Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 25 June 2020[1]

Case C-808/18

European Commission
v

Hungary

(Failure to fulfil obligations — Area of freedom, security and justice — Directive 2013/32/EU — National procedure for examining applications for international protection — Article 6 — Effective access — Article 43 — Procedural safeguards — Article 46(5) and (6) — No suspensory effect of appeals brought against administrative decisions refusing to grant refugee status — Directive 2013/33/EU — Article 2(h) — Compulsory placement in transit zones — Definition of 'detention' — Directive 2008/115/EC — Article 5, Article 6(1), Article 12(1) and Article 13(1) — Return of illegally staying third-country nationals)

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1 Original language: French.

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1. In the present case, the European Commission has brought an action before the Court pursuant to the second paragraph of Article 258 TFEU seeking a declaration that Hungary failed to fulfil its obligations under a number of provisions of Directive 2013/32/EU,[2] Directive 2013/33/EU[3] and Directive 2008/115/EC.[4]

2. This action is extremely broad in scope and calls into question the compatibility with EU law of a substantial part of the Hungarian legislation governing the procedures for examining asylum applications and for returning third-country nationals staying illegally in national territory. It raises some interesting legal issues, particularly regarding whether the situation of asylum applicants accommodated in transit zones at the Serbian-Hungarian border should be classified as 'detention' within the meaning of Directive 2013/33.

3. The sensitivity of the forthcoming judgment is that the Court's approach could, against the current backdrop of Member States bringing in tighter national laws in this area, have implications going well beyond the scope of the instant case.

I. Legal framework

A. European Union law

1. Directive 2008/115

4. Article 2(2) of Directive 2008/115 provides:

'Member States may decide not to apply this Directive to third-country nationals who:

(a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

…'

5. Article 6(1) of that directive provides:

'Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.'

6. Article 12(1) of the directive states:

'Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.'

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

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

4 Directive 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).

7. Under Article 13(1) of Directive 2008/115:

‘The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.’

2. Directive 2013/32

8. Article 3 of Directive 2013/32 provides:

‘1. This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection.

…’

9. Article 6 of that directive 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.

…

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

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

…

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

10. Article 24(3) of that directive states:

‘Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.

Where such adequate support cannot be provided within the framework of the procedures referred to in Article 31(8) and Article 43, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States shall not apply, or shall cease to apply, Article 31(8) and Article 43. Where Member States apply Article 46(6) to applicants to whom Article 31(8) and Article 43 cannot be applied pursuant to this subparagraph, Member States shall provide at least the guarantees provided for in Article 46(7).'

11. Article 26(1) of the same directive provides:

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

12. Article 43 of Directive 2013/32, 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.'

13. Article 46 of that directive provides:

'…

5. Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

6. In the case of a decision:

(a) considering an application to be manifestly unfounded in accordance with Article 32(2) or unfounded after examination in accordance with Article 31(8), except for cases where these decisions are based on the circumstances referred to in Article 31(8)(h);

(b) considering an application to be inadmissible pursuant to Article 33(2)(a), (b) or (d);

(c) rejecting the reopening of the applicant's case after it has been discontinued according to Article 28; or

(d) not to examine or not to examine fully the application pursuant to Article 39,

a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant's request or acting *ex officio*, if such a decision results in ending the applicant's right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.

…

8. Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory, laid down in paragraphs 6 and 7.

…'

3. Directive 2013/33

14. Under Article 8 of Directive 2013/33:

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

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

3. An applicant may be detained only:

(a) in order to determine or verify his or her identity or nationality;

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

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

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

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

(f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

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

…'

15. Article 9 of that directive provides:

'…

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

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

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

…'

16. Article 11(2) of the directive provides:

'Minors shall be detained only as a measure of last resort and [after having] been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.

…'

B. Hungarian law

1. Law on the right to asylum

17. Article 71/A of the menedékjogról szóló 2007. évi LXXX. törvény (Law No LXXX of 2007 on the right to asylum; 'Law on the right to asylum') provides:

'1. Where a foreign national lodges an application in the transit zone:

(a) before entering Hungary; or

(b) after being intercepted in Hungary within a distance of [eight kilometres] from the external border within the meaning of Article 2(2) 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)[5] or from the signs demarcating the border, and escorted to the gate of a facility for maintaining order at the border, as provided for in the Law on State borders;

the provisions of this chapter shall apply subject to the derogations provided for in this article.

…

5 OJ 2016 L 77, p. 1 (the 'Schengen Borders Code').

4. Where four weeks have elapsed since the application was lodged, the aliens police authority shall authorise entry into the territory in accordance with the law.

5. Where the application is not inadmissible, the aliens police authority shall authorise entry into the territory in accordance with the law.

6. Where entry into Hungarian territory has been authorised, the competent asylum authority shall conduct the asylum procedure in accordance with the general rules.

7. The rules governing border procedures shall not apply to persons in need of special treatment.'

18. Paragraph 1 of Article 31/A of the Law on the right to asylum reproduces verbatim the grounds for detention laid down in Article 8(3) of Directive 2013/33. Article 31/A(2) of that law provides that, 'the detention of asylum applicants may be ordered following an individual assessment of each case and only if the objective pursued cannot be achieved by a measure ensuring the availability of the person concerned', and, under Article 31/A(5), 'the detention of asylum applicants shall be ordered by means of a decision that is enforceable immediately upon notification'.

19. Article 31/B of the law states:

'1. Detention may not be ordered solely on the ground that an asylum application has been lodged.

2. Detention may not be ordered against an asylum applicant who is an unaccompanied minor.

3. Detention may be ordered against families with minor children only as a measure of last resort, having regard above all to the best interests of the children.

…'

20. Article 80/H of the Law on the right to asylum provides:

'In the event of a crisis situation caused by mass immigration, the provisions of Chapters I to IV and V/A to VIII are to be applied subject to the derogations provided for in Articles 80/I to 80/K.'

21. Article 80/I(i) of the Law on the right to asylum disapplies Article 30 and Article 31(a) as well as Article 71/A to Article 72(i) of that law.

22. Article 80/J of the Law on the right to asylum provides:

'1. An asylum application must be lodged in person with the competent authority, and exclusively in the transit zone, unless the asylum applicant:

(a) is the subject of a coercive measure, measure or penalty restricting his personal freedom;

(b) is the subject of a detention measure ordered by the competent asylum authority;

(c) is staying legally in Hungary and does not seek accommodation in a reception centre.

2. The asylum applicant shall be subject to the asylum procedure from the lodging of his application for international protection with the competent authority until notification of the decision adopted at the end of the procedure when it is no longer open to challenge.

…

4. For the duration of the procedure, asylum applicants staying in the transit zone shall not enjoy the rights referred to in Article 5(1)(a) and (c).

5. The competent asylum authority shall designate the transit zone as the asylum applicant's place of stay until the transfer order under the Dublin Regulation or the decision that is no longer open to challenge has become enforceable. The asylum applicant may leave the transit zone through the exit gate.

6. If the asylum applicant is an unaccompanied minor under the age of 14, the competent asylum authority shall conduct the asylum procedure in accordance with the general rules, after the minor has entered the country. That authority shall find temporary accommodation for the minor concerned and, at the same time, shall request the competent guardianship authority to appoint a guardian to protect and represent the minor. The guardian must be appointed within eight days of receipt of the competent asylum authority's request. The competent guardianship authority shall notify the name of the designed guardian to the unaccompanied minor and the competent asylum authority without delay.'

23. Article 80/K of that law provides:

'…

2. The competent asylum authority shall take a decision on the basis of the information in its possession, or shall discontinue the procedure, if the asylum applicant:

…

(d) leaves the transit zone.

…

4. The decision bringing an end to the procedure under paragraph 2 above may not be challenged in administrative proceedings.

…'

2. Law on State borders

24. Article 15/A of the államhatárról szóló, 2007. évi LXXXIX (Law No LXXXIX of 2007 on State borders; 'Law on State borders') provides:

'1. A transit zone may be established in the area referred to in Article 5(1) to serve as a temporary place of stay for persons applying for asylum or subsidiary protection ('asylum applicant') and the place where asylum and migration control procedures are conducted and which is equipped with the facilities necessary for that purpose.

2. An asylum applicant present in the transit zone may enter Hungary if:

(a) the competent asylum authority takes a decision granting international protection;

(b) the conditions for applying the general rules governing the asylum procedure are met; or

(c) it is necessary to apply Article 71/A(4) and (5) of [Law on the right to asylum].

2a. In a crisis situation caused by mass immigration, an asylum applicant present in the transit zone may be authorised to enter Hungarian territory in the cases referred to in paragraph 2(a) and (b).

…'

II. Pre-litigation procedure

25. On 11 December 2015, the Commission sent Hungary a letter of formal notice concerning that Member State's infringement of Article 46(1), (3), (5) and (6) of Directive 2013/32, construed in the light of Article 47 of the Charter of fundamental rights and freedoms of the European Union (the 'Charter'), and Article 3(8) of Directive 2010/64/EU.[6] In that letter, the Commission expressed its concerns on: the effects of legal remedies in border procedures; the fact that appeals brought against unfavourable asylum decisions do not have automatic suspensory effect; the guarantee of a personal interview in the context of the judicial review of decisions rejecting applications as inadmissible and decisions taken at end of an accelerated procedure; the independent procedural jurisdiction of assistant judges in judicial review procedures; and, lastly, non-compliance with EU legal rules on the right to interpretation and translation in criminal proceedings.

26. Hungary replied to the letter of formal notice by correspondence received at the Commission on 12 February 2016, in which that Member State asserted that the relevant Hungarian legislation was compatible with EU law.

27. On 7 March 2017, Hungary adopted Law No XX of 2017 amending the Law on the right to asylum. The Commission took the view that that law gave rise to further concerns, in addition to those set out in the letter of formal notice of 11 December 2015, in relation to the following matters: the removal of illegally staying third-country nationals contrary to the procedures laid down in Directive 2008/115; failure to ensure effective access to the asylum procedure; the unlawful extension of border procedures; the generalised detention of asylum applicants; non-observance of established procedural safeguards; misapplication of the safe third country principle; non-payment of the daily allowance to applicants for international protection; infringement of EU rules on coverage of costs related to reception conditions; and the shortening, from eight days to three, of the deadline for bringing applications for review of first-tier decisions refusing asylum.

28. On 18 March 2017, the Commission sent a supplementary letter of formal notice to Hungary complaining that it had not complied with its obligations under Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115, Articles 3, 6 and 7, Article 24(3), Article 31(8), Articles 33, 38, 43 and Article 46(1), (3), (5) and (6) of Directive 2013/32, Articles 2, 8, 9, 11 and Article 17(2) of Directive 2013/33 read in conjunction with Article 2(g) and Article 17(3) and (4) thereof, and, lastly, Articles 6, 18 and 47 of the Charter.

29. Hungary replied to the supplementary letter of formal notice by correspondence of 18 July 2017, before supplementing its reply on 20 October 2017 and 20 November 2017. While maintaining that it considered the Hungarian legislation at issue to be compatible with EU law, that Member State brought that legislation into line with EU law on a number of specific points.

6 Directive of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1).

30. In consequence, on 8 December 2017, the Commission sent Hungary a reasoned opinion, notified to it on the same day, in which it declared that Hungary:

– by limiting, in appeals against decisions rejecting an application for international protection, the examination referred to in Article 46(3) of Directive 2013/32 to the facts and points of law considered when the decision was adopted,

– by failing to transpose Article 46(5) of Directive 2013/32 into national law and by adopting provisions which derogate from the general rule of automatic suspensory effect in situations not covered by Article 46(6) thereof,

– by moving third-country nationals staying illegally in Hungary to the other side of the border fence without observing the procedures and safeguards laid down in Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115;

– by requiring asylum applications to be lodged in person with the competent authority, and exclusively in the transit zone,

– by ordering that a procedure be applied to all asylum applicants (except for children under the age of 14 years) resulting in the compulsory detention of those asylum applicants for the entire duration of the asylum procedure in the facilities of a transit zone, which, if left, lead only to Serbia, without that detention being subject to appropriate safeguards,

– by shortening, from eight days to three, the deadline for bringing applications for review of first-tier decisions refusing asylum,

– had failed to fulfil its obligations under Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115, Articles 3 and 6, Article 24(3), Article 43 and Article 46(3), (5) and (6) of Directive 2013/32, and Article 2(h) and Articles 8, 9 and 11 of Directive 2013/33, all read in conjunction with Articles 6, 18 and 47 of the Charter.

31. Hungary replied to the reasoned opinion on 8 February 2018. It restated its view that the rules of Hungarian law at issue were compatible with EU law and justified them by reference to the crisis situation caused by mass immigration and Article 72 TFEU.

32. Failing to be persuaded by the arguments put forward by Hungary, the Commission brought an action before the Court on 21 December 2018. Hungary lodged its defence on 11 March 2019. The parties also lodged a reply and a rejoinder on 23 April 2019 and 4 June 2019 respectively.

