Case C-924/19 PPU

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

18 December 2019

Referring court:

Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged, Hungary)

Date of the decision to refer:

18 December 2019

Applicants:

FMS

FNZ

Defendants:

Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság (National Directorate-General for Aliens Policing, Dél-alföld Directorate-General, Hungary)

Országos Idegenrendészeti Főigazgatóság (National Directorate-General for Aliens Policing, Hungary)

Subject matter of the case in the main proceedings

Two applications, the first against the decision amending the applicants' country of return and the second seeking a declaration that the authority failed to designate a place of stay outside the transit zone.

Subject matter and legal basis of the reference

Do the grounds of inadmissibility set out in Article 33 of Directive 2013/32 cover a situation in which an applicant reached a Member State via a country where he was not exposed to persecution or to a risk of serious harm or where an adequate

level of protection is guaranteed? In the affirmative, if a Member State rejects an asylum application relying on that ground of inadmissibility, is that Member State obliged to conduct an asylum procedure?

Does accommodation in a transit zone amount to a detention measure under the procedure for applying for international protection within the meaning of Article 2(h) of Directive 2013/33 or constitute detention within the field of competence of the Aliens Police for the purposes of Article 15 of Directive 2008/115?

Must a Member State ensure that a decision on the objection made against a decision by which the country of return was modified in the return decision be open to challenge before the courts?

Legal basis: Article 267 TFEU

Questions referred

1. [New ground of inadmissibility]

Must the provisions on inadmissible applications in Article 33 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 (recast) (‘the Procedures Directive’) be interpreted as precluding a Member State’s legislation under which an application made in the context of the asylum procedure is inadmissible when the applicant reached Hungary via a country where he was not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed?

2. [Conduct of an asylum procedure]

(a) Must Article 6 and Article 38(4) of the Procedures Directive, and recital 34 thereto, which imposes an obligation to examine applications for international protection, read in the light of Article 18 of the Charter of Fundamental Rights (‘the Charter’), be interpreted as meaning that the competent asylum authority of a Member State must ensure that the applicant has the opportunity to initiate the asylum procedure if it has not examined the substance of the application for asylum by relying on the ground of inadmissibility mentioned in Question 1 above and has subsequently ordered the return of the applicant to a third country which has however refused to readmit him?

(b) If the answer to question 2(a) is in the affirmative, what is the exact extent of that obligation? Does it imply an obligation guaranteeing the possibility to submit a new application for asylum, thereby excluding the negative consequences of subsequent applications referred to in

Articles 33(2)(d) and 40 of the Procedures Directive, or does it imply the automatic start or conduct of the asylum procedure?

(c) If the answer to Question 2(a) is in the affirmative, taking account also of Article 38(4) of the Procedures Directive, can the Member State — the factual situation remaining unchanged — re-examine the inadmissibility of the application in the context of that new procedure (thereby giving it the possibility of applying any type of procedure provided for in Chapter III, for example reliance once again on a ground of inadmissibility) or must it examine the substance of the application for asylum in the light of the country of origin?

(d) Does it follow from Article 33(1) and (2)(b) and (c) and Articles 35 and 38 of the Procedures Directive, read in the light of Article 18 of the Charter, that readmission by a third country is one of the cumulative conditions for the application of a ground of inadmissibility, that is to say, for the adoption of a decision based on such a ground, or is it sufficient to verify that that condition is satisfied at the time of the enforcement of such a decision?

3. (Transit zone as a place of detention in the context of an asylum procedure)

The following questions are relevant if, in accordance with the answer to Question 2, an asylum procedure must be conducted.

(a) Must Article 43 of the Procedures Directive be interpreted as precluding legislation of a Member State under which the applicant may be detained in a transit zone for more than four weeks?

(b) Must Article 2(h) 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 (recast) (‘the Reception Directive’), applicable pursuant to Article 26 of the Procedures Directive, read in the light of Article 6 and Article 52(3) of the Charter, be interpreted as meaning that accommodation in a transit zone in circumstances such as those in the main proceedings (a zone which an applicant cannot lawfully leave on a voluntary basis regardless of his destination) for a period exceeding the four-week period referred to in Article 43 of the Procedures Directive constitutes detention?

(c) Is the fact that the detention of the applicant for a period exceeding the four-week period referred to in Article 43 of the Procedures Directive takes place only because he cannot meet his needs (accommodation and food) due to a lack of material resources to cover those needs compatible with Article 8 of the Reception Directive, applicable pursuant to Article 26 of the Procedures Directive?

