CJEU - Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti F?igazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti F?igazgatóság, 14 May 2020

Country of Applicant:
Afghanistan
Iran

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Joined Cases C-924/19 PPU and C-925/19 PPU

Court Name:
Court of Justice of the European Union (Grand Chamber)

Keywords:
Accommodation centre [1]
Detention [2]
Inadmissible application [3]
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Relevant Legislative Provisions:
European Union Law > EN - Charter of Fundamental Rights of the European Union [9] > Article 2 [10]
European Union Law > EN - Charter of Fundamental Rights of the European Union [9] > Article 4 [11]
European Union Law > EN - Charter of Fundamental Rights of the European Union [9] > Article 6 [12]
European Union Law > EN - Charter of Fundamental Rights of the European Union [9] > Article 18 [13]

European Union Law > EN - Charter of Fundamental Rights of the European Union [9] > Article 26 [14]
European Union Law > EN - Returns Directive, Directive 2008/115/EC of 16 December 2008 [15] > Recital (6) [16]
European Union Law > EN - Charter of Fundamental Rights of the European Union [9] > Article 33 [17]
European Union Law > EN - Returns Directive, Directive 2008/115/EC of 16 December 2008 [15] > Recital (13) [18]
European Union Law > EN - Returns Directive, Directive 2008/115/EC of 16 December 2008 [15] > Recital (16) [19]
European Union Law > EN - Returns Directive, Directive 2008/115/EC of 16 December 2008 [15] > Recital (17) [20]
European Union Law > EN - Returns Directive, Directive 2008/115/EC of 16 December 2008 [15] > Recital (24) [21]
European Union Law > EN - Recast Reception Conditions Directive, Directive 2013/33/EU of 26 June 2013 [22] > Recital (17) [23]
European Union Law > EN - Recast Qualification Directive, Directive 2011/95/EU of 13 December 2011 [24]
European Union Law > EN - Charter of Fundamental Rights of the European Union [9] > Article 47 [25]
European Union Law > EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council [26] > Recital (34) [27]
European Union Law > EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council [26] > Recital (38) [28]
European Union Law > EN - Charter of Fundamental Rights of the European Union [9] > Article 52 [29] > Art 52.3
European Union Law > EN - Charter of Fundamental Rights of the European Union [9] > Article 52 [29]
European Union Law > EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council [26] > Article 2 [30]
European Union Law > EN - Recast Reception Conditions Directive, Directive 2013/33/EU of 26 June 2013 [22] > Article 7 [31]
European Union Law > EN - Recast Reception Conditions Directive, Directive 2013/33/EU of 26 June 2013 [22] > Article 8 [32]
European Union Law > EN - Recast Reception Conditions Directive, Directive 2013/33/EU of 26 June 2013 [22] > Article 9 [33]
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European Union Law > EN - Recast Qualification Directive, Directive 2011/95/EU of 13 December 2011 [24] > Article 15 [38]
European Union Law > EN - Recast Reception Conditions Directive, Directive 2013/33/EU of 26 June 2013 [22] > Article 26 [39]
European Union Law > EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council [26] > Article 26 [40]
European Union Law > EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council

Headnote:
1. A change of the destination country in a return decision by an administrative authority should be regarded as a new return decision requiring an effective remedy in compliance with Article 47 CFREU.

2. The national legislation providing for a safe transit country ground applicable in the present case is contrary to EU law.

3. The obligation imposed on a third-country national to remain permanently in a closed and limited transit zone, within which their movement is limited and monitored, and which the latter cannot legally leave voluntarily, in any direction whatsoever, constitutes a deprivation of liberty, characterised as "detention" within the meaning of the Reception Conditions (RCD) and Returns Directives (RD).

4. Neither the RCD nor Article 43 of the Asylum Procedures Directive authorise detention in transit zones for a period exceeding four weeks.

5. Detention under the RCD and the RD must comply with the relevant guarantees under EU law including being based on a reasoned detention decision; consisting of a measure of last resort, following an individualised assessment of the case, its necessity and proportionality; and effective judicial review should be available. An applicant for international protection cannot be held in detention solely on the ground that they cannot support themselves. Where detention is found to contravene EU law, domestic courts may release the applicant and order the authorities to provide accommodation in line with the RCD provisions. They are empowered to do so, even if they have no clear jurisdiction under national law.

Facts:
The two cases concern the situation following the arrival in Hungary of a married couple of Afghan nationals and an Iranian national with his underage son. They applied for asylum in the Röszke transit zone but their applications were rejected as inadmissible because they had arrived to Hungary via a country where they would not be exposed to any risk of ill-treatment. Following the rejection of their applications, they were ordered to continue their stay in the transit zone, which is reserved for those, whose asylum claims have been rejected.

