Provisional text

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 31 January 2019(1)

Case C‑704/17

D. H.
joined party:
Ministerstvo vnitra

(Request for a preliminary ruling from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic))

(Reference for a preliminary ruling — Area of freedom, security and justice — Charter of Fundamental Rights of the European Union — Articles 6 and 47 — Common policy on asylum and subsidiary protection — Directive 2013/33/EU — Article 9 — Guarantees for applicants for international protection who are subject to administrative detention — Judicial review of such decisions — Right to an effective remedy — National rules discontinuing process of judicial review upon release of applicants for international protection)

1. By this request for a preliminary ruling the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) asks the Court for guidance on the interpretation of the provisions of Directive 2013/33/EU (2) which provide guarantees for applicants for international protection placed in administrative detention pursuant to a decision of the competent national authorities. The referring court seeks to ascertain whether that directive, read in conjunction with the Charter of Fundamental Rights of the European Union, (3) in particular the rights to liberty and security and to an effective remedy enshrined therein, precludes national rules which provide that proceedings challenging a detention decision must be discontinued if the person concerned is released.

2. The question raised by the referring court requires, inter alia, this Court to examine the fundamental right to an effective remedy together with the general principles of EU law of equivalence and effectiveness in the context of national procedural autonomy.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’)

3. Article 5(1) of the ECHR (4) provides that ‘everyone has the right to liberty and security of

person'. Article 5(4) states that 'everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. Pursuant to Article 5(5), 'everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation'.

EU law

The Charter

4. Article 6 provides that 'everyone has the right to liberty and security of person'. (5) The remaining provisions of Article 5 of the ECHR are not specifically replicated.

5. The first paragraph of Article 47 states that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal. (6)

6. In accordance with Article 51(1), the provisions of the Charter apply to the Member States 'only when they are implementing [EU] law'.

7. Pursuant to Article 52(1), 'any limitation on the exercise of the rights and freedoms recognised by [the] Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the [European Union] or the need to protect the rights and freedoms of others'. Article 52(3) states that 'in so far as [the] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by [the ECHR]. This provision shall not prevent [EU] law providing more extensive protection'. Article 52(7) provides that the courts of the European Union and of the Member States shall give 'due regard' to 'the explanations drawn up as a way of providing guidance in the interpretation of [the] Charter'. (7)

8. The Explanations make clear that 'the rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope'. Consequently, 'the limitations which may legitimately be imposed on [those rights] may not exceed those permitted by the ECHR'. The Explanations indicate that the protection guaranteed in Article 47 of the Charter is more extensive than that provided by Article 13 of the ECHR, since it guarantees the right to an effective remedy before a court.

Directive 2013/32

9. Article 26(2) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (8) provides that 'where an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with Directive 2013/33'.

Directive 2013/33

10. The recitals of Directive 2013/33 include the following statements:

– The European Council adopted the Stockholm Programme (9) which reiterated a commitment to the objective of establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection based on high protection standards and fair and effective procedures (recital 5);

– With respect to the treatment of applicants for international protection, Member States are bound by obligations under instruments of international law to which they are party (recital 10);

– Such persons may be detained only in very clearly defined exceptional circumstances laid down in Directive 2013/33 and subject to the principles of necessity and proportionality with regard

both to the manner and the purpose of such detention; where an applicant for international protection is held in detention he should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority (recital 15); and

– Directive 2013/33 respects the fundamental rights and observes the principles recognised in particular by the Charter; it seeks to promote the application of, inter alia, Articles 6 and 47 of the Charter and should be implemented accordingly (recital 35).

11. Article 2 includes the following definitions. An 'application for international protection' is 'a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of [Directive 2011/95], that can be applied for separately'. (10) The 'applicant' means 'a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken'. (11) Finally, 'detention' means the 'confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement'. (12)

12. Article 3 states that Directive 2013/33 applies to '… all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants …'.

13. In accordance with Article 4, Member States may introduce or retain more favourable provisions as regards reception conditions for applicants.

14. Article 8 lays down the substantive conditions governing detention of applicants for international protection. Applicants may be detained only on the grounds laid down in Article 8(3). In particular, Article 8(3)(d) allows the Member States to detain an applicant for international protection in the context of a return procedure under Directive 2008/115/EC (13) 'in order to prepare the return and/or carry out the removal process', where the Member State concerned 'can substantiate on the basis of objective criteria, including that [the person concerned] already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision'. The grounds for detention are to be laid down in national law.

15. Article 9 is entitled 'Guarantees for detained applicants'. It provides:

'1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

…

2. Detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based.

3. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted ex officio and/or at the request of the applicant. When conducted ex officio, such review shall be decided on as speedily as possible from the beginning of detention. When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review ex officio and/or the judicial review at the request of the applicant shall be conducted.

