Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 2 June 2022 [1]

Case C-72/22 PPU

MA
intervener
Valstybės sienos apsaugos tarnyba

(Request for a preliminary ruling from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania))

(Reference for a preliminary ruling – Border controls, asylum and immigration – Asylum policy – Right of a third-country national who has unlawfully entered the territory of a Member State to apply for international protection in that State – Conditions for access to the procedures for granting that protection – Directive 2013/32/EU – Article 6 and Article 7(1) – Possibility of placing such an applicant in detention on the sole ground that he or she illegally crossed the national border – Directive 2013/33/EU – Article 8(3) – Incompatibility – Article 72 TFEU – Responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security – Whether a Member State may derogate from Directives 2013/32 and 2013/33 in the event of a mass influx of migrants at its border)

I. Introduction

1. A certain tension has always existed in international law between, on the one hand, the States' sovereign right to control aliens' entry into and residence in their territory and, on the other hand, the right of individuals, among those foreign nationals, [2] who fear persecution in their country of nationality to seek asylum. [3] The first allows States strictly to control the crossing of their borders, and to take stringent measures in the event of illegal entry, while the second calls for tolerance in this area.

2. That tension is particularly acute in situations commonly referred to as a 'mass influx' of third-country nationals at borders. That phenomenon, which has increased in frequency in Europe over the last 20 years as a result of wars and other tensions in various parts of the world, makes controlling borders more difficult. Many third-country nationals attempt, or even

1 Original language: French.

2 I shall use in this Opinion the more precise concept of 'third-country national' which, according to Article 2(6) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1) ('the Schengen Borders Code'), means 'any person who is not a Union citizen within the meaning of Article 20(1) TFEU and who [does not enjoy the right of free movement under Union law]'.

3 I shall use the terms 'international protection' and 'asylum' interchangeably in this Opinion.

succeed, in crossing them illegally. Those uncontrolled entries are often perceived by the State concerned as a threat to their internal security. At the same time, when the persons concerned apply for asylum there, they must, in principle, be admitted to the territory of those States and allowed to remain there while their application is examined.

3. Since the summer of 2021, Latvia, Lithuania and Poland have faced such a 'mass influx' at the borders which they share with Belarus – one of the entry points to the Schengen area – and cases of illegal crossings of those borders have increased drastically. That 'influx' is also taking place in a particular geopolitical context. As the European Union's political institutions have noted, it has in fact been orchestrated by the Belarusian authorities.

4. In order to deal with these circumstances, those Member States, with a view to reinforcing their borders and thus guaranteeing public order and internal security in their territory, have declared a state of emergency. In that context, they have implemented provisions derogating from ordinary law, including in the field of asylum. The present request for a preliminary ruling, made by the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania), invites the Court to clarify whether some of those provisions, applied by the Republic of Lithuania, comply with EU law.

5. The questions referred by that court concern, more specifically, the treatment which Member States may accord, under Directive 2013/32/EU on common procedures for granting and withdrawing international protection [4] ('the Procedures Directive') and Directive 2013/33/EU laying down standards for the reception of applicants for international protection [5] ('the Reception Directive'), to third-country nationals, who have entered their territory illegally and are seeking to obtain international protection there. By those questions, the referring court is essentially seeking to ascertain whether those directives preclude national rules which, in the context of a mass influx, first, significantly restrict the possibility for those third-country nationals to access procedures for granting such protection and, secondly, allow asylum applicants to be held in detention on the sole ground that they have crossed the national border illegally.

6. In this Opinion I shall explain that such rules are indeed not compatible with the Procedures and Reception Directives. However, I shall not stop there and shall address the question whether, in circumstances such as those faced by Lithuania at its border, a Member State is entitled under EU primary law to derogate from those directives on the ground of law and order and of internal security. On that point, I shall explain that, while certain derogations are, in theory, possible, the national rules at issue go beyond what is permissible in that regard.

4 Directive of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 180, p. 60).

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

II. The legal framework

A. The Geneva Convention

7. Article 31 of the Convention relating to the Status of Refugees[6] ('the Geneva Convention'), entitled 'Refugees unlawfully in the country of refuge', provides in paragraph 1 thereof:

'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

B. European Union law

1. The Procedures Directive

8. Article 6 of the Procedures Directive, entitled '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.

If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.

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.

4. Notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned.

[6] Convention signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954, as supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967.

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.'

9. Article 7(1) of that directive provides that 'Member States shall ensure that each adult with legal capacity has the right to make an application for international protection on his or her own behalf'.

10. Article 31 of that directive, entitled 'Examination procedure', provides in paragraph 8 thereof:

'Member States may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated and/or conducted at the border or in transit zones in accordance with Article 43 if:

…

(h) the applicant entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry; or

…'

11. Article 43 of that directive, entitled '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. The Reception Directive

12. Article 8 of the Reception Directive, entitled 'Detention', provides in paragraphs 2 and 3 thereof:

'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:

…

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

…

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

…'

C. Lithuanian law

1. The Law on foreign nationals

13. The Lietuvos Respublikos įstatymas 'Dėl užsieniečių teisinės padėties' (Law of the Republic of Lithuania on the Legal Status of Foreigners) (TAR, 2021, No 2021-27706), as amended by Law No XIV-816, of 23 December 2021 ('the Law on foreign nationals'), provides, in Article 2(20) thereof, that a foreign national who has lodged an application for asylum in accordance with the procedure laid down by that law and in respect of which a final decision has not yet been taken is to be regarded as an asylum applicant.

14. Chapter X^2 of the Law on foreign nationals governs the application of that law in the event of a declaration of martial law or a state of emergency as well as in the event of a declaration of an emergency due to a mass influx of foreigners.

15. In that chapter, Article 140^{12}(1) of that law provides that 'a foreign national may lodge an application for asylum: 1) at border control points or in transit zones – with the Valstybės sienos apsaugos tarnyba prie Lietuvos Respublikos vidaus reikalų ministerijos (State Border Protection Service of the Ministry of the Interior of the Republic of Lithuania) ('the VSAT'); 2) in the territory of the Republic of Lithuania, if the foreign national has lawfully entered that territory – with the [Migration Department]; 3) in a foreign State – with the diplomatic missions or consular posts of the Republic of Lithuania designated by the Minister for Foreign Affairs'. Article 140^{12}(2) of that law provides that 'an application for asylum lodged by a foreign national in a manner contrary to the procedure provided for in paragraph 1 of this Article shall not be accepted, and the procedure for lodging an application for asylum shall be explained [to the applicant]'. That provision also provides that the VSAT, having regard to the vulnerability of the foreign national or to other individual circumstances, may accept an asylum application made by a

foreign national who has illegally crossed the border of the Republic of Lithuania.[7]

16. Article 140[17] of the Law on foreign nationals, which governs the grounds for detention of an asylum applicant in the event of a declaration of martial law or a state of emergency and in the event of a declaration of an emergency due to a mass influx of foreigners, provides, in the introductory sentence and paragraph 2, that an asylum applicant may be detained if he or she has entered the territory of the Republic of Lithuania by unlawfully crossing the border of that Member State.

2. Description of the procedure

17. The Description of the procedure for granting and withdrawing asylum in the Republic of Lithuania, approved by Decree No 1V-131 of the Minister for the Interior of the Republic of Lithuania, of 24 February 2016 (as amended by Decree of the Minister for the Interior of the Republic of Lithuania No 1V-626, of 27 July 2021) ('the Description of the procedure'), provides, in point 22, that 'an application for asylum is deemed to have been lodged when the foreign national has lodged it with an authority or institution designated in Article 67(1) of the Law on foreign nationals … in accordance with the requirements of paragraph 2 of that article. Where the border of the Republic of Lithuania has been crossed unlawfully, the application for asylum must be lodged without delay. Once an application for asylum has been lodged, the person who made the application shall enjoy the rights and guarantees laid down for asylum applicants'.

18. Point 23 of the Description of the procedure provides that if the application for asylum is lodged with an authority which is not designated in Article 67(1) of the Law on foreign nationals or in breach of the requirements laid down in Article 67(2) of that law or point 22 of the Description of the procedure, that application must be returned to the foreign national no later than two working days after it has been established that the application received by the authority is an application for asylum, and the applicant must be informed of the procedure for lodging an application for asylum.

III. The dispute in the main proceedings and the questions referred for a preliminary ruling

19. It is apparent from the order for reference and the case file that, on 2 July 2021, a 'nationwide emergency due to a mass influx of foreigners' was declared in the Republic of Lithuania. That declaration was followed on 10 November 2021 by a declaration of a 'state of emergency' as regards a part of the Lithuanian territory.[8] Those declarations were a response to a sudden mass influx of migrants at the Lithuanian-Belarusian border.

20. Subsequently, MA, a third-country national, entered Lithuania illegally from Belarus. On 17 November 2021, in the course of an inspection, he and 21 other third-country nationals were arrested on Polish territory after leaving Lithuanian territory by minibus. The person concerned was unable to present to the Polish border guards the necessary travel documents, visas or authorisations required to stay in Lithuania or, more generally, in the European Union. As a result, he was placed in detention.

7 Between 10 August 2021 and 1 January 2022, those provisions were contained in Article 67(1[1]) and (1[2]) of the Law on foreign nationals (as amended by Law No XIV-515, of 10 August 2021). In view of the period covered by the facts in the main proceedings, those two articles are therefore applicable *ratione temporis*. Nevertheless, I shall limit myself to referring to Article 140[12] of that law.

