Reports of Cases

OPINION OF ADVOCATE GENERAL
JEAN RICHARD DE LA TOUR
delivered on 3 September 2020[1]

Joined Cases C-322/19 and C-385/19

K.S.,
M.H.K.
v
The International Protection Appeals Tribunal,
The Minister for Justice and Equality,
Ireland and the Attorney General (C-322/19)
(Request for a preliminary ruling
from the High Court (Ireland))
and
Ms R.A.T.,
Mr D.S.
v
The Minister for Justice and Equality (C-385/19)

(Request for a preliminary ruling
from the International Protection Appeals Tribunal (Ireland))

(References for a preliminary ruling – Asylum policy – Directive 2013/33/EU – Standards for the reception of applicants for international protection – Article 15 – Access to the labour market – Conditions for granting access – Interpretation of the condition relating to the status of 'applicant' – Interpretation of the condition relating to the absence of a delay attributable to the applicant – Applicants in respect of whom a transfer decision has been adopted pursuant to Regulation (EU) No 604/2013 – National legislation under which the adoption of such a decision deprives applicants of that status – Admissibility)

I. Introduction

1. In the present cases, the Court is asked to clarify the arrangements for the reception of an applicant for international protection ('the applicant') where a national authority has adopted a decision to transfer him or her to the Member State it has identified as being responsible for examining that application ('the Member State responsible') pursuant to Regulation (EU) No 604/2013.[2]

1 Original language: French.

2 Regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31). That regulation replaced Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

2. In particular, the questions referred for a preliminary ruling concern access to the labour market, which is a reception condition referred to in Article 15(1) of Directive 2013/33/EU.[3] In accordance with that provision, Member States are to ensure that the applicant has access to the labour market no later than nine months from the date when his or her application was lodged if a first instance decision has not been taken and the delay cannot be attributed to the applicant.

3. However, the Irish legislation at issue provides that the adoption of a transfer decision in respect of the applicant has the effect of depriving the person concerned of that status and of the right to apply for a work permit associated with that status.[4]

4. As requested by the Court, this Opinion will be confined to an analysis of the principal new points of law raised in the present case.

5. The first question relates to the determination of the beneficiaries of the measure provided for in Article 15(1) of Directive 2013/33 and concerns, in particular, the interpretation of the concept of 'applicant' in the light of the right of access to the labour market provided for in that provision. That question, which follows on from judgment of 27 September 2012, *Cimade and GISTI*,[5] seeks to determine whether, under that provision, a Member State may refuse access to the labour market to an applicant in respect of whom a transfer decision has been adopted.

6. In this Opinion, I shall explain why the adoption of a transfer decision in respect of an applicant cannot have the effect of depriving him or her of the status of applicant or the rights associated therewith.

7. The second question concerns the nature of the conduct capable of having caused a delay attributable to the applicant for the purposes of Article 15(1) of Directive 2013/33. The Court is called upon to determine whether a national authority may attribute to the applicant the delay resulting from carrying out the procedure for determining the Member State responsible, and thus deprive him or her of access to the labour market, first, on the ground that he or she did not lodge his or her application for international protection in the Member State of first irregular entry or, if he or she is lawfully resident in a Member State, in his or her Member State of residence and, secondly, on the ground that he or she brought legal proceedings against the transfer decision adopted pursuant to Regulation No 604/2013.

8. In this Opinion, I shall set out why, as the provisions of the Common European Asylum System (CEAS) currently stand, neither of those circumstances can be considered to have caused a delay attributable to the applicant, for the purposes of Article 15(1) of Directive 2013/33, capable of depriving the applicant of access to the labour market in the host Member State.

3 Directive of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96, and corrigendum OJ 2015 L 100, p. 81).

4 The previous legislation, which contained an absolute prohibition on applicants accessing the labour market before a decision on their applications had been adopted, was held to be contrary to the Irish Constitution by the Supreme Court (Ireland) in its judgment of 30 May 2017, No 31 and 56/2016 (see, in that regard, point 84 of this Opinion).

5 C-179/11, EU:C:2012:594; 'the judgment in *Cimade and GISTI*'.

II. Legal framework

A. EU law

9. In accordance with Article 78 TFEU, the Common European Asylum System comprises a number of provisions, in particular, of Directive 2011/95/EU,[6] which lays down the conditions for granting international protection, of Directive 2013/32/EU,[7] which specifies the procedural arrangements for examining an application for international protection, of Directive 2013/33 – the interpretation of which is sought here – laying down the standards for the reception of international protection applicants, and of Regulation No 604/2013, laying down the criteria and mechanisms for determining the Member State responsible.

1. Directive 2011/95

10. According to Article 1 of Directive 2011/95, the purpose of that directive is, inter alia, to lay down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.

11. Article 4 of that directive, entitled 'Assessment of facts and circumstances', provides as follows in paragraphs 1 and 2:

'1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in paragraph 1 consist of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.'

2. Directive 2013/32

12. The purpose of Directive 2013/32 is to establish the rules and procedural guarantees that apply to the examination of an application for international protection.

13. According to Article 2(p) of that directive, 'remain in the Member State' means 'to remain in the territory … of the Member State in which the application for international protection has been made or is being examined'.

14. In Chapter II of that directive, entitled 'Basic principles and guarantees', Article 9(1) provides that 'applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III'.

6 Directive of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

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

15. Article 13 of Directive 2013/32, which sets out the 'obligations of the applicants', provides:

'1. Member States shall impose upon applicants the obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) of Directive [2011/95]. Member States may impose upon applicants other obligations to cooperate with the competent authorities insofar as such obligations are necessary for the processing of the application.

2. In particular, Member States may provide that:

(a) applicants are required to report to the competent authorities or to appear before them in person, either without delay or at a specified time;

(b) applicants have to hand over documents in their possession relevant to the examination of the application, such as their passports;

(c) applicants are required to inform the competent authorities of their current place of residence or address and of any changes thereof as soon as possible. …;

(d) the competent authorities may search the applicant and the items which he or she is carrying. …;

(e) the competent authorities may take a photograph of the applicant; and

(f) the competent authorities may record the applicant's oral statements, provided he or she has previously been informed thereof.'

16. In Chapter III of Directive 2013/32, Article 31(3) is worded as follows:

'Member States shall ensure that the examination procedure is concluded within six months of the lodging of the application.

Where an application is subject to the procedure laid down in Regulation [No 604/2013], the time limit of six months shall start to run from the moment the Member State responsible for its examination is determined in accordance with that Regulation, the applicant is on the territory of that Member State and has been taken in charge by the competent authority.

Member States may extend the time limit of six months set out in this paragraph for a period not exceeding a further nine months, where:

…

(c) … the delay can clearly be attributed to the failure of the applicant to comply with his or her obligations under Article 13.

…'

17. Article 32 of that directive, entitled 'Unfounded applications', provides in paragraph 1:

'… Member States may only consider an application to be unfounded if the determining authority has established that the applicant does not qualify for international protection pursuant to Directive [2011/95].'

18. Article 33 of Directive 2013/32, entitled 'Inadmissible applications', provides in paragraph 1 that 'in addition to cases in which an application is not examined in accordance with Regulation [No 604/2013], Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive [2011/95] where an application is considered inadmissible pursuant to this Article'.

19. Article 33(2) of that directive contains an exhaustive list of the cases in which Member States may consider an application to be inadmissible.

3. Directive 2013/33

20. Article 1 of Directive 2013/33 provides that the purpose of that directive is to lay down standards for the reception of applicants for international protection in Member States.

21. Recitals 8, 11, 12, 13, 23 and 35 of that directive state:

'(8) In order to ensure equal treatment of applicants throughout the [European] Union, this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants.

