is therefore one of the cumulative conditions for making a decision based on the 'first country of asylum' ground, whilst in the case of a decision based on the 'safe third country' ground, admission or readmission by such a country only needs to be verified at the time of enforcement, as made clear by the unambiguous wording of recitals 43 and 44 of Directive 2013/32. In any event, I believe that the requirement that the applicant will be admitted or readmitted has a vital part to play if both the 'first country of asylum' ground and the 'safe third country' ground are to be able to perform their functions.

112. In my view, the function of the 'first country of asylum' and 'safe third country' concepts is to enable the authorities of Member States that have received an application for international protection to transfer responsibility for examining the requirement of international protection to a different country. It seems to me that the corresponding obligation on the competent authorities of that country to examine the substance of that application has as its corollary the creation of an individual

33 Even though the Hungarian Government's thesis might be understood to be arguing that the various parts of Question 2 are irrelevant and therefore inadmissible, it should be recalled that the referring court is hearing an action seeking a finding that the competent national authority failed to act when it determined the place of stay of the applicants in the main proceedings, and that a preliminary matter to be determined in that action is the legal status of those applicants that also constitutes the subject matter of that question.

right possessed by the persons concerned to have the substance of their application for international protection examined during the procedure relating to that application. In other words, that right implies that an examination of the substance of the application must 'take place, have taken place or be able to take place somewhere'.[34]

113. It is precisely the need to ensure that this right is upheld that, to my mind, justifies the inclusion in Articles 35 and 38 of Directive 2013/32 of a requirement that the applicant will be readmitted to the territory of the 'first country of asylum' or can enter the 'safe third country'. Accordingly, I concur with the position expressed by the referring court in the view that, since the 'safe country of transit' concept is similar to, although cannot be described as equivalent to, the 'safe third country' concept,[35] the legal effects of the refusal by the Serbian authorities to readmit the applicants in the main proceedings must be regarded as being covered by Article 38 of Directive 2013/32.

114. As regards whether those effects are exactly the same, I note that, in contrast to Article 35 of that directive, the fact that it is not certain that the applicants will be readmitted does not prevent the ground of inadmissibility under that article from applying, as can be seen from the wording of recital 44 of that directive and, specifically, use of the expression 'grounds for considering that the applicant will be admitted or readmitted' to the safe third country.[36] If, however, once the 'safe third country' ground of inadmissibility has been applied, the competent authorities of that country refuse to allow the applicant to enter their territory, according to Article 38(4) of Directive 2013/32 the competent authorities of the Member State where the application was made have a duty to ensure that a new procedure to examine the application for international protection can be initiated.

115. I am therefore of the view that, in the present case, the asylum authority is required to discharge an obligation that is identical in substance to that laid down in Article 38(4).

116. The question whether that obligation requires the competent national authorities merely to give applicants an opportunity to submit a new application or whether they must resume the procedure of their own motion cannot in my view be answered by interpreting Article 38(4) of Directive 2013/32 literally. Whilst the French version might suggest that the procedure can only be initiated if the person concerned submits a new application ('les États membres veillent à ce que cette personne puisse engager une procédure …'), the versions in English ('Member States shall ensure that access to a procedure is given …'), Spanish ('los Estados miembros garantizarán que tendrá acceso a un procedimiento …'), Estonian ('tagavad liikmesriigid juurdepääsu menetlusele vastavalt …') and Portuguese ('os Estados-Membros asseguram o acesso a une procedimiento …') can, in contrast, be understood as meaning that it is incumbent on the competent national authorities to resume examination of the applications for international protection at issue.

34 Bodart S., 'Article 18. Droit d'asile', in Picod F. and Van Drooghenbroeck S. (eds), *Charte des droits fondamentaux de l'Union européenne — Commentaire article par article*, Bruylant, 2020, p. 499.

35 I note in that respect that it is apparent from the order for reference that the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court) dismissed the actions brought by the applicants in the main proceedings against the decisions rejecting their applications for asylum because it found that the 'safe country of transit' ground was not incompatible with Directive 2013/32 because it could be subsumed under the 'safe third country' ground.

36 See the commentary on Article 22 of the proposal of 20 September 2000 for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2000) 578 final) (OJ 2001 C 262E, p. 231), according to which: 'While no explicit assurance of (re-)admittance for the individual applicant is imposed in this proposal, *any examination into the application of the safe third-country concept should take into account how the authorities of the third country will respond to the arrival of the applicant.* This should also be assessed individually by each Member State on the basis of all relevant evidence relating inter alia to past experiences, information from the HCR [United Nations High Commissioner for refugees] and other Member States and the existence of re-admission agreements' (emphasis added). See also, in that respect, HCR, 'Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries' April 2018, available at http://bit.ly/2ON4D0I, which clearly states that 'prior to transfer, it is important, keeping with relevant international law standards, individually to assess whether the third state will: … (re)admit the person …'.

117. As established in the Court's settled case-law, where a literal interpretation does not lead to an unambiguous conclusion, a systematic and teleological approach must be used to determine the scope of the provision at issue.

118. Looking at the context of Article 38(4) of Directive 2013/32, I fail to see how the first interpretation proposed above, based on the premiss that a person ceases to be an applicant for international protection as soon as his or her application is rejected as inadmissible, could be considered to be compatible with the definition of 'applicant' itself, enshrined in Article 2(c) of Directive 2013/32. That article defines an applicant 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*',[37] and the concept 'final decision' must be understood, according to Article 2(e) of that directive, as referring to 'a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of [Directive 2011/95] …'. This means that migrants only cease to be applicants for international protection at the time a decision is taken not to recognise them as refugees or persons needing subsidiary protection or, put differently, at the time of a decision rejecting the application *on the substance*.[38] Since the decisions rejecting the applications submitted by the applicants in the main proceedings are decisions *on admissibility*, in contrast to decisions on the substance of the application, those applicants do not as a result lose their status as applicants for asylum.

119. Likewise, the first interpretation suggested is to my mind also incompatible with the purpose of the condition that the applicant must be admitted or readmitted, as identified in point 112 of this Opinion, namely to ensure that responsibility for examining the requirement of international protection is effectively transferred to the competent authorities of a different country, thereby ensuring respect for the subjective right of the persons concerned to have the substance of their applications examined during the procedure relating to those applications. Indeed, were the Court to uphold such an interpretation, the procedure for examining all applications for international protection would be closed, where the applicant is not admitted or re-admitted, without the merits of the application initially submitted being assessed by the competent national authority.