8 It is clear from the Lithuanian Government's observations that the state of emergency was in force from 10 November 2021 to 14 January 2022 inclusive, while the legal regime of the 'emergency situation' is still in force.

21. On 19 November 2021, MA was handed over to VSAT officers. The VSAT, on the one hand, detained him for the maximum period of 48 hours and, on the other hand, applied to the Alytaus apylinkės teismas (District Court, Alytus, Lithuania), Alytus Division ('the court of first instance') for detention beyond 48 hours, until a determination had been made as to the legal status of MA but, in any event, for a period not exceeding six months.

22. In support of that application, the VSAT stated, inter alia, that it had no information concerning MA's various border crossings. The VSAT also pointed out that the person concerned had entered and stayed illegally in Lithuania, that he has no place of residence there, has no family, social, economic or other ties with that State, and that he has no means of subsistence there either. Therefore, according to the VSAT, it was reasonable to believe that, if he was not detained, MA might abscond in order to avoid possible removal.

23. At the hearing before the court of first instance, MA expressed his wish to receive international protection. Therefore, in accordance with Article 2(18[4]) and (20) of the Law on foreign nationals, and in light of the judgment in *Ministerio Fiscal (Authority likely to receive an application for international protection)*,[9] that court considered the person concerned to be an asylum applicant. Nevertheless, it considered that it was necessary to detain him on the ground provided for in Article 113(4)(2) of the Law on foreign nationals.[10] Indeed, having regard, inter alia, to the fact that MA had entered Lithuania illegally and to the fact that, according to his own statements, his destination was Germany, there were grounds for believing that, if he were not detained, he would abscond in order to avoid being returned to a third country or avoid being removed from Lithuania.

24. Accordingly, by decision of 20 November 2021, the court of first instance ordered MA's detention in a VSAT facility pending a decision on his legal status in Lithuania, but in any event for a maximum of three months, that is to say, until 18 February 2022 at the latest.

25. Subsequently, MA appealed against that decision to the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania). According to MA, the court of first instance wrongly imposed on him the most coercive measure, which goes beyond what is necessary. MA requested that a measure alternative to detention be imposed on him instead, namely the obligation to report regularly to the VSAT.

26. In its defence, the VSAT stated that, after MA arrived in Lithuania from Belarus, he did not apply to the national authorities and continued his journey by illegally crossing the Polish border. In that regard, MA reportedly stated that he had paid another person to transport him to Germany via Poland. During his hearing by that service, MA, from the outset, allegedly avoided directly answering the questions put to him, providing only vague answers to them. Such behaviour does not constitute appropriate cooperation. Accordingly, the VSAT maintained that, if the measure alternative to detention requested by the person concerned were adopted, it is highly likely that he would abscond before a decision on his legal status was taken.

9 Judgment of 25 June 2020 (C-36/20 PPU, EU:C:2020:495; 'the judgment in *Ministerio Fiscal*').

10 Under that provision, an asylum applicant may be detained for the purpose of determining the grounds on which his or her application is based (where it is not otherwise possible to obtain that information) and if, after examining the circumstances set out in certain provisions of the law, there are reasons to consider that the person concerned might abscond in order to avoid being returned to a third State or avoid being removed from Lithuania.

27. At a first hearing before the referring court, MA reiterated his application for international protection and stated that he had already made such an application in writing to an unidentified VSAT officer on 20 November 2021 but had no information on the outcome of that application. The VSAT representative then stated that there were no data on the registration of an asylum application concerning MA, as no such application had been lodged in accordance with Lithuanian law. The same representative nevertheless asked the referring court to instruct the competent authority, the Migration Department, to accept MA's application for consideration.

28. On 24 January 2022, MA submitted a written application for international protection to the VSAT, which that service forwarded to the Migration Department. On 27 January 2022, the Migration Department returned that application on the grounds, first, that it had been submitted in breach of Article 140[12](1) of the Law on foreign nationals, as well as points 22 and 23 of the Description of the procedure and, secondly, that it had not been made without delay.

29. On 1 February 2022, at a further hearing before the referring court, the VSAT representative and MA's representative each requested that the referring court order the Migration Department to examine the application for international protection made by the person concerned.

30. In those circumstances, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania) first decided temporarily to amend MA's status and to adopt in relation to him a measure 'alternative to detention', namely 'accommodation at a VSAT facility or at another facility adapted for that purpose, with restriction of his freedom of movement to the place of accommodation', valid until 18 February 2022. Noting that MA is 'manifestly an applicant for international protection', the referring court then ordered the Migration Department not to return him to a third country or remove him from Lithuania pending the adoption of a final decision in the main proceedings. Finally, that court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 7(1) of [the Procedures Directive], read in conjunction with Article 4(1) of [Directive 2011/95/EU 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],[11] be interpreted as precluding rules of national law, such as those applicable in the present case, which, in the event of a declaration of martial law, a state of emergency or also a declaration of an emergency due to a mass influx of foreigners, do not in principle allow a foreigner who has entered and remains unlawfully in the territory of a Member State to lodge an application for international protection?

(2) If the answer to the first question is in the affirmative: must Article 8(2) and (3) of [the Reception Directive] be interpreted as precluding rules of national law under which, in the event of a declaration of martial law, a state of emergency or also a declaration of an emergency due to a mass influx of foreigners, an asylum applicant may be detained merely because he or she entered the territory of the Republic of Lithuania by crossing the State border of the Republic of Lithuania unlawfully?'

[11] Directive of the European Parliament and of the Council of 13 December 2011 (OJ 2011 L 337, p. 9).

IV. The procedure before the Court

31. The request for a preliminary ruling, dated 2 February 2022, was lodged at the Court Registry on 4 February 2022.

32. The referring court also requested that the present request for a preliminary ruling be dealt with under the urgent preliminary ruling procedure, provided for in Article 107 of the Rules of Procedure of the Court.

33. In support of that request, the referring court pointed out that MA had been detained from 17 November 2021 to 2 February 2022, and that he had been the subject, from then until 18 February 2022, of a measure ordering his 'accommodation at a VSAT facility or at another facility adapted for that purpose, with restriction of his freedom of movement to the place of accommodation'. [12]

34. On 21 February 2022, the First Chamber of the Court decided to send a request for clarification to the referring court regarding the situation of MA after 18 February 2022. In its response, the referring court clarified that, since 11 February 2022, he had been the subject of a further measure of accommodation at a VSAT facility, which he was not permitted to leave without authorisation, pending the adoption of a decision on his legal status in Lithuania, but in any event for a period not exceeding three months, that is to say, until 11 May 2022 at the latest.

35. In the light of that response, on 3 March 2022 the First Chamber of the Court decided to accept the referring court's request that the present request for a preliminary ruling be dealt with under the urgent preliminary ruling procedure.

36. MA, the Lithuanian Government and the European Commission lodged written observations before the Court. The Lithuanian Government and the Commission were also represented at the hearing held on 7 April 2022.

V. Analysis

37. In the case in the main proceedings, the referring court is called upon to determine the legality and validity of a detention measure. That measure was imposed on MA, a third-country national who unlawfully entered Lithuania [13] from Belarus.

38. In order to rule on that measure, the referring court must *first* determine whether the national concerned falls within the scope of the rules applicable to applicants for international protection, including the safeguards which must be available to them concerning detention, as harmonised in the Procedures and Reception Directives.

39. In that context, the referring court raises the issue of the compatibility with EU law of a provision of Lithuanian law, namely Article 140[12] of the Law on foreign nationals. As I stated in the introduction, the peculiarity of that provision is that it applies only in the event of a declaration of 'martial law', a declaration of a 'state of emergency', or a declaration of a 'nationwide emergency

12 See points 24 and 30 of this Opinion.

13 By this expression I mean that MA crossed the border between Lithuania and Belarus without complying with the entry conditions listed in Article 6(1) of the Schengen Borders Code. Moreover, it appears that the person concerned crossed the border in an 'unauthorised' manner, within the meaning of Article 5(3) of that code, that is to say, outside border crossing points or outside fixed opening hours (see points 20 and 22 of this Opinion).

due to a mass influx of foreigners', situations in which, to varying degrees, ordinary law is temporarily suspended or restricted in order to enable the Lithuanian State to safeguard public order and internal security in the 'exceptional circumstances' in question. In the present case, a 'state of emergency' as well as a 'nationwide emergency' had, at the time of the facts, been put in place in Lithuania in order to deal with the 'mass influx' of migrants at the border which that State shares with Belarus.

40. In those circumstances, Article 140^{12} of the Law on foreign nationals replaced the rules of ordinary law concerning the conditions for access of third-country nationals to procedures for granting international protection in Lithuania and, in doing so, made those conditions more stringent. Contrary to what Lithuanian law allows in 'normal' times, that article provides, in essence, that a third-country national cannot, in principle, validly submit an application for international protection on Lithuanian territory after having entered it illegally – whereas in this case, MA has repeatedly expressed his wish to obtain such protection.

41. The referring court doubts that this is consistent with EU law. Accordingly, by its *first question*, it asks the Court to clarify whether the rules of the Procedures Directive [14] preclude a national provision which has such consequences.

42. Assuming that this is the case, and that a third-country national such as MA, in view of his expressed desire to obtain international protection, falls within the scope of the rules applicable to asylum applicants, the referring court must, *as a second step*, assess the detention measure which had been imposed on that person in the light of the guarantees provided for in the Procedures and Reception Directives.