…

(11) Standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.

(12) The harmonisation of conditions for the reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception.

(13) With a view to ensuring equal treatment amongst all applicants for international protection and guaranteeing consistency with current EU asylum *acquis* …, it is appropriate to extend the scope of this Directive in order to include applicants for subsidiary protection.

…

(23) In order to promote the self-sufficiency of applicants and to limit wide discrepancies between Member States, it is essential to provide clear rules on the applicants' access to the labour market.

…

(35) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [8]. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.'

22. Article 2 of Directive 2013/33, entitled 'Definitions', provides:

'For the purposes of this Directive:

…

8 'The Charter'.

(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;

…

(f) "reception conditions": means the full set of measures that Member States grant to applicants in accordance with this Directive;

(g) "material reception conditions": means the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance;

…'

23. Under Article 3(1) of that directive, it applies 'to all third-country nationals and stateless persons who make an application for international protection on the territory … of a Member State, as long as they are allowed to remain on the territory as applicants'.

24. In Chapter II of that directive, entitled 'General provisions on reception conditions', Article 15 – the interpretation of which is sought here – is worded as follows:

'1. Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.

2. Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market.

For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.'

4. Regulation No 604/2013

25. Article 1 of Regulation No 604/2013 provides that the purpose of that regulation is to lay down the criteria and mechanisms for determining the Member State responsible.

26. Recitals 11, 12 and 19 of that regulation state:

'(11) Directive [2013/33] should apply to the procedure for the determination of the Member State responsible as regulated under this Regulation, subject to the limitations in the application of that Directive.

(12) Directive [2013/32] should apply in addition and without prejudice to the provisions concerning the procedural safeguards regulated under this Regulation, subject to the limitations in the application of that Directive.

…

(19) In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the [Charter]. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.'

27. In Chapter II of Regulation No 604/2013, entitled 'General principles and safeguards', Article 3(1) provides that 'Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible'.

28. In Chapter VI of that regulation, entitled 'Procedures for taking charge and taking back', Article 20(1) provides that 'the process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State'.

29. In section IV of that chapter, entitled 'Procedural safeguards', Article 26(1) of the regulation provides, inter alia, that 'where the requested Member State accepts to take charge of or to take back an applicant …, the requesting Member State shall notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection'.

30. Article 27 of Regulation No 604/2013, entitled 'Remedies', provides:

'1. 'The applicant … shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

…

3. For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:

(a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal …'

B. Irish law

31. Following the application of Article 4 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice,[9] the European Communities (Reception Conditions) Regulations 2018 ('the 2018 Regulations') transposed the provisions of Directive 2013/33 into Irish law, with effect from 30 June 2018.

9 OJ 2016 C 202, p. 295.

32. Article 2(2) and (3) of the 2018 Regulations provides:

‘2. For the purposes of these Regulations, where a transfer decision, within the meaning of [the European Union (Dublin System) Regulations 2018[10]], is made in respect of an applicant, he or she shall, on and from the date of the sending to him or her of the notification under Regulation 5(2) of those Regulations of the making of the transfer decision—

(a) cease to be an applicant, and

(b) be deemed to be a recipient but not an applicant.

3. For the purposes of these Regulations, a person who has made an appeal under Regulation 16(2) of the [European Union (Dublin System) Regulations 2018], in respect of which appeal the International Protection Appeals Tribunal [(Ireland)] has not made a decision, shall be deemed to be a recipient but not an applicant.’

33. Article 11(3) and (4) of the 2018 Regulations, which implements Article 15(1) of Directive 2013/33, provides:

‘3. An applicant may make an application for a permission, which application shall be—

…

(b) made on or after the expiry of the period of 8 months beginning on the [international protection] application date.

4. The Minister [for Justice and Equality (Ireland)] may … grant a permission [to access the labour market] to the applicant where satisfied that—

(a) subject to paragraph (6), a period of 9 months, beginning on the application date, has expired, and, by that date, a first instance decision has not been made in respect of the applicant’s protection application, and

(b) the situation referred to in subparagraph (a) cannot be attributed, or attributed in part, to the applicant.’

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

34. The questions referred for a preliminary ruling by the High Court (Ireland) in the case of *The International Protection Appeals Tribunal and Others* (C-322/19) and by the International Protection Appeals Tribunal in the case of *Minister for Justice and Equality* (C-385/19) were submitted in the context of proceedings between third-country nationals and the Minister for Justice and Equality concerning the legality of decisions refusing to grant them permission to access the labour market as applicants for international protection whose transfer to another Member State had been requested under Regulation No 604/2013.

35. By decision of the President of the Court of 14 June 2019, those two cases were joined for the purposes of the written and oral procedure and of the judgment.

10 This footnote is not relevant for the English version of this Opinion.

A. Case C-322/19

36. In February 2010, K.S. left Pakistan for the United Kingdom and did not lodge an application for international protection in that Member State. In May 2015, he travelled to Ireland and applied for international protection there. Following the decision of 9 March 2016 to transfer the person concerned to the United Kingdom, he brought an appeal against that decision before the Refugee Appeals Tribunal (Ireland), which was dismissed on 17 August 2016. K.S. then brought judicial review proceedings having a suspensory effect before the High Court.

37. On 24 October 2009, M.H.K. left Bangladesh for the United Kingdom. After his residence permit in that Member State expired, and before a decision was taken on his application to extend that permit, he travelled to Ireland on 4 September 2014 and, on 16 February 2015, he applied for international protection there. Following the decision of 25 November 2015 to transfer the person concerned to the United Kingdom, M.H.K. brought an appeal against that decision before the Refugee Appeals Tribunal, which dismissed the appeal on 30 March 2016. He then brought judicial review proceedings before the High Court, relying on Article 17 of Regulation No 604/2013. Those proceedings are still pending and have suspensory effect.

38. Under Article 11(3) of the 2018 Regulations, K.S. and M.H.K. submitted applications for permission to access the labour market to the Labour Market Access Unit of the Department of Justice and Equality (Ireland). After their applications were rejected, the persons concerned each applied for a review of the rejection decision, and those applications were also rejected. They each brought an appeal against that decision before the International Protection Appeals Tribunal. By judgment of 11 September 2018, the International Protection Appeals Tribunal upheld the rejection decision addressed to K.S. on the ground that, under the national legislation at issue, applicants who are subject to a transfer procedure under Regulation No 604/2013 do not have the right of access to the labour market. By judgment of 17 October 2018, the International Protection Appeals Tribunal also dismissed the appeal lodged by M.H.K., holding, inter alia, that access to the labour market is not a 'material reception condition'. K.S. and M.H.K. then applied to the High Court for judicial review of those judgments.

39. That court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Where in interpreting one instrument of EU law that applies in a particular Member State an instrument not applying to that Member State is adopted at the same time, may regard be had to the latter instrument in interpreting the former instrument?

(2) Does Art. 15 of [Directive 2013/33] apply to a person in respect of whom a transfer decision under [Regulation No 604/2013] has been made?

(3) Is a Member State in implementing Art. 15 of [Directive 2013/33] entitled to adopt a general measure that in effect attributes to applicants liable for transfer under [Regulation No 604/2013] any delays on or after the making of a transfer decision?

(4) Where an applicant leaves a Member State having failed to seek international protection there and travels to another Member State where he or she makes an application for international protection and becomes subject to a decision under [Regulation No 604/2013] transferring him or her back to the first Member State, can the consequent delay in dealing with the application for [international] protection be attributed to the applicant for the purposes of Art. 15 of [Directive 2013/33]?