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

4. Detained applicants shall immediately be informed in writing, in a language which they

understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

5. Detention shall be reviewed by a judicial authority at reasonable intervals of time, ex officio and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.

6. In cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

...'

National law

16. The referring court states that until 14 August 2017 the provisions on judicial review of detention decisions laid down in Paragraph 46a(6) to (9) of Zákon č. 325/1999 Sb., o azylu (Law No 325/1999 on asylum) allowed applicants to challenge a detention decision within 30 days from the date of service of such a decision. The Krajský soud (Regional Court, Czech Republic) — the first instance court — was obliged to rule on the application within seven working days from the date of lodging the administrative file. An appeal on a point of law could be lodged against such a ruling with the referring court.

17. With effect from 15 August 2017, Paragraph 46a(9) of Law No 325/1999 on asylum was amended by Law No 222/2017. Pursuant to the amended version of Paragraph 46a(9) (14) (according to the information set out in the order for reference), where an applicant for international protection is released before the delivery of the court's decision on an application challenging a detention decision, that court must now automatically discontinue the proceedings pending before it. The competent authorities are required without delay to inform the court seised of the applicant's release. Those rules apply both to first instance proceedings and, *mutatis mutandis*,to appeal proceedings before the referring court.

Facts, procedure and the question referred

18. On 20 March 2017, Mr D. H. was found to be staying in the territory of the Czech Republic without valid travel documents or a residence permit. He was issued with a deportation order including a prohibition on entry and was detained for the purpose of deportation. Subsequently, Mr D. H. applied for international protection in the territory of the Czech Republic. By a decision of 28 March 2017, the competent authorities further detained him on the grounds that he had made his application for international protection with the sole aim of regularising his residence status and avoiding deportation from the Czech Republic ('the detention decision').

19. Mr D. H. challenged that decision before the Krajský soud (Regional Court). On 4 July 2017, that court dismissed Mr D. H.'s action as unfounded. On 16 August 2017, that is on the day following the entry into force of the national measure at issue, Mr D. H. challenged that judgment on a point of law before the referring court.

20. In the meantime, on 5 April 2017 Mr D. H. withdrew his application for international protection. He was subsequently released and, on 5 May 2017, voluntarily left the territory of the Czech Republic to travel to the Republic of Belarus. The competent authorities informed the referring court of his release and requested that the appeal proceedings pending before that court be discontinued, in accordance with the national measure at issue.

21. Against that background the referring court asks:

'Does the interpretation of Article 9 of Directive 2013/33 … in conjunction with Articles 6 and 47 of the Charter … preclude national legislation which prevents [the referring court] from reviewing a judicial decision concerning detention of a third-country national after that third-country national has been released from detention?'

22. The Czech Republic and the Commission submitted written observations. The case was assigned to the Grand Chamber. Despite the manifest importance of the issues concerned, no hearing was held.

Assessment

Admissibility

23. It is settled law that in proceedings under Article 267 TFEU, the national court which alone has direct knowledge of the facts of the case is in the best position to assess, with full knowledge of the matter before it, the need for a preliminary ruling to enable it to give judgement. Consequently, where the question submitted by a national court concerns the interpretation of EU law, this Court is, in principle, bound to give a ruling.

24. Mr D. H. has been released from detention (and subsequently left the territory of the Czech Republic). There is therefore an issue, which the Court will examine *ex officio*, as to whether the referring court is asking for a general opinion or seeking guidance on a hypothetical question, which would render the reference inadmissible. (15)

25. In my view that is not the case. It appears from the order for reference that the detention decision itself was not annulled; and that under national law an applicant must obtain an order annulling the detention decision before commencing a claim for compensation for unlawful detention. The referring court considers that automatic discontinuance deprives such applicants of the right to such compensation. That view is disputed by the Czech Government.

26. It is not for this Court to rule on the applicability of provisions of national law which are relevant to the outcome of the main proceedings. Rather, the Court must take account, under the division of jurisdiction between the EU courts and the national courts, of the legislative context, as described in the order for reference, in which the question put to it is set. (16) The Court is, however, competent to give the national court full guidance on how to interpret EU law in order to enable that court to determine the issue of compatibility of national law with EU law in the case before it. (17)

27. As it remains possible that Mr D. H. may wish to pursue proceedings seeking the annulment of his detention decision and the referring court is of the view that the answer which this Court gives to the question referred is relevant to its assessment in the main proceedings, I consider that the Court should examine that question.

General remarks

28. It is common ground that Mr D. H. applied for international protection and is therefore an applicant within the meaning of Directive 2013/33. (18) It is also not in dispute that as a result of the detention decision he was detained within the meaning of Article 2(h) of that directive.