43. In that context, the referring court raises the issue of the compatibility with those directives of a second provision of the Law on foreign nationals, namely Article 140^{17}(2) thereof. That provision is also applicable in Lithuania on account of the aforementioned declarations of a 'state of emergency' and of a 'nationwide emergency'. In those circumstances, that provision was added to the ordinary rules on the detention of applicants for international protection [15] and it too made it possible to treat more harshly persons who illegally entered the Lithuanian territory.

44. Indeed, while in 'normal' times a third-country national who has applied for asylum in Lithuania cannot be placed in detention on the sole ground that he or she illegally crossed the border of that State, Article 140^{17}(2) of the Law on foreign nationals allows this to happen in 'exceptional' times.

45. The referring court again doubts that this is compatible with EU law. Accordingly, by its *second question*, that court asks the Court to clarify whether the rules of the Reception Directive preclude such a national provision.

46. In order to be as instructive as possible, I shall divide my analysis into two parts. *First*, I shall explain why provisions such as Article 140^{12} and Article 140^{17}(2) of the Law on foreign nationals are not compatible with the Procedures and Reception Directives, regardless of the fact that those provisions apply only in, and seek to deal with, 'exceptional circumstances' (sections B and C). *Secondly*, I shall examine whether, and if so to what extent, a Member State is permitted

[14] Although the referring court, in the wording of its first question, referred to Article 4(1) of Directive 2011/95, that article deals with the elements substantiating an application for international protection and therefore has no bearing on the question referred. However, as I shall set out in detail below, various provisions of the Procedures Directive are relevant in that regard.

[15] Provided for, inter alia, in Article 113(4) of the Law on foreign nationals.

under primary EU law to derogate from those directives in order to safeguard public order and internal security when it is faced with such circumstances (section D). Prior to that, I shall turn my attention to the admissibility of the questions referred (section A).

A. Admissibility of the questions referred for a preliminary ruling

47. Although it did not formally raise an objection of admissibility, the Lithuanian Government put forward two arguments to that effect.

48. *In the first place*, the Lithuanian Government suggested that the second question was, from the outset, irrelevant to the resolution of the dispute in the main proceedings since MA's detention was ordered by the court of first instance, not on the basis of Article 140[17](2) of the Law on foreign nationals, but on the basis of Article 113(4)(2) of that law, in view of his risk of absconding. [16]

49. In my view, the second question is, on the contrary, clearly relevant to the resolution of the dispute in the main proceedings. The referring court explained that it was called upon to rule both on the legality and on the merits of the initial decision to detain MA. It is therefore necessary to verify not only whether that decision had a legal basis, but also whether it was appropriate. In this context, the fact that the court of first instance based its decision on the risk that the person concerned may abscond does not seem to prevent the referring court from taking into consideration other legal grounds which could justify that decision. Besides, the referring court emphasised that an answer to that question will enable it to 'rule unequivocally and clearly on … the precise reason for [MA's] detention or on the adoption of a measure alternative to detention'.

50. *In the second place*, the Lithuanian Government suggested that, in any event, there is no need to answer the questions referred. With regard to the first question, the Lithuanian Government stated at the hearing on 18 March 2022 that the Migration Department registered MA's application for international protection, the merits of which it was currently considering. As regards the second question, the Lithuanian Government pointed out that MA was no longer detained at present, as the detention ordered by the court of first instance on 20 November 2021 had been replaced on 2 February 2022 by a measure 'alternative to detention', renewed until 11 May 2022. [17]

51. In my view, it is still necessary to answer the questions raised.

52. In that regard, according to my understanding of the order for reference, in order to rule on the detention measure initially imposed on the person concerned, the national court must, in particular, take as its point of reference the date on which that measure was ordered. Accordingly, *on the one hand*, even assuming that the application for international protection of the person concerned was finally registered on 18 March 2022 – something which, moreover, the referring court has not confirmed – the dispute in the main proceedings still has a purpose, and the first question is still relevant to its resolution. Indeed, the question remains whether MA should have been regarded as falling within the rules applicable to asylum applicants, including

16 See point 23 of this Opinion.

17 See points 30 and 34 of this Opinion.

those on detention, from 20 November 2021, the date on which the disputed measure was ordered, and where the person concerned also expressed, for the first time, his wish to receive international protection. [18]

53. For the same reason, *on the other hand*, the fact that the detention measure initially imposed on MA was subsequently replaced by a measure 'alternative to detention', does not call into question the relevance of the second question. Moreover, the fact that the first measure was subsequently repealed did not eliminate the effects it had already brought about. MA was deprived of his liberty at least from 20 November 2021 to 2 February 2022. He therefore still has an interest in having the possible illegality of that measure established in court. Such a finding could provide him with a basis for a future claim for compensation. [19]

B. Access to a procedure for granting international protection in accordance with the Procedures Directive (first part of the first question)

54. As I have stated, Article 140^{12} of the Law on foreign nationals lays down 'exceptional' conditions for lodging applications for international protection in Lithuania, enforced in response to the 'mass influx' referred to previously. It seems appropriate at this stage of my analysis to describe in detail their functioning and implications.

55. According to that provision, a third-country national may submit an application for international protection only (1) at border control points or in transit zones, to the VSAT, or (2) in the territory of the Republic of Lithuania, *if he or she entered the territory legally*, to the Migration Department, or (3) when abroad, to the diplomatic missions or consular posts of that State.

56. Under Lithuanian law, such an application is considered validly submitted only when it has been submitted in accordance with the conditions laid down in that provision. [20] Where appropriate, the national concerned will then be regarded as an asylum applicant – in accordance with the definition of that concept in Article 2(20) of the Law on foreign nationals [21] – and will enjoy the rights and guarantees attaching to that status. [22]

57. Conversely, where a third-country national does not comply with the conditions in question, his or her application, subject to certain exceptions, [23] is not accepted for examination and is returned to the person concerned, in accordance with Article 140^{12}(2) of the Law on foreign nationals. [24]

58. It follows from the foregoing that, in practice, third-country nationals who do not fulfil the conditions for entry into the Schengen area can validly apply for asylum in Lithuania only from abroad or at the Lithuanian border. Those nationals cannot, subject to certain exceptions, apply

18 See point 23 of this Opinion.

19 In any event, MA argues that the measure 'alternative to detention' imposed on him constitutes de facto detention. The second question remains relevant to that extent also (see points 84 to 88 of this Opinion).

20 See, also, the first sentence of point 22 of the Description of the procedure.

21 See point 13 of this Opinion.

22 See, also, the third sentence of point 22 of the Description of the procedure.

23 Exception which will be discussed in point 78 of this Opinion.

24 See, also, point 23 of the Description of the procedure.

for asylum within the territory of Lithuania after having entered it illegally. In principle, when they seek to do so, their application is not considered by the national authorities and they are, therefore, not regarded as asylum applicants.

59. In the present case, MA apparently made four attempts to request international protection on Lithuanian territory after entering that territory illegally. [25] At least one of his written applications was forwarded to the competent Lithuanian authority, namely the Migration Department, which refused to consider it on the ground that it had not been lodged in accordance with the procedure provided for in Article 140^{12}(1) of the Law on foreign nationals. [26] According to the referring court, pursuant to Article 2(20) of the Law on foreign nationals, MA should therefore not be treated as an asylum applicant. [27]

60. Like MA and the Commission, I take the view that such conditions for access to a procedure for granting international protection, and their implications, are not compatible with the rules of the Procedures Directive.

61. In that regard, it should be recalled, *in the first place*, that, according to the settled case-law of the Court, every third-country national or stateless person [28] has, in accordance with Article 7(1) of that directive, read in conjunction with Article 3(1) thereof, the right to request international protection in the territory of a Member State. This is a specific expression of the right to asylum guaranteed in Article 18 of the Charter of Fundamental Rights of the European Union ('the Charter'). [29]

62. According to the same case-law, such a national may, pursuant to the abovementioned provisions, exercise his or her right to seek asylum not only at the borders of a Member State or in its transit zones, but also within the territory of that State, even if he or she is staying there illegally. [30] The same applies, by analogy, where that national has entered that territory illegally.

63. A reading of other provisions of the Procedures Directive confirms that interpretation. On the one hand, the fact that a third-country national has entered the territory of the host Member State unlawfully or prolonged his or her stay unlawfully is not one of the grounds for inadmissibility of asylum applications listed exhaustively in Article 33(2) of that directive. On the other hand, Article 31(8)(h) of that directive authorises, as I shall explain below, [31] the national authorities, in

25 See points 23, 27 to 28 of this Opinion.

26 That refusal was also based on the fact that MA did not lodge his application promptly after having illegally crossed the national border. That aspect will be discussed in footnote 33 of this Opinion.

27 I am simplifying matters for the sake of the analysis. In reality, the question of MA's legal status gives rise to a complex situation at national level: the court of first instance and the referring court regard him as an asylum applicant (see points 23 and 30 of this Opinion); the VSAT, for its part, had initially refused to accept his application, before finally asking the referring court to instruct the Migration Department to examine it (see point 27), thus apparently exercising the discretion discussed in point 78; lastly, while the Migration Department had returned MA's application (see point 28), it ultimately decided to examine it (see point 51). Clearly, those authorities did not all have the same reading of national or EU law.

28 For the sake of convenience, I shall refer only to third-country nationals in the remainder of this Opinion.

29 See, inter alia, judgment of 16 November 2021, *Commission* v *Hungary (Criminalisation of assistance to asylum seekers)* (C-821/19, EU:C:2021:930, paragraphs 132 and 136 and the case-law cited).

30 See, in particular, judgment of 16 November 2021, *Commission* v *Hungary (Criminalisation of assistance to asylum seekers)* (C-821/19, EU:C:2021:930, paragraph 136 and the case-law cited).