120. A teleological approach to the provision at issue likewise seems to suggest that the first interpretation should be rejected. Indeed, since it would involve starting the international protection procedure completely anew, that interpretation seems to be at odds with the requirement that applications for international protection should be processed expeditiously, a requirement that follows expressly from recital 18 of Directive 2013/32 ('it is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection'),[39] and is also intrinsic to a considerable number of other provisions of that directive. I note that even the provisions that do not impose strict time limits on the competent national authorities in which to perform procedural acts generally provide that those acts must be carried out 'as soon as possible'. One compelling example is Article 31(2) of Directive 2013/32, according to which 'Member States shall ensure that the examination procedure is concluded as soon as possible'.

37 Emphasis added.

38 I note in that respect that the proposal for a Regulation of the European Parliament and of the Council of 13 July 2016 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016) 467 final) ('Proposal for a new procedures regulation') suggests, in addition to changing terminology [in French)], making a fundamental change to the definition of 'final decision' (Article 2(d)). According to the proposal, that notion should include 'a decision on whether or not a third-country national or stateless person is granted refugee status or subsidiary protection status … *including a decision rejecting the application as inadmissible*' (emphasis added). To my mind, the proposed amendment is evidence that such decisions do not fall within the scope of the definition while Directive 2013/32 is in force.

39 See, to that effect, judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraph 53), in which, according to the Court the need to further the aim pursued by Directive 2013/32, of guaranteeing that such applications are processed 'as rapidly as possible', justified the limits on the procedural autonomy of the Member States that its interpretation involved, where a new decision is adopted on an application for international protection after the initial administrative decision rejecting such an application has been rejected.

121. Last, it seems to me that requiring the competent national authority to resume examination of the initial application is likely to ensure that the national procedures are more effective in cases where the 'safe third country' ground of inadmissibility is relied upon. That obligation is such as to make the authority more aware of its responsibilities when applying that ground, by means of a strict assessment of the existence of grounds for considering that the applicant will be admitted or readmitted to the relevant third country. I find it significant, in that respect, that the Court stated recently in its judgment in *Ibrahim and Others* that, where a Member State that has granted subsidiary protection systematically refuses, without real examination, to grant refugee status to applicants who nevertheless satisfy the conditions laid down in order to claim that status, and those applicants subsequently make a further application for asylum to a different Member State, the latter can reject the application pursuant to Article 33(2)(a) of Directive 2013/32, but *it is for the first Member State to resume the procedure* for the obtaining of refugee status. [40]

122. I am therefore inclined to favour an interpretation of Article 38(4) of Directive 2013/32 according to which, where the applicant is not admitted or readmitted, the competent national authorities must resume hearing the case relating to the application for international protection already submitted by the person concerned. [41] Accordingly, that application should be treated as already having been made within the meaning of Article 6 of that directive, and the principles and guarantees in Chapter II should be applied to it.

123. I would clarify that, where there is to be a new examination of the application, the decision of the competent national authority may, again, be based on a ground of inadmissibility, provided it is not the ground under Paragraph 51(2)(f) of the Law on the right to asylum that is contrary to EU law. That clarification clearly does not contradict the purpose of the obligation concerning admission or readmission under Article 38(4) of Directive 2013/32, since any new decision based on another of the grounds of inadmissibility listed in Article 33(2) of that directive, including that in Article 33(2)(b), would not prevent an examination of the substance of the application made by the applicants in the main proceedings, which would merely be deferred in the case of Article 33(2)(b) and has, by definition, already been carried out in the other situations.

124. In any event, even if the Court were to find in its forthcoming judgment that application of Article 38(4) of Directive 2013/32 must lead to the persons concerned submitting a fresh application for international protection, that application could not be classified as a 'subsequent application' within the meaning of Article 2(q) of Directive 2013/32, with the potential consequence of it being declared inadmissible under Article 33(2)(d) of that directive. [42] It is apparent from the definition of 'subsequent application', in Article 2(q) of Directive 2013/32, [43] that the ground of inadmissibility based on that concept only applies if there has been a 'final decision' on the first application submitted and, as already observed above, the notion of a 'final decision' is synonymous with a 'decision on the substance'. Where the first application has been rejected, as in the present case, by a decision finding it to be inadmissible, the new application submitted under Article 38(4) of Directive 2013/32 cannot be classified as a 'subsequent application' for the purposes of applying that ground of inadmissibility.

40 Judgment of 19 March 2019 (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, paragraph 100).

41 That is moreover how the Hungarian legislature seems to have understood the situation, when it included a provision in Paragraph 51/A of the Law on the right to asylum according to which 'if the safe third country refuses to take charge of the applicant, the competent asylum authority shall withdraw its decision and conduct the asylum procedure'. The foregoing does not prevent the person concerned from explicitly or implicitly withdrawing his or her application, in accordance with Articles 27 and 28 of Directive 2013/32 before the administrative procedure has resumed.

42 It is apparent from what was said at the hearing that one of the applicants in the main proceedings submitted a further application for international protection, which the competent national authority classified as a 'subsequent application' and rejected as being inadmissible.

43 Article 2(q) defines 'subsequent application' as 'a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1)'.

125. That conclusion is supported in particular by the wording of Article 40(2) of Directive 2013/32, according to which, for the purpose of ruling on the admissibility of a 'subsequent application' pursuant to Article 33(2)(d) of that directive, the competent national authority must, in a preliminary examination, ascertain whether new elements or findings have arisen or been presented by the applicant 'which relate to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU.' That wording suggests that, in order to justify such a determination, the initial application made by the persons concerned must already have been examined and rejected on the substance. [44]

126. I therefore suggest that the Court should reply to the second question referred that Article 38(4) must be interpreted as meaning that, where an application for international protection has been rejected on the basis of the 'safe transit country' ground of inadmissibility and that country refuses to allow the applicants to enter its territory, the competent national authority has a duty, regardless of the fact that the 'safe transit country' ground may be unlawful and of the ensuing consequences, to resume of its own motion the procedure to examine the application for asylum and may, in that procedure, apply one of the grounds of inadmissibility under Article 33(2) of Directive 2013/32.

127. Furthermore, whilst the requirement that it is known that the applicant will be readmitted is one of the cumulative conditions for making a decision based on the first country of asylum ground under Article 33(2)(b) of Directive 2013/32, admission or readmission by a 'safe third country' only has to be verified at the time of enforcement of a decision based on the 'safe third country' ground under Article 33(2)(c) of that directive.