29. The referring court explains that, whilst the version of the national law in force prior to 15 August 2017 applied to Mr D. H.'s proceedings at first instance challenging the detention decision, the amended version of that provision, requiring automatic discontinuance, now applies in the proceedings before it.

30. The referring court asks in essence whether Article 9 of Directive 2013/33 precludes the national measure at issue. That court is commendably aware of its responsibility, if necessary, to give

full effect to that directive without waiting for prior repeal of the national measure at issue by way of legislation or any other constitutional procedure. (19) It is likewise aware that it is required to interpret those provisions as far as possible in the light of the wording and purposes of Directive 2013/33 to give effect to the result intended, (20) to ensure that the directive in question is effective and that the outcome of the proceedings before it is consistent with the objective pursued by the directive. (21) The referring court emphasises that the national measure at issue requiring automatic discontinuance applies to *all* proceedings, both at first instance and on appeal.

31. When administrative or judicial authorities of Member States apply the provisions of national law adopted to transpose Directive 2013/33, they are acting within the scope of application of EU law and thus are implementing EU law within the meaning of Article 51(1) of the Charter. (22) They are therefore bound to respect the fundamental rights to liberty and to effective judicial protection established by Articles 6 and 47 of the Charter.

32. In so far as the Charter establishes rights which correspond to the rights guaranteed by the ECHR, their meaning and scope shall be the same as those laid down by that Convention. (23) The Explanations to the Charter state that Article 6 corresponds to Article 5 of the ECHR; whilst Article 47 of the Charter expands upon Article 13 of the ECHR. (24) The minimum threshold of protection of the rights guaranteed is thus to be determined not only by reference to the text of the ECHR, (25) but also, inter alia, by reference to the case-law of the Strasbourg Court. (26)

33. The Court needs essentially to consider two issues. First, what is the extent of the right of access to judicial review of the lawfulness of detention under Article 9 of Directive 2013/33? Second, to what extent do the same conditions apply to appeal procedures reviewing the lawfulness of such detention as apply to judicial review at first instance?

Judicial review of lawfulness of detention: Article 9 of Directive 2013/33

34. Article 8 of Directive 2013/33 lays down strict substantive conditions governing the administrative detention of applicants for international protection. Article 9 then provides those who are so detained with a number of important guarantees. These include that the person concerned should be kept in detention only for as long as the grounds in Article 8(3) of that directive apply (Article 9(1)). The order for reference is not explicit here, but it seems that Mr D. H. was detained on the basis of Article 8(3)(d). (27)

35. Where an applicant is held in detention, he must have the possibility of a speedy judicial review of the lawfulness of that detention decision. (28) He is given important ancillary procedural safeguards: the right to information in a language that he understands on the reasons for his detention and the procedures for challenging a detention order (29) and access to free legal assistance and representation. (30) Where the applicant's detention is held to be unlawful, he must be released immediately.

36. Since the provisions of Article 9 of Directive 2013/33 are to be read in the light of Articles 6 and 47 of the Charter and of the ECHR provisions to which the Charter cross-refers, it is convenient to begin by recalling the standards of protection prescribed by the ECHR.

37. Article 5(1) of the ECHR provides that no one shall be deprived of his liberty save in the specific cases enumerated therein, and in accordance with a procedure prescribed by law. Pursuant to Article 5(4), everyone who is deprived of his liberty is entitled to take proceedings by which the lawfulness of his detention is to be decided speedily by a court and his release ordered if the detention is not lawful. (31) The main objective of that judicial review is, evidently, to allow the detainee to enforce his right to liberty. If the detention is unlawful, of course he should not continue to be detained.

38. However, neither the *consequences* nor the *effects* of an unlawful detention disappear by magic when the doors of the detention centre swing open and the detainee walks free. A finding by a court that a person was unlawfully detained is a finding that he should not have spent those days or

weeks locked up. No power on earth can give him that time back, at liberty. But the courts can *mark and declare* the fact that the detention was unlawful. That puts the legal record straight. That may be important for the future, at any point where that person has a form to fill in that delves into his past; or an official or potential employer runs a computer check on him. It may in itself afford a degree of solace: official recognition that a wrong, an injustice was committed. And the person concerned may wish to go further and seek compensation for those lost days or weeks. Article 5(5) of the ECHR thus states clearly and unequivocally that everyone who is deprived of his liberty in contravention of the rules laid down in paragraphs (1) and (4) of that article has an enforceable right to compensation. (32)

39. As regards the right to judicial protection enshrined in Article 47 of the Charter, this Court has held that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The Court there stressed that the existence of effective judicial review designed to ensure compliance with the provisions of EU law is the very essence of the rule of law. (33)

40. It is clear beyond doubt from the text of Article 9(3) and (5) of Directive 2013/33 that a *detained* applicant must have access to judicial review of the lawfulness of his detention. Does that right persist if, whilst the proceedings that the applicant has launched during his detention are still pending, he is released from detention by an administrative decision of the competent national authorities?