(5) Where an applicant is liable to transfer to another Member State under [Regulation No 604/2013], but that transfer is delayed due to judicial review proceedings taken by the applicant which have the consequence of suspending the transfer pursuant to a stay ordered by the court, can the consequent delay in dealing with the application for international protection be attributed to the applicant for the purposes of Art. 15 of [Directive 2013/33], either generally or, in particular, where it may be determined in those proceedings that the judicial review is unfounded, manifestly or otherwise, or is an abuse of process?'

B. Case C-385/19

40. R.A.T. is an Iraqi national who applied for international protection in Ireland on 7 March 2018. By letter of 2 October 2018, she was notified of a decision to transfer her to the United Kingdom pursuant to Regulation No 604/2013. On 18 October 2018, she brought an appeal against that decision before the International Protection Appeals Tribunal. That appeal is still pending.

41. D.S. is an Iraqi national who claims to have left Iraq on 1 August 2015 and travelled via Turkey and Greece to Austria. He left Austria before a decision had been taken on the application for international protection he made in that country. On 8 February 2016, D.S. made another application for international protection in Ireland. The Irish authorities adopted a decision to transfer him to Austria, pursuant to Article 18(1)(b) of Regulation No 604/2013. D.S. brought an appeal against that decision before the International Protection Appeals Tribunal, which was dismissed. He brought judicial review proceedings before the High Court, which are still pending.

42. R.A.T. and D.S. applied for access to the labour market pursuant to Article 11(3) of the 2018 Regulations. Their application was rejected on the ground that, since a decision had been made under Regulation No 604/2013 to transfer them to another Member State, they no longer had the status of applicant, and were now deemed to be recipients, within the meaning of the 2018 Regulations. Therefore, they could not be granted access to the labour market in Ireland. R.A.T. and D.S. then brought appeals against those decisions before the International Protection Appeals Tribunal.

43. That court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are there separate categories of "Applicant" envisaged in Article 15 of Directive [2013/33]?

(2) What type of conduct will amount to delay attributable to the applicant within the meaning of Article 15(1) of Directive [2013/33]?'

IV. Analysis

44. Before examining the questions referred for a preliminary ruling, I think it would be useful to make some preliminary observations.

A. Preliminary observations

45. The first observation concerns the scope of the present Opinion. As requested by the Court, this Opinion will focus on two issues set out in the second to fifth questions in Case C-322/19 and in both questions in Case C-385/19.

46. The first issue concerns determination of the persons entitled to the right of access to the labour market provided for in Article 15(1) of Directive 2013/33. While, by its second question in the Case C-322/19, the High Court asks the Court of Justice whether an applicant in respect of whom a transfer decision has been adopted enjoys that right of access to the labour market, the International Protection Appeals Tribunal asks, by its first question in Case C-385/19, whether there are separate categories of applicant covered by the abovementioned provision.

47. The second issue concerns the circumstances in which a Member State may attribute to the applicant the delay in examining his or her application for international protection, for the purposes of Article 15(1) of Directive 2013/33, and thus refuse him or her access to the labour market, where that delay is due to the procedure for determining the Member State responsible. While the International Protection Appeals Tribunal, by its second question in Case C-385/19, asks the Court to specify the type of conduct capable of causing such a delay, the High Court, by its fourth and fifth questions in Case C-322/19, asks about two particular types of conduct which could result in a delay attributable to the applicant, namely, first, where the applicant did not lodge his or her application in the Member State of first irregular entry or, if he or she is lawfully resident in a Member State, in the Member State of residence (and the examination of his or her application therefore involves the implementation of a procedure for taking charge of him or her, for taking him or her back and, where appropriate, for transferring him or her to that Member State) and, secondly, where the applicant has brought legal proceedings against the transfer decision adopted pursuant to Regulation No 604/2013.

48. In order to examine those questions, it is necessary to take into account rules of EU law other than those expressly referred to in the orders for reference and, in particular, the substantive and procedural rules laid down by the EU legislature in Directives 2011/95 and 2013/32.

B. Determination of the persons entitled to labour market access as provided for in Article 15(1) of Directive 2013/33

49. The High Court, by its second question in Case C-322/19, and the International Protection Appeals Tribunal, by its first question in Case C-385/19, ask the Court, in essence, whether a Member State in the territory of which an application for international protection has been made is required to grant an applicant access to the labour market if the authorities of that Member State have adopted a decision to transfer the applicant to the Member State they have identified as being responsible in accordance with Regulation No 604/2013.

50. That question must clearly be answered in the positive, based on a literal, systematic and teleological interpretation of Article 15(1) of Directive 2013/33 and on the principles identified by the Court in the judgment in *Cimade and GISTI*. I note that, in the case which gave rise to that judgment, the Court was asked whether a Member State to which an application for international protection has been made at its border or in its territory is obliged to grant the minimum conditions for reception laid down in Directive 2003/9/EC[11] to an applicant in respect of whom it decides, under Regulation No 343/2003, to call upon another Member State, as the Member State responsible, to take charge of or take back the person concerned. The provisions at issue in the case which gave rise to the judgment in *Cimade and GISTI* were, in essence, identical to the provisions the interpretation of which is requested here. Those cases are, however, different in two respects. First, access to the labour market is not a minimum or material reception condition within the meaning of Directives 2003/9 and 2013/33. The right of access to the labour market is not intended to satisfy an essential or vital

11 Council Directive of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18), which has been replaced by Directive 2013/33.

need of the applicant. Secondly, the procedure for determining the Member State responsible is at a more advanced stage in the cases in the main proceedings than in the case which gave rise to the judgment in *Cimade and GISTI*, since, in the cases in the main proceedings, a decision to transfer the persons concerned has already been taken.

1. Literal interpretation of Article 15(1) of Directive 2013/33

51. In the first place, it is clear from the wording of Article 15(1) of Directive 2013/33 that the 'applicant' must receive access to the labour market of the host Member State.

52. According to Article 2(b) of that directive, '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'.

53. It should be noted at the outset that the EU legislature refers here to the definition of the concept of 'applicant' which is common to all the provisions forming part of the CEAS.[12] As EU law currently stands, none of the instruments forming part of that system establishes a specific definition or, moreover, a specific legal status for applicants subject to procedures for taking charge and taking back and to transfer procedures under Regulation No 604/2013. In the judgment in *Cimade and GISTI*, the Court had already held that it follows from Articles 2 and 3 of Directive 2003/9 that there is only one category of applicants for international protection, comprising all third-country nationals and stateless persons who make an application for asylum.[13]

54. As regards the definition of the concept of 'applicant' referred to in Article 2(b) of Directive 2013/33, I would observe, first, that, in using, in the French-language version, the indefinite adjective 'any' ('tout ressortissant de pays tiers ou tout apatride'), and, in the English-language version, the indefinite article 'a' ('a third-country national or a stateless person'), the EU legislature shows that no third-country national or stateless person is, a priori, excluded from the status of applicant. Although third-country nationals are required to have made an application for international protection, there is clearly no requirement for that application to have been lodged in the Member State responsible for the purposes of Regulation No 604/2013.[14] Lastly, I note that, according to that definition, the person concerned retains his or her status provided that 'a final decision [on the application for international protection] has not yet been taken'. According to the Court, the person concerned does not therefore lose his or her status of applicant until a final decision has been taken.[15] This means that an administrative authority and, where appropriate, a judicial authority must have taken a final decision on whether the status of beneficiary of international protection is to be accorded to the person concerned.

55. However, a transfer decision adopted on the basis of Article 26 of Regulation No 604/2013 does not constitute a 'final decision' on the application for international protection. Only a final decision can lead to the loss of the status of applicant.

56. As the Court pointed out in the judgment of 31 May 2018, *Hassan*,[16] a transfer decision is part of the specific mechanism established by Regulation No 604//2013 for determining the Member State responsible, and of the strict procedural system established in Articles 26 and 27 of that regulation.

