JUDGMENT OF THE COURT (Grand Chamber)

15 February 2016 (*)

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Standards for the reception of applicants for international protection — Directive 2008/115/EC — Lawful residence — Directive 2013/32/EU — Article 9 — Right to remain in a Member State — Directive 2013/33/EU — Point (e) of the first subparagraph of Article 8(3) — Detention — Protection of national security or public order — Validity — Charter of Fundamental Rights of the European Union — Articles 6 and 52 — Limitation — Proportionality)

In Case C-601/15 PPU,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands), made by decision of 17 November 2015, received at the Court on the same date, in the proceedings

J. N.

v

Staatssecretaris voor Veiligheid en Justitie,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz (Rapporteur), J.L. da Cruz Vilaça, C. Toader, D. Šváby and C. Lycourgos, Presidents of Chambers, E. Juhász, M. Berger, A. Prechal, E. Jarašiūnas, C.G. Fernlund, C. Vajda and K. Jürimäe, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 January 2016,

after considering the observations submitted on behalf of:

– Mr N., by S. Thelosen and S. Pijl, advocaten,

– the Staatssecretaris van Veiligheid en Justitie, by D. Kuiper, acting as Agent,

– the Netherlands Government, by M. Noort and M. Bulterman, acting as Agents,

– the Belgian Government, by S. Vanrie, M. Jacobs and C. Pochet, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil and S. Šindelková, acting as Agents,

– the Greek Government, by M. Michelogiannaki, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

– the Cypriot Government, by A. Argyropoulou, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Parliament, by T. Lukácsi and R. van de Westelaken, acting as Agents,

– the Council of the European Union, by M. Chavrier and F. Naert, acting as Agents,

– the European Commission, by M. Condou-Durande, H. Krämer and G. Wils, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This request for a preliminary ruling concerns the validity of point (e) of the first subparagraph of Article 8(3) 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).

2 The request has been made in proceedings between Mr N. and the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, 'the State Secretary') concerning Mr N.'s detention.

Legal context

The ECHR

3 Under the heading 'Right to liberty and security', Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

…

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'

The Charter

4 Article 6 of the Charter of Fundamental Rights of the European Union ('the Charter'), which is entitled 'Right to liberty and security', provides:

'Everyone has the right to liberty and security of person.'

5 Under Article 52 of the Charter, which is entitled 'Scope and interpretation of rights and principles':

'1. Any limitation on the exercise of the rights and freedoms recognised by this 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 Union or the need to protect the rights and freedoms of others.

…

3. In so far as this 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 said Convention. This provision shall not prevent Union law providing more extensive protection.

…

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.'

Directive 2008/115/EC

6 Recital 4 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) states:

'Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well-managed migration policy.'

7 Article 3 of Directive 2008/115, entitled 'Definitions', provides:

'For the purpose of this Directive the following definitions shall apply:

…

(2) "illegal stay" means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of [Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1)] or other conditions for entry, stay or residence in that Member State;

…

(4) "return decision" means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

…'

8 Article 7 of Directive 2008/115, entitled 'Voluntary departure', provides:

'1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

The time period provided for in the first subparagraph shall not exclude the possibility for the

third-country nationals concerned to leave earlier.

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.'

9 Article 8 of Directive 2008/115, entitled 'Removal', states in paragraph 1:

'Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.'

10 Article 11 of Directive 2008/115, entitled 'Entry ban', provides:

'1. Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

…

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

…'

Directive 2013/32/EU

11 Article 2 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), which is entitled 'Definitions', provides:

'For the purposes of this Directive:

…

(c) "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;

…

(p) "remain in the Member State" means to remain in the territory, including at the border or

in transit zones, of the Member State in which the application for international protection has been made or is being examined;

(q) "subsequent application" means a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1).

…'

12 Under Article 9 of Directive 2013/32, which is entitled 'Right to remain in the Member State pending the examination of the application':

'1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.