33. At the hearing on 10 February 2020, the Commission and Hungary submitted oral observations and replied to the Court's questions.

34. Pursuant to Article 61(1) of the Rules of Procedure of the Court of Justice, the parties were invited, at the request of the Judge-Rapporteur, to submit the statistics in their possession concerning the average length of time asylum applicants are accommodated in the transit zones at the Serbian-Hungarian border and also concerning a number of national provisions not appearing in the pleadings. The parties lodged their replies within the prescribed period. On 20 May 2020, the Court sent those replies to the parties and requested they present any observations until 1 June 2020. Only Hungary did so. In its observations, Hungary maintained, in particular, that after the closure of the transit zones and the transfer of people from those zones to open reception centres, which it did to

give effect to the judgment in *FMS and Others*,[7] the circumstance giving rise to the theory of generalised detention of all asylum applicants by reason of their presence a transit zone — that was expounded in the Commission's application — ceased to exist. As a result, that part of the present action has become devoid of purpose.

III. Analysis

35. As a preliminary point, I observe merely that the ground of inadmissibility raised by Hungary based on the recent closure of the transit zones cannot succeed in light of the settled case-law of the Court according to which the Commission still has an interest in bringing an action for failure to fulfil obligations even when the alleged infringement has been remedied after the expiry of the period prescribed in the reasoned opinion.[8] In such circumstances, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its infringement, to persons who derive rights.[9] In view of those considerations, I can now proceed to examine the substance of the present action.

36. This action is essentially underpinned by five complaints, which should be examined in turn.

A. No effective access to the asylum procedure

1. Arguments of the parties

37. By its first complaint, the Commission argues that, by requiring asylum applications to be lodged in person with the competent national authority, and exclusively in the transit zone, access to which is restricted to a limited number of persons, Hungary is in breach of its obligations under Articles 3 and 6 of Directive 2013/32.

38. The Commission observes that Law No XX of 2017 amended the Law on the right to asylum by introducing a special procedure during a crisis situation caused by mass immigration, which establishes the general rule, subject to a few isolated exceptions, that asylum applications must be lodged in person and exclusively in the two transit zones at the Serbian-Hungarian border, namely Röszke and Tompa.

39. After expressing its concerns regarding the living conditions in those transit zones, the Commission states that the competent Hungarian authorities permit only a very limited number of admissions to those zones. Reports by the United Nations High Commissioner for Refugees (HCR) and the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees show that the maximum number of applicants for international protection admitted by Hungary gradually declined until May 2018, when it all but closed its borders to such applicants.

40. According to the Commission, it is also apparent from those reports that some individuals congregate in front of the entrance to the transit zone, on a narrow strip of land, and that admission to the zone is based on an informal waiting list sent by 'community leaders' to the Hungarian authorities. Even though Hungary denies being involved in the drawing up of such a waiting list, it does not dispute its existence. Since the strip of land in question has no infrastructure and admission

7 Judgment of 14 May 2020, *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367)).

8 See, inter alia, judgment of 14 April 2005, *Commission* v *Luxembourg*, (C-519/03, EU:C:2005:234, paragraph 19).

9 See judgment of 10 April 2008, *Commission* v *Italy* (C-442/06, EU:C:2008:216, paragraph 42).

to the transit zone has reduced to a trickle, especially since January 2018, and is generally based on the waiting list in question, few people wait in front of the transit zone. In addition, those reports state that persons wishing to apply for international protection must wait for several months before they can enter the transit zone, a wait that may last up to 18 months.

41. The Commission notes that it follows from Articles 3 and 6 of Directive 2013/32 that Member States are required to ensure that all persons seeking international protection are able to lodge an application in their territory and, after arriving there, are afforded access to the procedure for the grant of such protection. The obligation to register applications for international protection no later than three working days after they were made, enshrined in Article 6 of that directive, also refers to applications lodged at the border of a Member State. Moreover, the very effectiveness of the obligation to grant international protection, as provided for in Article 18 of the Charter, would be undermined if Member States were able to refuse to register applications made at their borders.

42. In a nutshell, the Commission submits that by allowing only persons in the transit zone to make an application for international protection and have that application registered, and by severely restricting access to that zone, Hungary does not afford persons at its borders the possibility of making an application and having it registered within the time limit laid down in Directive 2013/32.

43. The Commission adds that it cannot be asserted in good faith that few people wish to lodge an application for international protection in Hungary on the pretext that only a small number of individuals wait in front of the transit zone. In view of the fact that the only place people can wait for admission to the transit zone is on a narrow strip of land without any kind of infrastructure, that the number of persons allowed to enter the zone has gradually declined to just one person per day, and that admission is based on an informal waiting list, it is hardly conceivable that applicants would stand and wait in single file during the winter months, without food or shelter, and without any realistic chance of entering the transit zone.

44. In any event, the Commission contends that, irrespective of the exact number of people waiting in the queue, a system which makes the right to registration conferred by Article 6 of Directive 2013/32 conditional on the application being lodged at a specific place, to which access is limited for a long period, is not consistent with the rule, laid down in the same article, that access to the procedure must be ensured in due time.

45. Hungary submits that applicants for international protection do not have the right to choose their country of asylum and that regard should be had not only to Article 6(1) of Directive 2013/32, but also to paragraphs 2 and 3 of that article, from which it follows that the EU legislature permits Member States to require applicants to lodge their application in person at a designated place. Article 80/J(1) of the Law on the right to asylum — under which, in a crisis situation caused by mass immigration,[10] asylum applications must be lodged in person with the competent authority in the transit zone — is therefore consistent with that requirement.

46. In particular, the Commission's assertion that there is no guarantee that applications lodged in the transit zone will be registered by the competent asylum authority in accordance with Directive 2013/32 is incorrect since, once an application has been lodged in the transit zone, the procedure begins its course under the general rules. Thus, Article 32/D of the Law on the right to asylum ensures that, after the application has been lodged, the competent asylum authority initiates the procedure immediately or within 24 hours at the latest, in accordance with Article 6(1) of Directive 2013/32.

10 In its defence, Hungary explains that a crisis situation caused by mass immigration is a special situation which may be declared when the conditions laid down in Article 80/A(1) of the Law on the right to asylum are met and during which specific procedural rules apply. It states that the Hungarian Government made that declaration in September 2015 and extended its effects until 7 September 2019.

47. Furthermore, although the Hungarian authorities are aware of the practice whereby asylum applicants who, in Serbia, have access to the asylum procedure or to assistance, report to the transit zones in the order set by themselves, the Serbian authorities or certain organisations, the Hungarian authorities have no influence on the order thus established and do not participate at all in the preparation or use of such lists.

48. According to Hungary, the 'narrow strip of land' referred to by the Commission in no way explains the small number of applicants. Since the Hungarian territory in front of the transit zone is adjacent to Serbian territory, a considerable number of people wishing to lodge an asylum application could easily wait in front of the transit zone. The absence of long queues, to which the Commission refers, is instead due to the fact that the persons concerned are or have already been the subject of an asylum procedure in Serbia and receive assistance in that State.

2. Assessment

(a) Precise identification of the obligation forming the subject matter of the complaint

49. The Commission relies on a combined reading of Articles 3 and 6 of Directive 2013/32 as the legal basis of the first complaint. Article 3 of that directive provides that the directive's provisions apply to all applications for international protection made in the territory of the Member States, *including at the border*, which means that Article 6 thereof is applicable to the present case. In the light of Article 6, it is necessary to identify the specific obligation which Hungary has allegedly failed to fulfil in the present case.

50. Article 6 of Directive 2013/32 sets out the obligations of the Member States at the initial stage of the procedure for granting international protection. Under that article, Member States are, first and foremost, required to register an application for international protection made by a third-country national or stateless person to the national authorities within three or six working days after the application is made. That time limit may be extended to 10 days where simultaneous applications for international protection by a large number of persons make it very difficult in practice to respect the main time limit. Next, Member States are to ensure that the persons concerned have an effective opportunity to lodge their application as soon as possible.

51. In its response, Hungary appears to take the view that the obligation it is claimed to have infringed is its obligation to register applications for international protection within the time limits laid down in Article 6(1) of Directive 2013/32. However, I note that, in response to Hungary's assertion that the Hungarian authorities duly register applications within 24 hours of them being made in one of the transit zones, the Commission made clear in its reply that it does not take issue with Hungary for the 'inappropriate nature' of the procedure for granting international protection in force in that Member State, which results from the failure to comply with the time limits prescribed for registration of the application for international protection, but rather the fact that Hungary did not ensure access to that procedure 'in due time'.

52. In so doing, the Commission refers to an obligation which, in a sense, precedes that of registering the application for international protection within the time limits prescribed in Article 6(1) of Directive 2013/32, namely the *obligation to ensure effective access to the procedure for granting international protection* by allowing all applications for international protection to be made.[11] Although it does not

11 The making of an application for international protection is defined in the Commission's proposal for [Council] Directive 2005/85/EC [of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13)], that is, the legal act that was repealed and replaced by Directive 2013/32, as 'any manifestation or expression of the person [concerned] indicating that he fears to be returned to his country' (see the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status /*COM/2000/0578 final — CNS 2000/0238*/ (OJ 2001 C 62 E, p. 231), comments on Article 4.

take the form of a specific provision, it seems self-evident to me that that obligation is inherent in the requirement to ensure that Article 6 of Directive 2013/32 and the directive as a whole have practical effect, given that, if the Member States concerned do not comply with that directive, the entire body of harmonised procedural rules enshrined in it would be meaningless.

53. In order to determine the character of that obligation more precisely, some key aspects may be inferred from the Commission's proposal for Directive 2005/85,[12] the basic philosophy of which on access to the procedure was not altered by Directive 2013/32, in so far as that proposal describes the correlative right of potential applicants to have access to the procedure as follows: 'Asylum applicants should have access to the asylum procedure as soon as possible. Rules on asylum procedures do not make sense if persons who wish protection from a Member State effectively fail to gain access to its asylum procedure or are left stranded in the territory of the Member State for an unnecessarily long time because authorities do not recognise these requests as asylum applications …'. That passage seems to me to imply both that, first, the obligation on Member States is not merely an obligation to refrain from obstructing the making of an application for international protection, but rather a *positive obligation* to facilitate it by engaging in proactive conduct towards persons who may wish to make such an application, and, second, there is a failure to fulfil that obligation when Member States only *belatedly* recognise a manifestation or expression by those persons of their fear of being returned to their country, which must be construed as the making of an application for international protection.

54. To my mind, the first of those two considerations was codified by Directive 2013/32, in so far as it states, in Article 8(1), that Member States are required to provide third-country nationals or stateless persons held in detention or present at border crossing points with information on the possibility of making an application for international protection *where there are indications that they may wish to make such an application*. In that connection, it must be noted that the 'Practical Guide: Access to the Asylum Procedure' drawn up by the European Asylum Support Office (EASO) and the European Border and Coast Guard Agency (Frontex), states that 'border guards and first-contact officials have a *responsibility to be proactive in ensuring effective access to the asylum procedure*. They have a duty to identify persons who may wish to apply for international protection, inform them about the right to apply for asylum and provide them with the information on how to make an application'.[13] [14]

55. As regards the second consideration, it is true that Directive 2013/32 does not set a time limit within which Member States are required to record the making of such an application. However, this does not mean that Member States may, at their discretion, subject potential applicants to an unreasonable wait before they are able to make their application. Such an interpretation would render meaningless the right of those applicants to access the procedure for granting international protection, which in turn is intended to give effect to the right to asylum enshrined in Article 18 of the Charter. I therefore share the Commission's view that the obligation on Member States to ensure effective access to that procedure requires them to establish a reception mechanism so that persons wishing to obtain international protection can effectively make an application for that purpose.

56. I will therefore examine whether, in the circumstances of this case, Hungary fulfilled the obligation the content of which is established above.

12 Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status /* COM/2000/0578 final — CNS 2000/0238*/, comments on Article 4.

13 Emphasis added.

14 EASO and Frontex, 'Practical Guide: Access to the Asylum Procedure', 2016, available at https://www.easo.europa.eu/sites/default/files/public/Practical-Guide1_0.pdf, p. 6.

(b) Application to the present case

57. It should be pointed out, first of all, that there are two parts to Hungary's alleged failure to fulfil obligations. The first concerns the obligation imposed by Article 80/J(1) of the Law on the right to asylum, under which persons wishing to obtain international protection who are not already lawfully staying in Hungary are required to report to one of the transit zones in order to activate the procedure for granting asylum. The second relates to the fact that access to those transit zones has been severely restricted since the migration crisis began (September 2015) and still is. I would state at this juncture that, in my view, the evidence adduced by the Commission substantiates both parts to the requisite legal standard.

