Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

17 December 2020*

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(Failure of a Member State to fulfil obligations – Area of freedom, security and justice – Policies on border checks, asylum and immigration – Directives 2008/115/EC, 2013/32/EU and 2013/33/EU – Procedure for granting international protection – Effective access – Border procedure – Procedural safeguards – Compulsory placement in transit zones – Detention – Return of illegally staying third-country nationals – Appeals brought against administrative decisions rejecting the application for international protection – Right to remain in the territory)

In Case C-808/18,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 21 December 2018,

**European Commission**, represented by M. Condou-Durande and by A. Tokár and J. Tomkin, acting as Agents,

applicant,

v

**Hungary**, represented by M.Z. Fehér and by M.M. Tátrai, acting as Agents,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, M. Ilešič and N. Wahl, Presidents of Chambers, E. Juhász, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos (Rapporteur), P.G. Xuereb and I. Jarukaitis, Judges,

Advocate General: P. Pikamäe,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 10 February 2020,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2020,

gives the following

## Judgment

1 By its application, the European Commission requests the Court to find that Hungary has failed to fulfil its obligations under Articles 3 and 6, Article 24(3), Article 43 and Article 46(5) 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 (OJ 2013 L 180, p. 60), Article 2(h) and 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 (OJ 2013 L 180, p. 96), and Article 5, Article 6(1) and 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 (OJ 2008 L 348, p. 98), read in combination with Articles 6, 18 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'):

– in requiring that asylum applications be lodged in person with the competent authority, and exclusively in transit zones, which it allows only a small number of persons to enter;

– in applying a special procedure as a general rule, during which the safeguards laid down in Directive 2013/32 are not observed;

– in requiring that a procedure be applied to all asylum applicants, with the exception of unaccompanied minors under 14 years of age, the result of which is that they must remain in detention throughout the duration of the asylum procedure in the facilities of transit zones which they may only leave in the direction of Serbia, and in not coupling that detention with the safeguards laid down in Directive 2013/33;

– in moving, to the other side of the border fence, third-country nationals staying illegally in Hungarian territory, 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;

– in failing to transpose, into its national law, Article 46(5) of Directive 2013/32 and in adopting provisions which derogate from the general rule of automatic suspensory effect of appeals by applicants for international protection in situations not covered by Article 46(6) of that directive.

## Legal context

### *European Union law*

*Directive 2008/115*

2 Article 2 of Directive 2008/115 provides:

‘1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.

2. 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 [Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1)] 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;

…’

3 According to Article 3 of that directive:

‘For the purpose of this Directive the following definitions shall apply:

…

2. “illegal stay” means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;

…’

4 Article 5 of that directive provides:

‘When implementing this Directive, Member States shall take due account of:

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.’

5 Article 6(1) and (2) of the same directive provides:

‘1. 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.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national's immediate departure is required for reasons of public order or national security, paragraph 1 shall apply.'

6 Article 12(1) of Directive 2008/115 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.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.'

7 According to Article 13(1) of that directive:

'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.'

8 According to Article 18 of that directive:

'1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. 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.'

*Directive 2013/32*

9 Recital 29 of Directive 2013/32 is worded as follows:

'Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.'

10 Article 2 of that directive provides:

‘For the purposes of this Directive:

…

(c) “applicant” means a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

(d) “applicant in need of special procedural guarantees” means 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;

(e) “final decision” means a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU [of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9)] and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome;

…

(p) “remain in the Member State” means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for international protection has been made or is being examined;

…’

11 Article 3(1) of that directive provides:

‘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.’

12 Article 6 of the same 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.

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

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

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

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

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.'

13 According to Article 7 of Directive 2013/32:

'1. Member States shall ensure that each adult with legal capacity has the right to make an application for international protection on his or her own behalf.

…

3. Member States shall ensure that a minor has the right to make an application for international protection either on his or her own behalf, if he or she has the legal capacity to act in procedures according to the law of the Member State concerned, or through his or her parents or other adult family members, or an adult responsible for him or her, whether by law or by the practice of the Member State concerned, or through a representative.'

14 Article 8(1) of that directive provides:

'Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.'

15 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).'

16 According to Article 26 of the same directive:

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

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

17 In accordance with Article 28(1) of Directive 2013/32:

‘When there is reasonable cause to consider that an applicant has implicitly withdrawn or abandoned his or her application, Member States shall ensure that the determining authority takes a decision either to discontinue the examination of the application, or, provided that the determining authority considers the application to be unfounded on the basis of an adequate examination of its substance in line with Article 4 of Directive [2011/95], to reject the application.’

18 According to Article 31(8) of that directive:

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

(a) the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection by virtue of Directive [2011/95]; or

(b) the applicant is from a safe country of origin within the meaning of this Directive; or

(c) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision; or

(d) it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality; or

(e) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of Directive [2011/95]; or

(f) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); or

(g) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal; or

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

(i) the applicant refuses to comply with an obligation to have his or her fingerprints taken …; or

(j) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.'

19 Article 33(2) of that directive provides:

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

(a) another Member State has granted international protection;

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

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

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

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

20 Under Article 39(1) of the same directive:

'Member States may provide that no, or no full, examination of the application for international protection and of the safety of the applicant in his or her particular circumstances as described in Chapter II shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.'

21 According to Article 41(1) of Directive 2013/32:

'Member States may make an exception from the right to remain in the territory where a person:

(a) has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State; or

(b) makes another subsequent application in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded.

Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect refoulement in violation of that Member State's international and Union obligations.'

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

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

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

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

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

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

23 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.

…'

*Directive 2013/33*

24 Recital 17 of Directive 2013/33 states:

'The grounds for detention set out in this Directive are without prejudice to other grounds for detention, including detention grounds within the framework of criminal proceedings, which are applicable under national law, unrelated to the third-country national's or stateless person's application for international protection.'

25 Article 2 of that directive provides:

'For the purposes of this Directive:

…

(b) "applicant": means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

…

(h) "detention": means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement;

…'

26 Article 3(1) of that directive provides:

'This Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law.'

27 Article 7 of the same directive provides:

'1. Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.

2. Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection.

3. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national law.

…'

28 According to 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 [(OJ 2013 L 180, p. 31)].

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

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

29 According to Article 9(2) of that directive:

'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.'

30 According to Article 10(1) of that directive:

'Detention of applicants shall take place, as a rule, in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners and the detention conditions provided for in this Directive shall apply.

…'

31 Article 11 of the same directive provides:

'1. The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities.

Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.

2. Minors shall be detained only as a measure of last resort and after it 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.

The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States.

Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.

3. Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible.

Unaccompanied minors shall never be detained in prison accommodation.

As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.

Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

…'

32 According to Article 18(9) of Directive 2013/33:

'In duly justified cases, Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:

(a) an assessment of the specific needs of the applicant is required, in accordance with Article 22;

(b) housing capacities normally available are temporarily exhausted.

Such different conditions shall in any event cover basic needs.'

33 According to Article 21 of that directive:

'Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.'

34 The third subparagraph of Article 22(1) of that directive provides:

'Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.'

### *Hungarian law*

*The Law on the right to asylum*

35 Article 4(3) of the Menedékjogról szóló 2007. évi LXXX. törvény (Law No LXXX of 2007 on the right to asylum) (*Magyar Közlöny* 2007/83; 'the Law on the right to asylum') provides:

'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.'

36 Article 5(1) of the Law on the right to asylum provides:

'An applicant for asylum shall be entitled:

(a) to reside, in accordance with the conditions laid down in this Law, in Hungarian territory and, in accordance with the specific regulations, to receive an authorisation to reside in Hungarian territory;

(b) in accordance with the conditions laid down in this Law and the specific legislation, to receive benefits, assistance and accommodation;

(c) to occupy a post at the place where the reception centre is located or at a place of work determined by the public employer within nine months following the lodging of the application for asylum then, after that period, in accordance with the general rules applicable to foreign nationals.'

37 Article 29 of that law provides:

'Reception conditions should be ensured taking into account the specific needs of persons in need of special treatment.'

38 According to Article 30(3) of that law:

'When adopting a decision restricting or withdrawing material reception conditions

(a) the competent asylum authority must take into consideration the individual situation of the applicant for asylum, taking into account, inter alia, persons who require special treatment, and

(b) the restriction or withdrawal must be proportionate to the offence committed.'

39 Article 31/A of the same law states:

'1. The competent asylum authority may, in conducting the asylum procedure, or in carrying out a transfer under Regulation [No 604/2013] – while taking into account the limits laid down in Article 31/B – detain applicants for asylum whose residence permits are based solely on the lodging of an application

(a) when it allows the identity or nationality of the person concerned to be established where that is uncertain,

(b) when the person concerned is subject to a return procedure and there are objective factors – such as the fact that he or she has already had the opportunity to access the international protection procedure – demonstrating, or other good reasons for believing, that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision,

(c) to establish the facts and circumstances on which the application for asylum is based where those cannot be obtained without detention, in particular where there is a risk of the person concerned absconding,

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

(e) when the application was lodged in the international zone of an airport,

(f) or when the detention is necessary to carry out transfer procedures under [Regulation No 604/2013] and there is a serious risk of the person concerned absconding.

…

2. The detention of an applicant for asylum may be ordered following an individual assessment of the particular case and only if the objective pursued cannot be achieved by a measure ensuring that he or she remains available to the authorities.

…

5. The detention of an asylum applicant shall be ordered by a decision which is enforceable upon notification.

…’

40 Article 31/B of the Law on the right to asylum provides:

‘1. Detention may not be ordered on the sole 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.

…’

41 Article 32/D(1) of that law provides:

‘The application is a declaration, made by a party, on the basis of which the competent asylum authority initiates an administrative procedure.’

42 According to Article 35 of that law:

‘1. The asylum procedure begins with the lodging of the asylum application with the competent asylum authority. The asylum applicant shall be subject to the asylum procedure

(a) from the lodging, in person, of the application for international protection with the competent asylum authority, or

(b) where he or she has lodged his or her application for international protection with another authority, from the registration of that application by the competent asylum authority

until notification of the decision taken at the end of the procedure when it is no longer subject to a remedy.

…'

43 Article 51 of the same law provides:

'1. If the conditions governing the application of [Regulations No 604/2013 and No 118/2014] are not met, the competent asylum authority shall decide on the admissibility of the application and on whether the conditions for deciding on the subject of the application in an accelerated procedure are met.

2. The application shall be inadmissible

…

(e) if there is, in respect of the applicant, a third country which may be considered to be a safe third country for him or her,

…

7. The application may be decided in an accelerated procedure if the applicant

…

(h) entered Hungarian territory unlawfully or prolonged his or her stay unlawfully and did not make an asylum application within a reasonable time, even though he or she had the opportunity to do so previously, and has been unable to provide any valid reason to justify that delay;

…'

44 According to Article 53 of the Law on the right to asylum:

'1. The competent asylum authority shall reject the application by order if it finds that one of the conditions laid down in Article 51(2) is met.

2. A rejection decision taken on the ground that the application is inadmissible, or delivered in an accelerated procedure, may be challenged in administrative proceedings.

…

6. In administrative proceedings, the lodging of an application does not have the effect of suspending enforcement of the decision, with the exception of asylum decisions taken pursuant to Article 51(2)(e) and (7)(h).'

45 On 15 September 2015, the Egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról szóló 2015. évi CXL. törvény (Law No CXL of 2015 amending certain laws in the context of managing mass immigration) (*Magyar Közlöny* 2015/124; 'the Law on the management of mass immigration') entered into force. The Law on the management of mass immigration, which

amended, inter alia, the Law on the right to asylum, introduced the concepts of 'crisis situation caused by mass immigration' and 'border procedure'. It also provides for the creation of transit zones within which asylum procedures are to be conducted.

46 Under the Law on the management of mass immigration, in a 'crisis situation caused by mass immigration' applications lodged in the transit zones established at the border are to be examined in accordance with the rules governing border procedure.

47 In that regard, Article 71/A of the Law on the right to asylum, which was introduced by the Law on the management of mass immigration, provides:

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

(a) before entering Hungarian territory; or

(b) after having been intercepted in Hungarian territory within a distance of 8 km 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) [(OJ 2016 L 77, p. 1)] or from the signs demarcating the border, and escorted beyond the gate of a facility for maintaining order at the border, as provided for in the Az államhatárról szóló 2007. évi LXXXIX. törvény (Law No LXXXIX of 2007 on State borders);

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

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

(3) The competent asylum authority shall determine as a priority the admissibility of the application for asylum, at the latest within 8 days following the lodging of the application. It shall notify its decision without delay.

(4) Where four weeks have elapsed since the lodging of the application, the aliens police authority shall authorise entry into Hungarian territory in accordance with the law.

(5) Where the application is not inadmissible, the aliens police authority shall authorise entry into Hungarian 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 the border procedure shall not apply to persons in need of special treatment.

…'

48 The Határőrizeti területen lefolytatott eljárás szigorításával kapcsolatos egyes törvények módosításáról szóló 2017. évi XX. törvény (Law No XX of 2017 amending certain laws related to the strengthening of the procedure conducted in the guarded border area) (*Magyar Közlöny* 2017/39; 'Law No XX of 2017') expanded the cases in which the Government may declare a 'crisis situation caused by mass immigration', within the meaning of the Law on the right to asylum, and amended the provisions allowing derogation from the general provisions of that law in such a situation.