41. In my view, the answer to that question is 'yes'.

42. Article 9(3) begins with the words, 'Where detention is ordered by administrative authorities …'. The text does not say, 'Where an applicant is in detention'. Rather, the focus is on the *legal fact* that the competent national authorities have ordered a deprivation of liberty. It is that legal fact that must be addressed; because it is that legal right to liberty that has been curtailed by the action of the State.

43. That is confirmed by the fact that Article 9(2) specifies that 'the detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based'. It is the detention order which is the subject of judicial review, because it is that order which forms the basis for the deprivation of liberty. Where, as a result of examining that order, 'detention is held to be unlawful, the applicant concerned shall be released immediately' (Article 9(3), final sentence). The strictness of the control that is to be applied to the legality of the detention order is underscored by recital 15 of Directive 2013/33, which states that applicants may be detained only under clearly defined exceptional circumstances and subject to the principles of necessity and proportionality. (34)

44. It thus seems to me that the wording of Article 9 of Directive 2013/33 supports the reading that I propose.

45. Turning next to the objectives and purpose of that provision, naturally the usual and immediate purpose of seeking judicial review of the legality of the detention decision is to quash the detention order so that the person concerned may regain his liberty. But the consequences and effects of detention are the same whether release from detention comes from a further administrative decision by the competent authorities or as a result of a court ruling quashing the original detention order.

46. A reading of the directive that meant that once the person concerned was no longer in detention he was no longer protected would lead to strange anomalies. Two examples will suffice to make that point.

47. Suppose that two applicants for international protection, A and B, are both detained by the competent authorities on grounds that are not permitted under Article 8(3) of Directive 2013/33. Both lodge applications for judicial review. After two weeks the authorities realise their error in respect of person A and release him in the morning of day 15 of his detention. Person B continues in detention.

That very afternoon, both applications are heard by the judge charged with judicial review of such claims. If release from detention extinguishes rights under the directive, A's case will be thrown out whilst B will get a ruling quashing the detention order, ordering his immediate release from detention that afternoon and opening the possibility for him to seek compensation for unlawful detention. A mere six hours separate the points in time at which A and B regain their liberty. Both have been detained unlawfully for over two weeks. Yet, on a restrictive reading of Article 9 as covering only applicants actually *detained* when their cases are heard, A is deprived of any judicial protection.

48. Suppose, alternatively, that applicant C is detained by the competent national authorities. It is a case of mistaken identity — although he is indeed an applicant for international protection, he is not in reality person D whom the authorities intended to detain; and there are no legal grounds under the directive for detaining him. He lodges an application for judicial review. Before his case can be heard (and still vociferously protesting that he is not person D) he is deported. He is therefore no longer in detention. On the restrictive reading of Article 9, because he has been 'released' (by being deported) he cannot look to the courts for protection.

49. If the competent authorities can remove a person whom they have placed in detention under Article 8 of Directive 2013/33 from the scope and protection of Article 9 thereof by the simple expedient of taking a further administrative decision to release him (and then applying an automatic discontinuance provision such as that at issue in the main proceedings), there is a very real possibility of abuse. It would be possible for the authorities, by sequentially detaining, releasing, re-detaining and re-releasing an applicant for international protection, to ensure that he could never get judicial review of the detention order(s).

50. In so saying, I am not alleging that that is in fact happening. I would refer instead to the historical example from the United Kingdom of an unfortunate Act of Parliament enacted at the height of the suffragettes' battle to win votes for women. Militants were being imprisoned for acts of petty damage to property or obstructing the police. They started to go on hunger strike in prison and were rather brutally force-fed. Public sympathy began to swing in their favour. The Liberal Government of Stanley Baldwin had a brainwave. Instead of force-feeding the suffragettes in prison once they had reached a certain degree of weakness through lack of food, why not release them on licence? Once they had started to eat again and had regained their strength, they could be rearrested and re-imprisoned. So the government enacted the Prisoners (Temporary Discharge for Ill Health) Act 1913. The Act rapidly became known by the soubriquet, 'The Cat and Mouse Act'; because the cruel analogy with a cat toying with its prey before despatching it was all too obvious. In the circumstances of the present case as there, it is clear that the potential for abuse exists.