In both cases, the Hungarian authorities issued return orders to Serbia and contacted the Serbian authorities to organise the return. Serbia, however, decided that it would not readmit the applicants as they had lawfully entered Hungary and were thus excluded from the readmission agreement between the two countries. Subsequently, the Hungarian Migration Police Authority amended the return decisions, changing the destination country from Serbia to Afghanistan and Iran respectively.

In both cases, the applicants brought an action before the referring court seeking to annul the return orders, as they were return decisions and should be open to judicial review. In addition, they also submitted an administrative appeal requesting that the referring court recognise Hungary?s

failure to comply with its obligation to accommodate them outside the Röszke transit zone.

The domestic court stayed proceedings and referred several questions to the Court of Justice of the EU, focusing on the inadmissibility ground of a safe transit country and the nature of the Röszke transit zone, as well as possible de facto detention and its compatibility with EU law.

Decision & Reasoning:
The Court answered the preliminary questions in the order that they are being summarised here.

Fifth question ? the nature of and remedy against an administrative amendment of the destination country in a return decision under the Return Directive

The Court first looked into whether the amendment of the destination country included in a return order is among the decisions that Article 13 of Directive 2008/115 (Return Directive ? RD) provides an effective remedy against. In this regard, it considered that the change of the destination country in the return decision is such a substantial modification that it should be regarded as a new return decision [116]. It did not agree with Hungary?s argument that the order with the modified destination was a removal order following a return order, since the former has to comply with the latter?s content, i.e., destination country. [120]. This finding is supported by the obligation of Member States to comply with the fundamental rights of the returnees, in line with the principle of non-refoulement [122].

On the nature of the remedy that would be available in this case under Article 13 RD, the Court noted that the characteristics of such a remedy should comply with Article 47 of the Charter of Fundamental Rights of the EU (CFREU), even if that provision permits the challenge to be brought before non-judicial authorities [128]. Consequently, national legislation that does not permit a challenge against a return decision to be addressed before a judicial body is against Article 13 RD and Article 47 CFREU [130]. In the cases at issue, the appeal against the modified return decision could be lodged with the asylum authority and the outcome would not be subject to any further review. However, such authority cannot be considered as impartial and independent, and a review before a CFREU-compliant judicial body should be available [134-136].

Lastly, where national law does not allow for a judicial review in a manner that complies with the EU law, the primacy of the latter and the guarantees of Article 47 CFREU require that domestic courts disapply the national legislation at stake [146-147]. The national court is therefore required to declare itself competent to hear and decide the appeals brought by the applicants against the asylum authority?s rejection of their objections against the modified return decisions.

First question ? the inadmissibility ground of safe transit country under EU law

The Court explicitly referred to its previous judgment in C-564/18, where it had ruled on the exhaustive nature of the inadmissibility grounds listed under Article 33 (2) of Directive 2013/32 (Asylum Procedures Directive ? APD).

The Court reiterated that the legislation at issue does not comply with the requirement of non-refoulement and there is no indication regarding the content of adequate protection in the safe transit country [153-155]. Moreover, the mere transit of a person through a third country cannot be considered as a ?connection? under Article 38 (2) and that sole element of transit cannot satisfy the obligations of national authorities to individually consider the safety of the third country and the significance of the connecting link under that same provision [156-158]. Lastly, the safe transit country concept cannot be based on Article 35 either, as it is not conditional on the applicant?s

benefit from international protection or generally sufficient protection against refoulement, which is a requirement under that Article [161-163].

Second question ? the consequences and procedure following an inadmissibility decision that was issued on a ground that was subsequently found to be unlawful under EU law

The Court stated that national authorities are required to disapply national legislation that is contrary to a directly applicable provision of EU law, such as Article 33 APD [183]. However, the administrative decision that was issued on the basis of the national law that was later found to be inapplicable as contravening EU law cannot be expected to be reversed, if it has become final [185]. Following an extensive analysis of the *res judicata* principle in EU law [186-187], the Court concluded that an asylum authority is not required to re-examine on its own motion an application for international protection which has been rejected as inadmissible, that rejection has been confirmed by a judicial decision and that decision has been found to contravene EU law following subsequent CJEU jurisprudence [190].