49 Since the entry into force of Law No XX of 2017, Article 80/A of the Law on the right to asylum has provided:

'1. A crisis situation caused by mass immigration may be declared:

(a) if the number of asylum applicants arriving in Hungary exceeds on average:

(aa) 500 persons per day for one month;

(ab) 750 persons per day for two consecutive weeks; or

(ac) 800 persons per day for one week;

(b) if the number of persons present in transit zones in Hungary – with the exception of those assisting foreign nationals – exceeds on average:

(ba) 1 000 persons per day for one month;

(bb) 1 500 persons per day for two consecutive weeks; or

(bc) 1 600 persons per day for one week;

(c) if, in addition to the cases referred to in (a) and (b), a circumstance relating to such a migration situation arises which:

(ca) directly threatens security at the external Hungarian border, as defined in Article 2(2) of the Schengen Borders Code;

(cb) directly threatens public security, public order or public health within a 60-metre strip of Hungarian territory from the line of the external Hungarian border, as defined in Article 2(2) of the Schengen Borders Code, or from the signs indicating the border, or in any locality situated in Hungarian territory, in particular if conflicts break out or acts of violence are committed in a reception centre or an accommodation establishment for foreign nationals present in that demarcated area or in that locality and its surroundings.

2. On the initiative of the chief of the national police and the head of the competent asylum authority and on a proposal from the competent minister, the Government may declare by decree a crisis situation caused by mass immigration. It may cover the whole or a specified part of the Hungarian territory.

…

4. The government decree referred to in paragraph 2 shall remain in force for a maximum period of six months, unless the Government extends its validity. The Government may extend the validity of the decree referred to in paragraph 2 if the conditions applicable to the declaration of a crisis situation caused by mass immigration are met at the time of the extension.

…

6. In a crisis situation caused by mass immigration, the provisions of Articles 80/B to 80/G are to be applied only to the territory defined in the government decree referred to in paragraph 2, and only in so far as is necessary to address the root causes of such a situation and to manage that situation.'

50 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 with the derogations provided for in Articles 80/I to 80/K.'

51 Article 80/I of that law provides:

'The following provisions shall not be applied:

…

(b) Article 35(1) and (6);

…

(i) Articles 71/A to 72.'

52 According to Article 80/J of that law:

'1. The 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, a measure or a penalty restricting his or her personal liberty;

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

(c) is staying legally in Hungarian territory 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 or her 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 subject to a remedy.

3. The police shall escort a foreign national staying illegally in Hungarian territory who declares his or her intention to lodge an application for asylum beyond the gate of a facility for maintaining order at the border, as provided for by the Az államhatárról szóló 2007. évi LXXXIX. törvény (Law No LXXXIX of 2007 on State borders). The person concerned may lodge his or her application for asylum in accordance with the provisions of paragraph 1.

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 [Regulation No 604/2013] or the decision which is no longer subject to a remedy 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 14 years of age, the competent asylum authority shall conduct the asylum procedure in accordance with the general rules, after the minor has entered Hungarian territory. That authority shall find him or her temporary accommodation without delay and, simultaneously, 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 designated guardian to the unaccompanied minor and the competent asylum authority without delay.'

53 According to Article 80/K of the same law:

‘1. A rejection decision taken on the ground that the application is inadmissible, or delivered in an accelerated procedure, may be challenged within three days. The competent asylum authority shall within three days communicate to the court the application, together with the documents relating to the case and the defence.

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

…

(d) leaves the transit zone.

…

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

…

7. Decisions addressed to asylum applicants who have left the transit zone shall be notified to them by way of a notice. …

…

10. Upon notification of a decision which is no longer subject to a remedy, the asylum applicant is to leave the transit zone.

11. If the asylum applicant lodges a fresh application when a final discontinuation or rejection decision has been taken on his or her previous application, he or she shall forfeit the rights provided for in Article 5(1)(a) to (c).’

*The Law on State borders*

54 Article 5 of the Az államhatárról szóló, 2007. évi LXXXIX (Law No LXXXIX of 2007 on State borders) (*Magyar Közlöny* 2007/88; ‘the Law on State borders’) provides:

‘1. In accordance with this Law, it is possible to use, in Hungarian territory, a 60-metre strip from the line of the external border as defined in Article 2(2) of the Schengen Borders Code, or from the signs demarcating the border, in order to build, establish or operate facilities for maintaining order at the border – including those referred to in Article 15/A – and to carry out tasks relating to defence and national security, disaster management, border surveillance, asylum and migration police.

1a. The police may, in Hungarian territory, apprehend foreign nationals staying illegally in Hungarian territory, within an 8-kilometre strip from the line of the external border as defined in Article 2(2) of the Schengen Borders Code or from the signs demarcating the border, and escort them beyond the gate of the nearest facility referred to in paragraph 1, except where they are suspected of having committed an offence.

1b. In a crisis situation caused by mass immigration, the police may, in Hungarian territory, apprehend foreign nationals staying illegally in Hungarian territory and escort them beyond the gate of the nearest facility referred to in paragraph 1, except where they are suspected of having committed an offence.

…’

55 Article 15/A of that law states:

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

2. The applicant for international protection present in the transit zone may enter Hungarian territory 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 the provisions of Article 71/A(4) and (5) of the Law on the right to asylum.

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

3. In the transit zone, public bodies shall perform their duties and exercise their powers in accordance with the legislative provisions applicable to them.

4. Contrary to the provisions referred to in paragraph 1, in a crisis situation created by mass immigration, a facility situated in a place other than that indicated in Article 5(1) may also be designated as a transit zone.’

*The Code of Administrative Procedure*

56 Article 39(6) of the Közigazgatási perrendtartásról szóló 2017. évi I. törvény (Law No I of 2017 establishing the Code of Administrative Procedure) (*Magyar Közlöny* 2017/30; ‘the Code of Administrative Procedure’) states:

‘Save as otherwise provided for in this Law, the lodging of an application does not have the effect of suspending the entry into force of the administrative measure.’

57 Article 50 of Code of Administrative Procedure provides:

‘1. Any person whose right or legitimate interest has been infringed by an action of the authorities or by the maintenance of a situation resulting from that action may, at any stage of the proceedings, make an application for immediate judicial protection to the competent court having jurisdiction, in order to prevent the occurrence of an imminent risk of harm, to obtain an interim decision concerning the legal relationship at issue or the maintenance of the situation which gave rise to the dispute.

2. In an application for immediate protection, the following may be requested:

(a) suspensory effect,

…’

*Government Decree 301/2007*

58 Article 33 of the A menedékjogról szóló 2007. évi LXXX. törvény végrehajtásáról szóló, 301/2007. (XI. 9.) Korm. rendelet (Government Decree 301/2007. (XI. 9.), relating to the implementation of the Law on the right to asylum) (*Magyar Közlöny* 2007/151) provides:

'1. If justified in the light of the individual situation of the applicant for asylum in need of special treatment, the competent asylum authority is required to ensure that he or she is provided with separate accommodation in the reception centre.

2. Family unity should also be preserved – in so far as is possible – where a person in need of special treatment is provided with separate accommodation.'

59 Article 34(1) of that decree provides:

'In addition to the provisions of Articles 26 and 27, applicants for asylum in need of special treatment – in so far as is necessary in view of their individual situation and also on the basis of a medical opinion – shall have the right to access, free of charge, health services justified in the light of their state of health, rehabilitation measures, psychological care, including clinical psychology treatment, as well as psychotherapeutic treatment.'

**Pre-litigation procedure**

60 On 11 December 2015, the Commission sent Hungary a letter of formal notice alleging that that Member State had infringed, inter alia, Article 46(1), (3), (5) and (6) of Directive 2013/32.

61 Hungary replied to that letter of formal notice asserting that its legislation was compatible with EU law.

62 On 7 March 2017, Hungary adopted Law No XX of 2017. The Commission took the view that that law was such as to give rise to concerns additional to those which had already been set out in the letter of formal notice.

63 On 18 May 2017, the Commission therefore sent Hungary a supplementary letter of formal notice by which it alleged that that Member State 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.

64 By letter of 18 July 2017, Hungary replied to that supplementary letter of formal notice, before supplementing its reply on 2 October and 20 November 2017. While declaring that its legislation was compatible with EU law, that Member State nevertheless amended it in certain specific respects.

65 On 8 December 2017, the Commission sent Hungary a reasoned opinion, which was notified to it on the same day, in which it declared that that Member State 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, read in conjunction with Articles 6, 18 and 47 of the Charter:

– in limiting, in appeal proceedings against a decision 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;

– in failing to transpose, into its national law, Article 46(5) of Directive 2013/32 and in adopting provisions which derogate from the general rule of the 'automatic suspensory effect' of appeals by applicants for international protection in situations not covered by Article 46(6) of that directive;

– in forcibly moving, beyond the border fence, third-country nationals staying illegally in Hungarian territory, 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;

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

– in requiring that a procedure be applied to all asylum applicants, with the exception of unaccompanied minors under 14 years of age, the result of which is that they must remain in detention throughout the duration of the asylum procedure in the facilities of a transit zone which they may only leave in the direction of Serbia, and in not coupling that detention with the appropriate safeguards;

– in reducing, from eight days to three, the deadline for applying for review of first-tier decisions rejecting an asylum application.

66 On 8 February 2018, Hungary replied to the Commission's reasoned opinion, restating its view that its legislation was in conformity with EU law.

67 On 21 December 2018, not being convinced by Hungary's observations, the Commission decided to bring the present action.

## The action

### *Preliminary observations*

68 According to the settled case-law of the Court, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (judgment of 28 January 2020, *Commission* v *Italy (Directive combating late payment)*, C-122/18, EU:C:2020:41, paragraph 58 and the case-law cited). The assessment as to whether or not there has been a failure to fulfil obligations as claimed must therefore relate to the state of the domestic legislation in force on that date (see, to that effect, judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraphs 23 and 24).

69 At the hearing, Hungary confirmed that, at the end of the period laid down in the reasoned opinion sent to it by the Commission, namely 8 February 2018, the provisions of Law No XX of 2017 were applicable throughout the Hungarian territory, the application of the government decree which had declared, throughout its territory, a 'crisis situation caused by mass immigration', within the meaning of the Law on the right to asylum, having been extended at least until that date.

70 It follows that, in examining the compatibility of the Hungarian legislation with the provisions of EU law that the Commission considers to have been infringed by Hungary, the Court must take into consideration the amendments made to that legislation by Law No XX of 2017.

### *The first complaint, relating to access to the international protection procedure*

*Arguments of the parties*

71 The Commission is of the view that Hungary has infringed Articles 3 and 6 of Directive 2013/32 in requiring asylum applications to be lodged in person and exclusively in the transit zones of Röszke (Hungary) and Tompa (Hungary), access to which has been severely restricted by the Hungarian authorities.

72 In that regard, in the first place, the Commission notes that, when a crisis situation caused by mass immigration has been declared, Article 80/J(1) of the Law on the right to asylum, introduced by Law No XX of 2017, requires, in principle, all asylum applications to be lodged, in person, in the transit zones of Röszke and Tompa, at the Serbian-Hungarian border.

73 The Commission also submits that the Hungarian authorities permit only a very limited number of daily entries into each of those transit zones. It is thus established that, from 23 January 2018, one person per day could enter each of those transit zones, creating a waiting period of several months before one of them could be accessed for an application for international protection to be made there.

74 Admission into each of the transit zones of Röszke and Tompa is carried out on the basis of an informal waiting list, which is sent by 'community leaders' to the Hungarian authorities. There being no infrastructure on the strip of land separating the Serbian-Hungarian border from those transit zones, few persons wait at their entrance, the majority of them staying in the Serbian villages in the vicinity.

75 In the second place, 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 wishing to obtain international protection are able to make an application in their territory and, after arriving there, are afforded access to the procedure for the grant of that protection. That requirement applies irrespective of the third country through whose territory the applicant reaches the border of a Member State.

76 In allowing only those persons who are present in the transit zones of Röszke and Tompa to make an application for international protection and have that application registered and in severely restricting access to those zones, however, Hungary does not afford persons present at its borders the possibility of making an application for international protection and having it registered within the time limit laid down in Directive 2013/32.

77 According to the Commission, irrespective of the exact number of persons waiting, a system which makes the right to registration conferred by Article 6 of Directive 2013/32 conditional upon the application being made at a specific place, access to which is limited for a long period, is not consistent with the requirement, set in the same article, that access to the procedure must be ensured in due time.

78 Hungary replies, in the first place, that applicants for international protection do not have the right to choose their country of asylum and that a portion of the persons presenting themselves at its borders are not fleeing persecution which directly threatens them.

79 It is appropriate also to take into consideration not only Article 6(1) of Directive 2013/32, but also of paragraphs 2 and 3 of that article, which show that the EU legislature allows Member States to require that applicants for international protection lodge their application in person at a designated place, which necessarily implies that it may be impossible for a very large number of applications to be lodged at the same time.

80 Moreover, Directive 2013/32 does not determine the number of places in which each Member State must ensure the possibility of lodging asylum applications. According to Hungary, on the expiry of the period laid down in the reasoned opinion, there were in its territory two transit zones, situated in Röszke and Tompa respectively, on the route of applicants for international protection in which it was possible to lodge such applications. In addition, the majority of the persons entering Hungary illegally would attempt to cross the Serbian-Hungarian border in the vicinity of those transit zones, so it could reasonably be expected that those persons would lodge their application within those transit zones.

