ECLI:EU:C:2021:11

JUDGMENT OF THE COURT (Fourth Chamber)

14 January 2021 (*)

(References for a preliminary ruling – Border controls, asylum and immigration – International protection – Standards for the reception of applicants for international protection – Directive 2013/33/EU – Third-country national who has travelled from one Member State of the European Union to another, but who has applied for international protection only in the latter Member State – Decision to transfer to the first Member State – Regulation (EU) No 604/2013 – Access to the labour market as an applicant for international protection)

In Joined Cases C-322/19 and C-385/19,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the High Court (Ireland) (C-322/19) and from the International Protection Appeals Tribunal (Ireland) (C-385/19), made by decisions of 25 March 2019 and 16 May 2019, received at the Court on 23 April 2019 and 16 May 2019 respectively, in the proceedings

K.S.,

M.H.K.

v

The International Protection Appeals Tribunal,

The Minister for Justice and Equality,

Ireland,

The Attorney General (C-322/19),

and

R.A.T.,

D.S.

v

Minister for Justice and Equality (C-385/19),

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra (Rapporteur), D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– K.S., by M. Conlon QC, B. Burns, Solicitor, and by E. Dornan and P. O'Shea, Barristers-at-Law,

– M.H.K., by M. Conlon QC, B. Burns, Solicitor, and by E. Dornan and P. O'Shea, Barristers-at-Law,

– R.A.T., by M. Conlon QC, B. Burns, Solicitor, and by E. Dornan, Barrister-at-Law,

– D.S., by M. Conlon QC, S. Bartels and A. Lodge, Solicitors, and by E. Bouchared, Barrister-at-Law,

– the Minister for Justice and Equality, by M. Browne, G. Hodge, S.-J. Hillery and R. Barron, acting as Agents,

– the European Commission, by A. Azéma, C. Ladenburger and J. Tomkin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2020,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 15 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 requests have been made in proceedings between, first, K.S. and M.H.K., on the one hand, and the International Protection Appeals Tribunal (Ireland), the Minister for Justice and Equality (Ireland), Ireland and the Attorney General (Ireland), on the other hand, and, secondly, R.A.T. and D.S., on the one hand, and the Minister for Justice and Equality (Ireland), on the other hand, concerning the legality of decisions refusing them access to the labour market as applicants for international protection whose transfer to another Member State has been requested pursuant to

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 Dublin III Regulation').

Legal context

European Union law

Directive 2013/33

3 Directive 2013/33 repealed and replaced, with effect from 21 July 2015, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18).

4 Recitals 8, 11, 23 and 33 of Directive 2013/33 state:

'(8) In order to ensure equal treatment of applicants throughout the Union, this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants.

…

(11) Standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.

…

(23) In order to promote the self-sufficiency of applicants and to limit wide discrepancies between Member States, it is essential to provide clear rules on the applicants' access to the labour market.

…

(33) In accordance with Articles 1 and 2 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU, and to the Treaty on the Functioning of the European Union (TFEU), and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application.'

5 Article 2 of the directive, headed '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;

…

(f) “reception conditions”: means the full set of measures that Member States grant to applicants in accordance with this Directive;

(g) “material reception conditions”: means the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance;

…’

6 Article 15 of Directive 2013/33, headed ‘Employment’, provides:

‘1. Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.

2. Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market.

…

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.’

Directive 2013/32/EU

7 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) repealed and replaced, with effect from 21 July 2015, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

8 Recitals 27 and 58 of Directive 2013/32 state:

‘(27) Given that third-country nationals and stateless persons who have expressed their wish to apply for international protection are applicants for international protection, they should comply with the obligations, and benefit from the rights, under this Directive and Directive [2013/33] …

…

(58) In accordance with Articles 1, 2 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application.’

9 Article 2(p) of Directive 2013/32 provides that the words ‘remain in the Member State’ mean ‘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’.

10 Article 9 of that directive, headed ‘Right to remain in the Member State pending the examination of the application’, provides, in paragraph 1 thereof:

‘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. That right to remain shall not constitute an entitlement to a residence permit.’

11 Article 13 of that directive, headed ‘Obligations of the applicants’, provides:

‘1. Member States shall impose upon applicants the obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) of 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)]. Member States may impose upon applicants other obligations to cooperate with the competent authorities in so far as such obligations are necessary for the processing of the application.