31 See point 129 of this Opinion.

certain cases,[32] to examine an application submitted in such circumstances on an accelerated basis and in accordance with a specific procedure – which necessarily implies that they must, at an earlier stage, accept it for examination.

64. *In the second place*, I would recall that in order to allow third-country nationals to exercise the right to seek asylum thus guaranteed to them, Member States are obliged to offer those nationals effective, easy and rapid access to a procedure for granting such protection in their territory.

65. In that regard, Article 6 of the Procedures Directive distinguishes, in paragraphs 1 to 4, between, *on the one hand*, the 'making' of an asylum application by a third-country national and, *on the other hand*, the 'lodging' of the application. The EU legislature intended thereby clearly to separate two stages, namely, *first*, the informal expression by such a national of his or her wish to receive international protection and, *secondly*, the formal submission of an application to that effect.

66. As regards the *first stage*, it follows from Article 6(1) of the Procedures Directive that a third-country national 'makes' an application for international protection when he or she expresses, in any way, the wish to receive such protection to the 'authority competent under national law for registering such applications' or to any 'other authority' with which he or she may come into contact in the course of his or her journey, such as 'the police, border guards, immigration authorities and personnel of detention facilities'.[33]

67. In this respect, I would point out that, in line with the explanations given in point 62 of this Opinion, a third-country national who has entered or is staying illegally in the territory of a Member State, such as MA, is perfectly entitled to 'make' an application for international protection while in detention, as the case may be in the context of a removal procedure under the so-called Return Directive.[34] As I indicated in the preceding point, that provision specifically includes 'personnel of detention facilities' among the 'other authorities' before which such a national may validly express his or her wish to receive such protection. Moreover, the Court has already found that a third-country national may 'make' an application for asylum before the court called upon to rule on the lawfulness of his or her detention, which must also be regarded as one such 'other authority'.[35]

68. When a third-country national has, like MA, expressed his or her wish to receive international protection to 'authorities' such as the VSAT and the court of first instance, those authorities cannot choose to disregard that fact on the ground that the procedure provided for by national law for lodging – that is to say, I would recall, formally submitting – an application for asylum has not been complied with. On the contrary, they must draw certain conclusions from that fact.

[32] Namely where the person concerned, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry. Thus, although, contrary to what the Migration Department considered (see point 28 of this Opinion), such circumstances cannot deprive the person concerned of his right to seek asylum (see also, concerning the admissibility of late applications, Article 10(1) of the Procedures Directive), they may have consequences for the way in which his or her application is examined by the national authorities (see also point 129 of this Opinion).

[33] See recital 27 of the Procedures Directive and judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 97 and the case-law cited).

[34] 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 Return Directive'). A third-country national who enters the territory of a Member State illegally and does not have a residence permit is 'staying illegally' there for the purposes of that directive. He or she must therefore, in principle, be subject to the removal process under that directive.

[35] See judgment in *Ministerio Fiscal* (paragraphs 59 to 68). In the present case, this was duly noted by the court of first instance (see point 23 of this Opinion).

69. *First of all*, from the moment that the national has 'made' his or her application, he or she must be regarded by the national authorities as an 'applicant', within the meaning of Article 2(c) of the Procedures Directive and Article 2(b) of the Reception Directive,[36] and benefit from the rights and guarantees attaching to that status, as provided for in those directives.[37] In particular, until such time as that application is decided upon at first instance, that national, even if he or she has entered the territory of the host Member State unlawfully or prolonged his or her stay unlawfully, must not, or must no longer, be regarded as being unlawfully in that territory and, therefore, as being subject to the rules applicable to unlawful migrants, including the Return Directive. Indeed, Article 9(1) of the Procedures Directive grants him or her the right to remain in that State during that period.[38] Moreover, his or her detention – or, where appropriate, continued detention – must be consistent with the relevant rules provided for by the Procedures and Reception Directives.

70. It follows that, contrary to what appears to be provided for in the present case by Article 2(20) of the Law on foreign nationals, the national authorities cannot take a formalistic approach to that status and restrict the benefit of the rights and guarantees associated with it to persons who have submitted an application in accordance with the procedure provided for under national law – otherwise those rights and guarantees would be deprived of a substantial part of their effectiveness.

71. *Next*, in order to ensure that the third-country national concerned actually benefits from the guarantees and rights provided for in the Procedures and Reception Directives, the national authorities are required to register, within the short period of time laid down in Article 6(1)[39] of the Procedures Directive, the third-country national as an 'applicant' in the relevant databases.[40]

72. *Finally*, such a national must, in accordance with Article 6(2) of the Procedures Directive, be given an effective opportunity to 'lodge' his or her application – that is to say, as I have stated in point 65 of this Opinion, to submit it formally – as soon as possible.

73. As regards that *second stage*, which marks the end of the access phase of the procedure for granting international protection and the beginning of the actual examination phase of the application,[41] it follows from Article 6(4) of that directive that it requires, in principle, that the third-country national concerned complete a form provided for that purpose. Moreover, in accordance with Article 6(3) of that directive, Member States may require that that form be lodged in person and/or at a designated place.

74. As the Lithuanian Government argues, the Republic of Lithuania could therefore implement, in its national law, a provision such as Article 140^{12}(1) of the Law on foreign nationals, requiring third-country nationals to lodge their applications for asylum at specified places and with designated authorities.

36 Those provisions define an 'applicant' as 'a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken'.

37 See recital 27 of the Procedures Directive, as well as, inter alia, judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 100 and the case-law cited).

38 See recital 9 of the Return Directive and judgment in *Ministerio Fiscal* (paragraph 99).

39 That provision requires, in principle, Member States to register the application no later than three or six working days after it is 'made', depending on whether the application has been made to the authority competent under national law for registering it or to any 'other authority'.

40 See recital 27 of the Procedures Directive.

41 See Article 31(3) of the Procedures Directive and judgment of 16 November 2021, *Commission* v *Hungary (Criminalisation of assistance to asylum seekers)* (C-821/19, EU:C:2021:930, paragraph 81).

75. Nevertheless, Member States cannot exercise their discretion under Article 6(3) of the Procedures Directive in such a way as to prevent, in practice, those nationals, or even only some of them, from lodging their application 'as soon as possible' – or, a fortiori, in such a way as to prevent them from doing so altogether. Otherwise, the objective of that directive consisting in ensuring effective, easy and rapid access to the procedure for granting such protection would be called into question, and the effectiveness of the right to seek asylum, which Article 7(1) of that directive confers on every third-country national, would be seriously undermined. [42]

76. As argued by MA and the Commission, Article 140^{12}(1) of the Law on foreign nationals seems problematic in that regard. According to the interpretation given by the referring court, a national such as MA, who has entered Lithuania illegally and is in detention there, has no effective opportunity to lodge his or her application in accordance with the procedure provided for in that provision: on the one hand, he or she is not, in principle, allowed to do so within the territory of Lithuania; on the other hand, he or she cannot travel, for that purpose, to the Lithuanian border, to a transit zone or to an embassy or consulate of Lithuania abroad.

77. In that respect, I would point out, in addition to what I have already stated in point 75 of this Opinion, that the detention of an applicant for international protection, assuming that it complies with the rules laid down in the Procedures and Reception Directives, cannot, in accordance with Article 6(2) of the Procedures Directive, prevent the person concerned from lodging his or her application and thus exercising his or her right to seek asylum. [43] On the contrary, that directive provides for various guarantees intended to facilitate access to the procedure for granting such protection in detention facilities. [44] As the Commission argued at the hearing, the procedures which Member States choose to put in place for the lodging of applications, pursuant to Article 6(3) of the Procedures Directive, must therefore allow an applicant in such a situation to lodge an application.

78. Contrary to what the Lithuanian Government maintains, the discretion of the VSAT under Article 140^{12}(2) of the Law on foreign nationals to accept, by way of exception, the application for international protection of a third-country national who has entered Lithuania illegally, having regard to his or her vulnerability or other individual circumstances, including when he or she is held in detention in one of its facilities, is not sufficient in that regard. According to Articles 6(2) and 7(1) of the Procedures Directive, all third-country nationals in such a situation – and not only some of them – must be able to request such protection and, to that end, lodge their application as soon as possible. [45]

[42] In that regard, I would point out that if an applicant does not lodge his or her application, Member States may, in principle, apply Article 28 of the Procedures Directive as a result, and thus consider that he or she has implicitly abandoned the application.

[43] See, to the same effect, Recommendation Rec(2003)5 of the Committee of Ministers to Member States on measures of detention of asylum seekers, adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies, point 8; and ECtHR, 25 June 1996, *Amuur v. France*, ECHR:1996:0625JUD001977692, § 43.

[44] See Article 8(1) of the Procedures Directive.

[45] The Lithuanian Government further argued that a third-country national who had illegally entered Lithuania could also, in accordance with the judgment in *Ministerio Fiscal*, make an application for asylum before the court responsible for his or her detention. Where appropriate, the application would be forwarded to the competent authority for registration; the applicant would then have an effective opportunity to lodge it and it would then be examined. This is what happened in the case in the main proceedings (see point 50 of this Opinion). In response to the Court's questions, the Lithuanian Government explained that this is a means of seeking asylum which, although not provided for in Article 140^{12} of the Law on foreign nationals, is not prohibited by that article either. That said, apart from the fact that the referring court did not give the same interpretation of that article, I would simply observe that a Member State does not ensure effective, easy and rapid access to the procedure for granting international protection if certain nationals are obliged to go before a judge in order to request such protection.