12 See, in that regard, Article 2(i) of Directive 2011/95, Article 2(c) of Directive 2013/32 and Article 2(c) of Regulation No 604/2013.

13 See the judgment in *Cimade and GISTI* (paragraph 40).

14 See, in that regard, the judgment in *Cimade and GISTI* (paragraph 40).

15 See, in that regard, the judgment in *Cimade and GISTI* (paragraph 53) and judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 63).

16 C-647/16, EU:C:2018:368, paragraph 41 et seq.

57. A transfer decision is neither a decision on the admissibility of the application nor a decision on the merits of the application. It is clear from Article 33 of Directive 2013/32 that, where an application is not examined in accordance with Regulation No 604/2013 – which is the case when a transfer decision is adopted under Article 26(1) of that regulation – Member States may not consider that application as inadmissible.[17] In addition, they are not required to examine whether the applicant qualifies for international protection.[18] Where a transfer decision has been adopted, that examination must be carried out by the authorities of the Member State designated as responsible.[19]

58. In the light of the foregoing, in so far as a transfer decision does not constitute a final decision on an application for international protection, the adoption of such a decision cannot have the effect of depriving the person concerned of the status of 'applicant', within the meaning of Article 2(b) of Directive 2013/33, and of the rights associated with that status.

59. In the second place, it is clear from the wording of Article 15(1) of that directive that the applicant must have access to the labour market no later than nine months from the date when the application for international protection was lodged and until a 'first instance decision' has been adopted by the competent authority. Moreover, Article 15(3) of that directive provides that where an appeal is lodged against a negative decision, the applicant is to retain access to the labour market until such time as a negative decision on the appeal is notified.

60. The EU legislature does not define the concept of 'first instance decision' in Directive 2013/33. Reference must be made, for that purpose, to the provisions set out in Chapter III of Directive 2013/32. It follows from the provisions set out in Articles 32 and 33 of that directive that a first instance decision is a decision by which the determining authority decides both on the admissibility of the application for international protection and on its merits. However, I note that, when adopting a transfer decision, the competent national authority does not decide either on the admissibility of the application or on its merits. Furthermore, should the authority which has adopted the transfer decision decide not to examine the application for international protection, that situation is not within the list of cases in which Member States may consider an application to be inadmissible for the purposes of Article 33 of Directive 2013/32. In that context, neither the transfer decision adopted pursuant to Article 26(1) of Regulation No 604/2013, nor, where applicable, the competent national authority's decision not to examine the application for international protection constitutes a 'first instance decision', within the meaning of Article 15(1) of Directive 2013/33. The right of access to the labour market laid down in that provision may be withdrawn only by a first instance decision.

61. In those circumstances, the adoption of a transfer decision cannot have the effect of depriving the person concerned of his or her status of applicant and the right of access to the labour market laid down in Article 15(1) of that directive.

62. That implies that anyone who lodges an application for international protection with the authorities of a Member State is considered to have the right of access to the labour market, as provided for in Article 15(1) of that directive, even if that Member State is not responsible for examining the application and has not made a decision on the admissibility or merits of that application.

17 In Article 33(2) of Directive 2013/32, the EU legislature provides an exhaustive list of the cases in which Member States may consider an application as inadmissible. I would observe that the situation in which an application for international protection is not examined in accordance with Regulation No 604/2013 does not appear on that list.

18 See, in that regard, Article 33(1) of Directive 2013/32.

19 Article 18(2) of Regulation No 604/2013 requires the Member State designated as responsible to examine the application for international protection or to complete the examination thereof, thus guaranteeing the continuity of the examination procedure.

2. The general scheme of which Article 15(1) of Directive 2013/33 forms part

63. In the first place, I would observe that the scope of Directive 2013/33, as defined in Article 3(1) thereof, extends to 'all third-country nationals and stateless persons who make an application for international protection on the territory … of a Member State, *as long as they are allowed to remain on the territory as applicants*'.[20]

64. The condition that the applicant must be allowed to remain on the territory is dictated by the purpose of that directive. In accordance with Article 1 thereof, the purpose of the directive is to lay down 'standards for the reception of [applicants]'. However, reception can be provided only by the Member State in the territory of which the applicant is present and is allowed to remain on account of having applied for international protection there.

65. I would observe that the expression 'remain in the Member State' is defined in Article 2(p) of Directive 2013/32, and should be interpreted as meaning 'to remain in the territory … of the Member State in which the application for international protection has been made or is being examined'. As the Court held in the judgment in *Cimade and GISTI*, that means that the applicant is allowed to remain not only in the territory of the Member State in which the application is being examined but also in that of the Member State in which that application was lodged.[21]

66. The condition that the applicant must be allowed to remain in the territory thus ensures that reception conditions are provided at all stages of the procedure for examining the application. That is the sense, in particular, of recital 8 of Directive 2013/33, which states that, in order to ensure equal treatment of applicants throughout the European Union, that directive 'should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants'.

67. The procedure for determining the Member State responsible carried out in accordance with Regulation No 604/2013 is by its very nature a 'procedure concerning applications for international protection'. It is an administrative procedure the purpose of which, according to Article 1 of that regulation, is to lay down the criteria and mechanisms for determining the Member State responsible.

68. Accordingly, Article 20(1) of that regulation provides that the process of determining the Member State responsible is to start as soon as an application for international protection is *first* lodged with *a* Member State. In recital 11 of Regulation No 604/2013, the EU legislature adds that 'Directive [2013/33] should apply to the procedure for the determination of the Member State responsible as regulated under [that] Regulation'. The procedure for determining the Member State responsible takes place, in practice, while the applicant is on the territory of the host Member State. In order to ensure the equal treatment sought by the EU legislature, it is therefore essential for the applicant in respect of whom a transfer decision has been adopted to be entitled to the reception conditions laid down in Directive 2013/33. Indeed, Article 27(3)(a) of Regulation No 604/2013 expressly confers on the applicant in respect of whom such a decision has been adopted 'the right to remain in the Member State concerned' if he or she has appealed against that decision, pending the outcome of the appeal.

69. Such an applicant therefore falls within the scope of Directive 2013/33, with the result that he or she cannot be excluded, a priori, from the reception conditions laid down therein.

20 Emphasis added.

21 See the judgment in *Cimade and GISTI* (paragraph 48).

70. The Court ruled to that effect in the judgment in *Cimade and GISTI*. It held that 'only the actual transfer of the [applicant] by the requesting Member State brings to an end the examination of the application … by that State and its responsibility for granting the minimum reception conditions'.[22] That case-law is applicable, on the same terms, to the provision of reception conditions other than material conditions, such as access to the labour market. The condition that the applicant must be allowed to remain on the territory applies regardless of the nature of the needs which the EU legislature seeks to meet.

71. In the second place, I would observe that Article 15(2) of Directive 2013/33 provides that Member States are to decide the conditions for granting access to the labour market in compliance with the principle of effectiveness.

72. Although the EU legislature sets out, in Articles 17, 18 and 20 of that directive, relatively precise provisions on the granting, reduction or withdrawal of material reception conditions, the fact remains that it does not set out similar provisions as regards the conditions for access to the labour market.[23] Thus, it leaves it to the Member States to decide, in accordance with their national law, the conditions for granting such access.

73. I would observe, however, that the EU legislature expresses two reservations.

74. First, while Member States are entitled to introduce conditions other than those expressly mentioned in Article 15(1) of that directive, they must nevertheless ensure *effective access* to the labour market. In other words, in the absence of EU rules, the conditions determined by the Member States for access to that market must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order.[24] In that context, a national rule which seeks to deprive the applicant of that status on the ground that he or she is subject to a transfer procedure seems contrary to the principle laid down by the EU legislature in so far as it prevents the applicant from enjoying the rights associated with that status.