2. In particular, Member States may provide that:

(a) applicants are required to report to the competent authorities or to appear before them in person, either without delay or at a specified time;

(b) applicants have to hand over documents in their possession relevant to the examination of the application, such as their passports;

(c) applicants are required to inform the competent authorities of their current place of residence or address and of any changes thereof as soon as possible. …

(d) the competent authorities may search the applicant and the items which he or she is carrying. …

(e) the competent authorities may take a photograph of the applicant; and

(f) the competent authorities may record the applicant’s oral statements, provided he or she has previously been informed thereof.’

12 Article 31 of Directive 2013/32, headed ‘Examination procedure’, provides, in paragraph 3 thereof:

‘Member States shall ensure that the examination procedure is concluded within six months of the lodging of the application.

Where an application is subject to the procedure laid down in [the Dublin III Regulation], the time limit of six months shall start to run from the moment the Member State responsible for its examination is determined in accordance with that Regulation, the applicant is on the territory of that Member State and has been taken in charge by the competent authority.

Member States may extend the time limit of six months set out in this paragraph for a period not exceeding a further nine months, where:

…

(c) the delay can clearly be attributed to the failure of the applicant to comply with his or her obligations under Article 13.'

The Dublin III Regulation

13 Recitals 11 and 19 of the Dublin III Regulation state:

'(11) Directive [2013/33] should apply to the procedure for the determination of the Member State responsible as regulated under this Regulation, subject to the limitations in the application of that Directive.

…

(19) In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.'

14 Article 3 of that regulation, headed 'Access to the procedure for examining an application for international protection', provides:

'1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

…'

15 Article 7 of that regulation, headed 'Hierarchy of criteria', provides:

‘1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

2. The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State.

…’

16 Article 13 of that regulation, headed ‘Entry and/or stay’, provides, in paragraph 1 thereof:

‘Where it is established, on the basis of proof or circumstantial evidence …, including the data referred to in Regulation (EU) No 603/2013 [of the European Parliament and of the Council of 26 June 2013 on the establishment of “Eurodac” for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ 2013 L 180, p. 1)], that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place.’

17 Article 17 of the Dublin III Regulation, headed ‘Discretionary clauses’, provides, in paragraph 1 thereof:

‘By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.’

18 Article 27 of that regulation, headed ‘Remedies’, provides:

‘1. The applicant … shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

…

3. For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:

(a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or

(b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; …

…’

19 Article 29 of that regulation, headed ‘Modalities and time limits’, provides:

‘1. The transfer of the applicant … from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).

…

2. Where the transfer does not take place within the six months’ time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds.

…’

Irish law

20 Pursuant to Article 4 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice (‘Protocol No 21’), the European Communities (Receptions Conditions) Regulations 2018 (S.I. No 230/2018; ‘the 2018 Regulations’) transposed the provisions of Directive 2013/33 into Irish law, with effect from 30 June 2018.

21 Regulation 2(2) and (3) of the 2018 Regulations provides:

‘(2) For the purposes of these Regulations, where a transfer decision, within the meaning of the [European Union (Dublin System) Regulations 2018 (S.I. No 62/2018)] is made in respect of an applicant, he or she shall, on and from the date of the sending to him or her of the notification under Regulation 5(2) of those Regulations of the making of the transfer decision—

(a) cease to be an applicant, and

(b) be deemed to be a recipient but not an applicant.

(3) For the purposes of these Regulations, a person who has made an appeal under Regulation 16(2) of the [European Union (Dublin System) Regulations 2018 (S.I. No 62/2018)], in respect of which appeal the International Protection Appeals Tribunal has not made a decision, shall be deemed to be a recipient but not an applicant.’

22 Regulation 11(3) and (4) of the 2018 Regulations, which implements Article 15(1) of Directive 2013/33, provides:

‘(3) An applicant may make an application for a permission [to access the labour market], which application shall be— …

(b) made on or after the expiry of the period of 8 months beginning on the [international protection] application date.

(4) The Minister may … grant a permission [to access the labour market] to the applicant where satisfied that—

(a) subject to paragraph (6), a period of 9 months, beginning on the application date, has expired, and, by that date, a first instance decision has not been made in respect of the applicant's protection application, and

(b) the situation referred to in subparagraph (a) cannot be attributed, or attributed in part, to the applicant.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-322/19

23 In February 2010, K.S. left Pakistan for the United Kingdom. He did not lodge an application for international protection in that Member State. In May 2015, he travelled to Ireland, where he lodged an application for international protection on 11 May 2015. On 9 March 2016, the Refugee Applications Commissioner (Ireland) took a decision to transfer that application to the United Kingdom on the basis of the Dublin III Regulation. K.S. brought an appeal against that decision, which was dismissed on 17 August 2016 by the Refugee Appeals Tribunal (Ireland). K.S. then brought judicial review proceedings before the High Court (Ireland), which are still pending and have suspensory effect.