79. *Lastly*, I would point out that the Procedures Directive does not allow a Member State to derogate from the obligations which I have just described, when it is, like the Republic of Lithuania, faced with a 'mass influx' of third-country nationals at its borders.

80. Although the Procedures Directive allows national authorities, in such circumstances, inter alia, to extend the time limits for the registration [46] and examination of asylum applications, [47] it does not allow those authorities to deprive, in law or in fact, certain third-country nationals of effective access to a procedure for granting that protection.

81. In the light of all the foregoing considerations, I suggest that the Court answer the first part of the first question to the effect that a national provision which does not allow, subject to certain exceptions, third-country nationals to access a procedure for granting international protection in the territory of the Member State in question when they illegally entered that territory is not compatible with Article 6(1) and (2) and Article 7(1) of the Procedures Directive.

C. The grounds for detention of asylum applicants, as provided for in the Reception Directive (first part of the second question)

82. It follows from the foregoing analysis that a third-country national, such as MA, must be regarded as an 'applicant', within the meaning of the Procedures and Reception Directives, from the moment he or she has 'made' an asylum application to an authority such as the VSAT or the court of first instance and up until a final decision has been taken on that application. This implies, inter alia, that he or she can only be placed or kept in detention in accordance with the relevant rules laid down by those directives.

83. It is now necessary to examine the first part of the second question and to determine whether a national provision, such as Article 140^{17}(2) of the Law on foreign nationals, which allows an asylum applicant to be detained on the sole ground that he or she has illegally crossed the national border is compatible with those directives (section 2). Before doing so, I consider it necessary to clarify the concept of 'detention' (section 1).

1. The concept of 'detention'

84. As I understand it, the referring court asked its second question solely for the purpose of assessing the legality and merits of the detention measure imposed on MA by the court of first instance in its decision of 20 November 2021.

85. However, MA argued before the Court that the alternative measure imposed on him as from 2 February 2022, namely 'accommodation at a VSAT facility …, with restriction of his freedom of movement to the place of accommodation', although regarded as an alternative to detention [48] under Lithuanian law, in reality constitutes de facto detention.

46 See Article 6(5) of the Procedures Directive, which allows that period to be extended to 10 days.

47 See Article 31(3)(b) of the Procedures Directive, which allows, in those circumstances, the time limit of six months normally applicable to be extended for a period not exceeding a further nine months.

48 See, in that regard, Article 8(4) of the Reception Directive.

86. If that is indeed the case, that second measure will, in my view, also have to be assessed in the light of the rules on detention provided for in the Procedures and Reception Directives. Indeed, the scope of those rules depends not on the classification given in national law to a particular measure, but on whether that measure meets the autonomous definition of 'detention' set out in Article 2(h) of the Reception Directive.

87. In that regard, the Court has held, in the light of that definition, that any 'coercive measure that deprives th[e] applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter' constitutes 'detention'.[49] In the present case, it will be for the referring court to determine whether the measure of 'accommodation at a VSAT facility' meets those criteria.

88. I nevertheless consider it appropriate to provide some useful clarification to the referring court on the matter. In essence, it seems apparent from the explanations given by that court that the 'territory' within which the person concerned is required at all times to remain is limited by the perimeter of the accommodation centre, from which he is not allowed to leave without authorisation – a fact which the Lithuanian Government confirmed at the hearing before the Court. That perimeter therefore appears 'restricted and closed'. Moreover, MA appears to be 'isolated from the rest of the population', having a very limited possibility of contact with the outside world. Subject to verification by the referring court, the measure in question therefore appears to deprive him of his freedom of movement and therefore to constitute 'detention', within the meaning of the Procedures and Reception Directives.[50]

2. The legality of the detention measure(s) in question

89. That clarification having been made, it should be recalled that the Procedures and Reception Directives govern the possibility for the national authorities to detain an asylum applicant. In that regard, it follows from Article 26(1) of the Procedures Directive that the grounds for and conditions of such a measure must be in accordance, in particular, with Article 8 of the Reception Directive.

90. Article 8(2) of the Reception Directive emphasises that the detention of asylum applicants should be the exception rather than the rule. According to that provision, such an applicant may be held in detention only where, following an assessment carried out on a case-by-case basis, that is necessary and where other less coercive measures cannot be applied effectively. Moreover, Article 8(3) of the Reception Directive lists exhaustively[51] the various grounds which may justify recourse to such a measure.

91. However, the ground for detention provided for in Article 140^{17}(2) of the Law on foreign nationals, namely the illegal crossing of the border, is quite simply not listed, *as such*, in Article 8(3) of the Reception Directive. Contrary to the Lithuanian Government's assertion, nor is that ground, *in essence*, consistent with any of those listed in that provision.

[49] Judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 223).

[50] See, by analogy, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 226 and 227). MA also argued that the living conditions in the VSAT facility in question are such as to amount to inhuman or degrading treatment, prohibited by, inter alia, Article 4 of the Charter and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'). Again, this will be for the referring court to ascertain in the light of the relevant case-law (see, in particular, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589).

[51] See, in particular, judgment in *Ministerio Fiscal* (paragraph 104 and the case-law cited).

92. In that regard, in its written observations, the Lithuanian Government has essentially argued that the ground provided for in Article 140[17](2) of the Law on foreign nationals is consistent with the ground contained in Article 8(3)(e) of the Reception Directive. I would recall that, according thereto, an applicant for international protection may be detained 'when protection of national security or public order so requires'. The possibility of placing an applicant in detention when he or she has crossed the national border illegally meets, according to that government, the requirements of national security. The measure in question is one of those taken by the Republic of Lithuania to protect the border which it shares with Belarus and, more specifically, to stem the illegal crossing of that border by migrants in the context of the 'mass influx' which that Member State is currently facing and, accordingly, to ensure internal security in its territory and in the Schengen area as a whole.

93. In my view, the fact that a person is part of a flow of migrants which a Member State is seeking to stem in order to safeguard the internal security of its territory [52] – understood in the broad sense of its 'policing' – cannot justify the detention of that person on the basis of the ground set out in Article 8(3)(e) of the Reception Directive.

94. According to the Court's established case-law, placing an applicant in detention under that provision can, in view of the requirement of necessity, be justified on the ground of a threat to 'national security' or 'public order', within the meaning of that provision, only if 'the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal … security of the Member State concerned' – for example, because that person is a dangerous criminal. In such a situation, the detention of the applicant makes it possible to 'protect … the public from the threat which [his or her] conduct … represents'. [53]

95. Accordingly, detention under Article 8(3)(e) of the Reception Directive implies an assessment of the dangerousness of the person concerned, taking into account factors other than the possible illegal crossing of the border – such an offence not being, in itself, such as to constitute a threat such as that referred to in the previous point. [54] In that context, national authorities cannot even *presume* that any person who has illegally entered the territory is dangerous. [55] On the contrary, before adopting such a measure against an applicant, they must have consistent, objective and specific evidence establishing that dangerousness. [56]

96. Moreover, the Lithuanian Government admitted at the hearing before the Court that Article 8(3)(e) of the Reception Directive covers only the particular situation which I have just described and that Article 140[17](2) of the Law on foreign nationals actually goes beyond what is permitted by that provision [57] – or by the Reception Directive in general. On the other hand, that government sought at the hearing to justify going beyond what is permitted by claiming that allowing detention only in that one situation is not sufficient to tackle effectively the 'mass influx' which it is facing. I shall address that specific matter in section D of this Opinion.

52 See, concerning that concept, point 100 et seq. of this Opinion.

53 Judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraphs 55 and 67).

54 See, by analogy, judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraphs 49, 50, 57 and 61). That is the case, a fortiori, where the person concerned has entered the host Member State illegally only for the purpose of transit to a second State (see paragraph 63 of that judgment).

55 See, by analogy, judgment of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 50).

56 See, to that effect, judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 172).

57 This is confirmed by the fact that that provision is, in Lithuanian law, already reflected in Article 113(4)(5) of the Law on foreign nationals.

3. Interim conclusion

97. In the light of the foregoing considerations, I suggest that the Court answer the first part of the second question to the effect that a national provision which allows an applicant for international protection to be placed in detention on the sole ground that he or she illegally crossed the border of the Member State concerned is not compatible with Article 8(3) of the Reception Directive.

D. The possibility of derogating from the Procedures and Reception Directives (second part of the two questions)

98. I have explained in the preceding sections why, in my view, provisions such as Article 140^{12} and Article $140^{17}(2)$ of the Law on foreign nationals are not compatible with the Procedures and Reception Directives. The second part of the questions referred therefore remains to be considered, concerning whether a Member State should be permitted to derogate from those directives, by implementing such provisions, in order to safeguard public order and internal security in 'exceptional circumstances', such as those at issue in the main proceedings.

99. I shall begin by recalling the context of the present case (section 1), before turning to the provisions of the FEU Treaty which may, in theory, allow a Member State to derogate from EU law on the ground of public order and internal security (section 2), and then the conditions under which such derogation is possible (section 3).

1. The 'exceptional circumstances' at issue

100. As I stated in the introduction to this Opinion, States have, in the international legal order, an 'inalienable' sovereign right to control aliens' entry into and residence in their territory.[58] Moreover, the Member States whose borders coincide, in part, with the external borders of the Schengen area, such as Lithuania, have obligations under EU law in that regard. Under the Schengen Borders Code, those States are required to 'protect' the borders in question. They must carry out checks as well as monitor those borders,[59] and take other measures to combat the unlawful crossing of the borders.[60]

101. As stated in recital 6 of the Schengen Borders Code, border control at the external borders of that area is in the interest of all Member States which have abolished internal border control. It should help inter alia to combat illegal immigration and to prevent any threat to internal security and public policy in that area.