58. Concerning the obligation imposed by Article 80/J(1) of the Law on the right to asylum and described above, Hungary does not dispute the fact that, under the derogating provisions applicable in the event of a crisis situation caused by mass immigration, persons wishing to obtain international protection are required, under Article 80/J(1) of the Law on the right to asylum, to travel to the Röszke or Tompa transit zone at the Serbian-Hungarian border in order to make their application and thus activate the procedure for granting international protection.

59. As for the Commission's claim that progressively severe restrictions were imposed on access to the transit zones, it should be noted that at no stage in these proceedings did Hungary cast doubt on the accuracy of the data contained in reports drawn up by various international bodies, according to which:

– in September 2015, the Hungarian Minister for the Interior informed the UNHCR that the maximum number of admissions to the transit zone was set at 100 persons per day, a number that was subsequently reduced to 50 in February 2016 and thereafter to 30 in March 2016;[15]

– in November 2016, only 10 persons per day were allowed to enter the transit zone, a number that was reduced to 5 per day in 2017 (that latter figure was moreover confirmed by a report of the Secretary General of the Council of Europe[16]) and, since January 2018, now stands at a single person per day;[17]

– in May 2018, 10 persons per week were admitted to the transit zones;

– because of that progressive limitation on access to the transit zones, persons wishing to apply for international protection are required to wait several months before being admitted to those zones, a wait that may last between 11 and 18 months.[18]

60. In addition, Hungary expressly admits that admission to the transit zone is based on an informal waiting list sent by 'community leaders' to the Hungarian authorities.[19] Far from denying the existence and use of that list, Hungary simply states that it is not involved in its drawing up and has no influence on the order of admission thus established.

15 Report of the UNHCR entitled 'Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016', available at https://www.refworld.org/docid/57319d514.html

16 Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General of the Council of Europe on Migration and Refugees, to Serbia and two transit zones in Hungary, 12 to 16 June 2017, available at link https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168075e9b2

17 Report drawn up by the Hungarian Helsinki Committee entitled 'Country Report: Hungary' ('Report on Hungary'), available at https://www.asylumineurope.org/sites/default/files/report-download/aida_hu_2017update.pdf

18 UNHCR report entitled 'Desperate journeys: Refugees and migrants arriving in Europe and at Europe's border', January to August 2018, available at https://www.unhcr.org/desperatejourneys/

19 As is apparent from the report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General of the Council of Europe on Migration and Refugees, to Serbia and two transit zones in Hungary, 12 to 16 June 2017, available at link https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168075e9b2

61. On the basis of that information, it may therefore be considered that persons wishing to apply for international protection at the Serbian-Hungarian border are required to wait between 11 and 18 months before they are admitted to one of the transit zones and are thus able to make an application. It seems to me that that is precisely the situation envisaged by the Commission in the proposal for Directive 2005/85, in so far as persons wishing to obtain international protection in the present case are left stranded in Hungarian territory for an *unnecessarily long* time because the competent Hungarian authority does not treat the manifestation or expression of their fear of being returned to their country, made outside a transit zone, as the making of an application for international protection. Given the length of the wait, I fail to see how the Hungarian reception system could be regarded as having been set up in such a way as to enable potential applicants to make their application *effectively*. As a result, I take the view that the legislative obligation to travel to one of the transit zones in order to make an application for international protection coupled with the drastic reduction in the number of persons allowed to enter those zones is not compatible with the obligation to ensure effective access to the procedure for granting international protection, as inferred from the purpose of Article 6 of Directive 2013/32 and described above.

62. It must nevertheless be noted that Hungary insists that only a small number of persons wait on the strip of land in front of the transit zone. According to that Member State, this is not due to the restrictions on admission implemented by the Hungarian authorities, combined with the absolute lack of infrastructure on that strip of land, as the Commission claims, but to the existence of the informal waiting list applied on the Serbian side, over which those authorities have no influence. Even if the very limited number of persons admitted to the transit zones was attributable solely to the existence of such a list, the conclusion reached in the preceding point regarding breach of the obligation to ensure that persons wishing to obtain international protection have effective access to the relevant procedure would be no different.

63. It is difficult to see how the undisputed fact that Hungary tolerated the existence of that list and even played an active part in its functioning by closely cooperating with 'community leaders', as seems to me to be apparent from one of the UNHCR reports cited by the Commission, can be reconciled with the *positive* nature of the obligation to ensure effective access to the procedure in question. As stated above, that positive nature necessitates proactive conduct on the part of the competent authorities of the Member State concerned to facilitate the making of applications for international protection by persons wishing to do so.

64. The other arguments put forward by Hungary to demonstrate that Article 6 of Directive 2013/32 was not infringed are also unpersuasive.

65. I see no relevance in the argument that the application of that directive to the present case would have the effect of conferring on the persons concerned an individual right to choose their country of asylum ('right to asylum shopping'), which does not follow from either Article 18 of the Charter or the United Nations Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, since the obligation on the host State to ensure effective access to the procedure for granting international protection disregards the third country through which those persons arrived in the territory of that State or at its borders. Moreover, I consider that the concepts of 'first country of asylum', 'safe country of origin' and 'safe third country' set out in Directive 2013/32 already allow Member States to prevent asylum shopping without jeopardising access to the procedure in question.

66. I must also reject the argument that the obligation to travel to a particular place in order to make an application for international protection is justified by the fact that, according to figures provided by the authorities and border police, most persons entering Hungary illegally attempt to cross the border near the transit zones. That could not, under any circumstances, legitimise the existence of a provision of national law, such as Article 80/J(1) of the Law on the right to asylum, preventing such an application from being made in breach of the requirements flowing from Article 6 of Directive 2013/32.

67. Hungary also contended that Article 80/J(1) of the Law on the right to asylum must be regarded as compatible with Directive 2013/32 in so far as Article 6(3) thereof allows Member States to require that applications for international protection be lodged in person and/or at a designated place. That argument merits closer examination.

68. I should make it clear from the outset that it seems to me to be based on a false premiss. There is little doubt that the lack of effective access to the procedure for granting international protection, which the Commission claims to be the case here, does not concern the stage at which the application for international protection is *lodged*, but rather the earlier stage at which the application is *made*.[20] Both the wording and the scheme of Article 6 of Directive 2013/32 speak to the existence of those two separate stages, entailing opposing conclusions as to the host Member State's power to impose obligations on the persons concerned. Although obligations may indeed be imposed on persons who have already made an application for international protection, the requirement to ensure effective access to the procedure means, by contrast, that no obligations can be imposed on persons who have not yet made such an application. That interpretation is borne out by the explanations provided in the amended proposal for Directive 2013/32, according to which 'a clearer distinction is introduced between the terms "make" and "lodge" relating to an application for international protection' and 'an application is deemed to be "made" as soon as a person who can be understood to seek refugee status or subsidiary protection status makes a request for protection from a Member State. This act does not require any administrative formalities. Relevant administrative formalities are accomplished when an application is "lodged"'.[21] [22]

69. The recent proposal for a regulation on the procedures for granting international protection seems to me to support that interpretation. With a view to streamlining and simplifying the procedure, the Commission drew a clear distinction between the various stages of access to that procedure, namely the making, registration and lodging of an application for international protection. In that context, the requirement for persons wishing to obtain international protection to travel in person to a place designated by the host Member State appears in Article 28 of the proposal for the regulation, entitled 'Lodging of an application for international protection', while no such requirement appears in Article 25 of that proposal, entitled 'Making an application for international protection'.[23]

70. In any event, the option given to Member States under Article 6(3) of Directive 2013/32 of requiring applications for international protection to be lodged in person and at a designated place is to be understood as being 'without prejudice to paragraph 2' of that article. In other words, it may not under any circumstances be exercised in such a way as to prevent the persons concerned from lodging their application for international protection 'as soon as possible'. Since those persons are in a position to access the transit zone only after a wait of between 11 and 18 months, as described above, it seems to me highly unlikely that Hungary could properly rely on Article 6(3) of Directive 2013/32 to show that Article 80/J(1) of the Law on the right to asylum is compatible with EU law.

71. To conclude, I am of the opinion that, by requiring asylum applications to be made in person to the competent national authority, and exclusively in one of the transit zones, to which that authority admits only a small number of persons, Hungary is in breach of its obligation under Articles 3 and 6 of Directive 2013/32.

72. I therefore consider that the first complaint in the present action for failure to fulfil obligations must be upheld.

20 I note, in that regard, that the Commission refers throughout its pleadings to the 'lodging' of the application for international protection. However, its first complaint clearly concerns the stage prior to registration of the application, namely the stage at which it is 'made'.

21 Annex, Detailed explanation of the amended proposal accompanying the document 'Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status', Article 6.

22 Footnote not relevant to the English version of this Opinion.

23 See the Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, signed at Brussels on 13 July 2016, COM/2016/0467 final — 2016/0224 (COD).

B. Infringement of the procedural rules applicable to applications for international protection

1. Arguments of the parties

73. By its second complaint, the Commission argues that since Article 43 of Directive 2013/32 exhaustively governs the conditions for the application of border procedures, Hungary, by applying generally a special procedure in which there is no guarantee that the safeguards laid down in that directive will be observed, is in breach of its obligations under Article 43 and Article 24(3) of the directive.

74. According to the Commission, Law No XX of 2017 inserted new provisions that are not compatible with Article 43 of Directive 2013/32. First, under Article 80/J(5) of the Law on the right to asylum, all procedures laid down in that law, whether they concern admissibility or substance, must be conducted in the transit zone, contrary to Article 43. Secondly, Article 80/J(5) of the Law on the right to asylum does not limit the duration of the procedure to four weeks, as required by Article 43. Thirdly, the procedure laid down in that law also fails to observe the procedural safeguards set out in Chapter II of Directive 2013/32, in particular the provision of adequate support to persons in need of special treatment in accordance with Article 24(3) of that directive.

75. Furthermore, Article 72 TFEU does not allow Member States to refuse to apply EU law in general terms, without any reference to specific persons, by invoking the maintenance of law and order and of internal security. In that regard, the Commission notes that the crisis situation caused by mass immigration, which led to the adoption of Law No XX of 2017, does not appear to have been declared in Hungary for a transitional period and, furthermore, other rules of EU law are designed to allow Member States to opt for flexible solutions in cases of emergency and to depart, to some extent, from the generally applicable rules, without undermining the effectiveness of EU law. According to the Commission, the Court has already made clear that the Treaty does not contain an inherent general exception excluding all measures taken for reasons of public security from the scope of EU law and that the Treaty provisions on public security, such as Article 72 TFEU, deal with exceptional and clearly defined cases.

76. Hungary submits that the procedures conducted in the transit zones are not border procedures and, as such, do not need to comply with the requirements flowing from Article 43 of Directive 2013/32.

77. The Hungarian transit zones are not comparable in law to the transit zones referred to in that provision. This is due to the fact that the amendment introduced by Law No XX of 2017 established new procedural rules in the event of a crisis situation caused by mass immigration and, at the same time, modified the functions of transit zones. When such a crisis is declared, Article 80/I(i) of the Law on the right to asylum precludes the application of the rules governing border procedures, so that the 'ordinary' procedural rules laid down in Directive 2013/32 apply. As a result, under the national legislation currently in force, the transit zones of Röszke and Tompa are essentially reception institutions located near the border, not 'transit zones' within the meaning of Article 43 of Directive 2013/32, where asylum procedures are conducted in accordance with the general rules.

78. Another reason why procedures in the transit zones of Röszke and Tompa clearly cannot be classified as border procedures is that, in those zones, the competent national asylum authority not only examines whether an application is admissible, but also decides on its substance if it is found to be admissible.

79. Hungary counters the Commission's claim that it failed to observe the safeguards set out in Chapter II of Directive 2013/32, in particular the obligation to provide adequate support under Article 24(3) of that directive, by stating that Article 4(3) of the Law on the right to asylum lays down the principle that the provisions of that law must, where persons in need of special treatment are concerned, be applied having regard to those persons' specific needs. Consequently, during the procedure, the competent national asylum authority is constantly mindful of the needs of persons requiring special treatment.

80. In any event, Hungary submits that Article 72 TFEU authorises it to declare a crisis situation caused by mass immigration and to apply, in such a situation, special procedural rules for the purpose of maintaining law and order and safeguarding internal security.

2. Assessment

81. The present complaint concerns the amendments made to the Law on the right to asylum by Law No XX of 2017, designed to further strengthen the special procedures, which derogate from the general provisions of the Law on the right to asylum in the event of a crisis situation caused by mass immigration, a situation that lasted without interruption in Hungary from 15 September 2015 to 7 March 2019 and was therefore in force when the period laid down in the reasoned opinion expired (2 February 2018). According to the Commission, the effect of those legislative amendments was to render the procedure conducted in the transit zones incompatible with the safeguards attaching to border procedures under Article 43 of Directive 2013/32.