2. Member States may make an exception only where a person makes a subsequent application referred to in Article 41 or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant ... or otherwise, or to a third country or to international criminal courts or tribunals.

…'

Directive 2013/33/EU

13 Recitals 15 to 18, 20 and 35 of Directive 2013/33 are worded as follows:

'(15) The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the 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)]. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.

(16) With regard to administrative procedures relating to the grounds for detention, the notion of "due diligence" at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures.

(17) The grounds for detention set out in this Directive are without prejudice to other grounds for detention, including detention grounds within the framework of criminal proceedings, which are applicable under national law, unrelated to the third country national's or stateless person's application for international protection.

(18) Applicants who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation. In particular, Member States should ensure that Article 37 of the ... United Nations Convention on the Rights of the Child, [adopted in New York on 20 November 1989 and ratified by all the Member States] is applied.

…

(20) In order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants.

…

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

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

'For the purposes of this Directive:

…

(b) "applicant": means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

…

(h) "detention": means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement;

…'

15 Article 8 of Directive 2013/33, entitled 'Detention', makes the following provision:

'1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive [2013/32].

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

(a) in order to determine or verify his or her identity or nationality;

(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;

(d) when he or she is detained subject to a return procedure under Directive [2008/115], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she 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;

(e) when protection of national security or public order so requires;

(f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [(OJ 2013 L 180, p. 31)].

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.'

16 Under Article 9 of Directive 2013/33, entitled 'Guarantees for detained applicants':

'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.

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

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.

…'

Netherlands law

17 Article 8 of the Law on Foreign Nationals of 2000 (Vreemdelingenwet 2000) ('Law on foreign nationals') provides:

'A foreign national shall be lawfully resident in the Netherlands only:

…

(f) pending a decision on an application for the issue of a residence permit [on grounds of asylum for a fixed period] …, where, by or pursuant to this Law or on the ground of a judicial decision, deportation of the applicant is not to take place until a decision has been taken on the application.

…'

18 Pursuant to Article 30a of the Law on Foreign Nationals:

'1. An application for the issue of residence permit [on grounds of asylum] for a fixed period may be declared inadmissible within the meaning of Article 33 of the Asylum Procedures Directive, if:

…

(d) the foreign national has lodged a subsequent asylum application which he or she has not based on any new elements or findings or in which no new elements or findings have been indicated which could be relevant for the assessment of the application; or

…

3. By or in accordance with a general administrative order, rules may be laid down for the purpose of applying paragraph 1.'

19 Article 59b of the Law on foreign nationals provides:

'1. A foreign national who is lawfully resident on the basis of Article 8(f) …, may, in so far as an application for the issue of a residence permit [on grounds of asylum for a fixed period] is concerned …, be detained by the Minister, if:

(a) the detention is necessary to determine the identity or nationality of the foreign national;

(b) the detention is necessary to collect information needed for assessing an application for a residence permit for a fixed period, as referred to in Article 28, in particular if there is a risk of the foreign national absconding;

…

(d) the foreign national represents a threat to national security or public order within the meaning of point (3) [of the first subparagraph] of Article 8(3) of Directive [2013/33].

…

4. The detention under paragraph 1(d) shall not exceed six months.

5. The Minister may extend the detention under paragraph 1(d) by a maximum of nine months in the case of:

(a) complex factual and legal circumstances relating to the examination of the application for the issue of a residence permit [on grounds of asylum] for a fixed period …; and

(b) a significant interest relating to public order or national security'.

20 Article 3.1 of the Decree on foreign nationals of 2000 (Vreemdelingenbesluit 2000) provides:

'…

2. The submission of an application for the issue of a residence permit [on grounds of asylum for a fixed period] … shall have the result that the deportation is not to take place unless:

(a) the foreign national has submitted a subsequent application after an earlier subsequent application was definitively declared inadmissible pursuant to Article 30a(1)(d) of the Law on foreign nationals or was definitively rejected as manifestly unfounded or as unfounded pursuant to Article 30b or Article 31 of the Law on foreign nationals, and no new elements or findings have arisen which might have a bearing on the assessment of the application.