102. In my view, it follows from the above that the protection of the external borders of the European Union by the Member States concerned is one of the responsibilities incumbent upon them with regard to the maintenance of law and order and the safeguarding of internal security, not only in their territory, but also in the Schengen area as a whole.

103. From that point of view, as the Lithuanian Government argued before the Court, the 'mass influx' of migrants which Lithuania is facing at its border with Belarus undeniably constitutes a critical situation. That 'influx' has led to a drastic increase in the number of cases of illegal

58 See, inter alia, ECtHR, 29 January 2008, *Saadi v. the United Kingdom*, CE:ECHR:2008:0129JUD001322903, § 64.

59 See, in particular, Articles 8 and 13 of the Schengen Borders Code.

60 See, in particular, Article 5(3) of the Schengen Borders Code.

crossings of the Lithuanian border.[61] The geopolitical context of that situation should also be borne in mind. The EU institutions, including the European Parliament, the European Council and the Commission,[62] have noted that that 'mass influx' has been orchestrated by the Belarusian Government. It is alleged that that government flew in third-country nationals from their countries of origin and then pushed them to the external borders of the Member States. Those various EU institutions have described the actions in question as the 'instrumentalisation of migrants for political purposes' or a form of 'hybrid attack' designed to destabilise the Member States directly concerned and the European Union as a whole.

104. It is not for me to re-examine those political assessments. I would simply observe that Lithuania could legitimately take the view that it faced an 'exceptional' threat to public order and internal security within its territory and the whole of the Schengen area.

105. The Lithuanian authorities could therefore consider it necessary to strengthen the protection of the European Union's external borders by means of extraordinary and temporary measures to stem those 'massive' migratory flows.[63]

106. Those authorities' assessment as to the need for such extraordinary and temporary measures seems, moreover, to be shared by the EU institutions. On 1 December 2021, the Commission presented, on the basis of Article 78(3) TFEU, a Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland,[64] measures which were deemed 'necessary' to address the 'real threat … to the Union's security' posed by the 'hybrid attack' on Lithuania in particular[65] and to which I shall return later. Furthermore, on 14 December 2021, the Commission presented a Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum,[66] which seeks to institutionalise most of the measures contained in the preceding proposal.[67] Those legislative proposals have, however, not yet been adopted.

2. The provisions allowing derogations from EU law on the basis of public order and internal security

107. That said, where a Member State adopts extraordinary and temporary measures with the legitimate aim of safeguarding public order and internal security in 'exceptional circumstances', those measures do not fall outside the scope of any legal framework. When they affect the normal application of EU law, such measures are compatible with that law only in so far as EU law allows such derogation.[68]

61 The Lithuanian Government has reported that 3 695 third-country nationals crossed Lithuania's borders illegally between 1 July 2021 and 10 March 2022.

62 See, respectively, European Parliament resolution of 7 October 2021 on the situation in Belarus after one year of protests and their violent repression (2021/2881(RSP)), § 16; European Council, Conclusions of the meeting of 21 and 22 October 2021 (EUCO 17/21), § 19, and Conclusions of the meeting of 16 December 2021 (EUCO 22/21), §§ 18 and 21; 2021 State of the Union Address by President von der Leyen, Strasbourg, 15 September 2021.

63 See point 92 of this Opinion.

64 COM(2021) 752 final ('the Proposal for a Council Decision').

65 Proposal for a Council Decision, explanatory memorandum, p. 1.

66 COM(2021) 890 final.

67 On the same day, the Commission also presented a Proposal for a Regulation of the European Parliament and of the Council amending the [Schengen Borders Code] (COM(2021) 891 final), which aims, inter alia, to allow Member States to act swiftly in the event of 'instrumentalisation of migrants'. In essence, that proposal provides that, in such circumstances, Member States would be able to limit the number of border crossing points and to intensify border surveillance.

68 See, to that effect, judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 214 and the case-law cited).

108. In that regard, the FEU Treaty expressly provides, in Articles 36, 45, 52, 65, 72, 346 and 347, for derogations applicable in situations which may affect law and order or internal security, including in 'exceptional circumstances'.

109. Curiously, in the present case, the Lithuanian Government did not refer to any of those articles in support of its position. However, in view of the substance of the arguments put forward by that government, and in the light of the discussions before the Court, two derogations must, in my view, be examined.

110. I shall, *in the first place*, briefly mention Article 347 TFEU, which concerns the measures which a Member State may be called upon to take inter alia in the event of 'serious internal disturbances affecting the maintenance of law and order' and in the event 'of war [or] serious international tension constituting a threat of war'.

111. To date, the Court has never ruled on the conditions for the application of that 'safeguard clause'. It has only stated that that derogation concerns 'wholly exceptional' situations.[69] Various Advocates General have nevertheless examined its scope in more detail.

112. It follows from their analyses that Article 347, placed at the end of the FEU Treaty, theoretically permits a derogation from all the rules of this treaty and those adopted on its basis.[70] As the Lithuanian Government argued at the hearing – without however, I repeat, making specific reference to that article – in the cases referred to in that article, a Member State could therefore, in theory, depart, on that basis and to a certain extent, from the Procedures and Reception Directives.[71]

113. However, the extreme circumstances envisaged in Article 347 TFEU are not at issue in the present case. In particular, without wishing to minimise the seriousness of the situation faced by Lithuania at its border, such a situation does not, in my view, fall within the scope of 'serious internal disturbances affecting the maintenance of law and order', as referred to in that article. The fact that that Member State has declared a state of emergency on part of its territory is not, in itself, decisive in that regard – otherwise the application of that article would vary according to the conditions laid down in the national law of each Member State for the implementation of such a regime. In my view, since any derogation must be interpreted strictly,[72] and since Article 347 TFEU equates the case of 'internal disturbances' with war, the circumstances in question must have a similar threshold of seriousness, that is to say, constitute genuine crises, verging on total collapse of internal security, the occurrence of which represents a grave danger for the very existence of the State.[73]

114. *In the second place*, I turn now to Article 72 TFEU, which seems more relevant. Pursuant to that article, the provisions which appear under Title V of the third part of the FEU Treaty, relating to the area of security, freedom and justice, '[are] not [to] affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the

69 See judgment of 15 May 1986, *Johnston* (222/84, EU:C:1986:206, paragraph 27).

70 See Opinion of Advocate General Darmon in *Johnston* (222/84, not published, EU:C:1986:44, point 5), and Opinion of Advocate General Jacobs in *Commission* v *Greece* (C-120/94, EU:C:1995:109, point 46).

71 Nevertheless, even in those cases, limits are laid down in respect of certain non-derogable fundamental rights (see points 138 and 139 of this Opinion).

72 See, inter alia, judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 215).

73 See Opinion of Advocate General Jacobs in *Commission* v *Greece* (C-120/94, EU:C:1995:109, point 47), and Opinion of Advocate General La Pergola in *Sirdar* (C-273/97, EU:C:1999:246, point 21).

safeguarding of internal security'. In the present case, the Procedures and Reception Directives fall within the scope of that article, since they were adopted on the basis of Article 78 TFEU, which appears under Title V.

115. The Court has ruled on Article 72 TFEU in several judgments. It has established the principle that Article 72 constitutes a derogation which may allow a Member State to depart from its obligations under such directives in certain circumstances – although it has so far consistently rejected the defences put forward by Member States in that regard, as they failed to fulfil the relevant requirements. I shall address those requirements in the next section.

3. The requirements which Member States must fulfil for such a derogation to be compatible with Article 72 TFEU

116. Since Article 72 TFEU, like any derogation, must be interpreted strictly, the Court has repeatedly held that it does not confer on Member States the power to depart from the provisions of EU law based on no more than reliance on the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.[74] On the contrary, they must meet certain requirements.

117. *First*, the Court has held that it is for the Member State which seeks to take advantage of Article 72 TFEU to prove that it is necessary to have recourse to that derogation in order to exercise the responsibilities in question.[75]

118. *Secondly*, in addition to that requirement of necessity, there is, in my view, a requirement of proportionality *stricto sensu*. The national measures at issue, even if they are necessary, cannot, in my view, be justified under Article 72 TFEU if the disadvantages which they caused were disproportionate to the aims pursued.[76] In that context, account must be taken, in particular, of the impact of those measures on the fundamental rights the observance of which the Court ensures, in particular those provided for by the Charter.[77]

119. *Finally*, those substantive requirements are, in my view, supplemented by a procedural requirement. In the light of the principle of sincere cooperation laid down in Article 4(3) TEU, a Member State cannot unilaterally adopt exceptional and temporary derogation measures without first duly consulting the EU institutions and the other Member States and seeking a common solution to the problem.[78] If and when the European Union itself adopts such common measures on the basis of Article 78(3) TFEU, any possibility of derogation under Article 72 TFEU is therefore excluded, in my view.

74 See, inter alia, judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 215).

75 See, inter alia, judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 216).

76 See, by analogy, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 64).

77 See, by analogy, judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 64 and the case-law cited).

78 I note that such a procedure is expressly provided for, in Articles 347 and 348 TFEU, in the event of implementation of the first provision.

120. In the present case, the Republic of Lithuania seems to me to have fulfilled that procedural requirement,[79] and no such measures have been adopted at present. However, in my view, provisions such as Article 140[12] and Article 140[17](2) of the Law on foreign nationals do not fulfil either of the two substantive requirements set out above, as I will explain in the following sections.