82. Hungary disputes the very premiss on which the breach of those safeguards is based, namely that the procedure falls within the concept of 'border procedure', so that Article 43 of Directive 2013/32 applies to the circumstances of this case. For that reason, before considering whether, following the introduction of the abovementioned amendments, the detailed rules for implementing the procedure at issue observe the safeguards provided for in that provision and the safeguard laid down in Article 24(3) of Directive 2013/32 (see section (b) below), I will state my views on the preliminary question of the applicability of that directive (see section (a) below).

(a) Applicability of Article 43 of Directive 2013/32

83. First of all, it is necessary to outline the main thrust of Hungary's primary line of defence. According to that Member State, although it is true that the facilities at Röszke and Tompa were used, until March 2017, to conduct border procedures, account should also be taken of the fact that Law No XX of 2017 — which disapplied, in the event of a crisis situation caused by mass immigration, the national provisions governing border procedures and applied in their place a special legal framework in the form of the alleged application of the 'general' procedural rules of Directive 2013/32 — simultaneously modified the functions of those facilities. Prior to that modification, the facilities in question had the legal status of 'transit zones' within the meaning of Article 43 of Directive 2013/32. Now, however, they are essentially reception institutions located near the border, where asylum procedures are conducted in accordance with the general procedural rules. The fact that a reception institution is located near the border does not necessarily mean that it is classified as a 'transit zone' or that the procedures carried out there are 'border procedures' for the purpose of the applicability of Article 43 of Directive 2013/32.

84. That argument is based, in my view, on an incorrect premiss as regards the rationale for 'border procedures' as provided for in Article 43.

85. It should be borne in mind that, by that provision, the EU legislature afforded Member States the possibility of confining the population of applicants for international protection to their borders and processing there, within a short period of time, the applications they had made, with no restriction on analysing admissibility but with limited powers to assess the substance of those applications, that is to say, in the situations listed in Article 31(8) of Directive 2013/32. To that end, the legislature refers, in the wording of Article 43 of that directive, to a power that Member States are entitled to exercise 'at the[ir] border or transit zones'. The conjunction 'or' does not mean that the transit zones must be located away from Member States' borders; it is intended solely to identify a place commonly used for the examination of applications for international protection made at the border.

86. It follows that, as I recently explained in my Opinion in the Joined Cases *FMS and Others*,[24] the fundamental factor in determining how to classify procedures conducted by the competent national authorities in the light of Article 43 of Directive 2013/32 is the *territoriality* of those procedures.[25] If Member States make use of the possibility afforded to them to establish procedures in a place located at their border, that provision is applicable.[26]

87. In that regard, it is common ground that:

– asylum applications must necessarily be made in the transit zones of Röszke and Tompa, in accordance with Article 80/J(1) of the Law on the right to asylum, as described at length in the examination of the first complaint in the present action for failure to fulfil obligations;

– the competent national authority is to designate, in accordance with Article 80/J(5) of that law, one of the transit zones as the asylum applicant's place of stay until the transfer order under Regulation (EU) No 604/2013[27] or the decision that is no longer open to challenge has become enforceable.

88. In the light of that objective evidence, there is, in my view, little doubt that, since the procedure for examining asylum applications is carried out entirely within a structure situated along the border, it falls within the scope of Article 43 of Directive 2013/32.

89. That conclusion is certainly not invalidated by the argument that the fact that, in the course of such a procedure, the competent national asylum authority takes a decision on the substance in situations beyond those listed in Article 31(8) of Directive 2013/32, is capable of preventing such a procedure from being classified as a 'border procedure'. That argument is tantamount to asserting that Article 43 of Directive 2013/32 is not applicable to the procedure in question because the detailed rules for implementing that procedure are not compatible with that article, which is pure sophistry.

(b) Non-observance of the safeguards laid down in Article 43 of Directive 2013/32

90. Having established that the procedure implemented by the competent Hungarian asylum authority in the transit zones of Röszke and Tompa indeed falls within the scope of Article 43 of Directive 2013/32, it is necessary to examine the merits of the claim that, following the amendments introduced by Law No XX of 2017, that procedure does not observe the safeguards laid down in Article 43 of the

24 See my Opinion in Joined Cases *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:294, point 136).

25 To my knowledge, the idea of establishing a specific framework for 'border procedures' dates back to the amended proposal for Directive 2005/85, which states: 'On the basis of subsequent consultations with Member States, a special approach to applications made at *border post[s]* is proposed' (emphasis added) (see the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status /* COM/2002/0326 final — CNS 2000/0238 */ (OJ 2002 C 291 E, p. 143)), which seems to me to confirm the paramountcy of the territoriality of the procedure.

26 This inevitably means that the functional classification under national law of the facilities at Röszke and Tompa as transit zones or reception institutions, which Hungary referred to on numerous occasions in its defence, is wholly irrelevant for that purpose.

27 Regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31, the 'Dublin Regulation').

directive, particularly those providing that the Member States may take a decision only on the admissibility of the application or on the substance in the situations listed in Article 31(8) of Directive 2013/32 (first part of the second complaint) and that the length of the procedure must be limited to four weeks, on the understanding that, if no decision is taken within that period, the applicant for international protection is to be granted the right to enter the territory of the Member State concerned (second part of the second complaint). Furthermore, the Commission submits that the procedure at issue also fails to comply with Article 24(3) of Directive 2013/32, applicable to border procedures on account of the reference made in Article 43 of that directive to the 'basic principles and guarantees of Chapter II', according to which 'adequate support' must be provided to applicants in need of special procedural guarantees (third part of the second complaint).

91. The three parts of the second complaint must clearly be upheld.

92. Concerning the first part, the parties agree that all procedures laid down in the Law on the right to asylum must be conducted in the transit zone, *whether they concern admissibility or substance*. As pointed out above, Article 80/J(5) of the Law on the right to asylum provides that the competent national asylum authority is to designate the transit zone as the asylum applicant's place of stay until the transfer order under the Dublin Regulation or the decision that is no longer open to challenge has become enforceable, without limiting that authority's power to the two situations envisaged in Article 43(1) of Directive 2013/32.

93. Concerning the second part, the parties also agree that Article 80/I(i) of the Law on the right to asylum and Article 15/A(2a) of the Law on State borders disapply the provisions of national legislation permitting the entry into Hungary of an asylum applicant present in a transit zone where four weeks have elapsed since the lodging of his application and requiring the competent national asylum authority to conduct a procedure in accordance with the general rules (Articles 71/A and 72 of the Law on the right to asylum), national provisions which transpose the requirements laid down in Article 43(2) of Directive 2013/32.

94. As for the third part, it should be recalled that Article 24(3) of Directive 2013/32 provides, in general terms, that Member States must ensure 'adequate support' for applicants for international protection in need of special procedural guarantees throughout the asylum procedure, a provision that also applies to persons whose application is examined pursuant to the rules governing border procedures set out in Article 43 of Directive 2013/32.

95. Hungary transposed Article 24(3) of Directive 2013/32 in favourable terms, in accordance with Article 5 of that directive, in that Article 71/A(7) of the Law on the right to asylum excludes applicants in need of special procedural guarantees[28] from the scope of the national provision transposing the abovementioned rules. However, it is common ground that Article 80/I(i) of the Law on the right to asylum disapplied Article 71/A(7) in the event of a crisis situation characterised by mass immigration,[29] a legal framework that the Hungarian authorities have applied continuously since its inception. In addition, and more importantly, Law No XX of 2017 established a specific mechanism for applicants for international protection requiring special procedural guarantees, in that

28 Article 2(d) of Directive 2013/32 defines the concept of 'applicant in need of special procedural guarantees' as: 'an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances'.

29 Specifically, Article 71/A(7) provides that the rules governing border procedures are not to apply to 'persons in need of special treatment', namely, in accordance with the definition laid down in Article 2(k) of the Law on the right to asylum, 'unaccompanied minors or any vulnerable persons — in particular minors, elderly people, disabled people, pregnant women, single parents with minor children, and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence — in respect of whom it can be established, following an individual assessment of their situation, that they have specific needs'. That concept nonetheless seems to me to fall within the broader concept of 'applicants in need of special procedural guarantees' used by Directive 2013/32. For the definition of that latter concept, see footnote 30 of this Opinion.

Article 80/J(6) of the Law on the right to asylum simply provides for the application of some procedural guarantees in favour of unaccompanied minors under the age of 14 years, that is to say, a small proportion of the category of applicants concerned. In my view, that situation amounts to a breach of Article 24(3) of Directive 2013/32 by the Hungarian authorities.

96. The fact that Hungary merely refers to Article 4(3) of the Law on the right to asylum, under which 'where persons in need of special treatment are concerned, it is necessary to apply the provisions of this law having regard to the specific needs arising from their situation', does not invalidate that conclusion, since that provision is akin to a mere *petitio principii*, contradicted by Articles 80/I(i) and 80/J(6) of that law.

97. In the light of the foregoing, I propose that the Court, by way of interim conclusion, should declare in its forthcoming judgment that, since border procedures conducted in the transit zones do not observe the safeguards provided for in Article 43 of Directive 2013/32 and the safeguard laid down in Article 24(3) thereof, Hungary failed to fulfil its obligations under those two provisions.

(c) Article 72 TFEU

98. In any event, Hungary argues that the application of rules which differ from those set out in Directive 2013/32 is justified in the present case by Article 72 TFEU. During the 2015 migration crisis, the rules in force proved insufficient to allow the Member States to deal with that situation appropriately. In that situation, Article 72 TFEU specifically allows derogations from the rules of EU law for the purpose of maintaining law and order and safeguarding internal security.

99. It should be recalled, as a preliminary point, that Article 72 TFEU, forming part of Chapter I, entitled 'General provisions', of Title V TFEU ('Area of freedom, security and justice'), reads as follows: 'This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

100. Hungary's argument seems to me to be based on an interpretation according to which that provision of primary law must be construed as a *conflict-of-law rule* under which the prerogatives of the Member States in terms of the maintenance of law and order and the safeguarding of internal security take precedence over their obligations under secondary law. A Member State could thus invoke Article 72 TFEU in order to disapply an act adopted under Title V of the Treaty, the binding nature of which is not in dispute, whenever it considers that the maintenance of law and order and the safeguarding of internal security is at risk.

101. That interpretation was rejected, in my view, in the Court's recent judgment in *Commission* v *Poland and Others (Temporary mechanism for the relocation of applicants for international protection)*,[30][31] the reasoning in which would be useful to bear in mind.

102. First of all, according to the Court, it cannot be considered that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of EU law, since the express derogations applicable in situations which may affect law and order or public security, under the Treaty, deal with exceptional and clearly defined cases.[32] Next, the Court stated that since the derogation provided for in Article 72 TFEU must, as such, be interpreted strictly, it cannot be read in such a way as to confer on Member States the power to depart from the provisions of the Treaty *based on no more than reliance on those responsibilities*. In other words, the

30 Judgment of 2 April 2020 (C-715/17, C-718/17 and C-719/17, EU:C:2020:257).

31 Before the Court ruled in that case, I had already taken a position on the interpretation of Article 72 TFEU in my Opinion in *Stadt Frankfurt am Main* (C-18/19, EU:C:2020:130, points 38 to 42).

32 According to the Court, those derogations are set out in Articles 36, 45, 52, 65, 72, 346 and 347 TFEU.

scope of the requirements relating to the maintenance of law and order or internal security cannot be determined by each Member State, without any control by the institutions of the European Union. Thus, the Court considers 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 its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security. [33]

103. If the validity of the secondary legislation concerned is not called into question in the light of Article 72 TFEU, it is therefore for that Member State to provide the Court with evidence showing that the legislation does not allow it, having regard to the wording of the legal mechanism introduced or the specific conditions for its implementation, to ensure the exercise of the abovementioned responsibilities. It is only in those circumstances that a Member State can properly rely on Article 72 TFEU to justify its refusal to implement an obligation imposed by the disputed secondary legislation. [34]

104. That reasoning should be applied here.

105. I note, first of all, that Hungary does not call into question, as a ground of defence, the validity of Article 43 of Directive 2013/32 in the light of Article 72 TFEU. That said, it is clear from its pleadings that Hungary relies on that provision to argue that, in a crisis situation caused by mass immigration, it is entitled to lay down rules dispensing with the safeguards *associated with border procedures*. In those circumstances, I am of the view that the existence of the need to have recourse to the derogation designed to allow Hungary to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security must be assessed solely in the context of Article 43 of that directive. Paragraph 3 of that article expressly provides for the possibility of applying such a derogation where the arrival of a large number of third-country nationals or stateless persons seeking international protection at the same time makes it impossible in practice to apply paragraph 1 thereof. However, Hungary did not rely on that paragraph in its pleadings, even in the alternative.