(d) Is the fact that (i) accommodation which constitutes de facto detention for a period exceeding the four-week period referred to in Article 43 of the Procedures Directive has not been ordered by a detention order, (ii) no guarantee that the lawfulness of the detention and its continuation may be challenged before the courts has been provided, (iii) the de facto detention takes place without any examination of the necessity or proportionality of that measure, or whether there are any alternatives measures and (iv) the exact duration of the de facto detention is not fixed, including the date on which it ends, compatible with Articles 8 and 9 of the Reception Directive, applicable pursuant to Article 26 of the Procedures Directive?

(e) Can Article 47 of the Charter be interpreted as meaning that, when a manifestly unlawful detention is brought for consideration before a court of a Member State, that court may, as an interim measure, until the administrative proceedings come to an end, require the authority to designate for the benefit of the third-country national a place of stay outside the transit zone which is not a place of detention?

4. (Transit zone as a place of detention in the context of an asylum procedure)

The following questions are relevant if, in accordance with the answer to Question 2, there is a need to conduct not an asylum procedure but a procedure within the field of competence of the Aliens Police:

(a) Must recitals 17 and 24 and Article 16 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (‘the Return Directive’), read in the light of Article 6 and Article 52(3) of the Charter, be interpreted as meaning that accommodation in a transit zone in circumstances such as those in the main proceedings (a zone which an applicant cannot lawfully leave on a voluntary basis regardless of his destination) constitutes deprivation of liberty for the purposes of those provisions?

(b) Is the fact that the detention of an applicant, national of a third country, takes place solely because he is subject to a return order and cannot meet his needs (accommodation and food) due to a lack of material resources to cover those needs compatible with Recital 16 and Article 15(1) of the Return Directive, read in the light of Articles 6 and 52(3) of the Charter?

(c) Is the fact that (i) accommodation which constitutes de facto detention has not been ordered by a detention order, (ii) no guarantee that the lawfulness of the detention and its continuation may be challenged before the courts has been provided and (iii) the de facto detention takes place without any examination of the necessity or proportionality

of that measure, or whether there are any alternatives measures, compatible with Recital 16 and Article 15(2) of the Return Directive, read in the light of Articles 6, 47 and 52(3) of the Charter?

(d) Can Article 15(1) and (4) to (6) and recital 16 of the Return Directive, read in the light of Articles 1, 4, 6 and 47 of the Charter be interpreted as precluding detention from taking place without its exact duration being fixed, including the date on which it ends?

(e) Can EU law be interpreted as meaning that, when a manifestly unlawful detention is brought for consideration before a court of a Member State, that court may, as an interim measure, until the administrative proceedings come to an end, require the authority to designate for the benefit of the third-country national a place of stay outside the transit zone which is not a place of detention?

5. [effective judicial protection with regard to the decision amending the country of return]

Must Article 13 of the Return Directive, under which a third-country national is to be afforded an effective remedy to appeal against or seek review of 'decisions related to return', read in the light of Article 47 of the Charter, be interpreted as meaning that, where the remedy provided for under domestic law is not effective, a court must review the application lodged against the decision amending the country of return at least once?

Provisions of international law relied on

Articles 5, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'). Article 2 of Protocol No 4 to the ECHR;

Case-law of the European Court of Human Rights ('the ECtHR'), in particular the judgment of 21 November 2019, *Ilias and Ahmed v. Hungary* (application 47287/15), and the judgment of 21 November 2019, *Z.A. and Others v. Russia* (Case 61411/15).

Provisions of EU law relied on

Articles 6, 47 and 5 of the Charter of Fundamental Rights of the European Union;

Recitals 16, 17 and 24 and Articles 2, 3, 13, 15 and 16 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98);

Articles 5, 26, 33, 35, 38 and 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60);

Article 2(h) and Articles 8 to 11 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96);

Article 3 of Council Decision 2007/819/EC of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation (OJ 2007 L 334, p. 45);

Judgment of 19 June 1990, *Factortame* (C-213/89, EU:C:1990:257).

Relevant provisions of national law

Article XIV(4) of the Magyarország Alaptörvénye (Hungarian Basic Law);

Judgment of the Hungarian Constitutional Court 2/2019. (III. 5.) AB;

Articles 5, 6, 12, 45, 51, 51/A. and 71/A. of A menedékjogról szóló 2007. évi LXXX. törvény (Law LXXX of 2007 on the right to asylum);

Article 5(1) and (1b) and Article 15/A of Az államhatárról szóló 2007. évi LXXXIX. törvény (Law LXXX of 2007 on State Borders);

Articles 47, 62 and 65 of A harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény (Law No II of 2007 on the entry and residence of third country nationals);

A tömeges bevándorlás okozta válsághelyzet Magyarország egész területére történő elrendeléséről, valamint a válsághelyzet elrendelésével, fennállásával és megszüntetésével összefüggő szabályokról szóló 41/2016. (III. 9.) Korm. Rendelet (Government Decree 41/2016 (III.9)) on the declaration of the crisis situation caused by mass immigration in the whole territory of Hungary and on the rules relating to the declaration, existence and end of a crisis situation).