(a) The requirement of necessity

121. In assessing whether it is necessary for a Member State to derogate from an instrument of EU law for the purposes of exercising its responsibilities for public order and internal security in a particular case, the Court not only concerns itself with the 'exceptional circumstances' involved, but also examines whether the EU legislature has provided, in the instrument in question, mechanisms enabling Member States to deal effectively with those circumstances.[80]

122. Therefore, in order to satisfy that requirement of necessity, the Member State relying on the benefit of Article 72 TFEU must demonstrate that the instrument of EU law in question does not allow it, having regard to that instrument's *actual content* or the *specific conditions for its implementation*, to ensure the exercise of the responsibilities in question in the circumstances at issue.[81]

123. In the present case, the Lithuanian Government submits, in essence, that strict compliance with the rules of the Procedures and Reception Directives did not allow it to ensure the effective exercise of its responsibilities in public order and internal security in the context of the control of the European Union's external borders in the face of a 'mass influx' such as that at issue in the main proceedings. In essence, that government's line of argument refers to the tension mentioned in the introduction to this Opinion: on the one hand, the Member States at those borders must generally prevent their crossing by third-country nationals who do not fulfil the conditions of entry laid down by the Schengen Borders Code;[82] on the other hand, when those nationals make an application for international protection, they have the right to remain in the territory of those States while their application is being examined – and, therefore, must be admitted, regardless of these conditions, to that territory, if they have not already entered it, in some instances illegally.[83]

124. The Lithuanian Government takes the view that this leads, in a situation of mass influx, to many abuses, since only a small proportion of migrants are bona fide refugees, while many others make asylum applications which they know to be manifestly unfounded for the sole purpose of temporarily benefiting from the guarantees attaching to the status of 'applicant', or even simply to be admitted to the Schengen area or, when they are already unlawfully in that territory, to delay their removal.

125. However, I note that the Procedures Directive contains a provision to enable Member States to control the external borders of the European Union, while respecting the right of third-country nationals to seek asylum, namely Article 43 of that directive.

79 I note in that respect that the Republic of Lithuania has consulted its European partners and invited the Commission to propose interim measures on the basis of Article 78(3) TFEU (see Proposal for a Council Decision, explanatory memorandum).

80 See, to that effect, judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)* (C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 171).

81 See Opinion of Advocate General Pikamäe in *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:493, point 103).

82 See point 100 of this Opinion.

83 See point 69 of this Opinion and Article 9(1) of the Procedures Directive.

126. Article 43(1) of the Procedures Directive allows Member States to provide for specific procedures at their borders or in transit zones in order to decide on the admissibility, pursuant to Article 33 of the Procedures Directive, of applications for asylum made at those locations, or even on the substance of those applications, in the cases referred to in Article 31(8) of that directive, which concern, in essence, various situations in which the applicant's conduct or statements tend to indicate that his or her application is manifestly unfounded and abusive. In accordance with Article 43(2) of the Procedures Directive, those specific procedures must nevertheless be conducted within a reasonable time, it being understood that if a decision has not been taken within four weeks, the Member State must grant the applicants concerned entry to its territory, their application then having to be processed in accordance with the normal procedure.

127. Those procedures allow Member States, *first of all*, to carry out an 'initial screening' of applications for international protection at the border or in a transit zone before allowing the nationals concerned to enter their territory. This therefore allows Member States to refuse entry to those persons, mentioned by the Lithuanian Government, who make manifestly unfounded and abusive claims.

128. *Next*, for the duration of these specific procedures, Member States are entitled, in accordance with Article 8(3)(c) of the Reception Directive, to detain the applicants concerned at the border or in a transit zone where, in accordance with Article 8(2) of that directive, such a measure is necessary. That is the case, in my view, where the national authorities have reasonable grounds for believing that an applicant, if left at liberty, would illegally cross or attempt to cross the border in question.

129. *Finally*, with regard to third-country nationals who have already crossed the national border illegally and who make an application for asylum within the territory of the Member State concerned, I would recall that Article 31(8)(h) of the Procedures Directive allows Member States, in the cases mentioned in that provision [84] and in order to combat possible abuses, to examine such an application on an accelerated basis and in accordance with a procedure at the border, as envisaged in Article 43 of that directive. In these cases, the national authorities can therefore, it seems, take the applicant concerned back to the border for the purposes of that procedure. In some circumstances, the fact that the person concerned first entered the territory illegally could, in my view, be such as to demonstrate that it is necessary to detain him or her there for the duration of the procedure on the basis of Article 8(3)(c) of the Reception Directive.

130. Accordingly, I consider that the content of the Procedures and Reception Directives cannot in itself be regarded as not allowing Member States to exercise, at the European Union's external borders, their responsibilities for public order and internal security.

131. As regards the *specific conditions for the implementation* of those instruments, I can accept that, in the case of a mass influx such as that at issue in the present case, which appears to be of a particular nature and scale, it is difficult for the authorities of a Member State to carry out, in the context of the specific border procedures, the 'initial screening' of asylum applications made simultaneously by a considerable number of third-country nationals, within the four-week period provided for in Article 43(2) of the Procedures Directive. Although Article 43(3) of that directive allows, in such circumstances, for procedures to continue beyond this period, this implies, nevertheless, admitting all the nationals concerned to the national territory – whether they are

[84] Namely, I recall, when the person concerned, without good reason, has not presented himself or herself to the authorities or has not submitted an application for international protection in the shortest possible time given the circumstances of his or her entry.

acting in good faith or abusing the system.[85] Moreover, even the Commission, in its Proposal for a Council Decision, suggests that the Procedures Directive is not entirely suited to such circumstances.

132. Accordingly, I could accept that it might be necessary for a Member State, until that proposal is adopted, to derogate, under Article 72 TFEU, from certain provisions of Article 43 of the Procedures Directive. In my view, a Member State could, as suggested in that proposal, extend the procedures at the border, by providing that all asylum applications of nationals who are stopped or found in the vicinity of the border in question, after entering illegally, or after having presented themselves at the border crossing points, should be examined in such procedures,[86] and, in that context, derogate, to a reasonable extent, from the four-week time limit provided for in Article 43(2) of that directive, in order to allow the national authorities sufficient time to carry out that 'initial screening' of asylum applications.[87]

133. On the other hand, I do not consider it necessary for a Member State to derogate from Articles 6 and 7 of the Procedures Directive and Article 8 of the Reception Directive by implementing national provisions such as Article 140^{12} and Article $140^{17}(2)$ of the Law on foreign nationals in order to effectively exercise its responsibilities for public order and internal security in the event of a 'mass influx' of migrants at its border – regardless of the nature and scale of the influx. As I have just explained, the specific procedures for examining asylum applications at the border, envisaged in Article 43 of the Procedures Directive, and the possibility of detaining certain applicants in that context, in accordance with Article 8(3)(c) of the Reception Directive, make it already possible to deal with such a situation, with some adjustments if necessary.

(b) Respect for fundamental rights

134. When examining the compatibility with EU law of any extraordinary and temporary derogation measure, the fundamental rights of the persons concerned should not be overlooked. Although in 'exceptional circumstances' more limitations may theoretically be placed on those rights in order to safeguard public order and internal security, the fact remains, *first*, that a balance must always be maintained between those rights and requirements, *secondly*, that some limitations are so serious that they are never acceptable in a democratic society and, *thirdly*, that some rights do not allow for any limitation, whatever the circumstances.

135. In that context, I believe that it is necessary to take into account not only the Charter, but also the ECHR, which establishes a minimum threshold of protection below which the European Union cannot fall. The same applies to the Geneva Convention. Although the European Union is not a contracting party to that convention, Article 78(1) TFEU and Article 18 of the Charter require it to observe the rules contained therein. Consequently, the Court must ensure, in the context of its interpretation of Article 72 TFEU and of the derogations from EU law which that provision could justify, that its interpretation is in line with the level of protection guaranteed by the convention itself.[88]

85 National authorities may only restrict the freedom of movement of those applicants to an area in proximity to the borders or transit zones of that Member State, in accordance with Article 7 of the Reception Directive.

86 See Article 2(2) of the Proposal for a Council Decision.

87 Article 2(5) of the Proposal for a Council Decision therefore allows the time limit for granting access to the territory to be extended to 16 weeks.

88 See, inter alia, judgment of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraphs 74 and 75).

(1) Not allowing a third-country national to access a procedure for granting international protection

136. *In the first place*, a provision such as Article 140[12] of the Law on foreign nationals, which in practice, and subject to certain exceptions, does not allow a third-country national to access a procedure for granting international protection when he or she has entered Lithuanian territory illegally, is not, in my view, compatible with the fundamental rights guaranteed by the Charter, even in the case of a 'mass influx' of migrants.

137. *On the one hand*, such a provision is, in my opinion, contrary to the right to asylum, guaranteed, as such, in Article 18 of the Charter. I should stress, in this regard, that the effectiveness of that right depends on access to a procedure in this area.[89] It is true that limitations may be placed on that right, as provided for by Article 52(1) of the Charter.[90] In my view, however, preventing, in practice, a third-country national from requesting international protection undermines the 'essence' of that right.[91]

138. *On the other hand*, refusing to accept for examination an application for asylum made by a third-country national who is unlawfully in the national territory is also contrary to the principle of non-refoulement, as provided for in Article 19(2) of the Charter.