24 K.S. in the meantime submitted an application for permission to access the labour market to the Labour Market Access Unit of the Department of Justice and Equality (Ireland) pursuant to Regulation 11(3) of the 2018 Regulations. Following the refusal of that application, he brought an appeal, which was dismissed by decision of 19 July 2018. K.S. brought an appeal against that decision before the International Protection Appeals Tribunal. By decision of 11 September 2018, that tribunal upheld the refusal decision on the ground that, under the 2018 Regulations, persons whose application had been transferred to another Member State pursuant to the Dublin III Regulation did not enjoy the right of access to the labour market. K.S. then applied to the referring court for judicial review of the decision of the International Protection Appeals Tribunal.

25 On 24 October 2009, M.H.K. left Bangladesh for the United Kingdom. Following the expiry of his residence permit, he travelled to Ireland on 4 September 2014, before a decision was taken on his application for extension of leave to remain in the United Kingdom. On 16 February 2015, M.H.K. lodged an application for international protection in Ireland. On 25 November 2015, the Refugee Applications Commissioner adopted a decision to transfer that application to the United Kingdom on the basis of the Dublin III Regulation. M.H.K. brought an appeal against that decision, which was dismissed on 30 March 2016 by the Refugee Appeals Tribunal. He then brought judicial review proceedings before the High Court, relying on Article 17 of the Dublin III Regulation. Those proceedings, which are still pending, have suspensory effect.

26 M.H.K. also submitted, pursuant to Regulation 11(3) of the 2018 Regulations, an application for permission to access the labour market to the competent authority of the Department of Justice and Equality. Following the rejection of that application by decision of 16 August 2018, M.H.K. made an application for review, which was rejected on 5 September 2018. He brought an appeal against that rejection decision before the International Protection Appeals Tribunal. By decision of 17 October 2018, that tribunal dismissed that appeal, holding that access to the labour market was not covered by 'material reception conditions'. M.H.K. then applied to the referring court for judicial review of that decision.

27 The applications for judicial review made to the High Court were granted on 24 September and 12 November 2018 respectively. That court states that those two applications seek, in the first place, the adoption of orders of *certiorari* quashing the decisions refusing to grant access to the labour market, in the second place, a declaration that Regulation 2(2) and Regulation 11(2) and (12) of the 2018 Regulations are contrary to Directive 2013/33 and, in the third place, compensation for the damage suffered.

28 In that context, the High Court asks, in the first place, whether Directive 2013/32 may be taken into account, even though that directive is not applicable to Ireland, in order to interpret Directive 2013/33.

29 In the second place, the High Court seeks to ascertain whether an applicant for international protection whose application has been transferred to another Member State pursuant to the Dublin III Regulation may rely on Article 15(1) of Directive 2013/33. That court notes that, in a draft directive on reception conditions, dated 13 July 2016, the European Commission proposed to exclude persons who are the subject of a transfer decision under the Dublin III Regulation from access to the labour market. That court considers, however, that it cannot be inferred, *a contrario*, that Article 15 of Directive 2013/33 permits persons who are the subject of such a decision to access the labour market.

30 The High Court considers, first, that persons such as the applicants in the main proceedings are persons who 'by definition' have, to a certain extent, abused the mechanism established by the Dublin III Regulation and, secondly, that the lodging of an application for international protection in a Member State other than that in which the applicant first entered is contrary to that regulation. In the light of the concept of abuse of rights, those persons cannot therefore enjoy access to the labour market under Article 15 of Directive 2013/33.

31 In that context, that court asks, in the third place, whether a Member State may, in transposing Article 15 of Directive 2013/33, adopt a general measure which attributes to applicants for international protection whose transfer to another Member State has been decided pursuant to the Dublin III Regulation any delay in the conduct of that procedure. It considers that this question should be answered in the affirmative.

32 In the fourth place, the High Court seeks to ascertain whether the fact that the applicant for international protection has brought legal proceedings with suspensory effect against a decision to transfer to another Member State pursuant to the Dublin III Regulation also constitutes a delay attributable to that applicant, within the meaning of Article 15(1) of Directive 2013/33. It considers that this question should also be answered in the affirmative.