E. Detention

128. Since analysis of the second set of questions referred has led to the conclusion that the applicants in the main proceedings should have been considered to be applicants for international protection falling within the scope of Directive 2013/32, it is necessary to examine the third set of questions referred, all parts of which relate to detention, and in whose first four parts the referring court asks the Court of Justice, in essence, whether the national legislation at issue in the main proceedings is compatible with Article 26, read in the light of Article 52(3), of the Charter and Article 43 of Directive 2013/32 and Articles 8 and 9 of Directive 2013/33, in so far as that legislation allows an applicant for international protection to be unlawfully detained. [45] It is plain from its observations that the Hungarian Government disputes that Article 43 of Directive 2013/32 applies in the present case, which needs to be determined as a preliminary matter.

1. Applicability of Article 43 of Directive 2013/32

129. After correctly noting that many applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant, recital 38 of Directive 2013/32 indicates that Member States should be able to provide for admissibility and/or substantive examination procedures which would make it possible for such applications to be decided upon at those locations, in well-defined circumstances.

44 See, to that effect, judgment of 17 December 2015, *Tall* (C-239/14, EU:C:2015:824, paragraph 46), in which the Court held that 'where an applicant for asylum makes a subsequent application for asylum without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new *full examination procedure*' (emphasis added). See also UNHCR, 'UNCHR Comments on the European Commission's Proposal for an Asylum Procedures Regulation', April 2019, available at https:://www.refworld.org/docid/5cb597a27.html, which states as follows: 'In UNHCR's view, treating an application as a subsequent application is justified only if the previous claim was considered fully on the merits, involving all the appropriate procedural safeguards'.

45 Although the wording of the question put by the referring court asks the Court of Justice to give a ruling on whether a provision of national law is compatible with EU law, which is not within its jurisdiction in the context of a referral for a preliminary ruling, it is apparent from consistent case-law that, in such a situation, it is for the Court to provide the referring court with the guidance as to the interpretation of EU law necessary to enable that court to rule on the compatibility of a national rule with EU law (see, to that effect, judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 18).

130. Article 43 of Directive 2013/32 is intended to do precisely that, by allowing the Member States to provide for procedures, which must comply with the basic principles and guarantees set out in Chapter II of that directive, in order to decide at the border or transit zones of the Member State on:

– the admissibility of an application, pursuant to Article 33 of that directive, made at such locations; and/or

– the substance of an application in a procedure pursuant to Article 31(8) of Directive 2013/32.

131. The EU legislature, clearly concerned for the conditions of applicants for international protection accommodated in facilities at the border or in transit zones, who are unfortunately all too often in highly precarious conditions, established in Article 43(2) of Directive 2013/32 a short four-week time limit within which Member States must take a decision on the admissibility of an application for international protection or on its substance and defined the consequences of failing to comply with that time limit, that is to say, that those applicants are entitled to enter the territory of the Member State concerned in order for their applications to be processed in accordance with the other provisions of the directive.

132. The Hungarian Government argues that the procedure for examining the applications for international protection of the applicants in the main proceedings is not a border procedure within the meaning of Article 43 of Directive 2013/32, which is therefore irrelevant in the present case, but is governed by the rules of the general asylum procedure under Directive 2013/32, the only difference being that the procedure was conducted in a transit zone along the border which has been designated as a place of stay for the corresponding period.

133. It is common ground that the rules of Hungarian law that were applied to the applicants in the main proceedings were those following the entry into force of Law No XX of 2017, which made significant amendments to the Law on the right to asylum, specifically by introducing special derogating procedures in the event of crises caused by mass immigration. Accordingly, Paragraph 80/I(i) of the Law on the right to asylum and Paragraph 15/A/2a of the Law on State borders disapply the national provisions that authorise an applicant for asylum who is in a transit zone to enter Hungarian territory on the expiry of four weeks from submission of his or her application and require the competent national authority to conduct a procedure in accordance with the general rules.

134. Merely to claim that the national law at issue — pursuant to which the rules of 'general' procedure under Directive 2013/32 apply to applications for international protection from migrants hosted in centres along the border — is specific is irrelevant. A specious and deliberately equivocal line of argument cannot, in my view, effectively challenge the applicability of Article 43 of Directive 2013/32.

135. It should be noted that the EU legislature has allowed Member States the option of confining the body of people who constitute applicants for international protection at their borders, where they can, promptly, process the applications submitted, with no restriction on analysing admissibility although with limited competence to assess the substance of applications, namely, in the situations listed in Article 31(8) of Directive 2013/32. Article 43 of that directive therefore defines a legal regime that forms an indissoluble whole and authorises the Member States to use the border procedures only if they comply with the conditions and guarantees it lays down, thereby contradicting the Hungarian Government's understanding of an 'à la carte' regime that allows it to conduct what are essentially border procedures whilst dispensing with the provisions governing them.

136. In this instance, it is important to consider the actual procedure conducted by the competent national authorities, and specifically where it took place, which is the decisive factor in determining how it should be classified in the light of Article 43 of Directive 2013/32. In that respect it is common ground that:

– the applicants in the main proceedings submitted their applications for international protection in the Röszke transit zone, under Paragraph 80/J(1) of the Law on the right to asylum which states that any application for asylum must be made in person to the competent national authority, exclusively in the transit zone, subject to exceptions;

– the competent national authority determined the place of stay of the applicants in the main proceedings in the Röszke transit zone, under Paragraph 80/J(5) of the Law on the right to asylum which provides that the competent national authority will designate the transit zone as the place of stay for asylum applicants until either the transportation order under the Dublin Regulation [46] or a decision that is no longer subject to appeal has become enforceable;

– the entire asylum procedure took place inside the transit zone, including notification of the decision of inadmissibility relating to the application for international protection of the applicants in the main proceedings, who have never left that zone.

137. In view of those specific objective circumstances, there is no doubt in my mind that the procedure to examine the applications for international protection made by the applicants in the main proceedings falls within the scope of Article 43 of Directive 2013/32.

2. Application of Article 43 of Directive 2013/32

138. It is apparent from the wording of the first four questions referred that in each of those questions the referring court invokes the fact that the applicants for international protection have stayed in the transit zone for more than four weeks, the maximum duration of the asylum procedure under Directive 2013/32.

139. It seems to me that a number of difficulties arise in determining the exact meaning of the questions referred, concerning how to understand the link that the referring court makes between the fact that the four-week time limit has been exceeded and the concept of detention, which is defined in Article 2(h) of Directive 2013/33 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. Both the wording of those questions and the referring court's observations on them suggest that, in its view and having regard to the characteristics of the transit zone, accommodating applicants for international protection in that zone for more than four weeks constitutes detention.