81 EU law therefore does not preclude Article 80/J(1) of the Law on the right to asylum, which incidentally applies only in the event of a declaration of a 'crisis situation caused by mass immigration'.

82 Hungary also observes that such a crisis situation may be declared, inter alia, if it is justified by national requirements relating to law and order and internal security. It claims that, in the case at hand, more than 17 000 offences related to illegal immigration were committed in Hungary in 2018. The obligation to lodge applications for international protection in the transit zones thus enhances the effectiveness of the fight against human trafficking and satisfies the requirement of protecting the borders of the Schengen area.

83 In addition, Article 80/J(1) of the Law on the right to asylum provides for exceptions to the obligation to lodge the application for asylum in those transit zones. Persons staying in Hungarian territory legally can thus lodge their application at any place in that territory.

84 Moreover, once the application has been lodged in the transit zone concerned, the procedure is initiated in accordance with the general rules. Article 32/D of the Law on the right to asylum thus ensures that, once the application has been made, the competent asylum authority initiates that procedure immediately. Registration of the application therefore takes place immediately after it has been lodged in the transit zone concerned or, in any event, within 24 hours at the latest, in accordance with Article 6(1) of Directive 2013/32.

85 Hungary disputes, in the second place, the fact that access to the transit zones has been restricted. Moreover, while the Hungarian authorities are aware of the practice whereby asylum applicants accessing the asylum procedure in Serbia or receiving assistance in that third State report to the transit zones in a particular order, according to lists drawn up by themselves, by the Serbian authorities or by certain organisations, the Hungarian authorities have no influence on the order thereby established and do not participate in the drawing up of such lists, nor do they use them.

86 Lastly, contrary to what the Commission claims, the absence of long queues at the entrance of the transit zones of Röszke and Tompa can be explained by the fact that the persons concerned are the subject – or have already been the subject – of an ongoing asylum procedure in Serbia and are receiving assistance in that third State.

*Findings of the Court*

87 By its first complaint, the Commission criticises Hungary, in essence, for having infringed Articles 3 and 6 of Directive 2013/32, in allowing only a very small number of persons to access on a daily basis, from Serbia, the transit zones of Röszke and Tompa, situated in the immediate vicinity of the Serbian-Hungarian border, even though applications for international protection can be made only in person and only in those transit zones.

88 In the first place, it is appropriate to note that, first, according to Article 3(1) of Directive 2013/32, that directive applies 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.

89 Second, Article 6 of that directive, entitled 'Access to the procedure', provides, in the first subparagraph of paragraph 1 thereof, that, when a person makes an application for international protection to an authority competent under national law for registering such applications, the registration is to take place no later than three working days after the application is made. The second subparagraph of Article 6(1) of the same directive specifies that, 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 are to ensure that the registration takes place no later than six working days after the application is made.

90 In so doing, the EU legislature took a broad view of authorities which, without being competent for registering applications for international protection, are nevertheless likely to receive such applications, within the meaning of the second subparagraph of Article 6(1) of Directive 2013/32. Thus, a national authority may, in principle, be regarded as such, if it is plausible that an application for international protection is being made to it by a third-country national or a stateless person (see, to that effect, judgment of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU, EU:C:2020:495, paragraphs 57 to 59). Furthermore, the third subparagraph of Article 6(1) of that directive explicitly mentions, as constituting such authorities, the police, border guards, immigration authorities and personnel of detention facilities.

91 Third, 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 Article 6(1) of that directive, Article 6(5) of the same directive allows Member States, by way of derogation, to register applications for international protection within 10 working days after they have been made.

92 Fourth, it should be added that, in accordance with Article 6(2) and (3) of Directive 2013/32, persons who have made an application for international protection must have an effective opportunity to lodge it as soon as possible, it being understood that, without prejudice to such a right, Member States may require that such an application be lodged in person and/or in a place designated for that purpose.

93 It follows from the foregoing that the Member States are, generally, obliged to register, within a period laid down in Article 6 of Directive 2013/32, any application for international protection made by a third-country national or a stateless person to the national authorities falling within the scope of that directive and that they must then ensure that the persons concerned have an effective opportunity to lodge their application as soon as possible (see, to that effect, judgment of 25 January 2018, *Hasan*, C-360/16, EU:C:2018:35, paragraph 76).

94 That being the case, it should be emphasised, in the second place, that, as the Commission confirmed at the hearing, its first complaint relates not to the procedure for registration or lodging of the application for international protection as such, but to the modalities under which it must be possible, prior to that, to make such an application to the Hungarian authorities.

95 In that regard, it is important to bear in mind, in the first place, that it is apparent from Article 7 of Directive 2013/32 that Member States are required to guarantee the right for any third-country national or stateless person to make an application for international protection on his or her own behalf or through a third party.

96 That Article 7, read in conjunction with Article 3(1) thereof, therefore confers on any third-country national or stateless person the right to make an application for international protection, including at the borders of a Member State or in its transit zones. In that regard, while it is true that, as Hungary observes, Article 6(3) of that directive allows Member States to require that applications for international protection be lodged at a designated place, it must be noted that no provision of that directive establishes a similar rule regarding the making of applications for international protection.

97 Such an application is, moreover, deemed to have been made as soon as the person concerned has declared, to one of the authorities referred to in Article 6(1) of Directive 2013/32, his or her wish to receive international protection, without the declaration of that wish being subject to any administrative formality whatsoever (see, to that effect, judgment of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU, EU:C:2020:495, paragraphs 93 and 94).

98 It therefore follows from Article 6 of Directive 2013/32 that any third-country national or stateless person has the right to make an application for international protection to one of the authorities referred to in that article, by declaring, to one of them, his or her wish to receive international protection.

99 Second, it should be stressed that making the application for international protection to one of the authorities referred to in Article 6 of Directive 2013/33 is an essential step in the procedure for granting international protection.

100 After all, a third-country national or stateless person is an applicant for international protection within the meaning of Article 2(c) of Directive 2013/32 as soon as he or she makes such an application (judgment of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU, EU:C:2020:495, paragraph 92).

101 Furthermore, it is from the date on which the application for international protection is made that the time limit within which that application must be registered, in accordance with Article 6(1) of that directive, starts to run and that the applicant must be given the opportunity to lodge his or her application for international protection as soon as possible, as Article 6(2) of that directive stipulates. It should also be noted that the lodging of that application triggers the running of the time limit within which, in accordance with Article 31 of that directive, the determining authority must, in principle, take a decision on the application for international protection.

102 The right to make such an application thus makes the effective observance of the applicant's rights conditional on that application being registered and being able to be lodged and examined within the periods prescribed by Directive 2013/32 including, ultimately, the effectiveness of the right to asylum, as guaranteed by Article 18 of the Charter.

103 Accordingly, a Member State cannot, without undermining the effectiveness of Article 6 of that directive, unjustifiably delay the time at which the person concerned is given the opportunity to make his or her application for international protection.

104 Third, it should be recalled that the very objective of that directive, in particular that of Article 6(1) thereof, is to ensure effective, easy and rapid access to the procedure for international protection (judgment of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU, EU:C:2020:495, paragraph 82).

105 Article 8(1) of the same directive also bears out that objective. The aim of that provision, after all, is to facilitate the making of applications for international protection by requiring inter alia Member States to provide any third-country national or stateless person present at a border crossing point – including a transit zone at the external borders – with information on the possibility of making such an application, where there are indications that he or she may wish to make an application of that sort.

106 It follows from all the foregoing considerations that Article 6 of Directive 2013/32 requires Member States to ensure that the persons concerned are able to exercise in an effective manner the right to make an application for international protection, including at their borders, as soon as they declare their wish of doing so, so that that application is registered and can be lodged and examined in effective observance of the time limits laid down by that directive.

107 It is necessary to examine whether, in the case at hand, Hungary complied with that requirement.

108 In that regard, that Member State confirms that Article 80/J of the Law on the right to asylum requires third-country nationals or stateless persons who, arriving from Serbia, wish to access, in Hungary, the international protection procedure, not only to lodge, but also to make their applications for international protection, in one of the two transit zones of Röszke and Tompa.

109 Thus, in its observations, Hungary states that the time limit laid down in Article 6(1) of Directive 2013/32 for registering an application for international protection cannot start to run until the applicants for international protection have entered one of those transit zones. It follows that their applications can be made only in those zones, which Hungary, moreover, confirmed at the hearing.

110 With the benefit of that preliminary clarification, it should be examined whether, as the Commission submits, the Hungarian authorities have effected a drastic limitation of the number of persons who, in practice, are authorised to enter each of the same transit zones daily in order to make an application for international protection there.

111 In that regard, it should be recalled, first of all, that an administrative practice can be the subject matter of an action for failure to fulfil obligations when it is, to some degree, of a consistent and general nature (see, inter alia, judgments of 9 May 1985, *Commission* v *France*, 21/84, EU:C:1985:184, paragraph 13, and of 5 September 2019, *Commission* v *Italy (Bacteria Xylella fastidiosa)*, C-443/18, EU:C:2019:676, paragraph 74).

112 In addition, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (see, inter alia, judgments of 27 April 2006, *Commission* v *Germany*, C-441/02, EU:C:2006:253, paragraph 48, and of 2 May 2019, *Commission* v *Croatia (Disposal in Biljane Donje)*, C-250/18, not published, EU:C:2019:343, paragraph 33). It is only where the Commission has adduced sufficient evidence to establish that the national provisions transposing a directive are not applied correctly in practice in the territory of the defendant Member State that it is incumbent on the latter to challenge in substance and in detail the information produced and the inferences drawn (see, inter alia, judgments of 26 April 2005, *Commission* v *Ireland*, C-494/01, EU:C:2005:250, paragraph 44, and of 28 March 2019, *Commission* v *Ireland (System for collecting and treating waste water)*, C-427/17, not published, EU:C:2019:269, paragraph 39).

113 With regard, in particular, to a complaint concerning the implementation of a national provision, the Court has held that proof of a Member State's failure to fulfil its obligations requires production of evidence different from that usually taken into account in an action for failure to fulfil obligations concerning solely the terms of a national provision, and that in those circumstances the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration and/or courts, for which the Member State concerned is answerable (judgments of 27 April 2006, *Commission* v *Germany*, C-441/02, EU:C:2006:253, paragraph 49, and of 9 July 2015, *Commission* v *Ireland*, C-87/14, EU:C:2015:449, paragraph 23).

114 In the present case, as the Advocate General observed in point 59 of his Opinion, the Commission annexed to its application a number of reports supporting its assertion that third-country nationals or stateless persons wishing to make an application for international protection to the authorities in the transit zones of Röszke and Tompa were subject to a waiting period of several months, caused by a consistent and generalised practice of the Hungarian authorities, which was still in force at the end of the period laid down in the reasoned opinion, namely on 8 February 2018, and consisted in limiting authorised entry into both transit areas to a significantly reduced number of persons per day.

115 Thus, according to one of the three reports of the United Nations High Commissioner for Refugees (UNHCR), annexed to the Commission's application, from October 2015 onwards the Hungarian authorities decided to limit the number of daily authorised entries into each of the transit zones of Röszke and Tompa. It is also apparent from those three reports that the number of daily authorised entries into those transit zones decreased gradually and steadily, such that, in 2018, only two persons per day were authorised to enter each of those transit zones. It is important to add, in that regard, that those reports are particularly relevant in the light of the role conferred on the UNHCR by the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 137, No 2545 (1954)), in consistency with which the rules of European Union law dealing with asylum must be interpreted (see, to that effect, judgment of 23 May 2019, *Bilali*, C-720/17, EU:C:2019:448, paragraph 57 and the case-law cited).

116 Moreover, the data contained in those reports coincide, to a large extent, with the observations made in two 2017 reports from, first, the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees and, second, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, annexed to the application and on which the Commission also relies.

117 It is also apparent from the UNHCR reports annexed to the application that the setting by the Hungarian authorities of a maximum number of authorised daily entries into each of the transit zones of Röszke and Tompa had the consequence that third-country nationals or stateless persons, present in Serbia in the immediate vicinity of the Serbian-Hungarian border and wishing to make an application for international protection in Hungary, were faced with a waiting time which kept increasing and which, in February 2018, was longer than 11 months.

118 It follows that the Commission has proved, in a sufficiently documented and detailed manner, the existence, at the end of the period laid down in the reasoned opinion, namely 8 February 2018, of a consistent and generalised administrative practice of the Hungarian authorities aimed at limiting access to the transit zones of Röszke and Tompa so systematically and drastically that third-country nationals or stateless persons who, arriving from Serbia, wished to access, in Hungary, the international protection procedure, in practice were confronted with the virtual impossibility of making an application for international protection in Hungary.

119 Such an administrative practice is incompatible with the requirements arising from Article 6(1) of Directive 2013/32.

120 None of the arguments put forward by Hungary is capable of calling such a conclusion into question.

121 In that regard, it should be noted, first of all, that it is true that that Member State disputes the fact that the administrative instructions sought to limit the daily number of applications for international protection that could be made in each of the transit zones of Röszke and Tompa.