The Court confirmed that that new application will be considered as a subsequent application within the meaning of Article 2 (q) of the APD [192]. However, when deciding on the existence of new elements that may justify that subsequent application under Article 33 (2) (d), the authorities shall regard a CJEU judgment ruling on the incompatibility of national legislation with EU law as a new element, even if the applicant has not explicitly referred to it [193-195]. To accept otherwise is to deprive the right of applicants to international protection, as expressed in Article 18 CFREU and Directives 2011/95 and 2013/32, from its effectiveness [196]. In order to avoid the continuous violation of EU law, Article 33 2 (d) APD will not be applicable to a subsequent application when the determining authority finds that the final rejection of the first application is contrary to EU law [197-198].

Third and fourth questions ? the transit zone as a place of detention under EU law

- *Detention under Article 43 APD*

The Court first clarified that the meaning of detention, under both Directive 2013/33 (Reception Conditions Directive ? RCD) and the RD, is a measure of last resort that does not merely restrict the individual?s freedom of movement but deprives them of their liberty [216-225]. It further held that the situation at the Röszke transit zone resembles a detention regime, as the applicants are confined without any lawful possibility to leave the area of their own will; entering Serbia could incur penalties for unlawful entry, while the act of leaving the designated transit zones can negatively affect their asylum procedure under Hungarian law [227-230]. It further noted the site?s characteristics, including the closed perimeter of the zone, the high fences and the barbed wire [226], and concluded that the applicants? placement in the transit zone constitutes detention under the aforementioned Directives [231].

In its examination of Article 43 APD, which in certain cases allows the stay of applicants in border or transit zones while their asylum application is being examined, the Court noted that this provision relates to the possibility for detention pending entry under Article 8 (3) (c) RCD [238]. The stay at these zones, however, cannot exceed a period of four weeks, which according to the Court starts from the lodging of the asylum application under Article 6 (2) APD [240-241]. Any extension beyond those four weeks is only possible under Article 43 (2) APD if there is a massive influx of applicants and the latter are accommodated in accordance with Articles 17 and 18 RCD [244-245]. The Court concluded that asylum applicants cannot be detained in transit zones for more than four weeks, even in the event of arrivals involving a large number of the third-country nationals or stateless persons.

- *Detention under Articles 8 and 9 RCD*

The Court first noted that Article 8 (3) RCD provides an exhaustive list of grounds for detention and does not include any ground relating to the applicants? inability to support themselves [250-251]. Even if other grounds of detention may be applicable (e.g. under criminal law), the objective of the Directive must always be respected [252]. Under the RCD, Member States are required to provide material reception conditions to applicants who cannot ensure an adequate standard of living for themselves; detaining them for this reason would undermine the very essence of that Directive [253-256].

Regarding the imposition of a detention measure, Article 8 (2) and (3) and Article 9 (2) RCD preclude detention without any reasoning or any assessment of the measure?s proportionality and necessity, including in the form of a written judicial or administrative decision [257-259]. A possibility for judicial review should always be provided under Article 9(3) and (5) RCD [260-261]. On the duration of detention, the Court noted that there is no provision in the RCD laying down a maximum duration limit but the applicants? right to liberty is only respected if effective procedural guarantees under Article 6 CFREU are in place [264]. In the absence of a time limit the detention should be terminated as soon as it is no longer necessary or proportionate, with the authorities acting with all due diligence. Consequently, the absence of a time-limit that, if exceeded, would render detention automatically unlawful is not contrary to Article 9 RCD, as long as the aforementioned conditions are respected [265].

- *Detention under the RD*

Similar to its assessment on detention under the RCD, the Court held that a detention measure under the RD is permissible only if the removal process risks being jeopardized; no detention can be imposed solely because the applicant is not able to support themselves [269-270]. The measure may be imposed only following an individualized assessment of the measure?s proportionality and necessity and in the form of a written decision stating the reasons for the detention [274-275]. A judicial review of the measure should always be available [276-277]. Article 15 (1) and (4) RD imply that detention may last only for as long as the removal process is taking place but Article 15 (5) and (6) RD additionally require Member States to set a maximum period of detention and a possible extension for up to a further 12 months in specific cases. Therefore, national legislation that does not set a time limit which, if exceeded automatically renders the detention unlawful, and ensures that detention is maintained only for the purpose/procedure of removal is contrary to the Return Directive [279-280].

- The lawfulness of detention under EU law

The Court lastly considered whether a detention that is unlawful under EU law may require under Article 47 CFREU that domestic courts oblige the national authorities to provide the applicant with appropriate accommodation. It first noted that the absence of judicial review in national legislation is not only contrary to the RCD and RD provisions but also contravenes Article 47 CFREU and domestic courts are required to disapply any such legislation that hinders judicial review [290-291].