…

3. The exceptions referred to in paragraph 2 shall not be applicable if the deportation would result in an infringement of the Convention [relating to the Status of Refugees, signed in Geneva on 28 July 1951, as supplemented by the New York Protocol of 31 January 1967], obligations under EU law, the [ECHR] or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.'

The dispute in the main proceedings and the question referred for a preliminary ruling

21 The appellant in the main proceedings (Mr N.) entered the Netherlands on 23 September 1995 and made his first application for asylum on the same date. The application was rejected by decision of 18 January 1996. By a judgment of 5 June 1997, the rechtbank Den Haag (District Court, The Hague) declared the action brought by Mr N. against that decision to be unfounded. That judgment became final.

22 The police records pertaining to Mr N., which have been made available to the referring court, indicate that, between 25 November 1999 and 17 June 2015, he was convicted on 21 charges, mostly for theft-related offences, with sentences that varied from fines to terms of imprisonment.

23 On 19 December 2012, Mr N. made a second application for asylum but withdrew it on 24 December 2012.

24 On 8 July 2013 Mr N. made a third asylum application. By decision of 8 January 2014 the State Secretary rejected that application, ordered Mr N. to leave the European Union immediately and imposed a ten-year entry ban on him. By judgment of 4 April 2014, the rechtbank Den Haag (District Court, The Hague) declared the action brought by Mr N. against that decision unfounded. That judgment also became final.

25 On 28 January 2015, Mr N. was arrested in the Netherlands for theft and failure to comply with the entry ban imposed on him. He was convicted of those two offences on 11 February 2015 and

was sentenced to two months' imprisonment.

26 While Mr N. was serving that sentence he submitted, on 27 February 2015, a fourth application for asylum but for reasons relating to his state of health no decision on that fresh application could be taken whilst that sentence was being carried out.

27 On 27 March 2015, the day on which that prison sentence came to an end, Mr N. was detained in his capacity as an asylum seeker, in particular in order to ascertain whether it was possible for him to be heard in respect of his asylum application.

28 On 9 April 2015, Mr N. was released from detention because there was a risk that the maximum period provided for by the national legislation in force at that time would be exceeded.

29 On 16 June 2015, Mr N. was again arrested for theft and failure to comply with the entry ban imposed on him. He was convicted of those two offences on 1 July 2015 and was sentenced to three months' imprisonment. That term of imprisonment ended on 14 September 2015.

30 Since at that point there were still medical reasons which prevented Mr N. from being heard in respect of his fourth asylum application, he was, by a decision of 14 September 2015, detained again in his capacity as an asylum seeker, the decision being taken on the basis of Article 59b(1)(d) of the Law on foreign nationals, which transposes point (e) of the first subparagraph of Article 8(3) of Directive 2013/33. According to the Netherlands authorities, Mr N. was detained because, even though he had the right — owing to his fourth asylum application — to reside lawfully in the Netherlands under Article 8(f) of the Law on foreign nationals, his detention was justified on grounds of protecting national security or public order, given that he had been convicted of a number of offences and was suspected of having committed others.

31 Mr N. brought an action challenging the detention decision of 14 September 2015 and claiming damages. The rechtbank Den Haag (District Court, The Hague), adjudicating at first instance, dismissed that action by a judgment of 28 September 2015.

32 On 28 September 2015 a police doctor found that Mr N. was still not in a fit state to be heard on his asylum application.

33 On 23 October 2015, Mr N.'s detention was lifted to enable him to serve a further term of imprisonment to which he had been sentenced.