33 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Where in interpreting one instrument of EU law that applies in a particular Member State an instrument not applying to that Member State is adopted at the same time, may regard be had to the latter instrument in interpreting the former instrument?

(2) Does [Article] 15 of [Directive 2013/33] apply to a person in respect of whom a transfer decision under the Dublin III Regulation … has been made?

(3) Is a Member State in implementing [Article] 15 of [Directive 2013/33] entitled to adopt a general measure that in effect attributes to applicants liable for transfer under the Dublin III Regulation … any delays on or after the making of a transfer decision?

(4) Where an applicant leaves a Member State having failed to seek international protection there and travels to another Member State where he or she makes an application for international protection and becomes subject to a decision under the Dublin III Regulation …, transferring him or her back to the first Member State, can the consequent delay in dealing with the application for [international] protection be attributed to the applicant for the purposes of [Article] 15 of [Directive 2013/33]?

(5) Where an applicant is liable to transfer to another Member State under the Dublin III Regulation …, but that transfer is delayed due to judicial review proceedings taken by the applicant which have the consequence of suspending the transfer pursuant to a stay ordered by the court, can the consequent delay in dealing with the application for international protection be attributed to the applicant for the purposes of [Article] 15 of [Directive 2013/33], either generally or, in particular, where it may be determined in those proceedings that the judicial review is unfounded, manifestly or otherwise, or is an abuse of process?'

Case C-385/19

34 R.A.T. is an Iraqi national who applied for international protection in Ireland on 7 March 2018. By letter of 2 October 2018, she was informed that a decision to transfer her to the United Kingdom had been taken pursuant to the Dublin III Regulation. She then brought an appeal against that decision before the International Protection Appeals Tribunal on 18 October 2018. That appeal is still pending.

35 D.S. is an Iraqi national who claims to have left Iraq on 1 August 2015 and travelled via Turkey and Greece to Austria. He lodged an application for international protection in Austria but left that Member State before a decision was taken on his application. D.S. claims to have returned to Iraq in August 2015 and then travelled directly to Ireland on 25 December 2015. He lodged an application for international protection in that Member State on 8 February 2016. A decision to transfer him to Austria, pursuant to Article 18(1)(b) of the Dublin III Regulation, was taken against him, the competent Austrian authority having agreed to take back the person concerned under that provision. D.S. brought an appeal against that decision before the International Protection Appeals Tribunal, which was dismissed. D.S. brought judicial review proceedings before the High Court, which are still pending.

36 R.A.T. and D.S. applied for access to the labour market pursuant to Regulation 11 of the 2018 Regulations. Their application was rejected on the ground that, since a decision had been made under the Dublin III Regulation to transfer them to another Member State, they no longer had the status of 'applicant' and were now deemed to be 'recipients' within the meaning of the 2018 Regulations. Therefore, they could not be granted access to the labour market in Ireland. R.A.T. and D.S. then brought appeals against the decisions rejecting their applications before the International Protection Appeals Tribunal. The referring tribunal held, by decisions of 12 March and 10 April 2019 respectively, that those appeals were admissible.

37 In that context, the referring tribunal seeks to ascertain whether persons whose transfer to another Member State has been decided pursuant to the Dublin III Regulation may constitute a category distinct from that of 'applicant', within the meaning of Article 15(1) of Directive 2013/33, which would be, consequently, excluded from access to the labour market of the Member State

which requested that transfer. In its view, that directive does not allow any distinction to be made between applicants for international protection, as the Court confirmed in paragraph 40 of the judgment of 27 September 2012, *Cimade and GISTI* (C-179/11, EU:C:2012:594).

38 As regards the interpretation of Article 15(1) of Directive 2013/33, in particular the phrase 'the delay cannot be attributed to the applicant', the International Protection Appeals Tribunal considers that the fact that an applicant has brought legal proceedings in order to challenge the validity of a decision adversely affecting him or her cannot automatically be regarded as a delay attributable to him or her for the purposes of that provision.

39 The International Protection Appeals Tribunal states, moreover, that, following the delivery of the judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána* (C-378/17, EU:C:2018:979), it deemed the 2018 Regulations to be contrary to Article 15 of Directive 2013/33 and, therefore, decided to apply that directive instead of the national provisions, as a result of which the applicants concerned are allowed access to the Irish labour market.