51. I also recall that the referring court has indicated that a court decision annulling the detention decision is a precondition for lodging a claim for compensation for unlawful detention. I record that the Czech Government in its written observations does not accept that that is necessarily the position under national law; and I refrain from expressing any view as to whether that government or the Nejvyšší správní soud (Supreme Administrative Court) is correct as to the proper interpretation of national law. I merely offer two more general observations.

52. First, the purpose of the guarantees provided by Article 9 is to provide a review of the grounds for detention laid down in Article 8(3) in order to ensure not only that applicants are released if those grounds cannot be established, but also to discourage arbitrary infringement of the applicant's right to liberty. (35) Since that provision is to be read in the light of the fundamental rights enshrined in Articles 6 and 47 of the Charter, that militates in favour of a non-restrictive reading. Conversely, the contrary interpretation seems to me to run counter to those fundamental rights. (36)

53. Second, it seems to me that the Court's case-law concerning a person's interest in pursuing proceedings provides helpful guidance here. Thus, the Court has held, in the context of individual restrictive measures adopted by the Council within the Common Foreign and Security Policy, that an applicant retains an interest in seeking the annulment of an act, in particular, where a finding of illegality could reasonably serve as the basis for a future action for material or non-material damages (37) caused to it by the disputed act. (38) Even in the absence of a prospect of obtaining

pecuniary damages, an applicant might conceivably have a non-material interest in pursuing the proceedings, on the basis that a potential annulment might constitute a form of reparation for the non-material harm which he has suffered by reason of illegality of the act in question. (39)

54. I consider that the principles set out in that case-law can sensibly be transposed to a situation such as the present, where the person concerned has suffered an interference with his fundamental right to liberty enshrined in Article 6 of the Charter. Thus, I consider that Article 9 of Directive 2013/33 does not merely allow an applicant who is still currently detained to access the courts for judicial review. It also enables an applicant who has been detained, but who is subsequently released by administrative order, to seek a declaration that the detention to which he was subjected was unlawful. Whether such a declaration provides moral solace for the injustice suffered or serves as a stepping stone to an action for compensation for unlawful detention is, in that sense, immaterial.

55. Finally, I recall that the referring court has explained that the national measure at issue provides for automatic discontinuance, thus excluding judicial scrutiny of an administrative detention decision, *even at first instance*. The referring court expresses the view that such an arrangement is incompatible with Article 9(3) of Directive 2013/33; and I respectfully agree. It seems to me that a provision whose practical effect is, in reality, to exclude the supervisory jurisdiction of the courts is difficult to reconcile with the fundamental premiss of the rule of law within the European Union.

56. Accordingly, I consider that in general terms the answer to the referring court's question should be that Article 9 of Directive 2013/33 precludes a national rule such as that at issue in the main proceedings insofar as that rule requires national courts automatically to discontinue judicial proceedings brought by an applicant for international protection to challenge a detention decision made against him if the person concerned is released from detention by a subsequent administrative order before the delivery of the court's decision.

Judicial review of the lawfulness of detention: appeals

57. In the present proceedings, Mr D. H. had the benefit of a first instance judicial examination of the detention decision in his case, *before* the amended version of Paragraph 46a(9) of Law No 325/1999 on asylum entered into force.

58. Do Member States retain a margin of discretion, as a matter of EU law, allowing them to provide that an *appeal* from a first instance judicial review decision must be discontinued automatically if the applicant is released from detention by administrative order before the delivery of the court's decision?

59. Both the Government of the Czech Republic and the Commission submit that such a position is compatible with Article 9(3) of Directive 2013/33.

60. I do not share their view.

61. Directive 2013/33 aims to introduce high standards of protection and fair and effective procedures for applicants. (40) The legislative history shows that legal and procedural safeguards relating to the detention of applicants were introduced to ensure a higher degree of harmonisation and to improve the standards established in the earlier measure laying down minimum standards for the reception of asylum seekers (Directive 2003/9/EC). (41) The aim was to ensure that such rules are fully compatible with fundamental rights enshrined in the Charter as well as with obligations flowing from international law. (42)

62. Insofar as Directive 2013/33 provides for a minimum harmonisation of reception conditions for applicants, (43) it establishes a basic level below which no Member State may go. They remain free, however, to adopt more generous rules.

63. Directive 2013/33 does not prescribe that Member States must provide a second level of judicial scrutiny where applicants wish to challenge a first instance decision. (44) Moreover, it is

settled case-law that the principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction. (45)

64. Thus, a national provision such as that at issue in the main proceedings falls squarely within the ambit of the procedural autonomy of Member States, subject to the principles of equivalence and effectiveness in EU law. (46) I observe in passing that providing a second level of jurisdiction may be perceived as having advantages not only for the applicant. Thus, for example, it allows the competent authorities of the Member State to challenge what they regard (rightly or wrongly) as 'rogue' first instance decisions; and where many different first instance judges are charged with decision-making, it allows a coherent body of case-law to be developed at appellate level that provides consistency and legal certainty for all.