140. Although Articles 10(5) and 11(6) of Directive 2013/33 make it clear that an applicant for international protection can be placed in detention at a border post or in a transit zone, it seems to me that the sequence of events in border procedures and that relating to detention are governed by different legal regimes. The fact that Article 43(2) of Directive 2013/32 authorises a four-week stay for applicants in the transit zone so that their applications for international protection can be properly examined does not mean that, the day after that time limit expires, if no decision is made on the application, an applicant still present in that zone can be treated as being in the same position as a detained person. Nevertheless, whilst the fact that the four-week time limit under Article 43(2) of

46 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)

Directive 2013/32 has been exceeded is not a necessary requirement, and much less a sufficient condition, for a finding that an applicant accommodated in a transit zone is detained, that circumstance has some relevance when assessing the overall situation of the person concerned in order to determine whether it constitutes detention.

141. Indeed, the continued presence of an applicant for international protection in the transit zone beyond the four-week time limit [47] and the corresponding denial of his or her right to enter Hungarian territory, as the national legislation permits, amount to a restriction on the freedom of movement of the person concerned which, together with the conditions in which the applicant is accommodated in that zone, examined below, contributes to such a situation being classified as de facto detention.

142. Last, whether or not the applicable national legislation, corresponding to a crisis caused by mass immigration, is compatible with EU law can only be examined by analysing that legislation in the light of Article 43(3) of Directive 2013/32, which envisages the consequences of a specific situation caused by the arrival of a large number of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone. Article 43(3) states that where such arrivals make it impossible in practice to apply the provisions of Article 43(1), those procedures may also be applied where and for as long as those third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

143. In other words, in the situation described above, the Member States may extend the territory to which the border procedure applies to locations in proximity to the border or transit zone, provided that the applicants are normally accommodated there and so long as they are still there. Article 43(3) of Directive 2013/32, which makes reference only to Article 43(1), is not intended to authorise the Member States to extend the four-week procedural time limit for applicants for international protection accommodated in proximity to the border or transit zone to whom the border procedure is being applied. To interpret it otherwise would be tantamount to allowing there to be no time limit on the border procedure, which seems to me scarcely conceivable.

144. Even assuming that Hungary establishes that there is in fact a recurring crisis caused by mass immigration that can serve as a basis for its derogating legislation on asylum, that legislation is in any event incompatible with Article 43(3) of Directive 2013/32 to the extent that it allows substantive assessment of applications for international protection in situations not limited to those listed in Article 31(8) of that directive and makes no provision to accommodate applicants normally outside the transit zone.

3. Accommodation in the transit zone

145. By Question 3(b), the referring court asks the Court of Justice, in essence, whether accommodation in a transit zone, in circumstances similar to those of the present case, must be classified as 'detention' within the meaning of Article 2(h) of Directive 2013/33, read in conjunction with Article 6 and Article 52(3) of the Charter.

47 Since Article 43 of Directive 2013/32 does not establish a starting point for the four-week time limit, I believe it is appropriate to rely on Article 31 of that directive according to which Member States are to ensure that the examination procedures are concluded within six months 'of the lodging of the application'. Since that definition of the starting point for the procedure can be regarded as of a general nature, I believe it can apply *mutatis mutandis* to border procedures. It will be for the referring court to determine, in the circumstances at issue in the main proceedings, whether that time limit has expired, and it is noted that the request for a preliminary ruling mentions only the date on which the applications for international protection were submitted.

(a) Legal framework for analysis

146. As a preliminary issue, it should be recalled that, in *Ilias and Ahmed v. Hungary*, the Grand Chamber of the European Court of Human Rights ruled recently on whether the fact that two third country nationals were accommodated in the Röszke transit zone constituted a deprivation of liberty for the purposes of applying Article 5 ECHR ('Right to liberty and security') and reached the conclusion that it did not.[48]

147. The Hungarian Government made reference to that judgment in the observations it submitted in these proceedings, to support its argument that the situation of the applicants in the main proceedings does not fall within the definition of 'detention' as stated in Article 2(h) of Directive 2013/33. It seems to believe that if the fact that the applicants in the main proceedings are accommodated in the transit zone is not deprivation of liberty within the meaning of Article 5 ECHR, it follows that nor can it be considered to be 'detention', because the notion of detention presupposes that there is deprivation of liberty within the meaning of Article 6 of the Charter.

148. It is common ground that Article 5 ECHR corresponds to Article 6 of the Charter, and that Article 52(3) of the Charter requires that the rights recognised in it that correspond to the rights guaranteed by the ECHR are interpreted as having the same meaning and the same scope as those conferred by the ECHR, and this seems to me to be the basis of Hungary's thesis. I note however that, as the Court of Justice has stated on several occasions, so long as the European Union has not acceded to the ECHR, it does not constitute a legal instrument which has been formally incorporated into EU law,[49] and the consistency that Article 52(3) of the Charter pursues therefore cannot adversely affect the autonomy of EU law and that of the Court of Justice of the European Union.[50]

149. It is apparent therefore that the Court of Justice has power to interpret the provisions of the Charter *autonomously*, and that it is those provisions alone that apply in the sphere of EU law. The Court can therefore leave aside the case-law of the European Court of Human Rights and examine the questions referred in the light of the Charter, provided its interpretation of the rights it contains that are similar in content to those in the ECHR leads to a higher level of protection than that guaranteed by the ECHR.[51]

150. I invite the Court to take that approach in the present case. Specifically, I believe that the Court should determine whether the fact that the applicants in the main proceedings are accommodated in the Röszke transit zone should be classified as 'detention' within the meaning of Article 2(h) of Directive 2013/33 in the light solely of Article 6 of the Charter, according to which — it is worth recalling — 'everyone has the right to liberty and security of person.'

151. I would comment that, according to its recital 35, Directive 2013/33 'respects the fundamental rights and observes the principles recognised in particular by the Charter', which implies that the requirements to protect the right to liberty flowing from Article 6 of the Charter must be regarded as having been *incorporated* in the definition of 'detention' in Article 2(h) of Directive 2013/33. Whether or not there is detention must therefore be determined, in the present case, *exclusively* by examining the elements comprising that definition.

48 ECtHR, 21 November 2019, *Ilias and Ahmed v. Hungary*, CE:ECHR:2019:1121JUD004728715.

49 See, in relation to asylum, judgments of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 45), and of 14 September 2017, *K.* (C-18/16, EU:C:2017:680, paragraph 32).

50 As apparent from the explanations relating to Article 52 of the Charter, which indicate that Article 52(3) is intended to ensure the necessary consistency between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of Union law and … that of the Court of Justice of the European Union'.