75. Secondly, while Member States may, for reasons relating to their employment policy, give priority to certain categories of persons, those persons must be EU citizens, nationals of the European Economic Area or legally resident third-country nationals. It follows from Article 15(2) of Directive 2013/33 that reasons relating to national employment policy do not justify drawing a distinction between applicants based on whether their application is to be examined by the host Member State or by the Member State which the competent national authorities have designated as responsible on the basis of the criteria laid down by Regulation No 604/2013.

76. The context and the general scheme of Directive 2013/33 therefore also support an interpretation of Article 15(1) of that directive according to which a transfer decision cannot have the effect of depriving the person concerned of his or her status of applicant and of the right of access to the labour market conferred on him or her by that provision.

77. I think that the aim of that directive and the obligation to respect fundamental rights support that interpretation.

22 See the judgment in *Cimade and GISTI* (paragraph 55).

23 As regards the circumstances in which a Member State may reduce or withdraw material reception conditions, see judgment of 12 November 2019, *Haqbin* (C-233/18, EU:C:2019:956).

24 See, by analogy, judgment of 20 October 2016, *Danqua* (C-429/15, EU:C:2016:789, paragraph 29 and the case-law cited).

3. Teleological analysis of Directive 2013/33

78. According to recital 35 of Directive 2013/33, the fundamental rights constitute the reference framework for the standards for the reception of applicants. The provisions set out in Chapter II of that directive are thus intended to guarantee the effective protection of the applicant in the host Member State by supporting his or her needs continuously and in a way which respects his or her fundamental rights, in particular his or her dignity, and ensures equal treatment.

79. The reception conditions laid down by Directive 2013/33 concern, above all, making provision for the basic and immediate needs of the applicant. Those conditions are defined in Article 2(g) of that directive and referred to as 'material reception conditions' (housing, food, clothing and a daily expenses allowance). In the judgment in *Cimade and GISTI*, the Court held that an applicant may not be deprived of those conditions, even for a temporary period of time after making his or her application and before actually being transferred, as this would be incompatible, in particular, with the purpose of Directive 2003/9 and the requirements of Article 1 of the Charter, under which human dignity must be respected and protected.[25]

80. Furthermore, the reception conditions laid down in Directive 2013/33 seek to meet the applicant's other needs while he or she is staying on the territory of the host Member State for a potentially prolonged period of time. Although those conditions are not intended to meet the applicant's vital needs, they are nevertheless aimed at ensuring respect for fundamental rights enshrined in the Charter, such as family unity (Article 7 of the Charter and Article 12 of Directive 2013/33), the protection of the child (Article 24 of the Charter and Article 23 of Directive 2013/33), the right to education and vocational training (Article 14 of the Charter and Articles 14 and 16 of Directive 2013/33), access to health care (Article 35 of the Charter and Articles 13 and 19 of Directive 2013/33) and the right to engage in work (Article 15 of the Charter and Article 15 of Directive 2013/33). Like the schooling of minors, access to the labour market must therefore serve to meet an objective need of the applicant during his or her stay on the territory of the host Member State.

81. Member States cannot therefore deprive an applicant of that reception condition without running the risk of disregarding the objectives pursued by Directive 2013/33 and the fundamental rights which he or she derives from the Charter.

82. In the first place, recitals 11 and 23 of Directive 2013/33 clearly express the EU legislature's intention to ensure that the applicant has a dignified standard of living during his or her stay in the host Member State and to promote his or her self-sufficiency.

83. The right to work, as enshrined in numerous international and regional human rights instruments,[26] plays a role not only in the personal development of the individual and in his or her social and economic integration into society, but also in preserving his or her dignity.

25 See the judgment in *Cimade and GISTI* (paragraph 56).

26 See, for example, Article 23 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, or Article 6 of the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January 1976, which enshrines, in its paragraph 1, the right to work in the following terms: 'The States Parties to the present [c]ovenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right'. See, also, Article 1 of the European Social Charter, signed at Turin on 18 October 1961, and the preamble to the Employment Promotion and Protection against Unemployment Convention (No 168) of the International Labour Organisation, adopted in Geneva on 21 June 1988, and, as regards refugees, Articles 17 to 19 of the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545, 1954).

84. In its Note on the integration of Refugees in the European Union of 2007, the United Nations High Commissioner for Refugees emphasises the independence, recognition and social status that applicants acquire through employment.[27] In General comment No 18 on the right to work,[28] the United Nations Economic and Social Council states that although the right to work should not be understood as an absolute and unconditional right to obtain employment,[29] it is essential for realising other human rights, forms an inseparable and inherent part of human dignity, and contributes at the same time to the survival of the individual and to that of his or her family, and, in so far as work is freely chosen or accepted, to his or her development within the community.[30] That is why, according to the United Nations Economic and Social Council, access to employment must be guaranteed in particular for disadvantaged and marginalised individuals and groups, to enable them to live a life of dignity.[31] It is also one of the reasons the Supreme Court, in its judgment of 30 May 2017,[32] held that the previous Irish legislation, under which no applicant could access the labour market before a final decision had been taken on his or her application, was contrary to the Constitution.[33] That case concerned the situation of a Burmese applicant who had been refused access to the labour market although his application had been under examination for eight years. During that period, the applicant had been granted material reception conditions and an allowance of EUR 19 per week. The Supreme Court held that, by imposing an absolute prohibition on employment, with no temporal limit on the procedure for examining an application for international protection, such legislation would cause damage to the individual, which is what the Constitution seeks to guard against.[34]

85. For an applicant, work therefore clearly contributes to the preservation of his or her dignity, since the income from that employment enables him or her not only to provide for his or her own needs, but also to obtain housing outside the reception facilities in which he or she can, where necessary, accommodate his or her family. There is no doubt that, in the context of the forced nature of migration and the often traumatic experiences associated with it, the refusal of an applicant to engage in any professional activity may increase his or her vulnerability, the precariousness of his or her situation and, sometimes, the isolation and social exclusion to which he or she is already subject, especially as the waiting period may be several months. In that context, where a procedure for taking charge of an applicant or for taking him or her back or, where appropriate, for transferring him or her has been initiated, that applicant is ultimately in a more precarious situation than an individual who is not subject to such procedures. Here, I am taking into account that procedures for taking charge of applicants, for taking them back and for transferring them are particularly lengthy, ranging between 6 and 18 months, in accordance with Article 29 of Regulation No 604/2013. I am also taking into consideration the actual number of transfers made, in relation to the number of transfer decisions notified.[35] Thus, in 2012, the Court had already held in the judgment in *Cimade and GISTI* that the

27 Note on the integration of Refugees in the European Union, available at: https://www.unhcr.org/protection/integration/463b462c4/note-integration-refugees-european-union.html (paragraph 14).

28 The Right to Work, General comment No 18, adopted on 24 November 2005, Article 6 of the International Covenant on Economic, Social and Cultural Rights, available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc= 4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQfUKxXVisd7Dae%2FCu%2B13J25Nha7l9NlwYZ%2FTmK57O%2FSr7TB2hbCAidyVu5x7XcqjNXn44LZ52C%2BIkX8AGQrVyIc; 'General comment No 18'.