65. When considering Member States' margin of discretion, it is nevertheless important to bear in mind that Article 9(3) of Directive 2013/33 gives specific expression, in relation to establishing reception conditions for applicants within the wider context of the Common European Asylum System, to the right to an effective remedy. The aim of that directive is to ensure that effective legal and procedural safeguards are in place to ensure that detention decisions are lawful. (47)

66. The Court has ruled in a number of cases where an individual sought to lodge an appeal against a first instance decision concerning rights derived from EU law but the EU legislation at issue did not provide for a second tier review at national level. In those cases it was necessary to examine national procedural rules governing the progress of such a review in the light of the principle of effectiveness. Two recent examples illustrate the Court's approach.

67. Thus, *Belastingdienst/Toeslagen* (48) concerned a third-country national's appeal against a decision of the national authorities ordering reimbursement of contributions received for rent and healthcare. The referring court sought guidance on the interpretation of Article 39 of Directive 2005/85/EC (49) and Article 13 of Directive 2008/115, read together with Articles 18, 19(2) and 47 of the Charter. The issue was whether those provisions precluded national legislation which, whilst making provision for appeals against judgments at first instance upholding a decision rejecting an application for international protection and imposing an obligation to return, did not confer automatic suspensory effect on that remedy even where the person concerned had invoked a serious risk of infringement of the principle of non-refoulement.

68. The Court there recognised that, although neither of those directives contained rules on introducing and organising a second level of jurisdiction for appeals against decisions refusing an application for international protection and return decisions, (50) 'the interpretation of Directive 2008/115 or of Directive 2005/85 must — as is apparent from recital 24 of the former and recital 8 of the latter — be consistent with the fundamental rights and principles recognised, in particular, by the Charter'. (51) The Court proceeded to analyse the national provisions using as its yardstick the twin principles of equivalence and effectiveness and ruled that the principle of effectiveness did not in that instance involve requirements which went beyond fundamental rights, in particular those guaranteed by Article 47 of the Charter. (52) The Court concluded there that both principles were respected.

69. In contrast, in *Sánchez Morcillo and Abril García*, (53) which concerned the interpretation of Article 7 of Directive 93/13/EEC on unfair terms in consumer contracts (54) and Article 47 of the Charter, the Court held that the national rules at issue jeopardised the effectiveness of consumer protection intended by Directive 93/13. (55) In assessing the national rules at issue against the principle of effectiveness, the Court stated that the obligation for the Member States to ensure the effectiveness of the rights that parties derived from Directive 93/13 (there, against the use of unfair contract clauses) implies *a requirement of judicial protection*, also guaranteed by Article 47 of the Charter, that is binding on the national court. That protection must be assured both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the definition of detailed procedural rules relating to such actions. (56)

70. It seems to me that the Court's approach in the latter case may usefully be applied here by analogy. At the end of the day, it is the effectiveness of the judicial review of detention decisions that

will determine whether the substantive conditions in Article 8, and the guarantees in Article 9, of Directive 2013/33, read in the light of Article 47 of the Charter, operate to protect applicants as they are meant to.

71. So far as the principle of effectiveness is concerned, it seems to me that the following aspects of the situation described by the referring court are particularly pertinent.

72. First, automatic discontinuance may lead to arbitrary treatment. Where the appellate jurisdiction has been unable to deal with an appeal from a first instance decision on a detention decision before the individual concerned is released, there will be a difference of treatment as compared with cases where the applicant remains in detention. Even if the grounds for review and the surrounding circumstances are the same, the latter would be able to challenge the first instance decision on appeal, whereas the former would not.

73. Second, the administrative authorities would be able to ensure, simply by releasing the applicant concerned, that the appellate jurisdiction is never able to review a first instance judgment. Equality of arms is scarcely thereby respected. (57) Moreover, to the extent that it is the competent authorities that notify the courts when an applicant is released, triggering automatic discontinuance of legal proceedings, that also places those authorities in a position to hamper the appellate jurisdiction in the performance of its independent functions. If — as the referring court states is the case in its order for reference — appeals on a point of law generally reach it only after the applicant concerned has been released, automatic discontinuance means that the referring court is effectively deprived of the opportunity to review the lawfulness of detention decisions.

74. Whilst it is perfectly true that Article 9(3) of Directive 2013/33 does not require a second level of judicial review, where Member States choose to include that additional review in their national systems, the *conditions* under which the review is exercised must, as I see it, respect the general framework of the guarantees in that directive and consequently Article 47 of the Charter.