122 However, in addition to the fact that that assertion is formally contradicted by the reports referred to in paragraphs 115 and 116 of the present judgment, Hungary has not explained, to the requisite legal standard, the reason why, in the presumed absence of such instructions, waiting lists – the existence of which it acknowledges – had been drawn up in order to establish the order in which persons situated in Serbia, in the immediate vicinity of the transit zones of Röszke and Tompa, and wishing to make an application for international protection in one of those zones, could enter them.

123 In that regard, even if, as Hungary contends, the Hungarian authorities did not participate in the drawing up of those lists or influence the order of access to the transit zones thus established by them, the fact remains that the very existence of the lists has to be seen as the unavoidable consequence of the practice identified in paragraph 118 of the present judgment.

124 Moreover, Hungary's argument that the gradual dissipation of the long queues at the entrance of those transit zones proves that there is no restriction on entry into those same zones cannot succeed, either.

125 After all, it is undisputed that there is no infrastructure available on the strip of land separating the Serbian-Hungarian border from the entry gate of the transit zones of Röszke and Tompa, meaning that it is extremely difficult to remain there for a long period of time. Furthermore, as the Commission has rightly pointed out, it can be inferred from the reports annexed to its application that the length of the queues at the entrance of each of the transit zones has decreased as from the date on which the waiting lists, mentioned in paragraph 122 of the present judgment, appeared, with only the persons placed in a favourable position on those lists being taken, by the Serbian authorities, to the strip of land separating the Serbian-Hungarian border from the entry gate of the transit zone concerned, on the eve of the date prescribed for those persons to enter that transit zone.

126 It follows that the dissipation of the long queues at the entrance of the transit zones of Röszke and Tompa cannot call into question the finding that the Hungarian authorities decided to limit access to those zones drastically.

127 Lastly, although, as Hungary recalls, it is indeed for Member States to ensure, inter alia, that external borders are crossed legally, in accordance with Regulation 2016/399, compliance with such an obligation cannot, however, justify the Member States' infringement of Article 6 of Directive 2013/32.

128 It follows from all the foregoing considerations that Hungary has failed to fulfil its obligations under Article 6 of Directive 2013/32, read in conjunction with Article 3 thereof, in providing that applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wish to access, in its territory, the international protection procedure, may be made only in the transit zones of Röszke and Tompa, while adopting a consistent and generalised administrative practice drastically limiting the number of applicants authorised to enter those transit zones daily.

***The second and third complaints, relating to the detention of applicants for international protection***

*Arguments of the parties*

– *The second complaint*

129 By its second complaint, the Commission criticises Hungary for having infringed Article 24(3) and Article 43 of Directive 2013/32.

130 In the first place, the Commission states, first, that Article 26 of Directive 2013/32 sets out the rule of principle according to which an applicant for international protection may not be held in detention for the sole reason that he or she has made an application for international protection. While it is true that Article 43 of that directive authorises Member States to apply specific rules in that regard, where they establish border procedures, they are nevertheless required, in such a case, to comply with the requirements laid down in Article 43. Law No XX of 2017, however, inserted new provisions which are incompatible with Article 43 of Directive 2013/32.

131 Thus, according to Article 80/J(5) of the Law on the right to asylum, the entirety of the procedure for examination of the application for international protection must be conducted in the transit zone, contrary to what the same Article 43 provides.

132 Moreover, Article 80/J(5) does not limit the duration of the border procedure to four weeks, as is required by Article 43 of Directive 2013/32.

133 The Commission considers, second, that the special procedural guarantees set out in Chapter II of Directive 2013/32 have not been observed, either. Thus, the 'adequate support' which persons in need of special procedural guarantees must receive, in accordance with Article 24(3) of that directive, is not ensured in the procedure laid down in Article 80/J of the Law on the right to asylum, since Law No XX of 2017 suspended, in the event of a crisis situation caused by mass immigration, the application of the provisions of the Law on the right to asylum pursuant to which border procedures are not applicable to applicants in need of such special procedural guarantees.

134 According to the Commission, Article 80/J(5) of the Law on the right to asylum therefore obliges, in breach of Article 24(3) and Article 43 of Directive 2013/32, applicants to remain in the relevant transit zone beyond a four-week period, in order for their application to be fully examined, without that examination being limited to the cases of inadmissibility provided for in Article 33 of that directive or to a substantive examination in the cases listed in Article 31(8) of that directive, and without 'adequate support' being granted to persons in need of the special procedural guarantees set out in Chapter II of Directive 2013/32.

135 In the second place, the Commission is of the view that Article 72 TFEU does not allow Member States to refuse to apply EU law by invoking, in a general manner, the maintenance of law and order and internal security.

136 In that regard, the Commission observes that the crisis situation caused by mass immigration does not appear to have been declared in Hungarian territory for a transitory period.

137 Furthermore, the situation in which a large number of third-country nationals or stateless persons simultaneously request international protection was envisaged by the EU legislature, in particular in Article 6(5), Article 14(1), Article 31(3)(b) and Article 43(3) of Directive 2013/32, in Article 10(1) and Article 18(9) of Directive 2013/33 and in Article 18 of Directive 2008/115. Those rules seek to allow

Member States to opt for flexible solutions in case of emergency and to depart, to a certain extent, from the generally applicable rules. Consequently, the crisis caused by mass immigration on which Hungary relies can and must be resolved in the framework of EU law.

138 Hungary replies, in the first place, that procedures conducted in the transit zones are done so pursuant to the general rules prescribed by Directive 2013/32, such that those procedures do not have to be in conformity with Article 43 of that directive, concerning border procedures.

139 On the basis of the legislation in force as of the expiry of the period laid down in the reasoned opinion, the transit zones of Röszke and Tompa were essentially open reception centres, situated close to the Serbian-Hungarian border, where the entirety of the procedure for examination of asylum applications was conducted.

140 As regards, in the second place, compliance with Article 24(3) of Directive 2013/32, Hungary submits that Article 4(3) of the Law on the right to asylum establishes the principle according to which the provisions of that law must be applied taking into account the specific needs of applicants in need of special procedural treatment. Consequently, the competent asylum authority is constantly attentive to the special needs of those applicants, throughout the procedure. The special needs of the applicants are also taken into account, in more specific ways, in other provisions.

141 In the third place, Article 72 TFEU authorises, in any event, Hungary to declare a crisis situation caused by mass immigration and to apply, in such a situation, derogatory procedural rules. In that regard, that Member State is of the view that the secondary law provisions relied on by the Commission have proved insufficient for adequately managing the prevailing situation as from the 2015 crisis.

– *The third complaint*

142 The Commission criticises Hungary for having failed to fulfil its obligations under Article 2(h) and Articles 8, 9 and 11 of Directive 2013/33, in detaining all applicants for international protection – with the exception of unaccompanied minors under 14 years of age – throughout the duration of the procedure for examination of their application, without observing the guarantees provided for in that regard.

143 The Commission notes, in the first place, that the compulsory stay of applicants in one of the transit zones gives rise to a restriction of their personal liberty so far reaching that it must be treated as detention, within the meaning of Article 2(h) of Directive 2013/33.

144 After all, those transit zones are closed places which, if left by applicants, lead only to Serbia. Moreover, in accordance with Article 80/K(2)(d) of the Law on the right to asylum, the competent asylum authority can discontinue the procedure if the applicant leaves the transit zone in question. That applicant is therefore not genuinely free to leave that zone, since he or she would thereby run the risk of having his or her application closed and thus of losing the possibility of obtaining international protection.

145 The Commission also notes that the time spent by the applicant for international protection in transit zones is an important factor in determining whether a stay in those zones can be regarded as detention. The representatives of the Commission found, during an on-site visit, however, that some applicants had stayed there for over 14 months.

146 In the second place, the Commission submits that such detention is incompatible with Article 26 of Directive 2013/32 and with Article 8(2) and (3), Article 9 and Article 11(2) of Directive 2013/33, since that directive is applied as a general rule, in a systematic manner, without individual assessment or issue of a written reasoned decision, and that it also involves minors, apart from unaccompanied minors under 14 years of age.

147 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 national provisions transposing EU law provisions on the detention of applicants for international protection, the Commission nevertheless considers such national provisions irrelevant in such a situation in so far as, in that situation, all applicants are required to stay in one of the two transit zones, in accordance with Article 80/J(5) of that law.

148 Hungary replies that those transit zones are not detention facilities, but, essentially, reception centres, situated in its territory at the external border of the Schengen area, which are designated as the place where the asylum procedure is conducted in accordance with EU law.

149 That Member State argues that a person wishing to travel to its territory may use a border crossing point, without entering one of the transit zones referred to, if he or she is in possession of valid documents. Moreover, the same transit zones are closed only in the direction of Hungary, so as to protect the external border of the Schengen area, their occupants however being free to leave them to enter Serbia. Equally, neither the length of the stay in a reception centre nor the quality of the conditions there should be taken into consideration in determining whether the stay in that centre may be treated as detention.

150 Furthermore, an applicant who leaves a transit zone does not necessarily suffer adverse consequences. Article 80/K(2)(d) of the Law on the right to asylum provides that, in such a case, 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 applicant's absence, that authority can take a decision on the application for international protection and, where appropriate, grant it.

151 What is more, the lodging of an asylum application does not automatically lead to an indiscriminate 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 Hungarian territory may lodge his or her application without having to travel to, or remain in, one of the transit zones.

152 It is also appropriate to take into consideration Article 80/J(1)(b) of the Law on the right to asylum, which specifically concerns the lodging of asylum applications by persons being held in detention. The specific rules on detention and the continuation thereof are, for their part, set out in Articles 31/A to 31/I of that law and ensure full compliance with the provisions of Directive 2013/33 relating to detention.

153 As regards the visit made by representatives of the Commission, Hungary states, moreover, that it pertained only to the transit zone of Röszke and that it cannot be ruled out that the persons questioned by the Commission representatives on that occasion were not applicants for international protection, but persons subject to a procedure under the aliens police authority.

154 Hungary claims, lastly, that the competent asylum authority issues, in all cases, a decision on accommodation in the transit zone in question, as the designated place of stay assigned to the person concerned in the course of the procedure, in accordance with Article 7(2) of Directive 2013/33, that decision being subject to a remedy. Moreover, the personal nature of the accommodation and treatment of the person concerned is reflected, inter alia, in how applicants are grouped in dwellings according to nationality, provision of specific diet and provision of furniture and healthcare, in particular psychological care.

*Findings of the Court*

155 By its second and third complaints, which it is appropriate to examine together, the Commission alleges, in essence, that Hungary has infringed Article 24(3) and Article 43 of Directive 2013/32 as well as Article 2(h) and Articles 8, 9 and 11 of Directive 2013/33, in establishing a system of systematic detention of applicants for international protection, in the transit zones of Röszke and Tompa, without observing the conditions and guarantees arising under those provisions.

156 It should be noted, as a preliminary point, that, contrary to what Hungary claims, the closure of those two transit zones following the judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367), is irrelevant to the assessment of the present action. After all, as has been recalled in paragraph 68 of the present judgment, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion issued by the Commission, namely, in the present case, 8 February 2018.

– *Existence of detention in the transit zones of Röszke and Tompa*

157 It follows from Article 80/J(1), (5) and (6) of the Law on the right to asylum that any applicant for international protection who does not already hold a residence permit in Hungarian territory must remain in one of the two transit zones of Röszke and Tompa throughout the examination of his or her application, or, as the case may be, during the judicial proceedings the purpose of which is to examine the appeal challenging any decision rejecting that application, unless the person concerned is an unaccompanied minor under 14 years of age or he or she has already been the subject of a detention measure or a measure restricting his or her personal liberty, within the meaning of Article 80/J(1) of that law.

158 Hungary, however, disputes the Commission's claim that such an obligation to remain in one of those two transit zones constitutes detention, within the meaning of Article 2(h) of Directive 2013/33.

159 In that regard, it should be noted that the detention of an applicant for international protection, within the meaning of that provision, is an autonomous concept of EU law understood as any coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 223).

160 In the present case, it is apparent from the application and from the documents annexed to it that those applicants for international protection whose place of stay is the transit zone of Röszke or that of Tompa are required to remain indefinitely in the transit zone in question, which is surrounded by a high fence and barbed wire. Those applicants are housed in containers with a floor area of not more than 13 $m^2$. They may not have contact with persons outside the transit zone in question, other than their legal representative, and their movements within the zone are limited and monitored by the members of the law enforcement services permanently present in the transit zone and its immediate vicinity.

161 Hungary does not dispute those elements.

162 It follows that, as the Advocate General observed, in essence, in point 134 of his Opinion, the placing of applicants for international protection in the transit zones of Röszke and Tompa is no different from a detention regime.

163 The line of argument put forward by Hungary, to the effect that those applicants are free to leave the transit zone concerned in the direction of Serbia, cannot call such an assessment into question.

164 First, although it is not for the Court, in the context of the present case, to rule on whether the Serbian authorities' conduct is compatible with the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, annexed to Council Decision 2007/819/EC of 8 November 2007 (OJ 2007 L 334, p. 45), it should be noted that any entry by those applicants for international protection into Serbia would, in all likelihood, be considered illegal by that third State and that, consequently, the applicants would be exposed to penalties there. Accordingly, applicants for international protection placed in the transit zones of Röszke and Tompa cannot, for that reason in particular, be considered to have an effective possibility of leaving those transit zones (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 229).