29 Paragraph 6 of General comment No 18.

30 Paragraph 1 of General comment No 18.

31 Paragraph 31(a) of General comment No 18.

32 See footnote 4 of this Opinion.

33 See, in particular, paragraphs 19 to 21 of that judgment.

34 See paragraph 20 of that judgment.

35 See statistics presented in September 2019 by Eurostat, 'Dublin statistics on countries responsible for asylum application', in particular under the heading, 'Implemented transfers within the Dublin procedure', available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application#Implemented_transfers_within_the_Dublin_procedure.

procedure established by Regulation No 343/2003 could, in certain cases, result in the applicant never being transferred to the requested Member State, but remaining in the Member State in which he or she lodged his or her application for international protection.[36] The same observation is made in the reports on the implementation of Regulation No 604/2013.[37]

86. In view of the length of those procedures, excluding the applicant from the labour market may, moreover, give rise to a greater risk of absconding – which could be reduced by granting access to employment – and an increase in intermittent employment, while Member States are quite rightly trying to combat these phenomena and the abuses resulting therefrom.

87. Furthermore, it is important to point out that, if an applicant does not have his or her own financial resources, the consequence of excluding him or her from access to the labour market is that the host Member State is required to ensure him or her a dignified standard of living by providing him or her, in particular, with material reception conditions as provided in Articles 17 to 20 of Directive 2013/33. That reception requires the mobilisation of material, financial and human resources. In that situation, it is clear that granting access to the labour market alleviates migratory pressure as well as the social and financial burden on the host Member State, thus enabling that Member State, in the context of procedures for taking charge, to focus its efforts on the most vulnerable applicants.

88. Moreover, in a situation where there is a systemic deficiency in the reception conditions, excluding applicants from access to the regular labour market could expose the Member State to the risk of infringing the principles enshrined in Articles 1 and 4 of the Charter. The European Court of Human Rights ruled to that effect in its judgment of 11 December 2014, *AL.K v. Greece*.[38] In that case, the applicant submitted that the Hellenic Republic had failed to provide him with dignified reception conditions and prevented him from improving his standard of living by, inter alia, refusing to grant him a work permit. In its judgment, the European Court of Human Rights accepted that infringement of the right of access to the labour market, in view of the administrative and practical obstacles resulting from the general context of the economic crisis, combined with a lack of accommodation at reception facilities, can constitute degrading treatment within the meaning of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[39]

89. In the light of the foregoing, there is no justification for depriving an applicant in respect of whom a transfer decision has been adopted from access to the labour market as long as he or she is allowed to remain on the territory of the host Member State.

90. In the second place, the CEAS, of which Directive 2013/33 and Regulation No 604/2013 form part, is based, in accordance with Article 67(2) and Article 80 TFEU, on a common policy which must be fair towards third-country nationals.[40] With the exception of the provisions concerning vulnerable persons, the EU legislature clearly shows in Directive 2013/33 its intention to ensure equal treatment of all applicants by ensuring that their status and the rights and obligations associated therewith are harmonised and uniform. Thus, under Directive 2013/33, applicants for subsidiary protection, who were not covered by the previous provisions of Directive 2003/9, can benefit from reception standards.[41]

36 See the judgment in *Cimade and GISTI* (paragraph 45).

37 See the results of the evaluations referred to in the Proposal for a Regulation of the European Parliament and of the Council 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 of 4 May 2016 (COM(2016) 270 final), in which the European Commission states that, in 2014, only about a quarter of the total number of accepted take-back and take-charge requests actually resulted in a physical transfer (p. 11).

38 CE:ECHR:2014:1211JUD006354211, § 56 to 60.

39 Signed at Rome on 4 November 1950.

40 Article 67(2) TFEU provides that the European Union is to develop a common policy on asylum based on solidarity between Member States. According to Article 80 TFEU, EU asylum policy is to be governed by the principle of solidarity and fair sharing of responsibility between the Member States.

41 See recital 13 of Directive 2013/33.

91. In recital 5 of Directive 2013/33, the EU legislature recalls the aim of the Stockholm Programme, which is for applicants to be offered an equivalent level of treatment as regards reception conditions, regardless of the Member State in which those applicants made their application. The objective is therefore, as stated in recital 11 of that directive, to ensure that applicants have comparable living conditions in all Member States and, as stated in recital 12 of the directive, to reduce the risk of 'secondary movements' of applicants influenced by the variety of reception conditions.

92. Recital 8 of Directive 2013/33 is also very illuminating in so far as it states that, in order to ensure equal treatment of applicants throughout the European Union, that directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants.

93. In the light of that objective and of the terms in which it is expressed, there is no doubt that the EU legislature did not intend to introduce a variable-geometry system of rights or, more specifically, a reception system in which there is a difference in treatment between third-country nationals whose applications are examined by the host Member State and those whose applications are to be examined by the Member State designated as responsible in accordance with Regulation No 604/2013. The needs of an applicant who is allowed to remain on the territory of the host Member State are identical whether he or she is awaiting a final decision on his or her application for international protection or awaiting his or her actual transfer to the Member State responsible. In that context, it is neither objective nor even reasonable to deprive an applicant awaiting transfer of the possibility of working legally and supporting him or herself, since the duration of his or her stay on the territory of the host Member State can be longer than that of an applicant awaiting a final decision on his or her application. It should be borne in mind that procedures for taking charge and taking back and transfer procedures are subject to the time limits set out in Articles 21 to 25 and Article 29 of Regulation No 604/2013, and that transfers are often not completed within the prescribed time limits. I note that, where a transfer does not take place within the time limit, the Member State responsible is to be relieved of its obligation, and the requesting Member State, which is the host Member State, is to assume responsibility for examining the application for international protection.[42]

94. In the light of all the foregoing, I am therefore of the opinion that Article 15(1) of Directive 2013/33 must be interpreted as precluding legislation of a Member State under which the applicant may be refused access to the labour market on the ground that the competent national authority has adopted a decision to transfer him or her to the Member State it has identified as being responsible in accordance with Article 26 of Regulation No 604/2013.

95. The adoption of such a decision cannot have the effect of depriving a third-country national or a stateless person who has lodged an application for international protection in the host Member State of the status of applicant or the rights associated therewith.

C. The scope of the condition relating to the delay attributable to the applicant

96. By the fourth and fifth questions referred by the High Court in Case C-322/19 and by the second question referred by the International Protection Appeals Tribunal in Case C-385/19, the Court is asked, in essence, to specify what type of conduct is capable of causing a delay attributable to the applicant for the purposes of Article 15(1) of Directive 2013/33.

42 See, in that regard, Article 29(2) of Regulation No 604/2013.

97. In particular, the High Court asks the Court whether it is possible, under that provision, to attribute to the applicant a delay caused, first, by the fact that he or she did not lodge his or her application for international protection in the first Member State of entry or his or her Member State of residence (and the examination of his or her application therefore involves the implementation of a procedure for taking charge of him or her, for taking him or her back and, where appropriate, for transferring him or her to that Member State) and, secondly, by the fact that he or she brought legal proceedings against the transfer decision.

98. That question asks the Court to determine the scope of one of the conditions, laid down in Article 15(1) of Directive 2013/33, for granting access to the labour market to applicants. I note that, under that provision, Member States must ensure that applicants have access to the labour market no later than nine months from the date when the application was lodged if 'a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant'.

99. I would observe that the wording of Article 15(1) of Directive 2013/33 does not specify the circumstances in which it could be considered that the delay in adopting a first instance decision may be attributed to the applicant. Moreover, the nature of those circumstances cannot be determined by examining the scheme of legislation of which that provision forms part or the purpose of that directive. That directive, by virtue of its title and preamble as well as its content and purpose, does not seek either to set out the procedural rules that apply to the adoption of a first instance decision, or to lay down the applicant's obligations in that context.

100. It is therefore necessary to refer to the procedural rules set out in Directive 2013/32 and to the objective pursued by those rules.