Secondly, where detention is unlawful, the national court must be able to issue its own decision ordering the release of the person, or an alternative measure if the detention ground is valid but the measure is disproportionate. In the present case, the Hungarian courts can order the immediate release of the applicants if their placement in the transit zone is found to be unlawful [293-294]. Regarding the possibility for courts to order the applicants? placement in accommodation, the Court noted that the applicant is still an asylum applicant after their release from detention and they are benefitting from Article 17 RCD [295]. Moreover, an appeal is provided

under Article 26 RCD against decisions affecting reception conditions provision, while courts are generally required to grant interim measures in cases covered by EU law, in order to fully ensure the effectiveness of the individuals? rights [296-298]. Lastly, the primacy of EU law and the right to effective judicial protection, require domestic courts to declare themselves competent to hear and decide on any action relating to the granting of interim accommodation measures if no other court has jurisdiction under national law [299].

Outcome:
1) Article 13 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, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding legislation of a Member State under which the amendment by an administrative authority of the country of destination mentioned in a previous return decision can only be challenged by the third-country national concerned by means of an appeal before an administrative authority, without any guarantee of subsequent judicial review of the decision of that authority. In such a case, the principle of primacy of Union law and the right to effective judicial protection guaranteed by Article 47 of the Charter of Fundamental Rights must be interpreted as requiring the national court or tribunal seised of an action challenging the legality under Union law of the return decision consisting of such a change in the country of destination to declare that it has jurisdiction to hear that action.

2) 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 must be interpreted as precluding national legislation which allows an application for international protection to be dismissed as inadmissible on the ground that the applicant has arrived in the territory of the Member State concerned from a State in which he is not exposed to persecution or a risk of serious harm, within the meaning of the national provision transposing Article 15 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection, on a uniform status for refugees or as persons eligible for subsidiary protection and on the content of the protection granted, or in which an adequate level of protection is ensured.

3) Directive 2013/32, read in conjunction with Article 18 of the Charter of Fundamental Rights of the European Union and the principle of loyal cooperation deriving from Article 4(3) TEU, must be interpreted as meaning that where an application for asylum has been the subject of a decision rejecting it which has been confirmed by a final judicial decision before the finding that the decision rejecting it infringes Union law, the determining authority, within the meaning of Article 2(f) of Directive 2013/32, is not obliged to re-examine that application of its own motion. Article 33(2)(d) of Directive 2013/32 must be interpreted as meaning that the existence of a judgment of the Court finding that national legislation which allows an application for international protection to be rejected as inadmissible on the ground that the applicant arrived in the territory of the Member State concerned from a State in which he is not exposed to persecution or a risk of serious harm or in which an adequate degree of protection is ensured is incompatible with Union law, constitutes a new element relating to the examination of an application for international protection within the meaning of that provision. Moreover, that provision is not applicable to a subsequent application, within the meaning of Article 2(q) of that directive, where the determining authority finds that the final rejection of the earlier application is contrary to Union law. Such a finding is necessarily binding on that authority where that conflict arises from a judgment of the Court of Justice or has been found, as an incidental question, by a national court.

4) Directive 2008/115 and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of persons seeking international protection must be interpreted as meaning that the obligation imposed on a third-country national to remain permanently in a transit zone whose perimeter is restricted and closed must be interpreted in such a way that it does not affect the right of a third-country national to stay in that zone, within which the movements of that national are restricted and supervised, and that the latter cannot legally leave voluntarily in any direction whatsoever, appears to be a deprivation of liberty, characteristic of a "detention" within the meaning of the said Directives.

5) Article 43 of Directive 2013/32 must be interpreted as not authorising the detention of an applicant for international protection in a transit zone for more than four weeks.

6) Articles 8 and 9 of Directive 2013/33 must be interpreted as precluding, first, an applicant for international protection from being held in detention solely on the ground that he cannot support himself, second, that detention takes place without the prior adoption of a reasoned decision ordering the detention and without an examination of the necessity and proportionality of such a measure and, third, there is no judicial review of the legality of the administrative decision ordering the detention of that applicant. On the other hand, Article 9 of that directive must be interpreted as not requiring Member States to fix a maximum duration for detention provided that their national law guarantees that detention lasts only for as long as the ground justifying it continues to apply and that administrative procedures relating to that ground are carried out expeditiously.

7) Article 15 of Directive 2008/115 must be interpreted as precluding, first, a third-country national from being held in detention solely on the ground that he is the subject of a return decision and that he cannot support himself and, second, such detention taking place without the prior adoption of a reasoned decision ordering detention and without an examination of the necessity and proportionality of such a measure, thirdly, there is no judicial review of the legality of the administrative decision ordering detention and, fourthly, the same detention may exceed 18 months and be maintained while the removal order is no longer in progress or is no longer being carried out with due diligence.