165 Second, by leaving Hungarian territory, those applicants risk losing any chance of obtaining refugee status in Hungary. According to Article 80/J(1) of the Law on the right to asylum, the applicants can submit a new application for asylum only in one of those two transit zones. In addition, it follows from Article 80/K(2) and (4) of that law that the competent asylum authority may decide to discontinue the international protection procedure if the applicant leaves one of those two zones, and its decision cannot be contested in a contentious administrative procedure (judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 230).

166 It follows that the obligation for applicants for international protection to stay in the transit zones of Röszke and Tompa, as follows from Article 80/J(5) of the Law on the right to asylum, must be regarded as detention, within the meaning of Article 2(h) of Directive 2013/33.

*– Compatibility of detention in the transit zones of Röszke and Tompa with the requirements laid down in Directives 2013/32 and 2013/33*

167 In the first place, the Commission criticises Hungary for having established a system of detention of applicants for international protection in the transit zones of Röszke and Tompa which does not comply with the conditions laid down in Article 43 of Directive 2013/32 and which is not justified on any of the grounds mentioned in the first subparagraph of Article 8(3) of Directive 2013/33.

168 According to settled case-law, the first subparagraph of Article 8(3) of Directive 2013/33 lists exhaustively the various grounds that may justify the detention of an applicant for international protection. Each of those grounds meets a specific need and is self-standing (judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 250 and the case-law cited).

169 While it is true that, as recital 17 of that directive states, the directive does not preclude Member States from establishing other grounds for detention, including within the framework of criminal proceedings, since those are unrelated to the status of applicant for international protection, it should be noted, in the present case, that the system of detention of applicants for international protection, established by Article 80/J(5) of the Law on the right to asylum, is not based on a ground unrelated to the status of those applicants.

170 It is therefore appropriate to examine whether the detention of the applicants for international protection referred to in paragraph 157 above in the transit zones of Röszke and Tompa, upon their arrival in Hungarian territory, falls within at least one of the situations listed in the first subparagraph of Article 8(3) of Directive 2013/33.

171 In that regard, first, it is necessary to rule out the notion that such detention can be justified on one of the grounds referred to in points (d) to (f) of the first subparagraph of Article 8(3) of that directive.

172 As regards, on the one hand, the ground for detention mentioned in point (e) of the first subparagraph of Article 8(3) of Directive 2013/33, it is not disputed that the applicants for international protection referred to in paragraph 157 above are held in detention in the transit zones of Röszke and Tompa without its first having been established that their individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of Hungary (see, in that regard, judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 67).

173 As regards, on the other hand, the grounds for detention listed in points (d) and (f) of the first subparagraph of Article 8(3) of Directive 2013/33, it is equally common ground that those applicants are required to remain in the transit zones of Röszke or Tompa, even if they are not already in detention subject to a return procedure under Article 15 of Directive 2008/115, and notwithstanding the fact that no decision has been taken under Article 28 of Regulation No 604/2013.

174 Second, an applicant for international protection may indeed, pursuant to the first subparagraph of Article 8(3) (a) and (b) of Directive 2013/33, be detained, inter alia, in the immediate vicinity of the borders of a Member State, in order to determine or verify his or her identity or nationality or in order to determine those elements on which his or her application for international protection is based which could not be obtained without detention.

175 At the same time, although the proper functioning of the Common European Asylum System requires that the competent national authorities have at their disposal reliable information relating to the identity or nationality of the applicant for international protection and to the elements on which his or her application is based, that objective cannot, however, justify detention measures being decided without those national authorities having previously determined, on a case-by-case basis, whether they are proportionate to the aims pursued, such a determination requiring them to ensure, in particular, that detention is used only as a last resort (see, to that effect, judgment of 14 September 2017, *K.*, C-18/16, EU:C:2017:680, paragraph 48).

176 Hungary does not dispute that the system of detention of applicants for international protection, established by Article 80/J(5) of the Law on the right to asylum, does not provide for any case-by-case examination of the proportionality of those applicants' detention in the light of the objective pursued, which is to verify their identity or nationality or the elements on which their application is based.

177 It therefore remains to be examined, third, whether the detention regime established by Article 80/J(5) of the Law on the right to asylum can be justified under point (c) of the first subparagraph of Article 8(3) of Directive 2013/33, pursuant to which a Member State may detain an applicant for international protection in order to decide, within the context of a procedure, on the right of that applicant to enter its territory.

178 In that regard, it should be noted, first of all, that the situation envisaged by point (c) of the first subparagraph of Article 8(3) includes the detention regime that may be established by Member States when they decide to apply border procedures, within the meaning of Article 43 of Directive 2013/32 (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 237 and 238).

179 Pursuant to that Article 43, Member States are authorised to place in 'detention', within the meaning of Article 2(h) of Directive 2013/33, applicants for international protection arriving at their borders, before granting them a right to enter their territory, on the conditions set out in that same Article 43

and in order to ensure the effectiveness of the procedures for which Article 43 provides (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 237 and 239).

180 Therefore, although Hungary formally disputes that the procedures for examining applications for international protection conducted in the transit zones of Röszke and Tompa, in accordance with Article 80/J of the Law on the right to asylum, are border procedures for the purposes of Article 43 of Directive 2013/32, that circumstance cannot relieve the Court of the need to take into account compliance with that latter article in its examination of whether the Hungarian legislation is compatible with point (c) of the first subparagraph of Article 8(3) of Directive 2013/33, no other ground listed in that provision being capable of justifying the detention system established by Article 8/J(5) of that law.

181 It is appropriate, next, to emphasise that Article 43(2) of Directive 2013/32 requires that the period of detention of an applicant for international protection, pursuant to that article, never exceed four weeks from the date of the lodging of the application for international protection, within the meaning of Article 6(2) of Directive 2013/32, paragraph 3 of that Article 43 merely authorising Member States, in the circumstances for which it provides, to maintain border procedures beyond that four-week period, provided that the applicants are, at the end of that period, accommodated normally at locations in proximity to the border or to the transit zone concerned, which precludes their remaining in detention (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 241 to 245).

182 It is not apparent from any provision of the relevant Hungarian legislation, however, that the detention of applicants for international protection in the transit areas of Röszke and Tompa is limited to a four-week period from the date of the lodging of their application.

183 Furthermore, it follows from Article 43(1) of Directive 2013/32 that detention based on that provision is justified only in order to allow the Member State concerned to examine, before granting the applicant for international protection the right to enter its territory, whether his or her application is not inadmissible, pursuant to Article 33 of Directive 2013/32, or whether that application must not be rejected as unfounded on one of the grounds listed in Article 31(8) of that directive.

184 As has been noted in paragraph 157 of the present judgment, applicants for international protection are required to remain in the transit zones of Röszke and Tompa for the entirety of the examination of their applications, or during the judicial proceedings the purpose of which is to examine the appeal challenging any decision rejecting those applications, and not solely for the purpose of verifying whether their applications can be rejected on one of the grounds referred to in the preceding paragraph.

185 It follows that the system of detention of applicants for international protection established by Article 80/J(5) of the Law on the right to asylum does not comply with the conditions provided for in Article 43 of Directive 2013/32 and is therefore incapable, in the present case, of being justified on the basis of point (c) of the first subparagraph of Article 8(3) of Directive 2013/33.

186 It follows from the foregoing that Article 80/J(5) of the Law on the right to asylum provides for applicants for international protection to be detained outside the conditions set out in Article 43 of Directive 2013/32 and outside the exhaustively enumerated cases in which such detention is authorised under Article 8 of Directive 2013/33.

187 In the second place, the Commission alleges that Hungary has infringed Article 24(3) of Directive 2013/32 on the ground that 'adequate support' within the meaning of that provision, which applicants for international protection in need of special procedural guarantees must receive, is not ensured during the procedure conducted in the transit zones of Röszke and Tompa.

188 In that respect, it should be noted that, under Article 2(d) of Directive 2013/32, an 'applicant in need of special procedural guarantees' is an applicant whose ability to benefit from the rights and to comply with the obligations provided for in that directive is limited due to individual circumstances. It is apparent from recital 29 of that directive that those circumstances include the interested person's age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or the consequences of torture, rape or other serious forms of psychological, physical or sexual violence.

189 As follows from Articles 21 and 22 of Directive 2013/33, given their vulnerability, those applicants must be given specific attention by the Member States, throughout the asylum procedure, in particular as regards the conditions in which they are accommodated in the territory of the Member State concerned during that procedure.

190 It is apparent, more specifically, from Article 11 of that directive that, although the detention of applicants in need of special procedural guarantees is not ruled out as a matter of principle, their health, including their mental health, must, where they are detained, be of primary concern to Member States, which are to ensure the regular monitoring of those persons and 'adequate support' taking into account their particular situation.

191 From that point of view, the second subparagraph of Article 24(3) of Directive 2013/32 provides that, where the adequate support which applicants in need of special procedural guarantees are to receive cannot be provided to them within the framework of a border procedure, within the meaning of Article 43 of that directive, Member States must not apply, or must cease to apply, that procedure.

192 Accordingly, national authorities are required to ensure, at the end of a case-by-case examination, that detention, on the basis of Article 43 of Directive 2013/32, of an applicant for international protection in need of special procedural guarantees does not deprive him or her of the 'adequate support' to which he or she is entitled in the context of the examination of his or her application.

193 In the case at hand, it should be noted that, as Hungary submits, a number of provisions of the relevant Hungarian legislation are aimed at taking account of the specific needs of all applicants for international protection in need of special procedural guarantees, within the meaning of Article 24(3) of Directive 2013/32.

194 Thus, Article 4(3) of the Law on the right to asylum provides that the authorities are required to apply the provisions of that law to applicants in need of special treatment, taking their specific needs into account. Similarly, Articles 29 and 30 of that law provide that the reception conditions for those applicants are to be ensured taking into account their specific needs, and such needs must also be taken into account where the competent authority restricts or withdraws material reception conditions.

195 It is also apparent from Article 33(1) and (2) of Government Decree 301/2007 that the competent asylum authority must ensure that the applicant in need of special procedural guarantees is provided with separate accommodation within the reception centre which preserves, in so far as is possible, family unity. It also follows from Article 34 of that decree that the applicant has the right to make use, free of charge, of health services, including psychological care, where that is necessary.

196 That being so, the fact remains that Hungary acknowledges that, since the entry into force of Article 80/J(5) of the Law on the right to asylum, all applicants for international protection in need of special procedural guarantees – with the exception of unaccompanied minors under 14 years of age and those who already hold a residence permit in Hungarian territory or who are the subject of another detention measure or a measure restricting their personal liberty – are required to stay in the transit zones of Röszke and Tompa, for the duration of the procedure for examination of their application for international protection, or, as the case may be, during the judicial proceedings the purpose of which is to examine the appeal challenging a decision rejecting that application.

197 Furthermore, it does not appear from any of the national provisions relied on by that Member State that the competent Hungarian authorities must examine whether such detention is compatible with the requirement of providing 'adequate support', within the meaning of Article 24(3) of Directive 2013/32, to those vulnerable applicants during that period.

198 Such a detention regime is incompatible with the requirement that the specific needs of those categories of applicants be taken into account, as follows from Article 24(3) of Directive 2013/32.

199 As has been stated in paragraphs 191 and 192 of the present judgment, the second subparagraph of Article 24(3) of Directive 2013/32 precludes an applicant for international protection in need of special procedural guarantees from being placed in detention automatically, in accordance with Article 43 of Directive 2013/32, without its first having been determined that that detention does not deprive him or her of the 'adequate support' to which he or she is entitled. In those circumstances, since, as has been noted in paragraphs 181 to 185 of the present judgment, the detention regime established by Article 80/J(5) of the Law on the right to asylum exceeds the limits within which Article 43 of Directive 2013/32 authorises the detention of applicants for international protection, it follows, a fortiori, that applying such a detention regime to all applicants in need of special procedural guarantees – with the exception of unaccompanied minors under 14 years of age and applicants who already hold a resident permit in Hungarian territory or who are the subject of another detention measure or a measure restricting their personal liberty – without verifying whether the detention of those applicants is consistent with their specific needs, cannot be deemed compatible with Article 24(3) of Directive 2013/32.

200 In the third place, the Commission alleges that Hungary has infringed Article 11 of Directive 2013/33 in requiring that all minor applicants for international protection – other than unaccompanied minors under 14 years of age – be detained in the transit zones of Röszke and Tompa throughout the duration of the procedure for examining their application.

201 Article 11(2) of Directive 2013/33 provides inter alia that minors may be detained only as a measure of last resort and after its having been established that other less coercive alternative measures cannot be applied effectively.

202 The protection which is thus granted specifically to minors supplements the guarantees more generally recognised by Article 11 to all applicants in need of specific reception conditions.

203 Hungary does not dispute, however, that all minor applicants for international protection, with the exception of unaccompanied minors under 14 years of age, are compelled to remain in one of the two transit zones of Röszke or Tompa until the conclusion of the procedure for examination of their application, or, as the case may be, until the conclusion of the judicial proceedings the purpose of which is to examine the appeal challenging a decision rejecting that application, unless those persons are the subject of another detention measure or a measure restricting their personal liberty or already hold a resident permit in Hungarian territory, which is incompatible with the specific guarantees arising under Article 11(2) of Directive 2013/33.

204 In the fourth place, the Commission complains that Hungary has infringed Article 9 of Directive 2013/33 on the ground that the detention of applicants for international protection in the transit zones of Röszke and Tompa is not ordered in writing and does not enable the applicant to ascertain the factual and legal grounds on which that detention is based.