101. Chapter II of Directive 2013/32, entitled 'Basic principles and guarantees', and Chapter III of that directive, entitled 'Procedures at first instance', define the rights and obligations of the applicant in the context of the procedure for the adoption of a decision at first instance. Point (c) of the third subparagraph of Article 31(3) of that directive thus contains an explicit reference to the circumstances in which a national authority may attribute to the applicant a delay in adopting a decision at first instance. According to that provision, Member States may extend the six-month time limit for adopting a decision at first instance by a further nine months, where 'the delay can clearly be attributed *to the failure of the applicant to comply with his or her obligations under Article 13* [of that directive]'.[43]

102. Article 13 of Directive 2013/32 is entitled 'Obligations of the applicants'. It is clear from Article 13(1) that applicants have the obligation to cooperate with the competent national authority with a view to establishing their identity and other elements referred to in Article 4(2) of Directive 2011/95, such as their age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection. Those are the essential elements which are necessary for the purposes of the assessment of the facts and circumstances which the competent authority must carry out when examining the application for international protection. According to the Court's case-law, such an obligation amounts to the applicant supplying, as far as possible, the required supporting documents and, where appropriate, the explanations and information requested.[44]

43 Emphasis added.

44 See judgment of 14 September 2017, *K.* (C-18/16, EU:C:2017:680, paragraph 38).

103. In Article 13 of Directive 2013/32, the EU legislature allows Member States to give concrete expression to such cooperation by laying down other obligations for the applicant 'in so far as [they] are necessary for the processing of the application'.[45] According to the EU legislature, Member States may, in particular, require applicants to report to the competent national authority, to hand over documents relevant to the examination of their application and to inform the competent national authority of their address and of any changes thereof, and provide that they may be searched or photographed or have their oral statements recorded.[46]

104. Therefore, although the Member States have a margin of discretion, the obligations imposed on applicants must be part of the cooperation established in Article 4 of Directive 2011/95. They must also serve to enable the authorities to assess and obtain the elements that are most relevant to determining the applicant's need for international protection, and to assemble all the information necessary to evaluate the applicant's credibility and the merits of his or her application. In the case of an asylum application, the objective is to determine, as required by Article 2(d) of Directive 2011/95 and on the basis of very specific information, whether the individual's fear of being persecuted once he or she has returned to his or her country of origin is objectively justified. In the case of an application for subsidiary protection, the aim is to determine, in the light of Article 2(f) of that directive, whether substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm. Under Article 4(1) of that directive, the burden of proof lies with the applicant. The applicant is in fact required to submit as soon as possible all the elements needed to substantiate his or her application.

105. I conclude, in the light of the foregoing, that the applicant's obligations, to which the EU legislature refers for the purposes of adopting a first instance decision in Article 13 and point (c) of the third subparagraph of Article 31(3) of Directive 2013/32, must be understood as being limited to enabling the assessment of the admissibility and merits of the application for international protection.

106. I propose, therefore, that the answer to the second question asked by the International Protection Appeals Tribunal should be that, in implementing Article 15(1) of Directive 2013/33, a Member State may attribute to the applicant the delay in adopting a decision at first instance only in so far as the applicant has failed to fulfil his or her obligations under Article 13 of Directive 2013/32.

107. It must now be determined whether, as the High Court argues in its order for reference, a Member State may attribute such a delay to the applicant on the ground that, first, the applicant did not lodge his or her application for international protection in the first Member State of entry or the Member State of residence and, secondly, that he or she brought legal proceedings against the transfer decision.

108. I take the view that, as the provisions of the CEAS currently stand, neither of those circumstances can be regarded as the cause of a delay attributable to the applicant, within the meaning of Article 15(1) of Directive 2013/33, capable of depriving him or her of access to the labour market in the host Member State.[47]

109. None of those circumstances is evidence of a failure on the part of the applicant to fulfil his or her obligations under the procedure for determining his or her international protection status.

45 Article 13(1) of that directive.

46 See Article 13(2) of that directive.

47 In the context of its proposal for a regulation, cited in footnote 37 of this Opinion, the Commission proposes the introduction of a new Article 4, entitled 'Obligations of the applicant', paragraph 1 of which would provide that, where an applicant has entered irregularly into the territory of a Member State, he or she must make his or her application in that Member State of first irregular entry or, if he or she is lawfully resident in a Member State, in the Member State in which he or she is lawfully resident (see, also, the explanations relating to the introduction of that new obligation on page 16 of the proposal). Under the new Article 5(3) of the amended regulation, if the applicant does not comply with that obligation, he or she will not be entitled to the reception condition set out in Article 15 of Directive 2013/33 in any Member State other than the one in which he or she is required to be present.

110. The alleged failures referred to by the High Court actually relate to the procedure for determining the Member State responsible, established by Regulation No 604/2013. There is no requirement under that regulation for the third-country national or stateless person to lodge his or her application for international protection in the first Member State of entry or the Member State of residence, or to waive his or her right to bring legal proceedings in order to ensure that the procedure is carried out expeditiously.

111. The interpretation suggested by the High Court is therefore incompatible with the terms, the scheme and the purpose of Regulation No 604/2013.

112. In the first place, as I have just pointed out, there are no provisions in that regulation laying down an obligation for the third-country national or stateless person to lodge his or her application for international protection in the first Member State of entry or the Member State of residence. It is true that the Commission has proposed to introduce such an obligation as part of the recast of the Dublin system in order to prevent secondary movements of applicants,[48] but that proposal, which was made in 2016, has not yet been adopted. As EU law currently stands, and as the Court emphasised in its judgment of 7 June 2016, *Ghezelbash*,[49] Regulation No 604/2013 therefore establishes a set of measures to involve applicants in the process for determining the Member State responsible. As soon as an application for international protection is first lodged in a Member State, Articles 4 and 5 of that regulation thus require the competent national authorities, first, to inform the applicant, in writing in a language that he or she understands, of the various mechanisms put in place by that regulation and, in particular, of the criteria for determining the Member State responsible and the order in which they should be applied and, secondly, to organise a personal interview.[50] As shown by the order in which the responsibility criteria are set out in Chapter III of Regulation No 604/2013, the first Member State of entry or the first Member State of residence is not necessarily the Member State responsible if it has been established, for example, that family members of the applicant are present in another Member State, of if it is not in the best interests of the minor concerned.[51]

113. Consequently, 'the regular and orderly application' of Regulation No 604/2013 referred to by the High Court in its order for reference does not require the third-country national or stateless person to lodge his or her application for international protection in the first Member State on the territory of which he or she entered from a third country or on the territory of which he or she resided.

114. In those circumstances, the host Member State cannot attribute to that applicant the delay caused by the procedure for determining the Member State responsible and refuse him or her the access to the labour market provided for in Article 15(1) of Directive 2013/33.

115. In the second place, the same conclusion must be reached as regards the interpretation suggested by the High Court, according to which a Member State may attribute to the applicant the delay caused by the proceedings which the applicant brought against the transfer decision.

48 See footnote 37 of this Opinion.

49 C-63/15, EU:C:2016:409, paragraphs 46 to 48.

50 Article 4 of Regulation No 604/2013 is entitled 'Right to information'. Paragraph 1 of that article provides, inter alia: 'As soon as an application for international protection is lodged within the meaning of Article 20(2) in a Member State, its competent authorities shall inform the applicant of the application of this Regulation, and in particular of: (a) the objectives of this Regulation and the consequences of making another application in a different Member State …; (b) the criteria for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration …; (c) the personal interview pursuant to Article 5 and the possibility of submitting information regarding the presence of family members, relatives or any other family relations in the Member States …; (d) the possibility to challenge a transfer decision …'. Article 5 of Regulation No 604/2013, entitled 'Personal interview', is worded as follows: '1. In order to facilitate the process of determining the Member State responsible, the determining Member State shall conduct a personal interview with the applicant. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4. … 3. The personal interview shall take place in a timely manner and, in any event, before any decision is taken to transfer the applicant to the Member State responsible pursuant to Article 26(1). …'

51 In accordance with Article 7(1) and (2) of Regulation No 604/2013, the Member State in which an application for international protection has been lodged must apply the criteria in the order in which they are set out in that chapter, on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State.