34 In his appeal against the judgment of the rechtbank Den Haag (District Court, The Hague) of 28 September 2015, Mr N. maintains that his detention is contrary to the second limb of Article 5(1)(f) of the ECHR, under which the detention of a foreign national may be justified only by the fact that action is being taken against him with a view to deportation or extradition. He submits that it is contrary to that provision to detain a foreign national when he is lawfully resident in the Netherlands pending a decision on his asylum application.

35 In view of that submission, the referring court raises a question concerning the validity, in the light of Article 6 of the Charter and point (e) of the first subparagraph of Article 8(3) of Directive 2013/33, pointing out that, according to the Explanations relating to the Charter, the rights provided for in Article 6 thereof correspond to those guaranteed by Article 5 of the ECHR and have, by virtue of Article 52(3) of the Charter, the same meaning and scope as those laid down by the ECHR.

36 In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 valid in the light of Article 6 of the Charter:

(1) in a situation where a third-country national has been detained pursuant to point (e) of the first subparagraph of Article 8(3) of that directive and, under Article 9 of Directive 2013/32, has the right to remain in a Member State until a decision on his asylum application has been made at first instance, and

(2) in view of the Explanations relating to the Charter that the limitations which may legitimately be imposed on the rights in Article 6 of the Charter may not exceed those permitted by the ECHR in the wording of Article 5(1)(f) thereof, and in the light of the interpretation by the European Court of Human Rights of the latter provision in, inter alia, *Nabil and Others v. Hungary*, no. 62116/12, § 38, 22 September 2015, according to which the detention of an asylum seeker is contrary to the aforementioned Article 5(1)(f) if such detention was not imposed with a view to removal?’

Urgent procedure

37 The Raad van State (Council of State) has requested that this reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Court’s Rules of Procedure.

38 The referring court advances, as one reason in support of its request, the fact that Mr N. is currently deprived of his liberty. It explains that, according to the information it has obtained from the State Secretary, although the order detaining Mr N. with effect from 14 September 2015 was lifted on 23 October 2015, he has since that date been serving a prison sentence (‘strafrechtelijke detentie’), which will come to an end on 1 December 2015; he will, in all likelihood, be returned to detention (‘vreemdelingenbewaring’) once that sentence has been served.

39 It should first be noted in this regard that the present reference for a preliminary ruling, which concerns the validity of point (e) of the first subparagraph of Article 8 of Directive 2013/33, raises questions concerning the areas covered in Title V (relating to the area of freedom, security and justice) of Part Three of the FEU Treaty. It may therefore be dealt with under the urgent preliminary ruling procedure.

40 Secondly, at the time consideration was given to whether the present reference should be dealt with under the urgent preliminary ruling procedure, Mr N. was deprived of his liberty. Although it is true that, at that point, his incarceration was not based on point (e) of the first subparagraph of Directive 2013/33, since Mr N. was serving out a prison sentence, that sentence, which began on 23 October 2015, followed on from a period of detention under Directive 2013/33. Moreover, the national authorities anticipated that Mr N. would be returned to detention, within the meaning of Article 2(h) of Directive 2013/33, once he had served his prison sentence.

41 Taking the foregoing into account, the Fourth Chamber of the Court decided, on 24 November 2015, on the Judge-Rapporteur’s proposal and after hearing the Advocate General, to grant the referring court’s request that the present reference be dealt with under the urgent preliminary ruling procedure. It also decided to request that the Court assign the case to the Grand Chamber.

42 On 1 December 2015, the referring court, which had undertaken to pass on all relevant information concerning the development of Mr N.’s situation, informed the Court, that, with effect from that date, Mr N. had again been placed in detention (‘vreemdelingenbewaring’) under Article 59b(1)(d) of the Law on foreign nationals.

The question referred for a preliminary ruling

43 By its question, the referring court in essence asks the Court of Justice to consider the validity of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 in the light of Article 6 of the Charter.