51 Subject to that outcome not being detrimental to another right enshrined in the Charter. See, in that respect, Opinion of Advocate General Kokott in *Puškár* (C-73/16, EU:C:2017:253, point 123).

152. According to Article 2(h) of Directive 2013/33 'detention' means 'confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement'.

153. That definition makes it clear that, in order to determine whether a particular measure has the effect that the applicants for asylum to which it relates are in detention, it is necessary to ask, first, whether the place of accommodation assigned to them means that they are confined, that is to say, cut off from the outside world, 'within a narrowly bounded or restricted location', to borrow the terminology used in Recommendation REC(2003)5 of the Committee of Ministers of the Council of Europe to member states on measures of detention of asylum seekers, which the Commission expressly took into account in its proposal in relation to Directive 2013/33. [52]

154. That interpretation is also justified, to my mind, because the definition of 'detention' needs to be consistent with the definitions relating to the restrictions on the free movement of applicants for asylum laid down in Article 7(1) to (3) of Directive 2013/33. According to those provisions, applying those restrictions leads to those applicants being assigned an 'area' or '[place of] residence', terms which undoubtedly refer to considerably larger sections of national territory than the 'particular place' to which the definition of detention refers.

155. Secondly, the definition of detention requires that applicants for asylum be found to be deprived of their freedom of movement in the place of accommodation assigned to them. In my view, whether or not those applicants are deprived of internal freedom of movement depends on the nature and extent of the specific restrictions imposed on them inside that place of accommodation. [53] That assessment involves examining the relevant rules governing the arrangements for those applicants to exercise their rights and meet the obligations with which they must comply. As regards external freedom of movement, whether or not there is deprivation of liberty depends, I would submit, on whether the applicants for asylum have a realistic, rather than a purely theoretical, possibility of leaving their place of accommodation of their own free will, which seems to me to require an overall assessment of all the elements of fact and law capable of influencing the choice made by the applicants for asylum in question.

156. The criteria having now been identified for establishing whether applicants for asylum are 'detained' within the meaning of Article 2(h) of Directive 2013/33, it is necessary to apply them to the situation of the applicants in the main proceedings.

(b) Application to the present case

157. It is necessary at this stage to clarify a point of methodology. Given the importance that must be given, in this analysis, to the fact that the applicants in the main proceedings in each of the joined cases are currently subject to return and removal decisions, I will distinguish the situation of those applicants before those decisions were taken from their situation afterwards.

(1) Whether there was detention before the return and removal decisions were taken

158. The first period commenced with the decision of 5 February 2019 (or 5 December 2018) taken as a result of the lodging of the applications for asylum, by which the asylum authority designated the Röszke transit zone, specifically the sector of that zone reserved for applicants for asylum, as the mandatory place of accommodation for the applicants in the main proceedings.

52 Proposal for a Directive of the European Parliament and of the Council of 30 January 2009 laying down minimum standards for the reception of asylum seekers in the Member States [COM(2008) 815 final].

53 It is that deprivation of liberty inside the place of accommodation that distinguishes the concept of 'detention' in Article 2(h) of Directive 2013/33 from the 'obligation to stay at an assigned place' in Article 8(4) of the same directive.

159. The first question that arises is whether that decision had the effect of confining the applicants.

160. According to the referring court, the Röszke transit zone is surrounded by a high fence with barbed wire, and has been divided internally into various sectors. I believe that, in order to answer the question put in the preceding point, it is necessary to consider the extent of the sector of the transit zone in which those applicants have lived, instead of the extent of the zone as a whole. Each of those sectors is in fact separated from the others by fences and it is only very rarely possible to go from one sector to the others. There is scarcely any doubt that the sector reserved for applicants for asylum in the Röszke transit zone, which is only one part of that zone, does indeed fall within the definition of a 'particular place', as used in Article 2(h) of Directive 2013/33, and of a 'bounded or restricted location' where people live physically isolated from the outside world [54] and therefore in confinement.

161. It is therefore necessary to ascertain whether the applicants were deprived of their freedom of movement within that sector.

162. The order for reference provides a number of pieces of information that are relevant here. First, the applicants in the main proceedings are housed in a metal container with a surface area of not more than 13 m^2. Secondly, they have very limited opportunities to go to a different sector of the transit zone (twice a week for approximately one hour). Thirdly, apart from that opportunity, the applicants in question can leave the sector reserved for applicants for asylum only when their presence is required to take part in proceedings that affect them or when they attend specific places, under police escort or escorted by armed guards, for medical check-ups or treatment. Fourthly, those applicants can have contact with persons from outside, including their lawyers, only with prior authorisation, in an area of the transit zone reserved for that purpose where they are taken under police escort. Fifthly, the order for reference also suggests that their movements are under constant surveillance given the presence of police or armed guards inside the transit zone and in the area immediately next to the wall.

163. To my mind, that body of evidence demonstrates that the freedom of movement of applicants for asylum is so highly restricted that the situation is comparable to an almost standard prison regime, thereby justifying a finding that the applicants in the main proceedings were deprived of freedom of movement while they were accommodated in the sector of the Röszke transit zone reserved for applicants for asylum.

164. The information that the Hungarian government subsequently submitted in its observations does not, in my view, undermine that finding. Neither the fact that physical needs relating to decent day-to-day living conditions are met, by providing a bed, a lockable cupboard for each person or microwave ovens, for example, nor the organisation of leisure activities and the provision of schooling for children has a direct effect on the freedom of movement of the applicants for asylum housed there. Nor is it in any way relevant that social workers and psychologists are present on site.

165. On whether or not the applicants in the main proceedings have a 'realistic' possibility of leaving the Röszke transit zone of their own free will, the Hungarian government states in its observations that it believes they do, since, it claims, nothing prevents them from leaving that zone at their own initiative if they so wish.

166. It is, however, reasonable to take the view that whether or not the possibility of voluntary departure is realistic must be assessed in the light of the specific situation of applicants for asylum. From that perspective, it seems to me that there is no realistic possibility, since leaving the transit zone would necessarily be synonymous with giving up any possibility of obtaining the international protection applied for. Articles 27 and 28 of Directive 2013/32 provide that in the event of explicit or

54 Whilst admittedly the applicants for asylum accommodated in the Röszke transit zone have a Wi-Fi connection and are permitted to keep their mobile telephones, in my view that merely mitigates their physical confinement.

implicit withdrawal or implicit abandonment of the application, the competent national authority will take a decision either to discontinue the examination or to reject the application. In the event that an applicant for asylum left the transit zone, even if, in theory, the competent national authority had the option of taking a decision on the basis of the information available to it, it seems to me highly probable, if not certain, that such a decision would be unfavourable to the applicant. Under those circumstances, I do not believe that any applicant for asylum is in a position to leave the transit zone of his or her own free will.