Succinct presentation of the facts and procedure in the main proceedings

1 The applicants are a married couple of Afghan nationality. On 5 February 2019, they submitted an application for recognition of refugee status in the Röszke transit zone (Hungary). According to their own declarations, they had not applied for refugee status in any other country nor had they been mistreated or harmed in the countries through which they had transited before their arrival in Hungary (Turkey, Bulgaria and Serbia). They left Afghanistan for political reasons.

2 By its decision of 25 April 2019, the competent asylum authority declared the applicants' application inadmissible and ordered their return to the territory of the Republic of Serbia. The authority justified its decision of inadmissibility on Article 51(2) of the Law on the right to asylum, relying on the fact that the applicants had reached Hungary via countries where they were not exposed to a risk of persecution justifying the recognition of refugee status or to a risk of serious harm which could serve as a ground for granting subsidiary protection or they were guaranteed an adequate level of protection in the countries via which they transited to reach Hungary.

3 The action brought by the applicants was dismissed by the competent court without any examination of the merits of the case.

4 Subsequently, by its decisions of 17 May 2019, the Aliens Policing Authority ordered the applicants to stay at a designated place, namely the Aliens Police sector in the Röszke transit zone.

5 After Serbia refused to readmit the applicants, the Aliens Policing Authority adopted a decision on 3 June 2019 amending the decision of 25 April 2019 and designated Afghanistan as country of return. The objection to that amending decision was rejected without judicial review.

6 The applicants currently stay in the Röszke transit zone, which is an area surrounded by a high wall with barbed wire and in which metal containers are located. The applicants can leave their sector only exceptionally (for example for medical check-ups or when their presence is required for the purposes of procedural acts) and are therefore almost isolated from the outside world. Asylum applicants accommodated in other sectors are also not allowed to visit them and contact with the outside world, including their legal representative, is only possible with prior authorisation and under police escort, in a container provided for that purpose in the transit zone. On 20 May 2019, at the applicants' request, the ECtHR adopted an interim measure requiring Hungary to provide them with food in the transit zone.

7 The applicants filed two applications. In the first, they seek the annulment of the decision concerning the objection to the enforcement of the decision amending the country of return and the conduct of a new procedure. In the second application, they seek a declaration that the competent asylum authority failed to act in that it did not designate a place of stay located outside the transit zone. Those two sets of proceedings have been joined.

Essential arguments of the parties to the main proceedings

8 The applicants claim that the decision taken in relation to the objection to the enforcement of the decision amending the country of return amounts to a return decision which must, in conformity with the principle of judicial protection, be open to challenge before the courts, which must examine its substance. The Law

on the right to asylum introduces a new ground of inadmissibility, not mentioned in Directive 2013/32 (concept of safe transit country), which infringes EU law. In addition, the stay in the designated place in the transit zone constitutes detention since none of the reasons set out in law to for that purpose are present. Under Hungarian law, they cannot leave the area of the transit zone to enter Hungary, whereas, on the basis of Decision 2007/819, Serbia does not readmit applicants who are subject to deportation.

9 The defendants contend that the objection to enforcement amounts to an effective remedy against the decision amending the country of return. The competent asylum authority examines the substance of an asylum application only when the ground of inadmissibility is based on the concept of safe country of origin or safe third country. However, in the applicants' case, the application for asylum was not rejected on those grounds but on the ground of safe country of transit.

10 The defendants add that the applicants are free to leave the territory of the transit zone to go to Serbia and accordingly their stay in the designated place in the transit zone does not constitute detention, as confirmed by the ECtHR in its judgment of 21 November 2019 (application 47287/15).

Succinct presentation of the grounds for the request for a preliminary ruling

11 As regards the first question referred for a preliminary ruling, the referring court holds that it is clear from the wording of Article 33(2) of Directive 2013/32 that the list of the grounds of inadmissibility it contains is a restrictive and exhaustive list and the Member States may not introduce any new ground of inadmissibility. Nevertheless, Article 51(2)(f) of the Law on the right to asylum specifically introduces a new ground of inadmissibility.