44 According to the documents before the Court, the reasons for Mr N.'s detention relate in particular to offences that he has committed in the Netherlands and to the fact that he has been issued with a decision ordering him to leave the Netherlands, to which an entry ban is attached, both of which have become final. The Raad van State refers to the case-law of the European Court of Human Rights concerning Article 5(1)(f) of the ECHR, in particular the judgment in *Nabil and Others v. Hungary* (§ 38), which is to be taken into consideration pursuant to Article 52(3) of the Charter for the purpose of interpreting Article 6 thereof. According to that judgment, the detention of an asylum seeker is contrary to Article 5(1)(f) of the ECHR when it is not imposed with a view to removal.

45 As a preliminary point, it should be recalled that, whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law and whilst Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law (judgments in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 44, and *Inuit Tapiriit Kanatami and Others* v *Commission*, C-398/13 P, EU:C:2015:535, paragraph 45).

46 Thus, an examination of the validity of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 must be undertaken solely in the light of the fundamental rights guaranteed by the Charter (see, to that effect, judgments in *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 47, and *Inuit Tapiriit Kanatami and Others* v *Commission*, C-398/13 P, EU:C:2015:535, paragraph 46).

47 In that regard, the explanations relating to Article 6 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to that effect, judgments in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 20, and *Spasic*, C-129/14 PPU, EU:C:2014:586, paragraph 54), make clear that the rights laid down in Article 6 of the Charter correspond to those guaranteed by Article 5 of the ECHR and that the limitations which may legitimately be imposed on the exercise of the rights laid down in Article 6 of the Charter may not exceed those permitted by the ECHR, in the wording of Article 5 thereof. However, the explanations relating to Article 52 of the Charter indicate that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of Union law and ... that of the Court of Justice of the European Union'.

48 Furthermore, in accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter (judgments in *McDonagh*, C-12/11, EU:C:2013:43, paragraph 44, and Review of *Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 40).

49 In permitting an applicant to be detained when the protection of national security or public order ('ordre public') so requires, point (e) of the first subparagraph of Article 8(3) of Directive

2013/33 provides for a limitation on the exercise of the right to liberty entrenched in Article 6 of the Charter.

50 Under Article 52(1) of the Charter, 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. In observance of the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms 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.

51 It should be stated in this regard that since the limitation in question derives from a directive, which is a legislative act of the European Union, that limitation is provided for by law.

52 In addition, point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 does not affect the essence of the right to liberty laid down in Article 6 of the Charter. That provision of the directive does not render the guarantee of that right less secure and — as is apparent from the wording of the provision and recital 15 of the directive — the power that it confers on Member States enables them to detain an applicant only on the basis of his individual conduct and under the exceptional circumstances referred to in the same provision, those circumstances also being circumscribed by all the conditions set out in Articles 8 and 9 of the directive.

53 Given that the objective pursued by point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 is the protection of national security and public order, it must be held that a measure ordering detention which is based on that provision genuinely meets an objective of general interest recognised by the European Union. Moreover, the protection of national security and public order also contributes to the protection of the rights and freedoms of others. Article 6 of the Charter states in this regard that everyone has the right not only to liberty but also to security of person (see, to that effect, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 42).

54 As regards the proportionality of the interference with the right to liberty that has been found to exist, it should be recalled that the principle of proportionality requires, according to settled case-law of the Court, that measures adopted by the EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, since the disadvantages caused by the legislation must not be disproportionate to the aims pursued (see, to that effect, judgments in *Afton Chemical*, C-343/09, EU:C:2010:419, paragraph 45; *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 71; and *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 50).

55 In this regard, the detention of an applicant where the protection of national security or public order so requires is, by its very nature, an appropriate measure for protecting the public from the threat which the conduct of such a person represents and is thus suitable for attaining the objective pursued by point (e) of the first subparagraph of Article 8(3) of Directive 2013/33.