167. A pragmatic and realistic approach to the prospect of a migrant leaving the transit zone voluntarily involves looking at his or her freedom of movement on leaving that zone. Is it conceivable that a migrant who leaves the facilities of the transit zone would be left to his or her own devices, able to travel freely? The answer is surely in the negative.

168. It is apparent from the observations of the Hungarian Government that the person concerned will not be able to travel into Hungary, in the absence of authorisation to enter and stay in the national territory. Importantly in that respect, under Paragraph 5(1b) of the Law on State borders, in a crisis caused by mass immigration the Hungarian police can apprehend illegally staying foreign nationals throughout the national territory and escort them to the nearest border fence, unless an offence is suspected. The migrants concerned have no alternative but to head for Serbia, that is to say, to return from whence they came, in circumstances in which it is at the very least uncertain whether they would be allowed to enter Serbian territory, whether their situation would be legal and how they would be dealt with by the immigration control authorities there. In such a case, a migrant would in fact have two options. The first would be to cross the Serbian-Hungarian border at a crossing point during the fixed opening hours, as required by Article 5(1) of the Schengen Borders Code,[55] which would undoubtedly lead to a refusal by the competent Serbian authorities to admit (or readmit) the migrant, since the Republic of Serbia has not agreed to receive migrants from the Hungarian transit zones, on the grounds that it considers them to have entered the territory of Hungary legally for the purposes of interpreting Article 3(1) of the agreement on readmission. The second would be to cross that border in such a manner as to infringe Article 5(1) of the Schengen Borders Code, in which case the illegal stay in Serbia would probably expose the migrant to criminal penalties, given the Republic of Serbia's well-documented repressive approach to illegal border crossings.[56] Is there a realistic prospect therefore of such a migrant freely leaving the transit zone and returning to Serbia? It is very doubtful that there is.[57]

169. Since I am suggesting that the answer should be that the applicants in the main proceedings are not free to leave the Röszke transit zone to go to the host State or to a different country, I believe that they should be considered to have been effectively deprived of their freedom of movement during the period of their stay in that zone before the return and removal decision was taken.

170. I therefore propose that the Court should find that, during the period from 5 February 2019 (or 5 December 2018) to 25 April 2019 (or 12 February 2019), the applicants in question were in 'detention' within the meaning of Article 2(h) of Directive 2013/33.

55 Article 5(1) of the Schengen Borders Code reads as follows: 'External borders may be crossed only at border crossing points and during the fixed opening hours. The opening hours shall be clearly indicated at border crossing points which are not open 24 hours a day.' I would point out that in the present case, Hungary has not applied the exception under Article 5(2) of the Schengen Borders Code.

56 The applicants in the main proceedings refer, in their observations, to the statistics presented in the report of the Belgrade Centre for Human Rights, 'Right to Asylum in the Republic of Serbia 2018', Belgrade, 2018, pp. 29 and 30.

57 I also note that if, under those circumstances, Hungary allowed a migrant to leave its territory without previously carrying out the 'thorough checks on exit' required of it under Article 8(3)(g) of the Schengen Borders Code, that conduct could constitute an infringement of that article. Those checks consist of 'verification that the third-country national is in possession of a document valid for crossing the border; (ii) verification of the travel document for signs of falsification or counterfeiting; (iii) whenever possible, verification that the third-country national is not considered to be a threat to public policy, internal security or the international relations of any of the Member States'.

(2) Whether there was detention after the return and removal decisions were taken

171. The second period, which started when the return and removal decision was taken and has lasted up to the present, can itself be broken down into two separate periods. The applicants in the main proceedings continued to be accommodated in the sector of the Röszke transit zone reserved for applicants for asylum after those decisions, until 17 May 2019 (Case C-924/19) and 27 March 2019 (Case C-925/19), the dates on which the competent national authority required the applicants in the main proceedings to stay in the aliens sector of that transit zone. That timing is immaterial for the answer to be given to the question referred under analysis here.

172. For the same reasons as set out in relation to the sector reserved for applicants for asylum, the aliens sector must be classified as a place of detention within the meaning of Article 2(h) of Directive 2013/33.

173. As regards whether the applicants in the main proceedings are deprived of freedom of movement inside the place of accommodation attributed to them, it seems plain to me, in the light of the clarifications provided by all the parties concerned at the hearing that, if those applicants had no freedom of movement in the sector reserved for applicants for asylum, they are likewise deprived of that freedom in the aliens sector, since the restrictions in place in the aliens sector are similar to those applied in the sector reserved for applicants for asylum. I note in that respect that Hungary has disclosed that, in addition to the factors referred to in point 162 of this Opinion, there is also a video surveillance system covering all foreign nationals, excluding only part of the common areas, the washrooms and the inside of the metal containers serving as living quarters.

174. On the question of whether the applicants in the main proceedings have a realistic possibility of leaving the Röszke transit zone of their own free will, there is in my view no doubt that the answer must be in the negative. At this stage in the analysis the fact that return and removal decisions were issued against the applicants in the main proceedings, on 25 April 2019 (and 12 February 2019), plays a decisive role.

175. It is irrelevant that the country of destination for the removal, which was initially Serbia, was amended by a decision taken by the competent national authority on 3 June 2019 (or 17 April 2019), according to which the applicants in the main proceedings had to be removed to the applicants' country of origin, Afghanistan or Iran. It is the mere fact that they are the addressees of return and removal decisions that is relevant in the present case.

176. Indeed, since such a decision causes a legal obligation to return to be imposed on the third-country nationals to which it relates,[58] it is inconceivable that those applicants would leave the Röszke transit zone of their own free will. Specifically, those applicants can only lawfully leave a transit zone of that nature if the Hungarian authorities perform all the procedural acts necessary for their removal, as established in Article 8(1) of Directive 2008/115.

177. The Hungarian Government's line of argument seems unclear to me, referring as it does, simultaneously, to the fact that the third country nationals concerned, who are subject to a decision requiring them to return to Serbia, 'could freely have left the transit zone' but 'chose to stay' in that zone, and to the fact that the persons concerned 'failed to comply with the obligation to leave the transit zone imposed on them by the initial return decision issued by the competent authority'. I note that the order for reference clearly states that the applicants in the main proceedings were the subject of return and removal decisions requiring their removal to Serbia, in the sense that those applicants had to be physically transported under escort, which is a defining feature of a forced return. Following the Republic of Serbia's refusal to readmit the applicants in the main proceedings, the competent

58 Article 3(4) of Directive 2008/115 defines 'return decision' 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'.

national authority then imposed the same solution with removal to Afghanistan and Iran, having regard to their nationality. This is therefore not at all a situation where a return decision is accompanied by a period for voluntary departure within the meaning of Article 7 of Directive 2008/115. The fact that the responsible national authority ordered removal is fundamentally incompatible with any notion of a voluntary departure by the applicants in the main proceedings.