116. The Court has already dealt at length with the scope of the right to a judicial remedy provided for in Regulation No 604/2013 in the judgment of 7 June 2016, *Ghezelbash*,[52] and in the judgments of 25 October 2017, *Shiri*,[53] of 31 May 2018, *Hassan*,[54] and of 2 April 2019, *H. and R.*,[55] to which I refer. In this Opinion, I believe it is sufficient to note that the EU legislature accompanied the adoption of Regulation No 604/2013 with measures to enhance the procedural safeguards granted to applicants under the Dublin system,[56] in particular, the judicial protection they enjoy under Article 47 of the Charter.[57]

117. I note that, under that provision, everyone whose rights or freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal.[58] Member States are therefore required to provide sufficient remedies and to observe the rights of defence of addressees of decisions which significantly affect their interests.[59] A transfer decision is such a decision.

118. The right to bring legal proceedings against such a decision is, first of all, laid down in Article 4(1)(d) of Regulation No 604/2013.[60] It is also enshrined in Article 27(1) of that regulation. Lastly, its scope is specified by the EU legislature in recital 19 of that regulation, and by the Court in the case-law cited in footnotes 52 to 59 of this Opinion.

119. In that regard, the Court recalled that 'the EU legislature did not intend that the judicial protection enjoyed by applicants for international protection should be sacrificed to the requirement of expedition in processing applications for international protection'.[61] As regards the risk that the conclusion of the procedure for determining the Member State responsible may be excessively delayed as a result of a judicial review, the Court held that that risk is limited in the light of the provisions expressly laid down in Regulation No 604/2013.[62]

120. Consequently, it seems clear to me that the Member State in which an application for international protection has been lodged cannot deter the applicant from exercising the right of appeal expressly granted to him or her both by the Charter and by that regulation by attributing to him or her the delay resulting from the legal proceedings and by depriving him or her of the standard of reception provided for in Article 15(1) of Directive 2013/33.

121. Such an action would infringe not only the applicant's right to effective judicial protection, but also his or her right to a dignified reception which respects his or her fundamental rights, as I have already stated.

52 C-63/15, EU:C:2016:409, paragraph 30 et seq.

53 C-201/16, EU:C:2017:805, paragraph 36 et seq.

54 C-647/16, EU:C:2018:368, paragraph 56 and the case-law cited.

55 C-582/17 and C-583/17, EU:C:2019:280, paragraphs 38 to 42 and the case-law cited.

56 See, in that regard, judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 57). See, also, to that effect, the Proposal for a Regulation of the European Parliament and of the Council 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 (COM(2008) 820 final), in particular, in part 3 of the explanatory memorandum, section 3, entitled 'Legal safeguards for the persons falling under the Dublin procedure' (p. 8), and section 6, entitled 'Particular pressure or inadequate level of protection' (in particular, p. 12).

57 See, in that regard, judgment of 31 May 2018, *Hassan* (C-647/16, EU:C:2018:368, paragraphs 57 and 58 and the case-law cited).

58 See judgments of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)* (C-564/18, EU:C:2020:218, paragraph 60 and the case-law cited), and of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 127 and the case-law cited).

59 See, to that effect, judgment of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraphs 29, 30 and 33 and the case-law cited).

60 See footnote 50 of this Opinion.

61 See, in that regard, judgment of 31 May 2018, *Hassan* (C-647/16, EU:C:2018:368, paragraph 57 and the case-law cited).

62 See, in that regard, judgment of 7 June 2016, *Ghezelbash* (C-63/15, EU:C:2016:409, paragraph 58).

122. In third and last place, I would like to state that, if a Member State considers that applicants have made fraudulent or excessive use of their right of appeal in order to delay the transfer procedure to which they are subject, this does not justify the adoption of a measure whereby the delay in adopting a decision at first instance would be generally attributable to all applicants.

123. I note that, in accordance with the case-law of the Court, in the absence of an express provision in EU legislation, the fact that a Member State is faced with a high number of cases of abuse of rights or fraud committed by third-country nationals cannot justify the adoption of a measure founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned him or herself. The Court has held that the adoption of measures pursuing an objective of general prevention in respect of widespread cases of abuse of rights or fraud would mean that the mere fact of belonging to a particular group of persons would allow the Member States to refuse to recognise a right expressly conferred by EU law.[63]

124. The Court thus considers that it is for the national court to provide proof of an abuse of rights by establishing the existence of two elements. The first requires that it demonstrate the existence of a set of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved. The second involves proving that the person concerned is motivated by the desire to obtain an advantage from the EU rules by artificially creating the conditions required for obtaining it.[64]

125. In the light of all the foregoing, I therefore consider that Article 15(1) of Directive 2013/33 must be interpreted as meaning that a Member State may attribute to an applicant the delay in adopting a decision at first instance only in so far as the applicant has failed to fulfil his or her cooperation obligations under Article 13 of Directive 2013/32.

126. In those circumstances, a Member State may not attribute to the applicant the delay resulting from the procedure for determining the Member State responsible either on the ground that he or she did not lodge his or her application for international protection in the first Member State of entry, or, if he or she is lawfully resident in a Member State, in the Member State of residence, or on the ground that he or she brought proceedings against the decision to transfer him or her, adopted pursuant to Article 26 of Regulation No 604/2013.

V. Conclusion

127. In the light of the foregoing considerations, I propose that the Court should answer the second question referred for a preliminary ruling by the High Court (Ireland) in *The International Protection Appeals Tribunal and Others* (C-322/19) and the first question referred for a preliminary ruling by the International Protection Appeals Tribunal (Ireland) in *Minister for Justice and Equality* (C-385/19) as follows:

(1) Article 15(1) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection must be interpreted as precluding legislation of a Member State under which an applicant for international protection may be refused access to the labour market on the ground that the competent national authority has adopted a decision to transfer him or her, pursuant to Article 26 of Regulation No 604/2013 of the European Parliament and of the Council of 26 June

63 See, in that regard, judgment of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraphs 55 and 56).

64 See judgments of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraphs 52 to 54), and of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 54 and the case-law cited).

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.

(2) The adoption of such a decision cannot have the effect of depriving a third-country national or a stateless person who has lodged an application for international protection in the host Member State of the status of applicant or the rights associated therewith.

128. Furthermore, I propose that the Court should answer the fourth and fifth questions referred for a preliminary ruling by the High Court in *The International Protection Appeals Tribunal and Others* (C-322/19) and the second question referred for a preliminary ruling by the International Protection Appeals Tribunal in *Minister for Justice and Equality* (C-385/19) as follows:

(1) Article 15(1) of Directive 2013/33 must be interpreted as meaning that a Member State may attribute to an applicant for international protection the delay in adopting a decision at first instance only in so far as the applicant has failed to fulfil his or her cooperation obligations under Article 13 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

(2) In those circumstances, a Member State may not attribute to the applicant for international protection the delay resulting from the procedure for determining the Member State responsible for examining his or her application for international protection either on the ground that he or she did not lodge his or her application for international protection in the first Member State of entry, or, if he or she is lawfully resident in a Member State, in his or her Member State of residence, or on the ground that he or she brought legal proceedings against the transfer decision adopted pursuant to Article 26 of Regulation No 604/2013.