56 As to whether the power which that provision confers on Member States to detain an applicant on grounds related to the protection of national security or public order is necessary, the Court stresses that, in view of the importance of the right to liberty enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is strictly necessary (see, by analogy, with regard to the right to respect for private life, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 52).

57 On that point, it can be seen both from the wording and context of Article 8 of Directive

2013/33 and from its legislative history that the possibility — provided for in point (e) of the first subparagraph of paragraph 3 — of detaining an applicant for reasons relating to the protection of national security or public order is subject to compliance with a series of conditions whose aim is to create a strictly circumscribed framework in which such a measure may be used.

58 First, it follows from a literal reading of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 that an applicant may be detained only when the protection of national security or public order so 'requires'.

59 It should also be noted that the first subparagraph of Article 8(3) of Directive 2013/33 lists exhaustively the various grounds, including the ground relating to the protection of national security or public order, which may justify recourse to detention and that each of those grounds meets a specific need and is self-standing.

60 The second subparagraph of Article 8(3) of Directive 2013/33 provides, in addition, that the grounds for detention are to be laid down in national law. It should be recalled in that regard that, when a directive allows the Member States discretion to define transposition measures adapted to the various situations possible, they must, when implementing those measures, not only interpret their national law in a manner consistent with the directive in question but also ensure that they do not rely on an interpretation of the directive that would be in conflict with the fundamental rights or with the other general principles of EU law (see, to that effect, judgments in *Promusicae*, C-275/06, EU:C:2008:54, paragraph 68, and *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 77).

61 Secondly, as is indicated by recitals 15 and 20 of the directive, the other paragraphs of Article 8 of Directive 2013/33 place significant limitations on the Member States' power to detain a person. Article 8(1) of the directive makes clear that Member States may not hold a person in detention for the sole reason that he has made an application for international protection. Furthermore, under Article 8(2) of the directive, detention may be ordered only when it proves necessary and on the basis of an individual assessment of each case, if other less coercive alternative measures cannot be applied effectively. Article 8(4) of Directive 2013/33 provides that Member States are to ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.

62 Similarly, Article 9(1) of Directive 2013/13 provides that an applicant is to be detained only for as short a period as possible and may be kept in detention only for as long as the grounds set out in Article 8(3) of that directive are applicable. Moreover, when a decision is taken to detain an applicant, significant procedural and legal safeguards must be observed. Thus, under paragraphs 2 and 4 of Article 9 of Directive 2013/13, the decision must state, in writing, the reasons in fact and in law on which it is based and certain information must be provided to the applicant in a language he understands or is reasonably supposed to understand. Paragraphs 3 and 5 of Article 9 set out the procedures which the Member States must establish for review by a judicial authority of the legality of the detention.

63 Thirdly, it is apparent from point 4 of Section 3 of the Explanatory Memorandum to the 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), which formed the basis for Directive 2013/33, that the ground for detention relating to protection of national security and public order — like the other three grounds included in the proposal and subsequently incorporated in points (a) to (c) of the first subparagraph of Article 8(3) of the directive — is based on the Recommendation of the Committee of Ministers of the Council of Europe on measures of detention of asylum seekers of 16 April 2003 and on the United Nations High

Commissioner for Refugees' (UNHCR) Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers of 26 February 1999. It is clear, in particular from points 4.1 and 4.2 of those guidelines, in the version adopted in 2012, that detention may be used only exceptionally and for a legitimate purpose and that there are three reasons which may render detention necessary in an individual case and which are generally in keeping with international law, namely public order, public health or national security. Moreover, detention is to be used only as a last resort, when it is determined to be necessary, reasonable and proportionate to a legitimate purpose.

64 It should be added that the strict circumscription of the power of the competent national authorities to detain an applicant on the basis of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 is also ensured by the interpretation which the case-law of the Court of Justice gives to the concepts of 'national security' and 'public order' found in other directives and which also applies in the case of Directive 2013/33.