178. In the light of the foregoing, I therefore propose that the Court should find that, from 25 April 2019 and 12 February 2019, those applicants were in 'detention' within the meaning of Article 2(h) of Directive 2013/33.

179. That interpretation of Article 2(h), treated as incorporating the requirements under Article 6 of the Charter by virtue of recital 35 of Directive 2013/33, ensures a higher level of protection than that guaranteed by the ECHR on the basis of an interpretation of Article 5 of that convention, and is therefore in line with the requirement in the last sentence of Article 52(3) of the Charter.

4. Lawfulness of the detention

180. It follows from the foregoing that the applicants in the main proceedings, who must be regarded as applicants for international protection falling within the scope of Directive 2013/32, have been detained when staying in the Röszke transit zone. In Question 3(d) the referring court asks the Court of Justice in essence whether that detention is lawful, bearing in mind that, under Article 26 of Directive 2013/32 and Article 8 of Directive 2013/33, applicants for international protection can, under certain circumstances, be held in detention.

181. The finding that the applicants in the main proceedings are in — de facto — detention means, by definition, that the legal provisions governing detention, which are defined in Articles 8 to 11 of Directive 2013/33, have not been complied with. As the referring court notes, the essential first step consisting of a detention order issued in due form, required under Article 9(2) of Directive 2013/33, is missing in the present case. It would seem to me at the least difficult to look for a measure equivalent to an express detention order, which in the present case would consist of either the decision determining that the applicants in the main proceedings would reside in the sector for applicants for international protection or the decision requiring them to stay in the aliens sector of the transit zone, given that the position of the Hungarian Government has always been to dispute that the persons concerned have even been detained.[59]

182. It has not been claimed, and a fortiori not proven, (i) that there was a prior individual examination of whether it was possible to adopt alternative solutions; (ii) that a detention order was issued that sets out the reasons in fact and law, referred to in Article 8 of Directive 2013/33, on which it is based; or (iii) that the applicants were in fact informed in writing, in a language which they understand or are reasonably supposed to understand, of, first, the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation and, secondly, the rules that apply in the detention centre and set out their rights and obligations.

183. As one ground of unlawfulness, the referring court notes that the period of detention, whose end date is not fixed, is indeterminate. In that respect the unambiguous wording of Article 9 of Directive 2013/33 seems to contradict that approach, since it states only that the period of detention is to be 'as short as possible' and does not indicate a maximum duration.

59 To my mind, the lawfulness or otherwise of the detention is not a matter of whether there was a decision having the *effect* of detaining the migrants concerned but that there was an actual decision having that detention as its *object*.

184. The referring court also asks the Court of Justice, by Question 3(c), whether Article 8 of that directive precludes applicants for asylum from being detained for the sole reason that they cannot meet their needs due to a lack of material resources to cover those needs. There is reason to query the relevance of that question, suggesting as it does a detention in due form even though no detention order has formally been issued under Articles 8 and 9 of the Directive 2013/33 and even though the disputes in the main proceedings do not concern an action for annulment of an act stating the grounds in fact and law that led to the applicants in the main proceedings being detained. Only in such a situation would it be relevant to assess the validity of the ground at issue in the light of Article 8 of that directive.

185. Were the Court to find that specific question to be admissible, it should be answered in the affirmative, since no such ground for detention is contained in Article 8(3) of Directive 2013/33, which exhaustively lists the various grounds that can justify detention.

186. Under those circumstances, I propose that it should be found that Articles 26 and 43 of Directive 2013/32 and Articles 8 and 9 of Directive 2013/33 preclude national legislation under which the competent national authority may, at the border or in a transit zone, rule on the admissibility or on the substance of an application for international protection, other than in the situations listed in Article 31(8) of Directive 2013/32, after the expiry of four weeks and thereby denying the applicants their right to enter national territory, where that circumstance, added to the conditions of accommodation in the transit zone, from which it is apparent that they are confined and cannot leave that zone of their own free will, constitutes de facto detention. That detention must be found to be unlawful in so far as it does not derive from a detention order indicating the reasons in fact and law on which it is based, preceded by a prior individual examination of whether it was possible to adopt alternative solutions and informing the applicants in writing, in a language which they understand or are reasonably supposed to understand, of, first, the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation and, secondly, the rules that apply in the detention centre and set out their rights and obligations.

5. Interim measures

187. As a preliminary issue, it should be recalled that the referring court is hearing an action for failure to act in which the applicants in the main proceedings are seeking a finding that the competent national authority failed to discharge its obligations by not assigning them a place of stay outside the Röszke transit zone. According to the referring court, in those administrative proceedings the national courts do not have power under Hungarian law to issue an interim measure ordering the designation of a place of stay.

188. By Question 3(e), the referring court asks the Court of Justice, in essence, whether, where detention is manifestly unlawful, Article 47 of the Charter can be interpreted as meaning that the national court must be able to order interim measures requiring the competent national authority to assign a place of accommodation for the applicants for asylum concerned, until the administrative proceedings come to an end, that is outside the transit zone and is not a place of detention within the meaning of Article 2(h) of Directive 2013/33.

189. It should be noted that the Court held in *Factortame and Others* that the need to ensure the full effectiveness of EU law necessarily means that a court seised of a dispute governed by EU law must be able to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law.[60] The Court subsequently specified that an absolute prohibition on ordering interim measures, irrespective of the circumstances of the case, would not be

60 Judgment of 19 June 1990 (C-213/89, EU:C:1990:257, paragraph 20).

compatible with the right of individuals to complete and effective judicial protection under EU law [61] — which is now enshrined in Article 47 of the Charter and which under the second sentence of Article 19(1) TEU the Member States must ensure — which implies in particular that interim protection be available to them if it is necessary for the full effectiveness of the definitive decision. [62]

190. It is apparent therefore that any finding that a national court has jurisdiction — not laid down in the national legislation — to order interim measures is linked to the need to protect a right under EU law whose infringement is claimed before that court. However, in the present case, the referring court has not expressly indicated which right of the applicants in the main proceedings has allegedly been infringed and would therefore justify that court intervening before the substantive decision is made in the action for failure to act in order to ensure the effectiveness of that decision.