205 In accordance with Article 9(2) of Directive 2013/33, detention of an applicant for international protection is to be ordered in writing by judicial or administrative authorities and the detention order is to state the reasons in fact and in law on which it is based.

206 Hungary contends that, in all cases, the competent asylum authority adopts a decision relating to accommodation in the transit zone concerned, as the place of stay assigned to the applicant for international protection during the procedure for examination of his or her application.

207 That contention is not, however, substantiated by any reference to a provision of the relevant national legislation. Moreover, while it is true that, under Article 80/J(5) of the Law on the right to asylum, the competent asylum authority designates the transit zone concerned as the applicant's place of stay, it is nevertheless not apparent from that provision that such an order must take the form of a written statement the reasoning for which satisfies the requirements laid down in Article 9(2) of Directive 2013/33.

208 It follows that the Commission has shown, to the requisite legal standard, that Hungary has failed to comply with the requirements of Article 9 of Directive 2013/33.

209 It follows from all the foregoing considerations that Hungary has failed to fulfil its obligations under Article 24(3) and Article 43 of Directive 2013/32 and under Articles 8, 9 and 11 of Directive 2013/33.

210 On the other hand, the Commission has not set out the reasons why Hungary has infringed Article 2(h) of Directive 2013/33, that provision being limited to defining the concept of 'detention', within the meaning of that directive.

211 In that regard, it should be stated that the fact that Hungary has established a detention system, in the transit zones of Röszke and Tompa – apart from the cases in which EU law authorises the detention of an applicant for international protection without observing the guarantees which, under EU law, must govern such detention – cannot suffice to demonstrate that that Member State has failed to transpose, or has transposed incorrectly, the very definition of the concept of 'detention' set out in Article 2(h) of Directive 2013/33.

*– Article 72 TFEU*

212 Pursuant to Article 72 TFEU, the provisions which appear under Title V of the FEU Treaty, relating to the area of security, freedom and justice, are not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

213 As has been stated in paragraph 141 of the present judgment, Hungary submits that that Article 72 authorises Member States to derogate from the EU rules adopted, in accordance with Article 78 TFEU, in the field of asylum, subsidiary protection and temporary protection, where compliance with those rules precludes Member States from adequately managing an emergency situation characterised by arrivals of large numbers of applicants for international protection. It follows, more specifically, in the present case, that the national rules governing the procedures conducted in the transit zones of Röszke and Tompa can derogate from Article 24(3) and Article 43 of Directive 2013/32.

214 In this connection, it should be recalled that, although it is for the Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it does not follow that such measures fall entirely outside the scope of European Union law. As the Court has held, the only articles in which the FEU Treaty expressly provides for derogations applicable in situations which may affect law and order or public security are Articles 36, 45, 52, 65, 72, 346 and 347, which deal with exceptional and clearly defined cases. It cannot be inferred that the FEU Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of European Union law and its uniform application (judgment of 2 April 2020,

*Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 143 and the case-law cited).

215 In addition, the derogation provided for in Article 72 TFEU must, as is provided in settled case-law, inter alia in respect of the derogations provided for in Articles 346 and 347 TFEU, be interpreted strictly. It follows that that Article 72 cannot be read in such a way as to confer on Member States the power to depart from the provisions of the European Union law based on no more than reliance on the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (see, to that effect, judgment of 2 April 2020, *Commission* v *Poland, Hungary and the Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraphs 144 and 145 and the case-law cited).

216 The scope of the requirements relating to the maintenance of law and order or national security cannot therefore be determined unilaterally by each Member State, without any oversight by the institutions of the European Union. It is accordingly 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 (judgment of 2 April 2020, *Commission* v *Poland, Hungary and the Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraphs 146 and 147).

217 It is appropriate to note, in the first place, that, in the present action, Hungary merely invokes, in a general manner, the risk of threats to public order and internal security that arrivals of large numbers of applicants for international protection might cause, without demonstrating, to the requisite legal standard, that it was necessary for it to derogate specifically from Article 24(3) and Article 43 of Directive 2013/32, in view of the situation prevailing in its territory at the end of the period laid down in the reasoned opinion, namely 8 February 2018.

218 Thus, while it is true that that Member State mentions, in support of its defence relating to the first complaint, a significant number of offences, committed in 2018, which it considers to be linked to illegal immigration, the fact remains that it does not specify the impact that those offences may have had on the maintenance of law and order and the safeguarding of internal security in its territory up until 8 February 2018. Nor does Hungary specify how a derogation from Article 24(3) and Article 43 of Directive 2013/32 was required, given such a number of offences, to ensure the maintenance of public order and internal security.

219 On the contrary, it should be noted that, according to that Member State's own statements, the majority of the offences it invokes were linked to illegal entry into and stay in its territory. However, Article 80/J(5) of the Law on the right to asylum requires the placing in detention of applicants for international protection who have not sought to enter Hungary illegally and who, in the light of that status as applicants for international protection, cannot be regarded as staying illegally on the territory of that Member State.

220 It follows that Hungary does not demonstrate how the offences it invokes made it necessary, in order to ensure the maintenance of public order and internal security, to derogate, in the manner provided for in that Article 80/J(5), from the guarantees governing the detention of applicants for international protection which are laid down in Article 24(3) and Article 43 of Directive 2013/32.

221 In the second place, it should be stressed that the EU legislature took due account of the exercise of the Member States' responsibilities under Article 72 TFEU in allowing them, in accordance with point (e) of the first subparagraph of Article 8(3) of Directive 2013/33, to detain any applicant for international protection where the protection of national security or public order so requires, which,

as has been recalled in paragraph 172 of the present judgment, nevertheless entails establishing that the individual conduct of the applicant for international protection represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned.

222 Furthermore, as the Commission notes, in adopting Directives 2013/32 and 2013/33, the EU legislature was also careful to take into account the situation where a Member State might face a very significant increase in the number of applications for international protection.

223 Thus, in particular, Article 10(1) and Article 18(9) of Directive 2013/33 allow a partial derogation from the provisions of that directive where capacities for placement at detention facilities or accommodation capacities at reception centres are exhausted.

224 It should also be noted that Article 43(3) of Directive 2013/32 allows, in the event of arrivals of large numbers of applicants for international protection at the borders of a Member State or into its transit zones, the border procedures laid down in Article 43 to be continued beyond the four-week period provided for in paragraph 2 thereof, while restricting the freedom of movement of those applicants to an area in proximity to the borders or transit zones of that Member State, in accordance with Article 7 of Directive 2013/33 (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 247).

225 It follows that, in the context of the present action, Hungary is not entitled to rely on Article 72 TFEU to justify the disregard of its obligations under Article 24(3) and Article 43 of Directive 2013/32.

226 It follows from all the foregoing considerations that Hungary has infringed its obligations under Article 24(3) and Article 43 of Directive 2013/32 and Articles 8, 9 and 11 of Directive 2013/33 in establishing a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa, without observing the guarantees provided for in those provisions.

### *The fourth complaint, relating to the removal of illegally staying third-country nationals*

#### *Arguments of the parties*

227 The Commission criticises Hungary for having allowed, pursuant to Article 5(1b) of the Law on State borders, in a crisis situation caused by mass immigration, for third-country nationals staying illegally in its territory to be forcibly moved to a strip of land devoid of any infrastructure, between a border fence, established in Hungarian territory, and the Serbian-Hungarian border proper, without observing the procedures and guarantees defined in Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115.

228 In the first place, the Commission notes that Article 5(1b) of the Law on State borders replaces Article 5(1a) of that law when a crisis situation caused by mass immigration is declared, and concerns all third-country nationals staying illegally in Hungarian territory. Hungary cannot therefore rely on the exception to the scope of Directive 2008/115 provided for in Article 2(2)(a) thereof.

229 In the second place, even if he or she is not moved to the border proper, the third-country national, escorted to a narrow strip of Hungarian border territory, where there is no infrastructure available and from which there is no means of travelling to the rest of the Hungarian territory, other than the transit zones of Röszke and Tompa, would, in practice, have no choice other than to leave that territory, given the long wait needed to enter one of those two transit zones.

230 The measure provided for in Article 5(1b) of the Law on State borders therefore corresponds to the concept of 'removal' as defined in Article 3(5) of Directive 2008/115, even though the physical transfer might not be completed outside the territory of the Member State concerned.

231 The removal of illegally staying third-country nationals, however, is carried out without a return decision being issued in respect of them, indiscriminately, without taking into account the best interests of the child, family life or the state of health of the person national concerned, and without observing the principle of non-refoulement. No written justification is provided and, in the absence of a return decision, no legal remedy is available to the person concerned.

232 In the third place, the Commission is of the view that such a substantial, general and protracted derogation from the provisions of Directive 2008/115 cannot be justified under Article 72 TFEU. The EU legislature, moreover, complied with that primary law provision by setting out, in Article 18 of Directive 2008/115, specific rules intended to be applied to emergency situations caused by the exceptionally large number of third-country nationals subject to an obligation to return.

233 In the first place, Hungary contends that Article 5(1a) of the Law on State borders falls under the derogation provided for in Article 2(2)(a) of Directive 2008/115. As for Article 5(1b) of that law, that Member State submits that it can be applied only in the event of a crisis situation caused by mass immigration, in order to preserve public order and internal security.

234 Article 72 TFEU, read in conjunction with Article 4(2) TEU, however, allows Member States to adopt and apply rules relating to the maintenance of public order and the safeguarding of internal security which derogate from the provisions of EU law. In that regard, the legal framework, provided for in secondary law for the purpose of managing crisis situations caused by mass immigration, has proved insufficient in the Commission's own view, which drew consequences by submitting, in 2016, a major reform concerning Directives 2013/32 and 2008/115.

235 In a crisis situation such as that prevailing in Hungary, Article 5(1b) of the Law on State borders can therefore derogate from the provisions of Directive 2008/115 which the Commission considers to have been infringed by that Member State.

236 In the second place, Hungary submits that, in any event, pursuant to that Article 5(1b), police services are authorised to take illegally staying third-country nationals apprehended in Hungarian territory not to the Serbian-Hungarian border, but only to the border fence, which is situated in Hungary, at a short distance from that border, even if there is no infrastructure on the strip of land separating that fence from the border proper. Third-country nationals are therefore not removed to Serbia. In the absence of any actual return, the application of the rules of Directive 2008/115 is by definition excluded, since a Member State cannot enforce a removal measure in its own territory.

237 The purpose of the transfer carried out pursuant to Article 5(1b) of the Law on State borders is, in fact, to enable those nationals to lodge, as soon as possible, an application for international protection in the transit zones of Röszke and Tompa.

238 Moreover, EU law does not indicate the place where illegally staying persons should be transported, nor does it require them to be provided with any care whatsoever.

239 In the third place, Hungary contends that, in the practical application of the police measures adopted on the basis of Article 5(1b) of the Law on State borders, the manner in which third-country nationals are treated is in conformity with the requirements provided for in Article 3(5) of Directive 2008/115.

240 The general safeguards concerning police measures, including the requirement of proportionality, are laid down in the Rendőrségről szóló 1994. évi XXXIV. törvény (Law No XXXIV of 1994 on the police) (*Magyar Közlöny* 1994/41). Furthermore, a person who has been the subject of coercive measures has the right to bring an action under Article 92 of that law. Lastly, Article 33 of that law defines, in detail, the requirements that must be complied with in the context of a police measure conducted under Article 5(1b) of the Law on State borders.

*Findings of the Court*

241 By its fourth complaint, the Commission criticises Hungary, in essence, for having failed to fulfil its obligations under Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115, in allowing illegally staying third-country nationals who are apprehended in Hungarian territory to be forcibly moved beyond a border fence erected in that territory to a few metres from the Serbian-Hungarian border, without observing the procedures and safeguards provided for in those provisions.

242 In that regard, first, it is appropriate to bear in mind that, according to Article 2(1) of Directive 2008/115, that directive applies, in principle, to third-country nationals staying illegally on the territory of a Member State.

243 The concept of 'illegal stay' is defined in Article 3(2) of that directive as the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 6 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State. It follows from that definition that any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory (judgment of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 48).

244 In the present case, it is not disputed that Article 5(1b) of the Law on State borders permits the adoption of a measure of forcible deportation beyond the border fence against third-country nationals who are staying illegally on Hungarian territory, within the meaning of Article 3(2) of Directive 2008/115, except where those nationals are suspected of having committed an offence.

245 Second, it should be noted that Article 2(2) of that directive lists the grounds on which Member States may decide to exclude from the scope of that directive an illegally staying third-country national, within the meaning of Article 3(2) of that directive.

246 That being so, it is not disputed that Article 5(1b) of the Law on State borders does not limit its scope to categories of illegally staying third-country nationals in respect of which Article 2(2) of Directive 2008/115 authorises Member States to derogate from that directive. Moreover, Hungary does not contend that Article 5(1b) of that law falls under any of the derogations provided for in that Article 2(2).

247 Third, where a third-country national falls within the scope of Directive 2008/115, he or she must, in principle, be subject to the common standards and procedures laid down by that directive for the purpose of his or her removal, as long as his or her stay has not, as the case may be, been regularised (see, to that effect, judgments of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 61, and of 19 March 2019, *Arib and Others*, C-444/17, EU:C:2019:220, paragraph 39).