106. In any event, it should be noted, in the first place, that Hungary could rely on Article 43(3) of Directive 2013/32 exclusively in order to dispense with the safeguard laid down in paragraph 2 of that article, namely to justify exceeding the four-week period within which border procedures should normally be completed. In the second place, that Member State could take advantage of that provision only if the applicants for international protection are accommodated normally at locations in proximity to the border or transit zone at the end of that four-week period. As the Court recently made clear in its judgment in *FMS and Others*, the requirement that applicants be accommodated under normal conditions necessarily means that they cannot be held in detention, [35] as they are in this case, which I will expand upon in my assessment of the third complaint.

107. I therefore consider that Article 72 TFEU does not allow Hungary, when conducting border procedures within the meaning of Article 43 of Directive 2013/32 in the transit zones of Röszke and Tompa, to derogate from the safeguards laid down in that provision.

108. In the light of the foregoing, I propose that the Court uphold the second complaint put forward by the Commission in its entirety.

33 Judgment of 2 April 2020, *Commission* v *Poland and Others (Temporary mechanism for the relocation of applicants for international protection)* (C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraphs 143 to 147).

34 I am paraphrasing paragraphs 148 to 153 of the judgment.

35 Judgment of 14 May 2020, *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 244).

C. Generalised detention of asylum applicants and non-observance of the relevant procedural safeguards

1. Arguments of the parties

109. By its third complaint, the Commission submits that, by providing for the application to all asylum applicants (except for children under the age of 14 years) of a procedure resulting in their compulsory detention for the entire duration of the asylum procedure in the facilities of one of the transit zones, which, if left, lead only to Serbia, and by not making that detention subject to the safeguards laid down in Directive 2013/33, Hungary failed to fulfil its obligations under Article 2(h) and Articles 8, 9 and 11 of Directive 2013/33.

110. The Commission states that the concept of 'detention', as defined in Article 2(h) of Directive 2013/33, is an autonomous legal concept of EU law with the result that the classification of transit zones under Hungarian law or the fact that they are located near the border has no bearing on the determination of that concept.

111. The transit zones established in Hungary are closed places which, if left, lead only to Serbia. Persons in those zones cannot enter Hungarian territory.

112. The Commission maintains that, under Article 80/K(2)(d) of the Law on the right to asylum, applicable during the crisis situation caused by mass immigration, the competent asylum authority could discontinue the procedure if the applicant left the transit zone. Accordingly, applicants do not freely choose to leave the transit zone.

113. The freedom of movement of persons in the transit zone is, moreover, severely restricted, as demonstrated by the European Committee for the Prevention of Torture inhuman and degrading treatment or punishment and the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees. The time spent by applicants in the transit zones is an important factor in determining whether a stay in those zones can be regarded as detention. The Commission's representatives found, on site, that some applicants had stayed there for over 14 months.

114. A stay in the transit zones thus amounts to a restriction on individual freedom which is so far reaching that it should be treated as detention within the meaning of Article 2(h) of Directive 2013/33. That conclusion was, moreover, confirmed by the Fourth Chamber of the European Court of Human Rights in its judgment in *Ilias and Ahmed v. Hungary*.[36]

115. Detention in the transit zones is not consistent with Article 26 of Directive 2013/32 and Article 8(2) and (3), Article 9 and Article 11(2) of Directive 2013/33 since, as a general rule, it occurs automatically, without any assessment of the individual circumstances of the applicants, without a written decision being issued, and because it may also be ordered in respect of minors, even unaccompanied minors, except for children under the age of 14 years.

116. Although Article 80/I of the Law on the right to asylum does not exclude, in the event of a crisis situation caused by mass immigration, the application of Article 31/A of that law, which lays down the rules applicable to the detention of asylum applicants, the Commission argues that the latter article cannot erase the infringement committed by Hungary inasmuch as, in such a crisis situation, all applicants are required to stay in the transit zone in accordance with Article 80/J(5) of the Law on the right to asylum.

36 Judgment of the ECtHR of 14 March 2017, *Ilias and Ahmed v. Hungary*, ECHR:2017:0314JUD004728715.

117. Lastly, the Commission asserts that no argument can be derived from the fact that, in the case giving rise to the *Bevándorlási és Menekültügyi Hivatal (Tompa)*[37] judgment, the application for the matter to be dealt with under the urgent procedure was dismissed by the Court. First, the concept of 'detention' does not depend on whether, in preliminary ruling proceedings, the Court orders that recourse be had to the urgent procedure. Secondly, in that case, the referring court requested the urgent procedure not because of the applicant's stay in a transit zone, but because it considered that the case had a significant impact on a number of similar cases falling under the same legislation.

118. Hungary contends that the transit zones are essentially reception centres located at the external border of the Schengen area in Hungary, designated as the place of the asylum procedure in accordance with EU law. They are not places of detention.

119. Placement in a transit zone is not detention, since it is only access to Hungary that is prevented in those transit zones, their occupants being free to leave them to go to Serbia. Moreover, asylum applicants who leave the transit zone do not necessarily suffer adverse consequences. Article 80/K(2)(d) of the Law on the right to asylum provides that, if an asylum applicant leaves the transit zone, the competent asylum authority is to take a decision on the basis of the information in its possession or discontinue the procedure. Consequently, even in the asylum applicant's absence, that authority could take a decision on the asylum application, including a decision granting the application. That legislation is consistent with Article 28 of Directive 2013/32, which allows the competent asylum authority to discontinue the examination of the application in the event of its implicit withdrawal.

120. Hungary also claims that the lodging of an asylum application does not automatically result in a deprivation of liberty since, under Article 80/J(1)(c) of the Law on the right to asylum, a person who is staying legally in Hungary is able to lodge an application anywhere and thus is not required to travel to or remain in the transit zone.

121. The detailed rules on the conditions for the detention of asylum applicants, the detention decision and its continuance are, for their part, laid down in Articles 31/A to 31/I of the Law on the right to asylum and ensure full compliance with the relevant provisions of Directive 2013/33.

122. Moreover, the duration of the stay in a reception institution is not the test of whether detention has occurred. The same is true of the standard of the conditions at a reception centre. The fact that the limited size of the area occupied by the transit zone necessarily entails certain restrictions on freedom of movement does not justify, inter alia, its classification as a detention zone.

123. As regards non-observance of the safeguards laid down in Directive 2013/33, Hungary asserts that in all cases the competent asylum authority issues a decision on accommodation in the transit zone, as the designated place of residence during the procedure, in accordance with Article 7(2) of Directive 2013/33, and that that decision may be challenged.

124. Concerning the judgment of the European Court of Human Rights, of 14 March 2017, in *Ilias and Ahmed v. Hungary* (CE:ECHR:2017:314JUD004728715), Hungary submits that it is not final and that the European Court of Human Rights did not examine in that judgment the situation of the transit zones currently in operation, but rather the situation of one facility in 2015, which admittedly bears the same name but whose status and classification in law, as well as the rights and obligations imposed on the persons staying there, are different.

37 Judgment of 19 March 2020 (C-564/18, EU:C:2020:218).

125. Moreover, the Court has already indirectly held that the transit zones, which have been acting as reception centres since March 2017, do not constitute detention facilities. The refusal to apply the urgent preliminary ruling procedure to the case giving rise to the judgment in *Bevándorlási és Menekültügyi Hivatal (Tompa)*,[38] relating to a dispute concerning an applicant staying in a transit zone, clearly shows that the Court did not regard a stay in a transit zone as detention, since recourse to that procedure may be justified, according to the case-law, where the case in question concerns a person in detention.

126. Lastly, concerning the visit by the Commission's representatives, Hungary states that that visit was confined to the Röszke transit zone and that its aim was to carry out on-the-spot checks of projects in receipt of EU financial assistance. Moreover, the Commission's representatives exchanged only a few words with some unidentified residents.

2. Assessment

127. As is apparent from the arguments summarised above, the disagreement between the parties centres on their differing characterisation of the concept of 'detention', as provided for in Article 2(h) of Directive 2013/33. I will consider that point before addressing the question of observance of the safeguards associated with detention within the meaning of that directive.

(a) Existence of detention

128. As a preliminary point, it should be noted that, following the end of the written procedure in the instant case, the Grand Chamber of the European Court of Human Rights ruled, in its judgment in *Ilias and Ahmed v. Hungary*,[39] on whether the accommodation of two third-country nationals in the Röszke transit zone constituted a deprivation of liberty for the purpose of the application of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') ('Right to liberty and security of person'). The Grand Chamber took a different view from the Fourth Chamber in its earlier judgment and found that it did not.

129. When invited to state their views on the relevance of that judgment at the hearing, the parties took opposing positions. While the Commission maintained that the conclusion reached by the European Court of Human Rights could not be transposed to the present case on account of a number of significant factual and legal differences, Hungary asserted that that conclusion, which did apply to the circumstances of the case, was such as to support its argument that the situation of applicants for international protection does not fall within the concept of 'detention' as laid down in Article 2(h) of Directive 2013/33. Thus, that Member State appears to take the view that, if the placing of those applicants in one of the transit zones is not a deprivation of liberty for the purpose of Article 5 of the ECHR, it goes without saying that it cannot be classified as detention either, since the concept of detention presupposes the existence of a deprivation of liberty in terms of Article 6 of the Charter.

130. In my Opinion in the Joined Cases *FMS and Others*,[40] which also concerned whether placing a person in one of the transit zones at the Serbian-Hungarian border amounted to detention within the meaning of Directive 2013/33, I explained that, while it is true that Article 5 of the ECHR corresponds to Article 6 of the Charter, and that Article 52(3) of the Charter requires that the rights enshrined therein, which correspond to the rights guaranteed by the ECHR, be interpreted as having the same

38 Judgment of 19 March2020 (C-564/18, EU:C:2020:218).

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

40 See my Opinion in Joined Cases *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:294, points 148 to 152).

meaning and the same scope as those laid down in the ECHR, the fact remains that the Court of Justice of the European Union has held on numerous occasions that the consistency that provision pursues cannot adversely affect the autonomy of EU law and of the Court itself,[41] since the ECHR does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law.[42] I thus invited the Court to leave aside the case-law of the European Court of Human Rights and to conduct its examination in the light of Article 6 of the Charter, considered autonomously.[43] Since the latter article must be deemed, in the light of recital 35 of Directive 2013/33,[44] to have been incorporated in the definition of 'detention' in Article 2(h) thereof, I concluded that the existence of detention must be determined *solely* by examining the conditions set out in that definition, whereby 'confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement' is to be regarded as detention.

131. It seems to me that, in the recent judgment delivered in those joined cases,[45] the Court of Justice of the European Union implicitly validated that approach in so far as it made a finding of detention following an analysis limited to the conditions flowing from Article 2(h) of Directive 2013/33, without taking account of the interpretation of Article 5 of the ECHR by the European Court of Human Rights in *Ahmed v. Hungary*.[46]

132. In the light of those conditions, the Court employed a literal, historical and contextual approach to find that the detention of an applicant for international protection, within the meaning of Article 2(h) of Directive 2013/33, 'constitutes a coercive measure which deprives that applicant of his freedom of movement and isolates him from the rest of the population, by requiring him to stay at all times in a restricted and closed area'.[47]

133. With a view to applying the concept of 'detention' thus described to the present case, the Commission adduces a number of items of factual evidence in its pleadings the veracity of which was not called into question by Hungary. According to the Commission, asylum applicants are required, throughout the procedure for examining their application, to remain at all times in one of the transit zones, which are surrounded by a high fence and barbed wire. Within the transit zone, those applicants are housed in groups of five persons in metal containers measuring approximately 13 m^2. They have extremely limited possibilities of leaving the section where they are housed to go to another section within the transit zone, which is permitted only in the case of medical appointments or interviews arranged in the context of the asylum procedure and provided they are escorted by the transit zone's guards. They are not permitted contact with outsiders, except their legal representatives. It seems to me to be apparent from the documents before the Court that their movements are continuously monitored on account of the presence of those guards within the transit zone and at the entrance to each of its sections.

41 It is apparent from the explanations relating to Article 52 of the Charter that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of EU law and … that of the Court of Justice of the European Union'.

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

43 That 'autonomous' interpretation of the provisions of the Charter the content of which is similar to those set out in the provisions of the ECHR is subject to the condition, laid down in Article 52(3) of the Charter, that it lead to a higher level of protection than that guaranteed by the ECHR.

44 That recital states as follows: 'This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter]. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly'.

45 Judgment of 14 May 2020, *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367).

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

47 Judgment of 14 May 2020, *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 216 to 222).

134. That body of evidence shows, in my view, that the restriction on asylum applicants' freedom of movement is so severe that the situation is akin to detention,[48] as the Court held in its judgment in *FMS and Others* concerning the Röszke transit zone on the basis of similar factual evidence provided by the referring court.[49]

135. As for the argument Hungary raised in its defence in this case, to the effect that placing the applicants concerned in the Röszke transit zone cannot be classified as detention within the meaning of Article 2(h) of Directive 2013/33 since all applicants for international protection are free to leave the transit zone, I note the Court rejected that argument in its judgment in *FMS and Others*.[50]

136. Starting from the premiss that detention can be ruled out only if there is a 'genuine' possibility of leaving the transit zone in question,[51] the Court justified its rejection by reference to the fact that, first, the entry of the applicants into Serbia would be regarded as illegal and would have exposed them to penalties, and, second, those applicants would have risked losing any chance of obtaining refugee status in Hungary if they had left Hungary.[52] I think that those reasons also support the rejection of the argument put forward by Hungary in this case.