65 The Court has thus held that the concept of 'public order' entails, in any event, the existence — in addition to the disturbance of the social order which any infringement of the law involves — of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (judgments in *Zh. and O.*, C-554/13, EU:C:2015:377, paragraph 60 and the case-law cited, as regards Article 7(4) of Directive 2008/115, and *T.*, C-373/13, EU:C:2015:413, paragraph 79 and the case-law cited, as regards Articles 27 and 28 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34)).

66 So far as the concept of 'public security' is concerned, it is apparent from the Court's case-law that this concept covers both the internal security of a Member State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (see, to that effect, judgment in *Tsakouridis*, C-145/09, EU:C:2010:708, paragraphs 43 and 44).

67 Thus, placing or keeping an applicant in detention under point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 is, in view of the requirement of necessity, justified on the ground of a threat to national security or public order only if the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned (see, to that effect, judgment in *T.*, C-373/13, EU:C:2015:413, paragraphs 78 and 79).

68 Point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 is also not disproportionate in relation to the objectives sought. The Court notes in this regard that that provision results from a fair balance between the general interest objective pursued, namely the protection of national security and public order, and the interference with the right to liberty to which detention gives rise (see, by analogy, judgment in *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraphs 72 and 77).

69 Such a provision cannot form the basis for measures ordering detention without the competent national authorities having previously determined, on a case-by-case basis, whether the threat that the persons concerned represent to national security or public order corresponds at least to the gravity of the interference with the liberty of those persons that such measures entail.

70 Having regard to the foregoing considerations, the Court concludes that the EU legislature, in adopting point (e) of the first subparagraph of Article 8(3) of Directive 2013/33, struck a fair balance between, on the one hand, the applicant's right to liberty and, on the other, requirements relating to the protection of national security and public order.

71 Concerning the application of the requirements deriving in particular from the principle of proportionality in the context of a case such as that before the referring court, and in order to give that court a comprehensive answer, it should be noted that, according to the information provided by the referring court and set out in paragraphs 30 and 44 of this judgment, the grounds for detaining Mr N. are, in essence, related to offences that he has committed in the Netherlands and to the fact that he has been issued with a decision ordering him to leave the territory, to which a ten-year entry ban is attached, both of which have become final.

72 As regards, first, the last-mentioned circumstance, it should be observed that, under Article 11(2) of Directive 2008/115, the length of an entry ban, which must be determined with due regard to all relevant circumstances of the individual case, is not in principle to exceed five years. However, according to the same provision, the length of the ban may exceed five years if the person concerned represents a serious threat to public policy ('ordre public'), public security or national security.

73 Accordingly, the reasons on which the national authorities based their view that Mr N.'s individual conduct represents a serious threat to public policy, public security or national security, within the meaning of Article 11(2) of Directive 2008/115, are also capable of justifying detention on grounds relating to the protection of national security or public order, within the meaning of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33. It is none the less necessary to verify that the principle of proportionality was strictly observed when such detention was ordered and that those reasons continue to be valid.

74 The fact that Mr N., after being issued with an order to leave the Netherlands and with a ten-year entry ban, made a fresh application for international protection is not an obstacle to the adoption under point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 of a measure ordering his detention. Such detention does not deprive an applicant for international protection of the right to remain in the Member State under Article 9(1) of Directive 2013/32, for the sole purpose of the international protection procedure, until the determining authority has taken a decision at first instance on his application for international protection.

75 The referring court has pointed out that, in accordance with its own case-law, the introduction of an asylum application by a person who is subject to a return decision automatically causes all return decisions that may previously have been adopted in the context of that procedure to lapse. It is important to stress in that regard that, in any event, the principle that Directive 2008/115 must be effective requires that a procedure opened under that directive, in the context of which a return decision, accompanied, as the case may be, by an entry ban, has been adopted, can be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance. Indeed, the Member States must not jeopardise the attainment of the objective which Directive 2008/115 pursues, namely the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals (see, to that effect, judgment in *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 59).