248 By virtue of those standards and procedures, an illegally staying third-country national must be the subject of a return procedure, the order of whose stages corresponds to a gradation of the measures to be taken in order to enforce the return decision which must, in principle, have been adopted in

respect of him or her, for him or her to be returned in a humane manner and with full respect for his or her fundamental rights and dignity (see, to that effect, judgments of 7 June 2016, *Affum*, C-47/15, EU:C:2016:408, paragraph 62, and of 8 May 2018, *K.A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraph 100 and the case-law cited).

249 Thus, once the illegality of the stay has been established, the competent national authorities must, under Article 6(1) of Directive 2008/115 and without prejudice to the exceptions provided for in Article 6(2) to (5) thereof, adopt a return decision (judgment of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraph 46 and the case-law cited).

250 It also follows from recital 6 of Directive 2008/115 that that return decision must be taken following a fair and transparent procedure. More specifically, pursuant to Article 5 of that directive, when the competent national authority is contemplating the adoption of a return decision, it must, on the one hand, observe the principle of non-refoulement and take due account of the best interests of the child, family life and the state of health of the third-country national concerned and, on the other hand, hear the person concerned on that subject (see, to that effect, judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraphs 101 to 103).

251 Directive 2008/115 also lays down the formal requirements for return decisions. Under Article 12(1) thereof, those decisions must be issued in writing and must state the reasons on which they are based. Article 13(1) thereof also requires Member States to put in place effective remedies against those decisions (see, to that effect, judgment of 5 November 2014, *Mukarubega*, C-166/13, EU:C:2014:2336, paragraph 40).

252 Once the return decision has been adopted, the third-country national in question must still, in principle, be given, under Article 7 of that directive, a certain period of time in which to leave the territory of the Member State concerned voluntarily. Forced removal is to take place only as a last resort, in accordance with Article 8 of that directive, and subject to Article 9 thereof, which requires Member States to postpone removal in the cases it sets out.

253 It follows that, without prejudice to the exceptions provided for in Article 6(2) to (5) of Directive 2008/115, Member States must adopt a return decision against third-country nationals staying illegally in their territory and falling within the scope of that directive, in compliance with the substantive and procedural safeguards established by that directive before carrying out, where appropriate, their removal.

254 In the case at hand, first, it should be noted that Hungary does not dispute that, under Article 5(1b) of the Law on State borders, third-country nationals staying illegally in its territory may be subject to forcible deportation beyond the border fence, without prior compliance with the procedures and safeguards provided for in Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115. In that regard, it must be stated that the safeguards surrounding the intervention of the police services, put forward by Hungary and summarised in paragraph 240 of the present judgment, clearly cannot be regarded as corresponding to the safeguards provided for in Directive 2008/115.

255 Second, contrary to what Hungary contends, the forced deportation of an illegally staying third-country national beyond the border fence erected in its territory must be treated in the same way as a removal from that territory.

256 While it is true that, according to Article 3(5) of Directive 2008/115, removal means the physical transportation out of the Member State in enforcement of an obligation to return, the fact remains that the safeguards surrounding the return and removal procedures provided for in that directive would be deprived of their effectiveness if a Member State could dispense with them, even if it forcibly displaced a third-country national, which is, in practice, equivalent to transporting him or her physically outside its territory.

257 Hungary acknowledges that the space between the border fence – beyond which illegally staying third-country nationals may be forcibly deported – and the Serbian-Hungarian border is merely a narrow strip of land devoid of any infrastructure. After having been forcibly deported by the Hungarian police to that narrow strip of land, the third-country national therefore has no choice other than to leave Hungarian territory and go to Serbia in order to be housed and fed.

258 In that regard, it should be noted that, contrary to what Hungary submits, that national does not have the effective possibility of entering, from that strip of land, one of the two transit zones of Röszke and Tompa to make an application for international protection there.

259 As has been noted in paragraph 128 of the present judgment, there was, at least until the end of the period laid down in the reasoned opinion issued by the Commission to Hungary, a consistent and generalised practice of the Hungarian authorities consisting in drastically reducing access to those transit zones which rendered completely illusory the possibility, for an illegally staying third-country national forcibly deported beyond the border fence, of entering one of those transit areas at short notice.

260 Moreover, the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment reached essentially the same conclusion in their reports annexed to the Commission's application.

261 Lastly, it is necessary to reject Hungary's line of argument according to which Article 5(1b) of the Law on State borders is justified under Article 72 TFEU, read in conjunction with Article 4(2) TEU, for reasons similar to those set out in paragraphs 216 and 217 of the present judgment, since that Member State, in that regard, merely invokes, in a general manner, a risk of threats to public order and national security, without demonstrating, to the requisite legal standard, that it was necessary for it to derogate specifically from Directive 2008/115, in view of the situation prevailing in its territory on 8 February 2018 (see, by analogy, judgment of 2 July 2020, *Stadt Frankfurt am Main*, C-18/19, EU:C:2020:511, paragraphs 27 to 29 and the case-law cited).

262 As regards, more specifically, Article 4(2) TEU, Hungary has not shown that, in the light of that situation, effectively safeguarding the essential State functions to which that provision refers, such as that of protecting national security, could not be carried out other than by derogating from Directive 2008/115 (see, by analogy, judgment of 2 April 2020, *Commission* v *Poland, Hungary and the Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 170).

263 It should also be noted that, in adopting, inter alia, Article 6(2), Article 7(4), Article 11(2) and (3) and the second subparagraph of Article 12(1) of Directive 2008/115, the EU legislature took due account of the exercise of the Member States' responsibilities under Article 72 TFEU. Those provisions allow Member States to derogate from a number of rules laid down by that directive if required for the protection of public order or public or national security.

264 Furthermore, as the Commission submits, Article 18 of Directive 2008/115, on which Hungary has not relied, is expressly concerned with emergency situations which a Member State may have to face where an exceptionally large number of third-country nationals to be returned places an unforeseen and heavy burden on the capacity of the detention facilities of that State or on its administrative and judicial staff. By virtue of that Article 18, Member States faced with such a situation may derogate from certain rules relating to placement in detention and maintenance there of illegally staying third-country nationals, without however disregarding their general obligation to take all appropriate measures to ensure fulfilment of their obligations under Directive 2008/115.

265 Lastly, contrary to what Hungary contends, the mere circumstance that a revision of Directive 2008/115 is envisaged is not sufficient to demonstrate that the provisions of that directive currently in force did not duly take into account the Member States' responsibilities in the matters referred to in Article 72 TFEU.

266 It follows from all the foregoing considerations that, in allowing the removal of all third-country nationals staying illegally in its national territory, with the exception of those of them who are suspected of having committed an offence, 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, Hungary has failed to fulfil its obligations under those provisions.

***The fifth complaint, relating to the right to remain in the territory of the Member State concerned***

*Arguments of the parties*

267 The Commission is of the view, in the first place, that Hungary has not correctly transposed Article 46(5) of Directive 2013/32, which guarantees the applicant for international protection the right to remain in the territory of the Member State concerned pending the outcome of the proceedings the purpose of which is to examine the appeal against the decision rejecting, at first instance, his or her application.

268 It notes in that regard that, under Hungarian law, the bringing of an appeal against an administrative decision does not, in principle, have suspensory effect, Article 50 of the Code of Administrative Procedure providing only for the possibility for a court to order such an effect under certain conditions.

269 As a *lex specialis*, the Law on the right to asylum, for its part, lays down the rules governing administrative proceedings applicable to the review of asylum decisions. The Law on the management of mass immigration, however, which entered into force on 1 August 2015, repealed the provisions of the Law on the right to asylum expressly guaranteeing the suspensory effect of appeals brought against decisions rejecting an application for international protection. That repeal applies even in the absence of a crisis situation caused by mass immigration.

270 It is true that Article 5(1)(a) of the Law on the right to asylum recognises the applicant's right to stay. Nevertheless, that provision makes such a right subject to additional conditions which are not specifically set out. Moreover, Article 80/J(5) of the Law on the right to asylum, applicable in a crisis situation caused by mass immigration, does not ensure an adequate transposition of Article 46(5) of Directive 2013/32, either. The stay in the transit zone, stipulated by that Article 80/J(5), should be classified as detention and does not correspond to the requirements of Article 46 of that directive.

271 As regards, in the second place, the judicial review of decisions rejecting an application for asylum as inadmissible, referred to in Article 46(6) of Directive 2013/32, Article 53(6) of the Law on the right to asylum provides that the bringing of the appeal for that purpose does not, in principle, have suspensory effect, which is not in conformity with that Article 46(6), under which Member States must either guarantee the automatic suspensory effect of appeals against decisions of inadmissibility or ensure that a court adopts a decision on such suspensory effect.

272 Furthermore, the Law on the right to asylum does not state clearly whether Article 50 of the Code of Administrative Procedure is applicable to judicial proceedings falling within the scope of the Law on the right to asylum.

273 In the third place, as regards the situations referred to in Article 46(6)(a) and (b) of Directive 2013/32, for which the rule laid down in Article 46(5) of that directive applies, the Commission accepts that they are mentioned in 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 application does not have the effect of suspending enforcement of the contested decision, with the exception of asylum decisions taken pursuant to that Article 51(2)(e) and (7)(h).

274 However, the Law on the right to asylum does not clearly provide that the lodging of an application seeking to challenge decisions adopted on the basis of that Article 51(2)(e) and (7)(h) has suspensory effect. Only *a contrario* reasoning would support the conclusion that a rule other than that of the lack of suspensory effect is applicable. In any event, the wording of the Law on the right to asylum does not specify whether that different rule entails automatic suspensory effect, as is required by Article 46(5) and (6)(a) and (b) of Directive 2013/32.

275 Hungary replies that its legislation adequately ensures that applicants for international protection are able to remain in its territory, in accordance with Article 46 of Directive 2013/32, even if that article has not been transposed into its national law verbatim.

276 In the first place, Article 5(1) of the Law on the right to asylum provides that the applicant has the right to stay in Hungarian territory in accordance with the conditions laid down in that law. That right must be guaranteed to any applicant subject to an asylum procedure, which implies, in accordance with Article 35(1) of that law, that he or she enjoys it until notification of the decision taken at the end of the asylum procedure, a decision which corresponds, where appropriate, to the judicial decision rendered following the examination of the appeal challenging the decision rejecting the application for international protection.

277 The reference to the conditions laid down by the law, made in Article 5(1) of the Law on the right to asylum, means that a third-country national must conform to the status of applicant defined in the law. Another condition may be the obligation, for the applicant, to reside in the place designated by the asylum authority. Article 80/J(5) of the Law on the right to asylum introduces a rule of that type. Lastly, those conditions are also intended to exclude from the benefit of the right to stay the applicant for international protection who resubmits an application for international protection, in accordance with Article 80/K(11) of that law.

278 Furthermore, under Article 80/J(5) of the Law on the right to asylum, when a crisis situation caused by mass immigration is declared, the applicant has the right to stay in the transit zone concerned and, therefore, in Hungarian territory, until notification of the final decision, in accordance with Article 80/J(2) of that law.

279 As regards, in the second place, the situations referred to in Article 46(6) of Directive 2013/32, the applicant is, by virtue of Article 50 of the Code of Administrative Procedure, able to apply for immediate judicial protection, which can result in the grant of suspensory effect and, as a result, in the possibility of remaining in Hungarian territory.

280 In the third place, the situations referred to in Article 46(6)(a) and (b) of Directive 2013/32, for which Article 46(5) applies, are covered by Article 51(2)(e) and (7)(h) of the Law on the right to asylum, the right to remain in Hungarian territory being guaranteed in both cases automatically.

*Findings of the Court*

281 By its fifth complaint, the Commission criticises, in essence, Hungary for having failed to fulfil its obligations under Article 46(5) and (6) of Directive 2013/32, on the ground that that Member State does not guarantee, under the conditions laid down by those provisions, the right of applicants for international protection to remain in its territory, pending the outcome of the proceedings the purpose of which is to examine the appeal against the decision rejecting, at first instance, their applications.

– *The first part of the fifth complaint, relating to Article 46(5) of Directive 2013/32*

282 First, it should be noted that, under Article 46(5) of Directive 2013/32, applicants for international protection are to be allowed, subject to the cases provided for in Article 41(1) and Article 46(6) of that directive, to remain in the territory of the Member State concerned until the time limit within which to exercise their right to an effective remedy against the decisions referred to in paragraph 1 of that Article 46 has expired and, when such a right has been exercised within the time limit, pending the outcome of that remedy.

283 According to Article 2(p) of Directive 2013/32, the expression 'remain in the Member State' refers to the act of remaining in the territory of the Member State in which the application for international protection has been made or is being examined, including at the border or in one of its transit zones.

284 Second, it should be noted that a third-country national or stateless person whose application for international protection has been rejected, at first instance, by the determining authority, is to continue to enjoy, under Article 3(1) of Directive 2013/33, read in conjunction with Article 2(b) thereof, the reception conditions laid down by that directive, as long as he or she is allowed to stay in the territory, pursuant to Article 46 of Directive 2013/32, in order to challenge such a rejection decision.

285 Article 3(1) of Directive 2013/33 provides that the applicant for international protection is to enjoy the reception conditions laid down in that directive, as long as he or she is allowed to remain on the territory of the Member State concerned as an applicant and, according to Article 2(b) of that directive, the third-country national or stateless person is to be regarded as an applicant for international protection, within the meaning of the same directive, as long as a final decision has not been taken on his or her application.