139. That fundamental right, which is directly linked to the prohibition of torture and inhuman or degrading treatment or punishment in Article 4 of the Charter and Article 3 ECHR, does not allow for any limitation. It prohibits Member States, in all circumstances, from removing, expelling or extraditing a person to a State where there is a serious risk of that person being subjected to such treatment.[92]

140. However, a Member State cannot exclude that risk and therefore fulfil its non-refoulement obligations, as regards a third-country national who is unlawfully in its territory, if it does not examine, before expelling the person concerned, an application in which he or she specifically claims that he or she fears persecution in his or her country of origin.[93]

141. The above interpretation is not called into question by the Lithuanian Government's argument that, in essence, a third-country national who enters a State illegally in the context of a 'mass influx' is engaging in abuse justifying the deprivation of his or her right to seek asylum, and that the principle of non-refoulement cannot be regarded as absolute in such a situation.

89 See, to that effect, judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 102).

90 According to that provision, any limitation on the exercise of a right guaranteed by the Charter is permissible only provided that it, first, is 'provided for by law', secondly, respects the 'essence' of that law and, thirdly, respects the principle of proportionality.

91 Denial of that opportunity must, in my view, be contrasted with the possibility of making examination of the application subject to an accelerated procedure or to a specific procedure at the border.

92 See, in particular, judgment of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraphs 94 to 96). See also Article 15 ECHR, which allows, in paragraph 1 thereof, Member States to derogate from the obligations under that convention in time of war or other public emergency threatening the life of the nation, but specifies, in Article 15(2) ECHR, that no derogation from Article 3 of that convention is to be made under that provision.

93 United Nations High Commissioner for Refugees (UNHCR), *Observations on Draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No 21-29207)*, 27 September 2021, § 17.

142. *On the one hand*, I recall that the authors of the Geneva Convention recognised that, when exercising their right to asylum, refugees (including asylum applicants, until a negative decision is taken on their application) [94] often have to enter unlawfully the territory of States in which they seek protection. Far from authorising States to deprive those persons of their right to seek asylum on that ground, those authors, on the contrary, restricted, in Article 31 of that convention, the power of States to impose penalties on those refugees in the event of illegal entry or presence in their territory – [95] an matter to which I will return. *On the other hand*, the obligations on States to respect the principle of non-refoulement, as guaranteed in Article 19(2) of the Charter, apply irrespective of the conduct of the person concerned. [96]

143. The judgment in *N.D. and N.T. v. Spain*, [97] relied on by the Lithuanian Government, does not, in my view, demonstrate the contrary. That judgment does not concern the principle of non-refoulement, as protected by Article 3 ECHR, and, moreover, it concerns very specific circumstances (the applicants had taken part in a collective assault in an attempt to enter Spanish territory by forcing their way through the border fence using violence), which differ substantially from those in the present case. In any event, even if that judgment is to be understood as meaning that, according to the European Court of Human Rights (ECtHR), the fact that an asylum applicant has illegally entered the territory of a State, in the context of a mass influx of migrants, allows that State not to consider his or her application for asylum, which I very much doubt, it would simply follow that EU law therefore provides, in Article 18 and Article 19(2) of the Charter, more extensive protection than the ECHR, as is expressly permitted by Article 52(3) of the Charter.

(2) The possibility of detaining an applicant on the sole ground that he or she has crossed the national border illegally

144. *In the second place*, a provision such as Article 140[17](2) of the Law on foreign nationals, which allows an asylum applicant to be detained on the sole ground that he or she has crossed the national border illegally, is also incompatible, in my view, with the fundamental rights guaranteed by the Charter and other relevant instruments, even in the event of a 'mass influx' of migrants.

145. *First*, by providing for such a detention measure, that provision gives rise to a particularly serious interference with the right to liberty enshrined in Article 6 of the Charter. In that regard, I would recall that, according to the Court's settled case-law, in the light of the importance of that fundamental right, in the face of such a serious interference, limitations on the exercise of that right are permissible solely if they are applied only in so far as is strictly necessary. [98]

94 See Goodwin-Gill, G.S., 'L'article 31 de la convention de 1951 relative au statut des réfugiés : l'absence de sanctions pénales, la détention et la protection', Feller, E., Türk, V. and Nicholson, F. (Ed.), *La Protection des réfugiés en droit international*, Larcier, Bruxelles, 2008, pp. 232 to 234.

95 UNHCR, *Observations on Draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens*, op. cit., §§ 11 and 14 and references cited. Moreover, the EU legislature has already provided for less radical measures to combat possible abuse in that connection (see points 63 and 129 of this Opinion).

96 See judgment of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 94).

97 ECtHR, 13 February 2020, CE:ECHR:2020:0213JUD000867515. In that judgment, the European Court of Human Rights held that Spain could, in derogation from the principle of the prohibition of collective expulsions provided for in Article 4 of Protocol No 4 ECHR, turn back, without examining their individual circumstances, migrants who had attempted to cross its border illegally, relying, on the one hand, on the conduct of the persons concerned and, on the other hand, on the fact that that State offered effective possibilities for legal entry (§§ 201, 218, 222 and 231).

98 See judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 56).

146. When questioned by the Court at the hearing as to the way in which Article 140^{17}(2) of the Law on foreign nationals contributes to, and is necessary for, the maintenance of law and order and internal security in the territory of Lithuania, and as to the precise purpose of a detention measure of that provision, the Lithuanian Government explained in particular that, if migrants succeed in entering national territory illegally, their possible detention is aimed at preventing illegal secondary movements within the Schengen area – since, otherwise, according to this government the majority of those persons would not be likely to stay in Lithuania and would continue their journey to other Member States.

147. Seen from this perspective, such a detention measure goes, in my view, beyond what is necessary to protect public order and internal security.

148. Admittedly, the fact that an applicant has entered the territory illegally may, in certain cases, constitute an indication of a risk of his or her absconding – possibly to other Member States – from the latter. If supported by other evidence, this risk could validly make it necessary to detain the person concerned, for a given period of time, as permitted, moreover, by Article 8(3)(b) of the Reception Directive. [99] However, in the absence of such evidence, a detention measure based on illegal entry alone verges on the arbitrary. [100]

149. *Secondly*, a measure such as the one provided for in Article 140^{17}(2) of the Law on foreign nationals is, in my view, contrary to Article 31(1) of the Geneva Convention. I would recall that, according to that provision, States parties to that convention must not impose 'penalties' on 'refugees' (including, I recall, asylum applicants) on account of their illegal entry or presence, under certain conditions.

150. That provision is to prevent those persons from being penalised for their illegal entry or presence in the territory of a State. [101] In view of this objective, it is generally accepted that the concept of 'penalty', for the purposes of that provision, must be understood, autonomously and broadly, as covering any measure which is not only preventive, but also punitive or deterrent, irrespective of its classification under national law. [102]

151. Although, as the Lithuanian Government stated at the hearing, a detention measure under Article 140^{17}(2) of the Law on foreign nationals does not constitute a penalty under Lithuanian law, that government acknowledged nonetheless on that occasion that such detention is also intended, to some extent, to punish applicants who have illegally crossed the national border and to deter other migrants who might be tempted to behave in the same way.

99 See also, in the present case, point 23 and footnote 16 of this Opinion.

100 See, by analogy, United Nations Human Rights Committee, *A. v. Australia*, 1997, paragraph 9.4. See, also, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, paragraphs 31 and 32.

101 Accordingly, while Article 5(3) of the Schengen Borders Code provides that Member States are to introduce penalties for the unauthorised crossing of external borders, that obligation is imposed on those States 'without prejudice … to their international protection obligations', since such penalties cannot, in principle, be imposed on refugees.

102 See Goodwin-Gill, G.S., op. cit., pp. 232 to 234.

152. Accordingly, that detention measure constitutes, in my view, a 'penalty' for the purposes of Article 31(1) of the Geneva Convention. Since Article 140[17](2) of the Law on foreign nationals is directed solely at asylum applicants, it would, in my view, be compatible with that fundamental provision only if it concerned exclusively those who do not fulfil the conditions laid down in that provision – [103] which does not seem to be the case.

4. Interim conclusion

153. In the light of the foregoing considerations, I suggest that the Court answer the second part of the two questions that Article 72 TFEU does not allow a Member State to apply provisions such as Article 140[12] and Article 140[17](2) of the Law on foreign nationals, in derogation from the Procedures and Reception Directives, in the event of 'exceptional circumstances' characterised by a 'mass influx' of migrants at its border.

VI. Conclusion

154. Having regard to all the foregoing considerations, I suggest that the Court answer the questions referred by the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania) as follows:

(1) A national provision which does not allow, subject to certain exceptions, third-country nationals to access the procedure for granting international protection in the territory of the Member State in question when they illegally entered that territory is not compatible with Article 6(1) and (2) and Article 7(1) 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.

(2) A national provision which allows an applicant for international protection to be placed in detention on the sole ground that he or she illegally crossed the border of the Member State concerned is not compatible with Article 8(3) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

(3) Article 72 TFEU does not allow a Member State to apply such national provisions, in derogation from Directives 2013/32 and 2013/33, in the event of 'exceptional circumstances' characterised by a 'mass influx' of migrants at its border.

[103] On that point, I would simply point out, with regard to the requirement that refugees must 'com[e] directly from a territory where their life or freedom was threatened', that it is generally accepted that that expression must not be understood literally, and that it also covers situations in which the persons concerned, in the course of their journey, transit through another country in which they were not guaranteed effective protection (see Goodwin-Gill, G.S., op. cit., p. 232), a category in which Belarus can, in all likelihood, be placed. Therefore, the mere fact that an asylum applicant briefly stayed in Belarus after leaving his or her country of origin before entering Lithuania does not result in that person losing the benefit of the protection provided for in Article 31(1) of the Geneva Convention.