76 In this regard it follows both from the duty of sincere cooperation of the Member States, deriving from Article 4(3) TEU and referred to in paragraph 56 of the judgment in *El Dridi* (C-61/11 PPU, EU:C:2011:268), and from the requirements for effectiveness referred to, for example, in recital 4 of Directive 2008/115 that the obligation imposed on the Member States by Article 8 of that directive, in the cases set out in Article 8(1), to carry out the removal must be

fulfilled as soon as possible (see, to that effect, judgment in *Achughbabian*, C-329/11, EU:C:2011:807, paragraphs 43 and 45). That obligation would not be met if the removal were delayed because, following the rejection at first instance of the application for international protection, a procedure such as that described in the preceding paragraph could not be resumed at the stage at which it was interrupted but had to start afresh.

77 Finally, it must be recalled that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, Article 52(3) of the Charter provides that the meaning and scope of those rights are to be the same as those laid down by that convention. Account must therefore be taken of Article 5(1) of the ECHR for the purpose of interpreting Article 6 of the Charter. In fact, the EU legislature, in adopting point (e) of the first subparagraph of Article 8(3) of Directive 2013/33, did not disregard the level of protection afforded by the second limb of Article 5(1)(f) of the ECHR.

78 As the wording of the last-mentioned provision indicates, it permits the lawful detention of a person against whom action is being taken with a view to deportation or extradition. In this regard, although the European Court of Human Rights held in the judgment in *Nabil and Others v. Hungary* (§ 29) that a deprivation of liberty based on Article 5(1)(f) ECHR will be justified only for as long as deportation or extradition proceedings are in progress and that if such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under that provision, that judgment does not exclude the possibility of a Member State ordering — in such a way that the guarantees provided for by that provision are observed — the detention of a third-country national in respect of whom a return decision accompanied by an entry ban was adopted prior to the lodging of an application for international protection.

79 The European Court of Human Rights has also stated that the existence of a pending asylum case does not as such imply that the detention of a person who has made an asylum application is no longer 'with a view to deportation' — since an eventual rejection of that application may open the way to the enforcement of removal orders that have already been made (European Court of Human Rights, *Nabil and Others v. Hungary*, § 38).

80 Thus, as has been held in paragraphs 75 and 76 of the present judgment, a procedure opened under Directive 2008/115, in the context of which a return decision, accompanied, as the case may be, by an entry ban, has been adopted, must be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance and, accordingly, action under that procedure is still 'being taken' for the purposes of the second limb of Article 5(1)(f) ECHR.

81 It should also be noted that, according to the case-law of the European Court of Human Rights relating to Article 5(1) of the ECHR, if the execution of a measure depriving a person of liberty is to be in keeping with the objective of protecting the individual from arbitrariness, that means, in particular, that there can be no element of bad faith or deception on the part of the authorities, that execution of the measure is consistent with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1) ECHR and that the deprivation of liberty concerned is proportionate in relation to the ground relied on (see, to that effect, judgment of the European Court of Human Rights in *Saadi v. the United Kingdom*, no. 13229/03, § 68 to 74, ECHR 2008). As is apparent from the reasoning set out in connection with the examination of its validity in the light of Article 52(1) of the Charter, point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 — whose scope, in view of the context of the provision, is strictly circumscribed — satisfies those requirements.

82 The answer to the question referred for a preliminary ruling is therefore that consideration of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 has disclosed no factor of such a kind as to affect the validity of that provision in the light of Articles 6 and 52(1) and (3)

of the Charter.

Costs

83 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber), rules as follows:

Consideration of point (e) of the first subparagraph of Article 8(3) 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 has disclosed no factor of such a kind as to affect the validity of that provision in the light of Articles 6 and 52(1) and (3) of the Charter of Fundamental Rights of the European Union.

[Signatures]

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* Language of the case: Dutch.