8) The principle of primacy of Union law and the right to effective judicial protection, guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as imposing on the national court in the absence of a national provision providing for judicial review of the lawfulness of an administrative decision ordering the detention of applicants for international protection or third-country nationals whose application for asylum has been rejected, to declare itself competent to rule on the lawfulness of such detention and empower that court to release the persons concerned immediately if it finds that such detention constitutes detention contrary to Union law.

Article 26 of Directive 2013/33 must be interpreted as meaning that it requires an applicant for international protection whose detention, found to be unlawful, has ended to be able to assert, before the court having jurisdiction under national law, his right to obtain either a financial allowance enabling him to obtain accommodation or accommodation in kind, that court having, under Union law, the possibility of granting interim measures pending its final decision.

The principle of primacy of Union law and the right to effective judicial protection, guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as requiring the national court, in the absence of a national provision providing for judicial review of the right to accommodation, within the meaning of Article 17 of Directive 2013/33, to declare that it has jurisdiction to hear the action seeking to guarantee such a right.

NB: Based on an unofficial translation by EDAL. For any official reference to the operative part of the judgment, please consult and use the original text of the Court in French and Hungarian here[44].

Observations/Comments:
On 23 April 2020, Advocate General Pikamäe delivered his opinion [45] in this case, which has been largely followed by the Court. In his opinion, AG Pikamäe first addressed the question concerning the right to an effective remedy. He noted, *inter alia,* that Article 13 Directive 2008/115 [46] read in light of Article 47 of the Charter [47] must be interpreted as imposing on Member States the obligation to provide a remedy against a return decision before a judicial body. Addressing the first question, concerning the ground of inadmissibility of a safe transit country, AG Pikamäe considered, in light of the Court?s previous rulings [48], that Directive 2013/32 [49] must be interpreted as precluding Hungarian legislation which provides for a ?safe transit country? ground for inadmissibility.

The AG then addressed Hungary?s obligation to examine the applications for international protection. Observing, *inter alia,* that the applications for international protection were made in the transit zone and that the Hungarian authorities had designated a place of residence for the applicants in the transit zone, he opined that the procedure for examining applications for international protection does indeed fall within the scope of Article 43 Directive 2013/32. As such, in the event of an absence of admission or readmission by the Serbian authorities, the Hungarian authorities are obliged to examine the present applications.

On question three, the AG examined whether the accommodation of the applicants in the transit zone amounted to detention within the scope of Article 2 Directive 2013/33 [50] in conjunction with Article 6 and 52 of the Charter. Despite the recent ruling of the European Court of Human Rights in Ilias and Ahmed [51], where it was held that the accommodation of applicants of international protection in the Röszke transit zone *did not* amount to a deprivation of liberty, AG Pikamäe observed that due to the autonomy of EU law the Court of Justice has a power to interpret provisions of the Charter independently of the ECtHR when EU law provides for a higher level of protection. He noted, *inter alia,* that the applicants? situation of isolation together with the severely restricted possibility to voluntarily leave the transit zone constituted detention within the meaning of Article 2 Directive 2013/33. The AG opined that the detention of the applicants in the Röszke transit zone, which was not based on a formally adopted detention decision outlining the factual and legal grounds on which it was based, and was not preceded by an individual examination as to the possible implementation of solutions, must be classified as unlawful.

EDAL has published an article on the case, written by Galina Cornelisse, Associate Professor of EU and International Law at VU University Amsterdam. You can read tir here:Borders, Procedures and Rights at Röszke: Reflections on Case C-924/19 (PPU)[52].

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Attachment(s):

C-924 925 Arret.pdf[64]

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[26] https://www.asylumlawdatabase.eu/node/3946
[27] https://www.asylumlawdatabase.eu/node/3946#toc_43
[28] https://www.asylumlawdatabase.eu/node/3946#toc_47
[29] https://www.asylumlawdatabase.eu/node/453#toc_221
[30] https://www.asylumlawdatabase.eu/node/3946#toc_78
[31] https://www.asylumlawdatabase.eu/node/4039#toc_98
[32] https://www.asylumlawdatabase.eu/node/4039#toc_106
[33] https://www.asylumlawdatabase.eu/node/4039#toc_119
[34] https://www.asylumlawdatabase.eu/node/3946#toc_117
[35] https://www.asylumlawdatabase.eu/node/4039#toc_138
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