137. Concerning the first reason (i), Hungary did not dispute the clarification provided by the Commission at the hearing when it said that the Republic of Serbia currently refuses to apply the readmission agreement to migrants coming from Hungarian transit zones. As for the second reason, it should be pointed out that leaving the transit zone would necessarily be synonymous with waiving the possibility of obtaining the international protection sought. It is true that Article 80/K(2)(d) of the Law on the right to asylum provides that, if an applicant leaves the transit zone, the competent national authority is not required to discontinue the procedure, but may also take a decision on the basis of the information in its possession. However, even if that theoretical possibility existed, I think it highly likely, if not certain, that such a decision would go against the applicant. Furthermore, under Article 80/K(4) of the Law on the right to asylum, any decision bringing an end to the procedure may not be challenged in administrative proceedings. In those circumstances, I take the view that asylum applicants are not in a position to leave the transit area bound for Serbia of their own volition.

138. I might add that those applicants would also be unable to go to Hungary without permission to enter and remain in national territory. It should be pointed out in that connection that, under Article 5(1b) of the Law on State borders, which is the subject of the Commission's fourth complaint in this case, the Hungarian police may, during a crisis situation caused by mass immigration, stop illegally staying foreign nationals throughout national territory and escort them to the gate of the nearest facility, except where they are suspected of having committed an offence. Given the length of time they have to wait to enter the transit zone and make an application for international protection, the migrants concerned have no alternative but to head in the direction of Serbia, that is to say, to return to where they came from in a context of, at the very least, uncertainty as to whether they will be allowed to enter Serbia and as to the regularity of their situation and the fate awaiting them there at the hands of the immigration authorities.

139. Accordingly, the prospect of an asylum applicant leaving the transit zone voluntarily is, in my view, manifestly unrealistic.

48 For my part, I do not see how such a far-reaching restriction on freedom of movement could be regarded as an inevitable consequence of the limited size of the transit zone as a whole, as Hungary claims.

49 Judgment of 14 May 2020, *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 226).

50 Judgment of 14 May 2020, *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367).

51 See, in that regard, my Opinion in Joined Cases *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:294, points 155 and 166), in which I submitted that detention can be ruled out only if there is a 'realistic' possibility of voluntary departure and the question whether or not that possibility is realistic must be assessed in the light of the specific situation of the applicants for international protection.

52 Judgment of 14 May 2020, *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 228 to 229).

140. In the light of all the foregoing considerations, I consider that placing an applicant in the transit zone while his application for international protection is being examined must be regarded as constituting 'detention' within the meaning of Article 2(h) of Directive 2013/33.

141. The classification and legal status of transit zones under Hungarian law, on which Hungary relied on several occasions in its pleadings, is wholly irrelevant to the above assessment, since the concept of 'detention' at issue contains no reference whatsoever to national law and must therefore be regarded as an autonomous concept of EU law. [53]

142. The outcome of that assessment is also not altered by the fact that the Court refused to grant an application for urgent treatment made by the referring court in *Bevándorlási és Menekültügyi Hivatal (Tompa)*, relating to a dispute concerning an asylum applicant staying in a transit zone, since the judgment delivered in that case does not state that the reason for the Court's refusal was the fact that the applicant was not in detention. [54] In any event, the preliminary assessment carried out by the Court in that context regarding the existence of detention, which is of a factual nature and the scope of which is strictly circumscribed by the information provided by the referring court, does not seem to me to be the same as that carried out to determine whether the elements of that concept of 'detention' are also present.

(b) Lawfulness of detention

143. It follows from the foregoing that all asylum applicants are held in detention, within the meaning of Directive 2013/32, while they are accommodated in the transit zones at the Serbian-Hungarian border. At this juncture, it is therefore necessary to take a position on the lawfulness of that detention, bearing in mind that, under Article 26 of Directive 2013/32 and Article 8 of Directive 2013/33, applicants for international protection may, under certain circumstances, be detained.

144. The Commission takes the view that Hungary does not comply with the legal rules specific to all detention measures, defined in Articles 8 to 11 of Directive 2013/33. I endorse that view without any hesitation.

145. It is apparent from the national provisions submitted by the Commission that Articles 31/A and 31/B of the Law on the right to asylum, which lay down the conditions governing the detention of asylum applicants under domestic law, are disapplied by Article 80/I(a) of that law in the event of a crisis situation caused by mass immigration. In any event, even if, as Hungary submits, those provisions continue to apply in that situation, it is reasonable to consider, in the light of the fact that that Member State strongly denied the very existence of any detention of asylum applicants, that the relevant provisions are not applied to the detention of such applicants in the transit zones.

146. Hungary in no way denies that Article 80/J(5) of the Law on the right to asylum, which confers on the competent asylum authority the task of designating the transit zone as the asylum applicants' place of stay for the duration of the procedure, is applied *as a matter of course*. There is no doubt, in my opinion, that the Commission is correct in its view that this infringes the first subparagraph of Article 8(3) of Directive 2013/33, under which detention may be warranted only on the grounds listed exhaustively therein, and Article 8(2) of that directive, which provides that detention may be ordered only where it proves necessary and on the basis of an *individual assessment of each case*, if other less coercive measures cannot be applied effectively. [55]

53 See, in particular, judgment of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 37).

54 Judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)* (C-564/18, EU:C:2020:218, paragraph 27).

55 See also judgment of 14 September 2017, *K.* (C-18/16, EU:C:2017:680, paragraph 48).

147. As regards the failure to issue a detention order stating the reasons in fact and in law on which it is based, in breach of Article 9(2) of Directive 2013/33, I note that Hungary contends that, in all cases, the competent national asylum authority issues a decision placing the asylum applicant in question in the transit zone for the duration of the procedure. However, Hungary itself implicitly acknowledges in its response that that decision is not a detention order within the meaning of Article 9(2) of Directive 2013/33, since it describes it as a decision imposing restrictions on the freedom of movement of applicants for international protection for the purpose of Article 7(2) thereof.

148. Hungary does not even deny that detention may also be ordered in respect of minors, even unaccompanied minors, except for children under the age of 14 years, which undoubtedly infringes Article 11(2) of Directive 2013/33, under which minors may be detained only as a measure of last resort and after it has been established that other less coercive alternative measures cannot be applied effectively.

149. It is apparent from the application that the Commission also alleges infringement of Article 2(h) of Directive 2013/33. However, I fail to see where the infringement of that provision — which merely defines the concept of 'detention' — lies, since the Commission does not claim that it was not transposed. Consequently, I cannot agree with the Commission's conclusion in that regard.

150. In the light of the foregoing, I consider that Hungary failed to fulfil its obligations in so far as it did not make detention in the transit zones subject to the safeguards laid down in Articles 8, 9 and 11 of Directive 2013/33.

151. I therefore find that the third complaint in this action for failure to fulfil obligations should be upheld.

D. Failure to comply with the procedures laid down in Directive 2008/115

1. Arguments of the parties

152. By its fourth complaint, the Commission argues that, by moving illegally staying third-country nationals to the other side of the border fence without observing the procedures and safeguards laid down in Article 5, Article 6, Article 12(1) and Article 13(1) of Directive 2008/115, Hungary failed to fulfil its obligations under those provisions.

153. First of all, the Commission notes that, under Article 5(1) of the Law on State borders, it is possible to use, in Hungarian territory, a strip of 60 metres from the external border in order to build, establish or operate facilities to maintain order at the border and to carry out tasks relating to defence and national security, disaster management, border surveillance, asylum and migration control. In addition, Article 5(1b) of the Law on State borders provides that the police may, in a crisis situation caused by mass immigration, stop illegally staying foreign nationals and escort them to the gate of the nearest facility referred to in Article 5(1) of that law, except where they are suspected of having committed an offence.

154. It is apparent from the reports cited by the Commission that the Hungarian police escort illegally staying third-country nationals apprehended in Hungarian territory to the border and make them cross the border fence. Third-country nationals who are moved to a narrow border strip in Hungarian territory, which is entirely devoid of infrastructure and offers no means of travelling to the rest of Hungary, in practice have no choice other than to leave Hungarian territory. The Commission therefore submits that that procedure corresponds to the concept of 'removal' as defined in Article 3(5) of Directive 2008/115, even though, in some cases, it is technically possible that the physical transfer might not be completed outside Hungarian territory.

155. The removal of the third-country nationals concerned takes place without a return decision being issued, without careful consideration, without taking account of the best interests of the child, family life or the state of health of the third-country national concerned, and without respecting the principle of non-refoulement. Those third-country nationals receive no adequate written justification or explanation and, in the absence of a return decision, are afforded no remedy.

156. In addition, Article 5(1b) of the Law on State borders is not covered by the exception laid down in Article 2(2)(a) of Directive 2008/115. That exception does not apply to nationals already present in Hungarian territory, while the scope of Article 5(1b) extends to all third-country nationals staying illegally in Hungary.

157. Finally, a substantial, general and protracted derogation from the provisions of Directive 2008/115 cannot be justified by Article 72 TFEU, which merely lays down a principle that the EU legislature must take into account and that facilitates the interpretation of EU acts adopted on the basis of Part Three, Title V, of the TFEU.

158. Hungary submits, as a preliminary point, that Article 5(1a) of the Law on State borders is justified under the derogation provided for in Article 2(2)(a) of Directive 2008/115. As for Article 5(1b) of that law, Hungary states that it can be applied only in the event of a crisis situation caused by mass immigration, unlike Article 5(1a).

159. In that context, Hungary submits that Article 72 TFEU allows Member States to adopt and apply rules relating to the maintenance of law and order and the safeguarding of internal security which may derogate from EU legal provisions, provided that the objective of declaring a crisis situation caused by mass immigration and of the rules applied in such a situation is, in all cases, to maintain law and order and safeguard internal security in the country. Directive 2008/115 does not provide that the rules it establishes must also be applied in the context of Article 72 TFEU. Consequently, a Member State may depart from the provisions of that directive when exercising its responsibilities relating to the maintenance of law and order and the safeguarding of internal security.

160. Law and order and public security are overriding public interest requirements which give Member States a legislative power enabling them to encroach upon EU law, the primacy of which is underscored in Article 4(2) TEU. In accordance with the Court's case-law,[56] Member States are completely free to decide what they consider to be covered by the concept of law and order, and that assessment is likely to vary over time. Hungary states that the legal framework laid down in secondary legislation for the purpose of managing crisis situations caused by mass immigration had, in the Commission's own view, proved insufficient. The Commission drew the appropriate conclusions from this by submitting, in 2016, a complex package of proposals to reform the Common European Asylum System, covering both Directive 2013/32 and Directive 2008/115.

161. Consequently, in a crisis situation such as that facing Hungary, there is no obligation to comply with Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115 when the Hungarian police apply Article 5(1b) of the Law on State borders.

162. In addition, the police do not make illegally staying third-country nationals apprehended in Hungarian territory cross the border, given that the border protection facility (border fence) is in Hungary, not on the border line. Those persons are therefore not removed to Serbia and could, after being escorted to the gate, lodge their application in the nearest transit zone. In the absence of any actual return, the application of Directive 2008/115 is by definition excluded, since a Member State cannot enforce a removal measure in its own territory.

56 Hungary refers, in particular, to the judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708).

163. Hungary adds that no provision of EU law stipulates where the facilities for processing asylum applications must be located in the territory of a country or where persons staying illegally should be moved to. Therefore, when the police move illegally staying third-country nationals within Hungary to enable them to lodge their application for international protection as quickly as possible, they are not infringing EU law. Moreover, no rule of EU law requires that illegally staying third-country nationals be provided with any care whatsoever. Finally, Hungary submits that the police act within the limits of the legislative framework and use coercive measures proportionately only in the cases provided for by law.

2. Assessment

164. It should be noted at the outset that Hungary does not deny that third-country nationals staying illegally in Hungary are taken to the gate of the nearest facility by the Hungarian police without the safeguards attaching to the return procedure, laid down in Directive 2008/115, being observed.[57] Above all, that measure is implemented without taking account of the best interests of the child, family life and the state of health of the third-country national concerned, without respecting the principle of non-refoulement (Article 5) and without a return decision being issued (Article 6(1)). Furthermore, the third-country nationals concerned do not receive any written decision setting out the reasons in fact and in law for the return and/or removal (Article 12(1)) and, in the absence of a return decision, are afforded no remedy (Article 13(1)).