286 Having regard to the close link between the scope of Directive 2013/32 and that of Directive 2013/33, it is appropriate to use, for the purposes of Article 2(b) of Directive 2013/33, the same definition of 'final decision' as the one used in Article 2(e) of Directive 2013/32 to determine the scope of the latter directive, that is to say, a decision on whether the person concerned is granted refugee or subsidiary protection status and which is no longer subject to a remedy within the framework of Chapter V of that directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member State concerned pending its outcome.

287 It follows, first, that, although Article 46(5) of Directive 2013/32 is limited to conferring on the applicant for international protection who falls within its scope a right to remain in the territory of the Member State concerned, the existence of that right is nevertheless enshrined unconditionally, subject to the exceptions provided for in Article 41(1) and Article 46(6) of that directive, and, second, that a Member State may lay down detailed rules governing the exercise of that right only to the extent that they are in conformity, inter alia, with Directives 2013/32 and 2013/33.

288 Third, it should be recalled that, according to the Court's settled case-law, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty, under which, where the directive is intended to create rights for individuals, the persons concerned must be enabled to ascertain the full extent of their rights (judgment of 8 July 1999, *Commission* v *France*, C-354/98, EU:C:1999:386, paragraph 11; of 14 March 2006, *Commission* v *France*, C-177/04, EU:C:2006:173, paragraph 48; and of 4 October 2018, *Commission* v *Spain*, C-599/17, not published, EU:C:2018:813, paragraph 19 and the case-law cited).

289 It follows that, where a Member State decides to lay down detailed rules governing the exercise of the right to remain in its territory, as it is enshrined in Article 46(5) of Directive 2013/32, those rules must be defined in a sufficiently clear and precise manner so that the applicant for international protection may ascertain the exact extent of that right and that it is possible to assess whether such rules are compatible, inter alia, with Directives 2013/32 and 2013/33.

290 In the light of those observations, it is appropriate, in the present case, to note, in the first place, that it is not disputed that, when a crisis situation caused by mass immigration is declared, Article 80/J(5) of the Law on the right to asylum establishes, by way of derogation from Article 5(1)(a) of that law, that applicants are required to remain in the transit zones of Röszke and Tompa until the conclusion of the proceedings the purpose of which is to examine the appeal brought against the decision of the competent asylum authority rejecting their application.

291 Article 80/J(5) thus guarantees that applicants have the right to remain in Hungary while the appeals against the decisions rejecting their applications are pending. However, as has been noted in paragraph 226 of the present judgment, those applicants are subject, during that period, to a system of systematic detention in those transit zones, which is incompatible with the rights conferred on them by Article 24(3) and Article 43 of Directive 2013/32 and by Articles 8, 9 and 11 of Directive 2013/33.

292 In that regard, it should be noted, more specifically, in the light of the situation at issue in the examination of the present complaint, that none of the grounds for detention listed in the first subparagraph of Article 8(3) of Directive 2013/33 relates to the situation of an applicant for international protection whose application has been rejected at first instance by the determining authority and who is still within the time limit for bringing an appeal against that decision or who has brought such an appeal.

293 As is apparent from paragraph 287 of the present judgment, a Member State may not lay down detailed rules governing the exercise of the right to remain in its territory, guaranteed in Article 46(5) of Directive 2013/32, which disregard the rights guaranteed to applicants for international protection by Directives 2013/32 and 2013/33.

294 It follows that, in allowing, in the event of a declaration of a crisis caused by mass immigration, applicants for international protection whose applications have been rejected at first instance by the determining authority to remain in its territory only on condition that they are placed in detention in a manner contrary to Directives 2013/32 and 2013/33, Hungary has failed to fulfil its obligations under Article 46(5) of Directive 2013/32.

295 In the second place, it is not disputed that, when no crisis situation caused by mass immigration is declared, Article 5(1)(a) of the Law on the right to asylum – which was not repealed by Law No XX of 2017 – provides that the applicant for asylum has the right to stay in Hungarian territory in accordance with the conditions laid down in that law, it being understood that such a right exists, under Article 35(1) of the Law on the right to asylum, until notification of the decision, which is not subject to a remedy that is taken at the end of the asylum procedure.

296 The Commission, however, takes the view that that legislation does not guarantee an applicant for international protection a right to remain in Hungarian territory, under the conditions laid down in Article 46(5) of Directive 2013/32, because that right is made subject, under Article 5(1) of the Law on the right to asylum, to conditions that are not otherwise defined.

297 Hungary stated, in its written pleadings and at the hearing, that the conditions referred to by the aforementioned Article 5(1) consist in requiring, first, that the person concerned conform to the status of applicant defined by the law and comply, in addition, with his or her obligation, as the case may be, to reside in a particular place, which may be, in accordance with Article 80/J(5) of the Law on the right to asylum, one of the two transit zones of Röszke and Tompa, when a crisis situation caused by mass immigration has been declared. Second, according to that Member State, those conditions are also intended to deprive, in accordance with Article 80/K(11) of that law, the applicant who lodges a fresh asylum application of the right to remain in Hungarian territory once a final discontinuation or rejection decision has been taken on his or her previous application.

298 In that regard, first, it should be noted that, in accordance with Article 7 of Directive 2013/33, Member States may, under certain conditions, require that applicants for international protection reside in a specific place, including after their application has been rejected, at first instance, by the determining authority. Accordingly, it cannot be held to be contrary to Article 46(5) of Directive 2013/32 that the right to remain in the territory of a Member State should be subject to compliance with such a residence condition, as long as that condition observes the guarantees laid down in Article 7 of Directive 2013/33. It should be noted, however, that Hungary identifies no provision of the Law on the right to asylum which contains precisely such a condition.

299 Second, it should be noted that Article 80/J(5) and Article 80/K(11) of the Law on the right to asylum are intended to apply only where a crisis situation caused by mass immigration has been declared and where, as Hungary conceded at the hearing, in such a situation, Article 5(1)(a) of the Law on the right to asylum is not applicable. That Member State cannot therefore, without contradicting itself, assert that Article 80/J(5) and Article 80/K(11) of the Law on the right to asylum lay down the conditions under which Article 5(1) of that law applies.

300 Third, and last, it should be noted that the condition requiring compliance with the status of applicant for international protection defined by the law and to which, according to Hungary's own assertions, the right of residence under Article 5(1)(a) of the Law on the right to asylum is also subject is open to various interpretations and refers to other conditions which have not been identified by that Member State.

301 As has been noted in paragraph 289 above, where a Member State lays down detailed rules governing the exercise of the right to remain in its territory, guaranteed in Article 46(5) of Directive 2013/32, those rules must be defined in a sufficiently clear and precise manner so that the applicant for international protection may ascertain the exact extent of that right and that it is possible to assess whether such rules are compatible, inter alia, with Directives 2013/32 and 2013/33.

302 It follows from all the foregoing considerations that Hungary has failed to fulfil its obligations under Article 46(5) of Directive 2013/32.

– *The second part of the fifth complaint, relating to Article 46(6) of Directive 2013/32*

303 By way of derogation from Article 46(5) of Directive 2013/32, Article 46(6) thereof allows Member States, in the cases envisaged by that provision, inter alia where the decision rejecting the application for international protection is based on certain grounds of inadmissibility, not to grant automatically a right to remain in the territory pending the outcome of the appeal brought by the applicant, provided

that a court has jurisdiction to decide whether the person concerned may remain in the territory of the Member State concerned, notwithstanding the decision adopted at first instance in respect of him or her.

304 According to the Commission, Hungary has not correctly transposed that provision in so far as, first, Article 53(6) of the Law on the right to asylum does not give suspensory effect to the bringing of the appeal against a decision rejecting the application for international protection as inadmissible and, second, that law does not state clearly whether Article 50 of the Code of Administrative Procedure – which allows a suspension of the contested administrative decision to be requested from the competent court having jurisdiction – is applicable to judicial proceedings falling within the scope of the Law on the right to asylum.

305 It follows that the Commission criticises Hungary, in essence, for having failed to transpose, in a sufficiently clear and precise manner, Article 46(6) of Directive 2013/32, on the ground that the Hungarian legislation does not expressly state that Article 50 of the Code of Administrative Procedure applies to decisions rejecting an application for international protection as inadmissible.

306 That line of argument is, however, unfounded.

307 As the Advocate General noted, in essence, in point 207 of his Opinion, the mere fact that Article 50 of the Code of Administrative Procedure is general in scope and that Article 53(6) of the Law on the right to asylum does not specify that Article 50 applies in proceedings governed by that law is not sufficient to support a finding that Hungary has not complied in a sufficiently clear and precise manner with Article 46(6) of Directive 2013/32. In that regard, it must be pointed out that Article 53(6) of the Law on the right to asylum does not exclude the application of the same Article 50 nor introduce a rule which is incompatible with the latter article. Moreover, the Commission has not adduced any element liable to cast doubt on the possibility for the Hungarian courts to apply Article 50 of the Code of Administrative Procedure in the examination of an appeal against a decision rejecting as inadmissible an application for international protection.

308 It follows that the second part of the fifth complaint must be rejected as unfounded, without its being necessary to examine whether the remainder of Article 50 of the Code of Administrative Procedure constitutes a complete and correct transposition of the last subparagraph of Article 46(6) of Directive 2013/32.

*– The third part of the fifth complaint, relating to Article 46(6)(a) and (b) of Directive 2013/32*

309 By way of derogation from the rule laid down in Article 46(6) of Directive 2013/32, it follows from points (a) and (b) of that provision that, where the application for international protection is rejected as unfounded owing to the circumstances referred to in Article 31(8)(h) of that directive or is declared inadmissible by virtue of Article 33(2)(c) and (e) thereof, the right to remain in the territory of the Member State must be granted under the conditions laid down in Article 46(5) of that directive, and not those in the final subparagraph of Article 46(6) thereof.

310 The Commission criticises Hungary for having failed to transpose that derogatory rule in a sufficiently clear and precise manner on the ground that Article 53(6) of the Law on the right to asylum does not clearly show that the lodging of the application has suspensory effect, where that application seeks to challenge a decision adopted on the basis of Article 51(2)(e) and (7)(h) of the Law on the right to asylum.

311 That line of argument must, however, be rejected as unfounded.

312 As the Advocate General noted, in essence, in point 211 of his Opinion, it is clear from the very wording of Article 53(6) of the Law on the right to asylum that appeals brought against decisions taken under Article 51(2)(e) and (7)(h) of the Law on the right to asylum have automatic suspensory effect.

313 Accordingly, the third part of the fifth complaint must also be rejected as unfounded, without its being necessary to examine whether the remainder of Article 53(6) of the Law on the right to asylum constitutes a complete and correct transposition of Article 46(6)(a) and (b) of Directive 2013/32.

314 It follows that Hungary has failed to fulfil its obligations under Article 46(5) of Directive 2013/32 in making the exercise by applicants for international protection who fall within the scope of that provision of their right to remain in its territory subject to conditions contrary to EU law.

315 Having regard to all the foregoing considerations, it must be held that Hungary has failed to fulfil its obligations under Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115, Article 6, Article 24(3), Article 43 and Article 46(5) of Directive 2013/32, and Articles 8, 9 and 11 of Directive 2013/33:

– in providing that applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wish to access, in its territory, the international protection procedure, may be made only in the transit zones of Röszke and Tompa, while adopting a consistent and generalised administrative practice drastically limiting the number of applicants authorised to enter those transit zones daily;

– in establishing a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa, without observing the guarantees provided for in Article 24(3) and Article 43 of Directive 2013/32 and Articles 8, 9 and 11 of Directive 2013/33;

– in allowing the removal of all third-country nationals staying illegally in its territory, with the exception of those of them who are suspected of having committed a criminal offence, 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;

– in making the exercise by applicants for international protection who fall within the scope of Article 46(5) of Directive 2013/32 of their right to remain in its territory subject to conditions contrary to EU law.

316 The action is dismissed as to the remainder.

## Costs

317 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 138(3) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, 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. Since the Commission has applied for costs to be awarded against Hungary has, in essence, been unsuccessful, Hungary must, having regard to the circumstances of the case, be ordered to bear its own costs and to pay four fifths of the costs of the Commission. The Commission is to bear one fifth of its costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that Hungary has failed to fulfil its obligations under 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, under Article 6, Article 24(3), Article 43 and Article 46(5) 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, and under 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:**

   – **in providing that applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wish to access, in its territory, the international protection procedure, may be made only in the transit zones of Röszke (Hungary) and Tompa (Hungary), while adopting a consistent and generalised administrative practice drastically limiting the number of applicants authorised to enter those transit zones daily;**

   – **in establishing a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa, without observing the guarantees provided for in Article 24(3) and Article 43 of Directive 2013/32 and Articles 8, 9 and 11 of Directive 2013/33;**

   – **in allowing the removal of all third-country nationals staying illegally in its territory, with the exception of those of them who are suspected of having committed a criminal offence, 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;**

   – **in making the exercise by applicants for international protection who fall within the scope of Article 46(5) of Directive 2013/32 of their right to remain in its territory subject to conditions contrary to EU law;**

2. **Dismisses the action as to the remainder;**

3. **Orders Hungary to bear its own costs and to pay four fifths of the costs of the European Commission;**

4. **Orders the European Commission to bear one fifth of its costs.**

[Signature]