40 In those circumstances, the International Protection Appeals Tribunal decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are there separate categories of "Applicant" envisaged in Article 15 of Directive [2013/33]?

(2) What type of conduct will amount to delay attributable to the applicant within the meaning of Article 15(1) of Directive [2013/33]?'

Procedure before the Court

41 By decision of the President of the Court of 14 June 2019, Cases C-322/19 and C-385/19 were joined for the purposes of the written and oral procedure and the judgment.

42 By separate order of 23 April 2019, the High Court requested that Case C-322/19 be determined pursuant to an expedited procedure under Article 105(1) of the Rules of Procedure of the Court of Justice. In its order for reference of 16 May 2019, the International Protection Appeals Tribunal made the same request in relation to Case C-385/19.

43 It follows from Article 105(1) of the Rules of Procedure that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, decide after hearing the Judge-Rapporteur and the Advocate General that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of those rules.

44 In support of their requests, the referring court and tribunal emphasise that the applicants in the main proceedings are in a state of uncertainty as to their right of access to the labour market and as to their family life, which is aggravated by the existence of divergent rulings by the Irish courts concerning the application of Directive 2013/33. An answer given by the Court within a very short time would make it possible to put an end to that state of uncertainty.

45 The referring court and tribunal also observe that the right of access to the labour market conferred by Directive 2013/33, at issue in the main proceedings, falls within the right to human dignity guaranteed in Article 1 of the Charter of Fundamental Rights of the European Union ('the Charter').

46 In the present case, on 22 May 2019, as regards Case C-322/19, and on 14 June 2019, with regard to Case C-385/19, the President of the Court decided to refuse the requests of the referring court and tribunal mentioned in paragraph 42 above, pursuant to Article 105(1) of the Rules of Procedure.

47 Those decisions are based, first of all, on the fact that the legal uncertainty relied on by the applicants in the main proceedings and their legitimate interest in knowing as quickly as possible the scope of the rights that they derive from EU law do not, as such, constitute an exceptional circumstance that could justify the use of the expedited procedure provided for in Article 105 of the Rules of Procedure (see, to that effect, order of the President of the Court of 18 January 2019, *Adusbef and Others*, C-686/18, not published, EU:C:2019:68, paragraph 14 and the case-law cited).

48 Thus, unlike the order of the President of the Court of 17 April 2008, *Metock and Others* (C-127/08, not published, EU:C:2008:235), cited by the High Court, in which couples were deprived of the possibility of leading a normal family life, it is not apparent from the orders for reference that that would be the case here. Similarly, in the case which gave rise to the order of the President of the Court of 9 September 2011, *Dereci and Others* (C-256/11, not published, EU:C:2011:571, paragraph 15), also cited by the High Court, at least one of the applicants was denied the suspensory effect of the appeal he had brought against his expulsion order, with the result that the removal order against the person concerned could be implemented at any time. The Court considered that that threat of imminent removal deprived him of the possibility of leading a normal family life. However, in the cases in the main proceedings, the applicants are not deprived of liberty and the transfer decisions affecting them are suspended pending final judgment.

49 Next, it must be stated that a difference in the interpretation of a provision of EU law within the national courts is not sufficient, in itself, to justify that the reference for a preliminary ruling be determined pursuant to an expedited procedure. The importance of ensuring uniform application within the European Union of all the provisions which form part of its legal order is inherent in any request made under Article 267 TFEU (see, to that effect, order of the President of the Court of 17 September 2018, *Lexitor*, C-383/18, not published, EU:C:2018:769, paragraph 16).

50 Lastly, it is not apparent from the orders for reference that the applicants in the main proceedings are deprived of the material reception conditions guaranteed by Directive 2013/33. Consequently, their situation is not of such insecurity that it would be justified to determine the references for a preliminary ruling pursuant to the expedited procedure provided for in Article 105 of the Rules of Procedure.

Consideration of the questions referred

Admissibility of the third question referred in Case C-322/19

51 By its third question in Case C-322/19, the High Court asks, in essence, whether a Member State may, in transposing Article 15 of Directive 2013/33, adopt a general measure which attributes to an applicant for international protection whose transfer to another Member State has been requested pursuant to the Dublin III Regulation any delay in the adoption of a transfer decision.

52 It must be noted at the outset that it is not apparent from the file before the Court that such a general transposition measure is at issue in the main proceedings.

53 Although questions referred for a preliminary ruling which relate to EU law enjoy a presumption of relevance, the justification for a reference for a preliminary ruling is not that it

enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (judgments of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 28, and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 44).