165. However, Hungary puts forward two main arguments to contest the infringements alleged against it in the present complaint: primarily, the inapplicability of Directive 2008/115 to the present case and, in the alternative, the possibility for Member States to rely on Article 72 TFEU in order to derogate from the uniform rules laid down in that directive. I will examine each of them in turn.

(a) Applicability of Directive 2008/115

166. Hungary submits, in the first place, that Directive 2008/115 is not applicable to the present case since the practice of escorting individuals to the border is justified under the derogation set out in Article 2(2)(a) of Directive 2008/115.

167. Under that provision, Member States may decide not to apply the directive to third-country nationals who have been apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State. The Court has already stated that the expression 'in connection with the irregular crossing' implies '*a direct temporal and spatial link* between the apprehension or interception of the third-country national and the crossing of an external border' and 'that situation therefore concerns third-country nationals who have been apprehended or intercepted by the competent authorities *at the very time* of the irregular crossing of the border or near that border after it has been so crossed'.[58] [59]

168. It does not seem to me that the Commission denies that Article 5(1a) of the Law on State borders is intended to make use of the derogation provided for in Article 2(2)(a) of Directive 2008/115.

57 It must be stated that Hungary's argument that the Hungarian police act within the limits of the legislative framework and use coercive measures proportionately only in the cases provided for by law, as required by Article 8(4) of Directive 2008/115, is irrelevant to determining whether Hungary failed to fulfil the obligations it is claimed to have infringed in the present complaint.

58 Judgment of 19 March 2019, *Arib and Others* (C-444/17, EU:C:2019:220, paragraph 46 and the case-law cited).

59 Emphasis added.

169. This complaint concerns, rightly in my view, only Article 5(1b) of the Law on the right to asylum, which applies in lieu of paragraph 1a in the event of a crisis situation caused by mass immigration and was still in force when the period laid down in the reasoned opinion expired. It is therefore that provision which, according to the Commission, is not covered by the scope of the derogation.

170. Article 5(1b) of the Law on State borders provides that, 'during a crisis situation caused by mass immigration, the police may stop foreign nationals staying illegally in Hungary and escort them to the gate of the nearest facility referred to in paragraph 1, except where they are suspected of having committed an offence'. Since that police power is not restricted to 'a distance of [eight kilometres] from the external border', as provided for in Article 5(1a) of the Law on State borders,[60] that provision applies to *all* third-country nationals staying illegally in Hungary, not only to those who have been apprehended or intercepted at the time of the irregular crossing of the external border or near that border after it has been so crossed, as required by Article 2(2)(a) of Directive 2008/115. It follows that, since Article 5(1b) of the Law on State borders does not meet one of the conditions laid down in that derogation, it does not fall outside the scope of Directive 2008/115 by virtue of the derogation.

171. In the second place, Hungary argues that the Hungarian police's practice of moving third-country nationals staying illegally in Hungary to the gate of the nearest facility does not amount to 'removal' within the meaning of Directive 2008/115, since that directive does not apply in the absence of any actual return.

172. The concept of 'removal' is defined in Article 3(5) of that directive as 'the enforcement of the obligation to return, namely the physical transportation *out of* the Member State', which might indeed suggest that the interpretation proposed by Hungary is legally correct. It is common ground that Article 5(1b) of the Law on State borders authorises the police only to escort illegally staying third-country nationals apprehended in Hungarian territory to the gate of the nearest border protection facility, facilities located in Hungary. Thus, the physical transfer is not completed outside that territory, as required by the definition at issue. However, it seems to me that, in conducting that assessment, we cannot ignore the fact that, having been left on the narrow strip of land between the border fence and the national border, which has absolutely no infrastructure enabling them to stay there for an extended period, third-country nationals have no option but to leave that strip of land and cross the land border with Serbia. Furthermore, it must be considered that those third-country nationals are not even able to go from the gate to which the police escorted them to the transit zone and to enter that zone in order to make an application for international protection, since that would entail an average wait of 11 to 18 months on a narrow strip of land which is, as I have just pointed out, devoid of any infrastructure. To conclude, I take the view that the practice at issue is, in fact, comparable to 'removal' within the meaning of Article 3(5) of Directive 2008/115.

173. In the light of those considerations, there is little doubt in my mind that Directive 2008/115 is applicable to the measure in question.

60 Article 5(1a) of the Law on State borders provides: 'The police may, in Hungarian territory, stop foreign nationals staying illegally in Hungary, within a distance of [eight kilometres] from the external border within the meaning of Article 2(2) of the Schengen Borders Code or from the signs demarcating the border, and escort them to the gate of the nearest facility referred to in paragraph 1, except where they are suspected of having committed an offence'.

(b) Article 72 TFEU

174. As regards the argument put forward by Hungary that Article 72 TFEU allows Member States to depart from the provisions of Directive 2008/115 when they exercise their responsibilities relating to the maintenance of law and order and the safeguarding internal security, the considerations set out in points 101 to 103 of this Opinion concerning the Court's reasoning in its judgment in *Commission* v *Poland and Others (Temporary mechanism for the relocation of applicants for international protection)*[61] remain, in my view, entirely relevant.

175. That line of reasoning should be applied once again.

176. I note first of all that, in its pleadings, Hungary did not expressly invoke, as a ground of defence, the invalidity of certain provisions of Directive 2008/115 in the light of Article 72 TFEU. That being said, it must be ascertained whether it is necessary for that Member State to rely on the derogation provided for therein in the context of Directive 2008/115 as a whole.[62] Article 18 of that directive is potentially relevant as it expressly governs emergency situations caused by an exceptionally large number of third-country nationals having to be returned. It affords Member States the possibility of derogating from a number of other provisions of that directive for as long as the emergency situation persists. However, I note that Hungary did not rely on the application of Article 18 in its pleadings and that, in any event, that article does not permit any derogation from the provisions alleged to have been infringed in the present complaint.[63] [64]

177. It follows that Hungary cannot rely on Article 72 TFEU to justify its refusal to implement all of the obligations imposed on it by Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115.

178. The other arguments put forward by Hungary are not, in my view, capable of invalidating that conclusion. The same is true of the argument based on a combined reading of Article 72 TFEU and Article 4(2) TEU. There is nothing to indicate that the effective preservation of essential State functions covered by the latter provision, such as ensuring territorial integrity, maintaining law and order and safeguarding national security, could be achieved only by disapplying the relevant provisions of Directive 2008/115. As for the judgment in *Tsakouridis*,[65] while it is true that it follows from that judgment that Member States are entitled to adopt measures to maintain public order, I do not see how it can be construed as allowing Member States to apply such a derogation in cases not provided for in EU secondary legislation simply by invoking Article 72 TFEU. I would merely point out that the Court was called upon in that case to interpret a provision of secondary legislation, namely Article 28(3) of Directive 2004/38/EC.[66]

179. In the light of the foregoing, I propose that the Court uphold the Commission's fourth complaint.

61 Judgment of 2 April 2020 (C-715/17, C-718/17 and C-719/17, EU:C:2020:257).

62 In the absence of any challenge to its validity, the fact that Directive 2008/115 does not contain a recital, like recital 51 of Directive 2013/32, stating that it does not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, in accordance with Article 72 TFEU, certainly does not justify a derogation from the provisions of that directive on the basis of that article, as Hungary claims.

63 Article 18 of Directive 2008/115 merely permits Member States to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) of that directive and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2) of the directive.

64 As the Commission notes in the application, Article 18(3) of Directive 2008/15 even expressly states that 'nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive'.

65 Judgment of 23 November 2010 (C-145/09, EU:C:2010:708).

66 Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

E. Ineffectiveness of appeals brought against decisions rejecting an asylum application

1. Arguments of the parties

180. The Commission contends that Hungary is in breach of Article 46(5) and (6) of Directive 2013/32 because, where an application for international protection is rejected, the Law on the right to asylum does not clearly provide for the possibility of appeals having suspensory effect. Consequently, the right of asylum applicants to remain in Hungary pending the outcome of an appeal is not guaranteed, as an adverse decision is enforceable irrespective of whether or not an appeal has been brought.

181. Pursuant to the general rules of judicial procedure applicable to administrative proceedings in Hungary, the bringing of an appeal does not have suspensory effect, since Article 50 of the Code of Administrative Procedure provides only that an application for suspensory effect may be made under certain conditions. The Law on the right to asylum, as a *lex specialis*, lays down the rules governing administrative proceedings applicable to the review of asylum decisions.

182. The egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról szóló 2015. évi CXL. törvény (Law No CXL of 2015 amending certain laws on the management of mass immigration), which entered into force on 1 August 2015, amended Articles 53 and 68 of the Law on the right to asylum and repealed the provisions expressly ensuring suspensory effect. Those amendments apply both during a crisis caused by mass immigration and in the absence of such a crisis.

183. Accordingly, the Commission submits, first, that since appeals against decisions rejecting an asylum application as unfounded do not have automatic suspensory effect, Hungary failed to transpose correctly the general rule laid down in Article 46(5) of Directive 2013/32. In that regard, Article 35(1) of the Law on the right to asylum does not, in itself, grant asylum applicants a right to stay; it merely states that such persons are to be subject to the asylum procedure until notification of a decision that is no longer open to challenge. Therefore, the only legislation from which the applicant could derive a right to stay in Hungary is Article 5(1)(a) of the Law on the right to asylum, under which the applicant is entitled, in accordance with the conditions laid down by that law, to stay in Hungary. Nevertheless, that provision makes the right to stay in Hungary subject to additional conditions that are not precisely detailed. The fact that, in accordance with Article 80/J(5) of the Law on the right to asylum, applicable during a crisis situation caused by mass immigration, the competent asylum authority is to designate the transit zone as the asylum applicant's place of stay until the decision that is no longer open to challenge has become enforceable, does not allow such a conclusion to be reached. The stay in the transit zone should be classified as detention and does not correspond to the concept of stay in the Member State for the purpose of Article 46 of Directive 2013/32.

184. As regards, secondly, the judicial review of decisions rejecting an asylum application as inadmissible, Article 53(6) of the Law on the right to asylum provides that the lodging of an appeal does not have suspensory effect, which is consistent only with the rule laid down in Article 46(6) of Directive 2013/32, under which Member States must ensure either that appeals have automatic suspensory effect or that a decision on suspensory effect is taken by a court or tribunal. Furthermore, the Law on the right to asylum does not specify clearly whether Article 50 of the Code of Administrative Procedure is also applicable to court proceedings falling within the scope of the Law on the right to asylum, for which that law lays down special rules, and is thus regarded as correctly transposing Article 46(6) of that directive in accordance with the settled case-law of the Court.

185. Thirdly, under Article 46(6)(a) and (b) of Directive 2013/32, if an application has been rejected as inadmissible because a third country is considered to be a safe third country for the applicant, or unfounded because the applicant entered the territory of the Member State unlawfully or prolonged his stay there unlawfully, the suspensory effect of bringing an appeal should also be automatic. The Commission acknowledges that those two situations are covered by Article 51(2)(e) and (7)(h) of the Law on the right to asylum, and that Article 53(6) of that law provides that the lodging of an action does not stay enforcement of the decision, except for decisions on asylum taken pursuant to those provisions. Nonetheless, it claims that the Law on the right to asylum does not clearly state that, in such cases, the lodging of the action has suspensory effect. Only an interpretation *a contrario* would support the conclusion that, in those cases, a rule other than the absence of suspensory effect applies. However, the wording of the law does not specify whether that different rule entails automatic suspensory effect, as required by Article 46(5) and (6) of Directive 2013/32.

186. Hungary considers that asylum legislation and practice provide sufficient assurances that applicants can remain in its territory, even though the provisions of Directive 2013/32 were not transposed verbatim into Hungarian law. It is apparent from a combined reading of Article 5(1) and Article 35(1) of the Law on the right to asylum that asylum applicants have a guaranteed right to remain in the territory until the asylum procedure has been concluded, which, where appropriate, coincides with notification of the judicial decision disposing of the appeal brought against rejection of the asylum application. Thus, the national legislation is consistent with Article 46(5) of Directive 2013/32.

187. According to Hungary, Article 46(6) of Directive 2013/32 merely requires, by way of exception to the general rule, that, in a certain number of cases, the court hearing the appeal have jurisdiction to order its suspensory effect, either at the request of the applicant or of the court's own motion. In that situation, although Article 53(6) of the Law on the right to asylum does not provide for an automatic right to remain in the territory, the applicant can nonetheless, under Article 50 of the Code of Administrative Procedure, request immediate judicial protection which could result, depending on the court's decision, in the action having suspensory effect and, therefore, in him being able to remain in the territory. Applicants who bring appeals consistently make use of that possibility and, in practice, the courts always uphold such requests.

188. The 'exceptions to the exception' provided for in Article 46(6)(a) and (b) of Directive 2013/32 are covered by Article 51(2)(e) and (7)(h) of the Law on the right to asylum, as the right to remain in the territory is naturally guaranteed in both cases.