12 As regards the second question referred, it is apparent from Article 33(1) and (2) (b) and (c) and Articles 35 and 38 of Directive 2013/32, read in the light of Article 18 of the Charter, that one of the cumulative conditions for the application of a ground of inadmissibility is that the applicant must be readmitted by a third country. If even before the adoption of the decision of inadmissibility there is no doubt that the country of return will not readmit the applicant, the competent authority of the Member State cannot adopt such a decision since the assumption that the applicant can genuinely be granted protection in that country is invalid. It therefore 'resurrects' the obligation of the competent asylum authority to conduct an asylum procedure, which it must do in accordance with the principles and guarantees of Directive 2013/32.

13 If the asylum procedure must be conducted because the country of return does not readmit the applicant, the application submitted for that purpose cannot be regarded as a subsequent application.

14 As regards the third question referred, Article 43(2) of Directive 2013/32 provides that when a decision has not been taken within four weeks, the applicant will be

granted entry to the territory of the Member State. Article 5 of that directive does not permit the high number of applicants (in Hungarian law: crisis situation caused by the large number of applicants) to be relied on in order to lay down exceptions to that provision which are detrimental to applicants. Article 43(3) of Directive 2013/32 does not apply as the applicants have not been accommodated normally at locations in proximity to the border or transit zone.

15 In the light of the foregoing, accommodation in the transit zone for a period exceeding four weeks constitutes detention within the meaning of Directive 2013/33 and Articles 8 to 11 of that directive are to be applied to that situation.

16 As regards the fourth question referred, the referring court considers that Article 15 of Directive 2008/115, read in conjunction with Articles 6 and 52 of the Charter, is applicable to the applicants.

17 On the basis of the assessment criteria set out in the ECtHR judgments *Ilias and Ahmed* and *Z. A. and Others*, the referring court considers that accommodation in the transit zone amounts to deprivation of liberty (Article 5(1) of the ECHR).

18 Those criteria are as follows:

a) personal circumstances of the applicants and the choices made by them: the applicants did not enter the transit zone voluntarily, but were forced to stay there by a decision [of the authorities]. At the beginning of their de facto detention they were not applicants for asylum because their applications for asylum had previously been rejected and their return ordered.

b) *set of legal rules applicable in the country concerned and the aim it pursues*: the applicants' mandatory place of stay was not designated with a view to examining the substance of their application for asylum but because their return was ordered without them having access to the necessary accommodation or food.

c) *applicable duration and procedural guarantees*: Hungarian legislation does not lay down the maximum duration of a stay in the transit zone and the decision ordering such a stay does not refer to it either, so that it appears that it may even be possible to extend it indefinitely. There are no procedural means available to the applicants to challenge the duration of their stay in the transit zone.

d) *nature and degree of seriousness of the restrictions actually imposed on the applicants and endured by them*: since the applicants cannot go to Serbia and their deportation to Afghanistan is only possible by air, their leaving the transit zone does not depend on their will, but exclusively on the actions of the authorities.

19 In the light of the foregoing, accommodation in the transit zone constitutes de facto unlawful detention, because:

– it takes place without a reasoned decision being given in due time and form which is contrary in particular to Article 6 of the Charter and Article 5 of the ECHR;

– it lacks legal basis since, under Article 15 of Directive 2008/115, it cannot be imposed merely because the return of the applicants has been ordered and the applicants do not have access to the necessary accommodation and food;

– the duration of the stay has not been fixed;

– the mandatory and automatic possibility of bringing the matter before the courts is not guaranteed;

– the authority did not assess, in its prior examination of the alternatives, whether detention was the only solution or whether in their specific case it was a necessary and proportionate restriction.

20 The referring court adds that, by virtue of the right to an effective remedy enshrined in Article 47 of the Charter, in the event of unlawful detention, the court of a Member State may, by way of an interim measure until the end of the administrative proceedings, require the authority to designate for the benefit of the third-country national a place of stay outside the transit zone, even if the legislation of the Member State makes no provision for the application of such a measure (see judgment of 19 June 1990, *Factortame and Others*, C-213/89).

21 As regards the fifth question referred, in the light of its content and effects, the decision of the Aliens Policing Authority amending the country of return which was included in the decision ordering the return constitutes a new return decision adopted pursuant to Article 3(4) of Directive 2008/115; that new decision must be open to challenge before the courts. In accordance with Articles 6 and 13 of the ECHR and Article 47 of the Charter, the body that hears the action must be an independent and impartial tribunal, which does not apply in the case of the competent asylum authority. The objection to enforcement does not guarantee [access to] an effective remedy because Hungarian legislation does not provide for review by the courts of the authority's decision relating to the objection to enforcement. In the present case, effective legal protection would be guaranteed only if a court is able to review the decision amending the country of return.

22 Even if it were established that the applicants' situation falls within the scope of Directive 2013/32, the referring court considers that it is essential for the Court of Justice to answer that question because otherwise the decision amending the country of return may remain in force.