191. For my part, I believe that such a right may arise under Article 9 of Directive 2013/33. The second subparagraph of paragraph (3) of that article, which requires Member States to provide for judicial review of the detention of an applicant for international protection, *ex officio* or at the request of the applicant, establishes the mandatory consequence of a court finding that the detention is unlawful, namely the immediate release of the applicant concerned. The corollary of that obligation on Member States must be a right, to the same effect, possessed by the applicant. I would point out that Article 9 does not provide that the national court will order any measure accompanying the release and relating specifically to determination of the place where the person concerned is to reside.

192. It is apparent from Article 7 of Directive 2013/33 that applicants for international protection can move freely within the territory of the host Member State or within an area assigned to them by that Member State, which may determine where those applicants will reside on the terms defined in Article 7(2) and (3). The wording of that article does not seem to me to indicate that applicants for asylum have a right relating to determination of their place of residence such that infringement of that right can be claimed before the referring court and could give rise to the adoption of interim measures in order to ensure the effectiveness of the subsequent judicial decision.

193. In the light of the right to immediate release, it is therefore necessary to determine whether it is necessary for the national court to be able to order interim measures in order to ensure the full effectiveness of the definitive decision on whether the applicants in the main proceedings have been unlawfully detained. [63]

194. To answer that question, it is necessary to determine, as the case-law requires, [64] whether it is apparent from the overall scheme of the national legal system in question that no legal remedy exists which makes it possible to ensure, even indirectly, respect for an individual's rights under EU law.

195. I would point out in that respect that at the hearing both the Hungarian Government and the applicants in the main proceedings confirmed that Hungarian law does contain an 'immediate judicial protection' remedy. This is an extraordinary remedy, laid down in the Code of Administrative Actions Procedure, by which, according to the Hungarian Government, applicants for international protection can bring proceedings before the referring court or a different national court to obtain 'immediate and temporary' suspension of the decision assigning the Röszke transit zone as their mandatory place of accommodation. It is for the referring court to determine whether that remedy is capable of ensuring respect for the right of the applicants in the main proceedings to be released immediately in the event

61 Two examples of reasoning in which effective judicial protection is linked to interim measures can be found in the judgments of 11 January 2001, *Kofisa Italia* (C-1/99, EU:C:2001:10) and of 11 January 2001, *Siples* (C-226/99, EU:C:2001:14).

62 Order of the President of the Court of 29 January 1997, *Antonissen* v *Council and Commission* (C-393/96 P(R), EU:C:1997:42, paragraph 36 and the case-law cited); and judgments of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraphs 40 and 41) and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraphs 103 and 104).

63 Any assessment of whether the detention is 'manifestly' unlawful, as invoked in this question referred, is to my mind irrelevant in that context.

64 Judgments of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraph 41) and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 104).

that they are unlawfully detained. In that context it will be for the referring court to consider the conditions for granting that immediate judicial protection, including the fact, to which the applicants in the main proceedings drew attention at the hearing, that such protection can only be granted where there is 'immediate danger'.

196. In the light of those considerations, I propose that the Court should reply that, if national law does not provide for a remedy intended to ensure respect for the right of applicants for international protection to be immediately released when a court finds their detention to be unlawful, Article 47 of the Charter, read in conjunction with the second subparagraph of Article 19(1) TEU, must be interpreted as meaning that a national court must be able to order interim measures requiring the competent national authority to release the applicants. In contrast, no right for applicants for international protection to have their place of accommodation designated outside the place of unlawful detention arises under EU law and therefore no interim measures can relate to such a right.

V. Conclusion

197. In the light of the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged, Hungary) as follows:

(1) Article 13 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it imposes an obligation on Member States to establish a remedy against an act amending the country of destination indicated in a return decision at least before a judicial body, where the administrative authority or competent body called upon to consider the remedy in question is not composed of impartial members who enjoy safeguards of independence. It is for the referring court, which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law and give full effect to those provisions, when it hears the action brought by the applicants in the main proceedings, to verify whether the national legislation at issue in the main proceedings can be interpreted in conformity with those requirements of EU law and to disapply any provision of that legislation that is contrary to the intended outcome of Directive 2008/115.

(2) 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 must be interpreted as precluding national legislation pursuant to which an application for international protection can be rejected as inadmissible on the ground that the applicant has arrived in the territory of the Member State concerned 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.

(3) Article 38(4) and Article 6 of Directive 2013/32 must be interpreted as meaning that, where an application for international protection has been rejected on the basis of the 'safe transit country' ground of inadmissibility and where that country refuses to allow the applicants to enter its territory, the competent national authority has a duty, regardless of the fact that the 'safe transit country' ground may be unlawful and of the ensuing consequences, to resume of its own motion the procedure to examine the application for asylum and may, in that procedure, apply one of the grounds of inadmissibility under Article 33(2) of Directive 2013/32. As regards the 'first country of asylum' and 'safe third country' grounds under Article 33(2)(b) and Article 33(2)(c) of Directive 2013/32 respectively, the requirement that it is known that the applicant will be readmitted is one of the cumulative conditions for making a decision based on the first ground, whilst admission or readmission has to be verified only at the time of enforcement of a decision based on the second ground.

(4) Articles 26 and 43 of Directive 2013/32 and Articles 8 and 9 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 must be interpreted as precluding national legislation according to which the competent national authority may, at the border or in a transit zone, rule on the admissibility or on the substance of an application for international protection, other than in the situations listed in Article 31(8) of Directive 2013/32, after the expiry of four weeks and thereby denying the applicants their right to enter national territory, where that circumstance, added to the conditions of accommodation in the transit zone, from which it is apparent that they are confined and cannot leave that zone of their own free will, constitutes de facto detention. That detention must be found to be unlawful because it does not derive from a detention order indicating the reasons in fact and law on which it is based, preceded by a prior individual examination of whether it was possible to adopt alternative solutions and informing the applicants in writing, in a language which they understand or are reasonably supposed to understand, of, first, the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation and, secondly, the rules that apply in the detention centre and set out their rights and obligations.

(5) Article 47 of the Charter of Fundamental Rights, read in conjunction with the second sentence of Article 19(1) TEU, must be interpreted as meaning that, where it is found, as a result of a judicial review, that applicants for international protection are unlawfully detained and national law does not provide a remedy intended to ensure respect for their right to be immediately released, pursuant to the second subparagraph of Article 9(3) of Directive 2013/33, a national court must be able to order interim measures requiring the competent national authority to release the applicants. In contrast, no right for applicants for international protection to have their place of accommodation designated outside the place of unlawful detention arises under EU law and therefore no interim measures can relate to such a right.