189. The compatibility of Hungarian law with EU law is also not called into question by Article 80/J(2) of the Law on the right to asylum. Under Article 80/J(5) of that law, the applicant has the right to stay in the transit zone and, therefore, in Hungary until notification of the final decision, which corresponds to the concept, laid down in Article 2(p) of Directive 2013/32, of 'remain in the Member State' and meets the requirements of Article 46(5) and (6) of that directive.

2. Assessment

190. I would like to begin with some preliminary remarks.

191. The transposition of directives into national law is characterised by the constant pursuit of a balance between the nature of the legal act in question — which simply, according to Article 288 TFEU, binds the Member States to which they are addressed as to the result to be achieved, while leaving to them the choice of form and methods — and the need to ensure the full and uniform application of EU law. Thus, the Court has consistently held that transposing a directive does not necessarily require its provisions to be copied verbatim in express, specific law or regulation; a general legal context may be sufficient, provided that it does effectively ensure the full application of the

directive in a sufficiently clear and precise manner.[67]

192. Where the provision of the directive to be transposed is *designed to create rights for individuals*, compliance with the attendant requirement of legal certainty means that the national legislative framework must leave no reasonable doubt as to the scope of those rights. In those circumstances, the transposition obligation incumbent on Member States implies, according to the Court's settled case-law, that they must ensure that the legal situation of individuals is sufficiently precise and clear so that they are able to ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.[68]

193. It is in the light of those principles that the merits of the three parts of the present complaint must, in my view, be assessed.

194. The first part of the complaint concerns Article 46(5) of Directive 2013/32 ('Right to an effective remedy'), which lays down the general rule that every applicant for international protection has the right to remain in the territory of the Member State concerned, even after the adoption of an administrative decision rejecting his application, until the time limit for bringing an appeal against that decision has expired or, where such an appeal has been brought, until the appeal has been disposed of.

195. In that regard, I should point out that the information provided by the Commission in its reply leads me to conclude that its grievance is one of incorrect transposition and, in any event, lack of clarity in such transposition. In other words, the Commission objects to the fact that the national legal framework leaves room for reasonable doubt as to the scope of the right to remain in the territory of the Member State concerned, contrary to the requirements of the case-law referred to above.

196. It should be noted that Hungary claims that a combined reading of Article 5(1)(a) and Article 35(1) of the Law on the right to asylum makes it possible to achieve the result sought by Article 46(5) of Directive 2013/32. I should say at the outset that I agree with the Commission in so far as it considers that Article 35(1) of the Law on the right to asylum at issue ('The applicant shall be subject to the asylum procedure from the lodging, in person, of the application for international protection with the competent asylum authority … until notification of the decision issued at the end of the procedure when it is no longer open to challenge'), says nothing about the applicant's right to remain in the territory of the Member State concerned.[69]

197. The question then arises as to whether Article 5(1)(a) of the Law on the right to asylum, considered in isolation, is capable of conferring on asylum applicants the right to remain in Hungary and thus constitutes adequate transposition of Article 46(5) of Directive 2013/32.

198. In my view, that question ought to be answered in the negative.

199. In order to explain the reasons which led me to that conclusion, I recall first of all that the provision in question reads as follows: 'an applicant for asylum shall have the right, *in accordance with the conditions laid down in this law*, to stay in Hungary and, in accordance with the specific rules, to obtain a permit authorising him to reside in Hungarian territory'.[70] Although that provision has the effect of conferring a right to stay in Hungarian territory on every asylum applicant, the

67 See judgment of 22 February 2018, *Commission* v *Poland* (C-336/16, EU:C:2018:94, paragraph 120 and the case-law cited).

68 See, inter alia, judgment of 13 February 2014, *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67, paragraph 34 and the case-law cited).

69 Hungary does not dispute the Commission's assertion that, while it is true that Article 51(2) of Law No II of 2007 on the entry and stay of third-country nationals provides that 'where third-country nationals are subject to the asylum procedure, refoulement or return may not be ordered or enforced', that provision is not capable of conferring on asylum applicants a right to remain in Hungary, since it applies only 'if the third-country national has the right to stay in Hungary, as specified in a separate law'.

70 Emphasis added.

exercise of that right nevertheless appears to be subject to additional conditions in respect of which no details are given, as the Commission rightly points out. When asked to identify those conditions at the hearing, Hungary mentioned only Article 35(1) of the Law on the right to asylum, which seems to me to refer instead to the transposition of the concept of 'asylum applicant', not to the formulation of one of the conditions for the grant of the abovementioned right to stay.

200. In those circumstances, the Hungarian legal framework does not make it possible to achieve the result sought by Article 46(5) of Directive 2013/32, namely to grant all applicants for international protection whose application has been rejected as unfounded the right to remain in the territory of the Member State concerned. In any event, dealing as we are with a right to stay without any defined boundaries, I do not see how the legal framework could be considered to be sufficiently precise and clear so that asylum applicants 'are put in a position to know the *full extent* of their rights and, where appropriate, to be able to rely on them before the national courts'.[71]

201. That conclusion is limited to the Hungarian legal framework applicable in normal circumstances, that is to say, in the absence of a declaration of a crisis situation caused by mass immigration. When such a situation has been declared, Hungary recalls that Article 80/J(4) of the Law on the right to asylum suspends the right to remain in national territory, as acknowledged by Article 5(1)(a) of that law. In such circumstances, the relevant national provision is, according to that Member State, Article 80/J(5) of that law, in so far as it provides that the transit zone is to be designated as the asylum applicant's compulsory place of stay until the decision on his application that is no longer open to challenge (or the transfer order under the Dublin Regulation) has become enforceable.

202. Since I propose that the Court find that such a provision constitutes unlawful detention, for the purpose of Directive 2013/33, it must be considered incapable of satisfying the requirement that asylum applicants be granted the right to remain in national territory under Article 46(5) of Directive 2013/32.

203. The second part of the present complaint concerns Article 46(6) of Directive 2013/32, which provides, by way of derogation, that where the rejection decision falls within one of the categories listed in that paragraph (including, in particular, decisions declaring an application to be manifestly unfounded and, barring some exceptions, unfounded at the end of an accelerated procedure or inadmissible[72]), the right to remain in the territory need not necessarily be ensured automatically by the Member State concerned, but that that Member State must at least ensure, when the decision in question terminates the applicant's right to remain there, that a court or tribunal is to rule on the existence of such a right.

204. First of all, it should be noted that the Commission's criticism concerns only the transposition of that article as regards appeals brought against decisions rejecting an application as inadmissible. It claims that Article 53(6) of the Law on the right to asylum governing appeals brought against such decisions,[73] according to which 'in administrative proceedings, the lodging of an action does not stay enforcement of the decision, except for decisions on asylum taken pursuant to Article 51(2)(e) and (7)(h)', does not correctly transpose the result sought by Article 46(6) of Directive 2013/32. It is not necessary, in my view, to address that matter since Hungary does not deny the fact that that national provision, considered in isolation, does not ensure that such appeals have automatic suspensory effect or that a decision on suspensory effect is taken by a court or tribunal.

71 Emphasis added.

72 Article 46(6)(a) and (b) of Directive 2013/32.

73 Hungary confirmed at the hearing that Article 53 covers appeals brought against those decisions by drawing attention to paragraph 2 of that article, according to which 'a decision rejecting an application *on grounds of inadmissibility* or which was handed down in an accelerated procedure may be challenged in administrative proceedings' (emphasis added).

205. What I think merits special attention is, by contrast, Hungary's argument that that result is in fact achieved, in the domestic legal order, by reason of the existence of Article 50 of the Code of Administrative Procedure. According to that Member State, the provision in question allows an application to be made to the court hearing the main action requesting immediate judicial protection, which may take the form, inter alia, of the grant of suspensory effect,[74] something the Commission does not dispute. On the other hand, the Commission states that it does not consider Article 50 to be a sufficiently clear and precise transposition of Article 46(6) of Directive 2013/32.

206. I cannot agree with that argument.

207. In support of its position, the Commission simply notes that the Law on the right to asylum does not clearly state that the general rules of administrative procedure are applicable to court proceedings falling within the scope of that law. It seems to me that this observation cannot in itself lead to the conclusion that the legal situation arising from the national law at issue lacks sufficient clarity and precision to enable asylum applicants to ascertain the full extent of their rights and to rely on them before a court or tribunal, for three main reasons. First, Article 53(6) of the Law on the right to asylum does not expressly preclude the application of Article 50 of the Code of Administrative Procedure or contain any aspects incompatible with such application. Secondly, it is certainly not unusual for there to be a link between a *lex generalis* (Code of Administrative Procedure) and a *lex specialis* (Law on the right to asylum),[75] in terms of which the former may apply to the same situations as the latter in order to fill the lacunae in the latter. Thirdly, the Commission does not adduce any evidence, such as national case-law, to cast doubt on the submission that the Hungarian administrative courts are in fact able to stay enforcement of the decision declaring the asylum application to be inadmissible and thus recognise that the applicant concerned has the right to remain in national territory.

208. Moreover, I do not believe that a different interpretation from that proposed would respect the balance that the Court sought to strike by means of the case-law cited in points 191 and 192 of this Opinion.

209. The third part of this complaint concerns the exceptions to the derogation that are laid down in Article 46(6) of Directive 2013/32. It follows from Article 46(6)(a) of Directive 2013/32 that, where the rejection decision is based on the circumstances referred to in Article 31(8)(h) of that directive, the general rule laid down in Article 46(5) thereof becomes applicable again with the result that the right to remain in the territory must be granted automatically. Similarly, it follows that that right must be granted automatically where the application is declared inadmissible pursuant to Article 33(2)(c) and (e), because Article 46(6)(b) applies only to cases in which the application is declared inadmissible pursuant to Article 33(2)(a), (b) and (d).

210. It should be borne in mind that, by this part of the complaint, the Commission does not deny that the exceptions deriving from points (a) and (b) of paragraph 2 were indeed transposed, in so far as Article 53(6) of the Law on the right to asylum specifically refers to them when it provides that the lodging of an appeal does not have suspensory effect 'except for decisions on asylum taken pursuant to Article 51(2)(e) and (7)(h)'. However, it again considers that the transposition lacks clarity in that the national provision in question does not expressly state that the exception to the lack of suspensory effect is automatic suspensory effect.

74 Paragraph 4 of that article states that the reasons justifying the need for immediate judicial protection must be set out in detail in the application, the supporting documents must be attached and the facts on which the application is based must be substantiated.

75 Hungary confirmed at the hearing that the relationship between those two legal acts must be understood in that way.

211. In view of how the Commission formulated its arguments in this part of the complaint, suffice it to note that a straightforward *a contrario interpretation* of that provision shows quite clearly that the Hungarian legislature wished to confer automatic suspensory effect on appeals brought against decisions based on the circumstances referred to in Article 51(2)(e) and (7)(h) of the Law on the right to asylum.

212. In the light of the foregoing, I propose that the Court uphold the first part of the fifth complaint and dismiss the second and third parts.

IV. Costs

213. In principle, pursuant to the first sentence of Article 138(3) of the Rules of Procedure of the Court, where, as in this case, each party succeeds on some and fails on other heads, the parties must bear their own costs. However, on the basis of the second sentence of that provision, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

214. According to the proposed solution, the European Commission is largely successful, whereas Hungary's arguments can be upheld in respect of only a small part of the subject matter of the proceedings, namely the second and third parts of the fifth complaint. Accordingly, it would seem appropriate in the present case to order Hungary, in addition to bearing its own costs, to pay four fifths of the Commission's costs and the latter to bear one fifth of its own costs.

V. Conclusion

215. For the reasons set out in this Opinion, I therefore propose that the Court should:

(1) declare that, by requiring all asylum applications to be lodged in person with the competent authority, and exclusively in the transit zones, access to which is restricted to a limited number of persons, Hungary failed to fulfil its obligation under Articles 3 and 6 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) declare that, by implementing a procedure for examining asylum applications at the border without the safeguards provided for in Article 43 of Directive 2013/32, Hungary failed to fulfil its obligations under that provision;

(3) declare that, by applying to all asylum applicants, except for children under the age of 14 years, an examination procedure resulting in their compulsory detention in the transit zones for the entire duration of that procedure, without the benefit of the safeguards provided for in Articles 8, 9 and 11 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, Hungary failed to fulfil its obligations under those provisions;

(4) declare that, by moving third-country nationals staying illegally in national territory to the other side of the border fence without observing the safeguards set out in Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Hungary failed to fulfil its obligations under those provisions;

(5) declare that, by incorrectly transposing into national law Article 46(5) of Directive 2013/32, Hungary failed to fulfil its obligations under that provision;

(6) dismiss the action as to the remainder;

(7) order Hungary to pay its own costs and four fifths of the European Commission's costs and the Commission to bear one fifth of its own costs.