75. Here, a helpful parallel can be drawn with the Court's early ruling in *Sotgiu*. (58) That case concerned the interpretation of the public service exception from free movement of workers in Article 48(4) of the EEC Treaty. The Court held that the interests which that derogation allows Member States to protect were satisfied by the opportunity of restricting admission of foreign nationals to certain activities in the public service. However, that provision could *not* be relied upon to justify discriminatory measures with regard to remuneration or other conditions of employment against such workers *once they had been admitted* to the public service. (59)

76. By analogy, where a Member State *does* provide for a second level of review of detention decisions, I consider that it must then respect the guarantees in Article 9 of Directive 2013/33 read in the light of Article 47 of the Charter, including effective access to judicial review.

77. I have suggested elsewhere that, where a national measure falling within the scope of EU law is a limitation on the right to an effective remedy before a court or tribunal within the meaning of Article 47 of the Charter, such a limitation can be justified only if it is provided by law, if it respects the essence of that right and (subject to the principle of proportionality), it is necessary and genuinely meets objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. As I see it, in cases such as the present, the assessment set out in Article 52(1) of the Charter is required in order to satisfy the level of protection which Article 47 of the Charter confers on individuals. Applying a different methodology would have the surprising (and in my view unacceptable) effect that Member States would be able to escape that test solely because they were acting, within the scope of their procedural autonomy, in a domain where the EU legislature has given specific expression to the right to an effective remedy. (60)

78. Against that background, it seems to me that the national measure at issue does not satisfy the principle of effectiveness.

79. What of the principle of equivalence?

80. That principle requires equal treatment of claims based on a breach of national law and similar claims based on a breach of EU law, not equivalence of national procedural rules applicable to different types of proceedings. (61) The position of a third-country national seeking international protection is in some respects particular. There are, for example, obligations under international law as well as specific provisions of EU law that will affect the position. (62) Thus, a third-country national seeking international protection within the framework of Directive 2013/33 is not necessarily subject to the same procedural rules as those covering national matters.

81. I note that the referring court sets out in its order for reference various examples of national procedures involving judicial oversight of detention, such as the review of the lawfulness of detention by the police or detention in a health institution. At first sight, those procedures seem possible comparators for the national measure at issue. That said, it is ultimately for the referring court to verify whether national procedural rules that implement that directive are comparable to more general procedural rules which govern the detention of individuals. As the Court has put it, 'with regard to the comparability of actions, it is for the national court, which has direct knowledge of the detailed procedural rules applicable, to ascertain whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics'. (63)

Conclusion

82. In the light of the foregoing considerations I propose that the Court should answer the question referred by the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) as follows:

Article 9 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, read in conjunction with Articles 6 and 47 of the Charter of Fundamental Rights of the European Union, should be interpreted as precluding a national rule such as that at issue in the main proceedings insofar as that rule requires national courts automatically to discontinue judicial proceedings brought by an applicant for international protection to challenge a detention decision made against him if the person concerned is released from detention by a subsequent administrative order before the delivery of the court's decision.

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1 Original language: English.

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2 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).

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3 OJ 2010 C 83, p. 389 ('the Charter').

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4 Signed at Rome on 4 November 1950 ('the ECHR').

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5 Article 6 of the Charter corresponds to Article 5 of the ECHR.

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6 That right is based on Article 13 of the ECHR.

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7 Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

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8 Directive of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 180, p. 60).

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9 At the meeting of the European Council from 10 to 11 December 2009.

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10 Article 2(a). The cross-reference is to Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

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11 Article 2(b).

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12 Article 2(h).

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13 Directive 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).

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14 In what follows, I shall refer to the amended text as 'the national measure at issue'; and to the process that is being challenged here as 'automatic discontinuance'.

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15 Judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraphs 34 to 36.

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16 Judgment of 17 July 2008, *Corporación Dermoestética*, C-500/06, EU:C:2008:421, paragraph 20 and the case-law cited.

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17 Judgment of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 51 and the case-law cited.

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18 See points 9 and 11 above.

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19 See, in confirmation, judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 49.

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20 Judgment of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395, paragraph 8.

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21 See, to that effect, judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 59.

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22 See, by analogy, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 84 and the case-law cited.

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23 Article 52(3) seeks to ensure the necessary consistency between the rights contained in it and the

corresponding rights guaranteed by the ECHR. See, judgment of 28 July 2016, *JZ*, C-294/16 PPU, EU:C:2016:610, paragraph 50.

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24 Judgment of 14 September 2017, *K.*, C-18/16, EU:C:2017:680, paragraph 50.

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25 See point 8 above; see also (regarding Article 6 of the Charter) judgment of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraph 37.

