



According to Advocate General Pikamäe, Hungary has failed to fulfil obligations arising from EU law in relation to a substantial part of its national legislation on asylum procedures and the return of illegally staying third-country nationals

In particular, it should be established that there has been a failure to fulfil obligations for breach of ensuring effective access to the asylum procedure, and for breach of the procedural safeguards relating to applications for international protection, to the unlawful detention of applicants for that protection in transit zones and to the unlawful removal of illegally staying third-country nationals

The Commission has brought an action for failure to fulfil obligations against Hungary before the Court of Justice seeking a declaration that a substantial part of the national legislation of that Member State on the right to asylum and on the return of illegally staying third-country nationals is contrary to EU law and more specifically the 'Procedures'¹ 'Reception'² and 'Return'³ Directives.

In particular, the Commission alleges that Hungary has infringed the procedural safeguards relating to applications for international protection, has unlawfully detained applicants for that protection in transit zones and has unlawfully removed illegally staying third-country nationals.

In today's Opinion, Advocate General Priit Pikamäe takes the view, in the first place, that the combination (i) of the obligation laid down in the Hungarian legislation for applicants for international protection to travel to one of the transit zones⁴ located at the Serbian-Hungarian border in order to make their application and (ii) of the drastic reduction in the number of persons allowed to enter those zones **prevents those applicants from making their application effectively**. Those applicants, deprived of their right, stemming from the 'Procedures' Directive, to have effective access to the procedure for granting international protection, are required to wait between 11 and 18 months before they are admitted to one of the transit zones and are thus able to make an application.

In the second place, the Advocate General takes the view that **the procedure implemented by the competent Hungarian asylum authority in the transit zones falls within the scope of the 'border procedure'** provided for by the 'Procedures' Directive. In that regard, the Advocate General observes that, where a Member State, like Hungary in the present case, makes use of the possibility afforded to it by the 'Procedures' Directive to establish procedures in a place located at its border, the rules relating to the 'border procedure' must imperatively be applied.

As regards whether the abovementioned national procedure is consistent with the rules relating to the 'border procedure', the Advocate General observes that although, pursuant to those rules, Member States having recourse to the 'border procedure' may decide on the admissibility of an application for international protection in a transit zone, they may decide, in such a zone, on the substance only in a defined number of cases. However, **in disregard of the rules in question,**

¹ Directive 2013/33/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).

² 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. 137).

³ 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).

⁴ Namely, the Röske and Tompa transit zones.

the national procedure at issue is always conducted in a transit zone, whether it concerns admissibility or any aspect on the substance.

Similarly, the Advocate General takes the view that the rules relating to the national procedure at issue **do not comply with the 'border procedure' requirement that applicants for international protection cannot be accommodated in a transit zone for more than four weeks.**

In that context, the Advocate General examines Hungary's argument that the migration crisis in 2015 justified, under Article 72 TFEU,⁵ a derogation from the rules on the 'border procedure' for the purpose of maintaining law and order and safeguarding internal security. In that regard, the Advocate General observes that, in the event of the arrival of a large number of third-country nationals or stateless persons seeking international protection at the same time, it is the 'Procedures' Directive itself which enables the Member States to derogate from the rules which are generally applicable to the 'border procedure' and to make use of the specific provisions which it lays down for that purpose. Consequently, according to the Advocate General, **the derogation provided for in Article 72 TFEU cannot be applied in the present case, so that the abovementioned argument of Hungary must be rejected.**

In the third place, referring to the *FMS* judgment recently delivered by the Court,⁶ the Advocate General observes that **the placing of all applicants for international protection in one of the transit zones during the examination of their applications constitutes detention within the meaning of the 'Reception' Directive.**

As regards the lawfulness of that detention, the Advocate General considers **that the fact that all applicants for international protection are systematically placed in a transit zone constitutes a breach of the 'Reception' Directive.** That directive provides (i) that detention may be warranted only on the grounds listed exhaustively therein and (ii) that detention may be ordered only where it proves necessary, on the basis of an individual assessment of each case, and only if other less coercive measures cannot be applied effectively. Furthermore, the Advocate General observes that, contrary to what is required by the 'Reception' Directive, applicants for international protection are detained in transit zones without a detention order being issued and detention may also be ordered for minors or even unaccompanied minors.

In the fourth place, the Advocate General notes that, while a Member State is entitled not to apply the 'Return' Directive to third-country nationals who have been apprehended or intercepted by the competent authorities in connection with the irregular crossing of its external border or after such crossing in the vicinity of that border, **Hungarian legislation extends that derogation to illegally staying third-country nationals who have not been apprehended or intercepted in such circumstances.** Consequently, so far as those nationals are concerned, **the national legislation in question does not fall outside the scope of the Return Directive and, in so far as it deprives them of the safeguards attaching to the return procedure, constitutes a breach of that directive.**

In the fifth place, the Advocate General observes that the 'Procedures' Directive grants applicants for international protection a right to remain in the territory of a Member State until the time limit for bringing an appeal against the administrative decision rejecting their application has expired or until the appeal has been disposed of. In that context, the Advocate General considers that Hungary has not correctly transposed that provision of the Directive into its national law and that, in any event, it is not clearly and precisely apparent from the Hungarian legislation that applicants do in fact have that right to remain in the territory of Hungary.

Accordingly, the Advocate General proposes that the Court **should essentially uphold the Commission's action.**

⁵ According to that article, the provisions of the TFEU relating to the area of freedom, security and justice, of which asylum policy inter alia forms part 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.

⁶ Joined cases: [C-924/19 PPU](#) and [C-925/19 PPU](#) *FMS and Others* see also Press Release No. [60/20](#).

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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