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26 Judgment of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraph 35.

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27 See point 14 above for the text of that provision.

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28 See both Article 26(2) of Directive 2013/32 and Article 9(3) of Directive 2013/33.

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29 Article 9(4).

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30 Article 9(6).

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31 See ECtHR, judgment of 8 July 2004, *Vachev v. Bulgaria*, CE:ECHR:2004:0708JUD004298798, § 71.

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32 See ECtHR, judgments of 16 June 2005, *Storckv. Germany*, CE:ECHR:2005:0616JUD006160300, § 119 to § 122, and of 19 February 2009, *A. and Others v. United Kingdom*, CE:ECHR:2009:0219JUD000345505, § 226 to § 229.

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33 Judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 73. The corresponding rights in the ECHR are Articles 6 and 13.

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34 Judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 56.

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35 It follows that I do not read the words 'where an applicant is held in detention' in recital 15 as meaning that an applicant must be physically detained in order to be eligible to apply for judicial review. In any event, it is settled law that the preamble to an EU act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question or for interpreting them in a manner clearly contrary to their wording (see, judgment of 24 November 2005, *Deutsches Milch-Kontor*, C-136/04, EU:C:2005:716, paragraph 32 and the case-law cited).

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36 See my View in *N.*, C-601/15 PPU, EU:C:2016:85, point 136; see also recitals 10 and 35 of Directive 2013/33.

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37 See judgment of 22 December 2008, *Gordon* v *Commission*, C-198/07 P, EU:C:2008:761, paragraphs 19 and 60.

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38 See, for example, judgment of 27 June 2013, *Xeda International and Pace International* v *Commission*, C-149/12 P, not published, EU:C:2013:433, paragraphs 32 and 33.

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39 See, by analogy, judgments of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraphs 70 to 72, and of 15 June 2017, *Al-Faqih and Others* v *Commission*, C-19/16 P, EU:C:2017:466, paragraphs 36 and 37.

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40 Recital 5 of Directive 2013/33.

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41 Council Directive of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18). There were no specific provisions setting out the grounds for detention or the guarantees for applicants in that act.

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42 The Commission's Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers COM(2008) 815 final/2 of 9 December 2008.

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43 Article 4 of Directive 2013/33.

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44 A fortiori, therefore, Directive 2013/33 does not make specific provision concerning the progress of an appeal procedure, such as whether an applicant's appeal should be discontinued if he is released from detention.

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45 Judgment of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)*, C-175/17, EU:C:2018:776, paragraph 34 and the case-law cited.

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46 National procedural rules should be no less favourable than those governing similar domestic situations (principle of equivalence) (see points 79 to 81 below) and they should not in practice render impossible or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness) (see points 71 to 78 below); judgment of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)*, C-175/17, EU:C:2018:776, paragraph 39 and the case-law cited. Regarding the principle of effectiveness, see also the second subparagraph of Article 19(1) TEU which provides that Member States must provide remedies sufficient to ensure effective legal protection 'in the fields covered by [EU] law'.

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47 See point 57 above.

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48 Judgment of 26 September 2018, *Belastingdienst/ Toeslagen (Suspensory effect of the appeal)*, C-175/17, EU:C:2018:776.

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49 Council Directive of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

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50 Judgment of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)*, C-175/17, EU:C:2018:776, paragraph 30.

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51 Judgment of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)*, C-175/17, EU:C:2018:776, paragraph 31, citing to that effect judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraph 51.

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52 Judgment of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)*, C-175/17, EU:C:2018:776, paragraph 47.

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53 Judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099.

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54 Council Directive of 5 April 1993 (OJ 1993 L 95, p. 29).

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55 See judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraphs 44 to 46 and 50.

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56 Judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 35.

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57 It is settled case-law that the principle of equality of arms, together with, among others, the principle audi alteram partem, is no more than a corollary of the very concept of a fair hearing that implies an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a clearly less advantageous position compared with its opponent. See judgment of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraphs 48 and 49.

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58 Judgment of 12 February 1974, 152/73, EU:C:1974:13.

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59 Judgment of 12 February 1974, *Sotgiu*, 152/73, EU:C:1974:13, paragraph 4.

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60 My Opinion in *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:307, points 37 and 38.

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61 Judgment of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 34.

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62 Among the instruments of international law is the Geneva Convention relating to the Status of refugees signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954)), as supplemented by the New York Protocol of 31 January 1967 ('the Geneva Convention').

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63 Judgment of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)*, C-175/17, EU:C:2018:776, paragraph 43, citing judgments of 27 June 2013, *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 39, and of 9 November 2017, *Dimos Zagoriou*, C-217/16, EU:C:2017:841, paragraph 20.