54 In any event, as the Commission correctly points out, the delay referred to in Article 15(1) of that directive concerns the adoption of a decision at first instance regarding an application for international protection, not the adoption of a transfer decision, within the meaning of the Dublin III Regulation.

55 It follows from the foregoing that, since the third question referred in Case C-322/19 seeks, in reality, to obtain an advisory opinion from the Court, it is inadmissible.

Substance

The first question referred in Case C-322/19

56 By its first question referred in Case C-322/19, the High Court asks, in essence, whether a national court may take account of Directive 2013/32, which, pursuant to Articles 1 and 2 and Article 4a(1) of Protocol No 21, does not apply in the Member State of that court, in order to interpret the provisions of Directive 2013/33, which is, by contrast, applicable in that Member State in accordance with Article 4 of that protocol.

57 According to the Court's settled case-law, it follows from the requirement for the uniform application of EU law and from the principle of equal treatment that the terms of a provision of EU law which does not contain any express reference to the law of the Member States for the purpose of determining its meaning and scope must be given an autonomous and uniform interpretation throughout the European Union, which interpretation must take into account not only the wording of that provision but also its context and the objective pursued by the legislation in question (judgment of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU, EU:C:2020:495, paragraph 53 and the case-law cited).

58 Moreover, in a situation such as that at issue in the main proceedings, in which the two instruments concerned belong to the same body of law, namely the Common European Asylum System, for the purposes of interpreting the provisions of Directive 2013/33, the provisions of Directive 2013/32 constitute relevant and necessary contextual elements.

59 In those circumstances, account must be taken of Directive 2013/32, even where that directive does not apply in the Member State of the referring court, pursuant to Protocol No 21, in order to interpret Directive 2013/33, applicable in that Member State, pursuant to that protocol, so as to ensure a uniform interpretation and application of the provisions of the latter directive in all the Member States.

60 Accordingly, the answer to the first question referred in Case C-322/19 is that a national court must take account of Directive 2013/32, which, pursuant to Articles 1 and 2 and Article 4a(1) of Protocol No 21, does not apply in the Member State of that court, in order to interpret the provisions of Directive 2013/33, which is, by contrast, applicable in that Member State in accordance with Article 4 of that protocol.

The second question referred in Case C-322/19 and the first question referred in Case C-385/19

61 By the second question referred in Case C-322/19 and the first question referred in Case C-385/19, which it is appropriate to examine together, the referring court and tribunal ask, in essence, whether Article 15 of Directive 2013/33 must be interpreted as precluding national legislation which excludes an applicant for international protection, within the meaning of Article 2(b) of that directive, from access to the labour market on the sole ground that a transfer decision has been taken in his or her regard under the Dublin III Regulation.

62 In that regard, it should be recalled, in the first place, that, in accordance with Article 15(1) of Directive 2013/33, Member States are to ensure that applicants have access to the labour market under the conditions laid down in that provision. In so far as that provision concerns access to the labour market for the benefit of 'applicants', reference must be made to the definition of that concept in Article 2(b) of that directive.

63 Article 2(b) of Directive 2013/33 defines an 'applicant' as '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'. In using the indefinite article 'a', the EU legislature indicates, as the Advocate General noted in point 54 of his Opinion, that no third-country national or stateless person is, a priori, excluded from the status of applicant.

64 Furthermore, Article 2(b) makes no distinction as to whether or not the applicant is the subject of a procedure for transfer to another Member State under the Dublin III Regulation. Under that provision, the applicant is to retain that status provided that 'a final decision has not yet been taken' on his or her application for international protection. As the Advocate General observed in points 55 to 58 of his Opinion, a transfer decision does not constitute a final decision on an application for international protection, with the result that the adoption of such a decision cannot have the effect of depriving the person concerned of the status of 'applicant' within the meaning of Article 2(b) of Directive 2013/33.

65 That literal interpretation is consistent, in the second place, with the intention of the EU legislature, as is apparent from recital 8 of Directive 2013/33, according to which that directive applies during all stages and types of procedures concerning applications for international protection and for as long as applicants are allowed to remain on the territory of the Member States in that capacity. It follows that applicants who are subject to the 'procedures concerning applications for international protection' established by the Dublin III Regulation are clearly included in the scope *ratione personae* of that directive and, consequently, in that of Article 15 thereof.

66 That interpretation is also supported by two other instruments which, like Directive 2013/33, form part of the Common European Asylum System, namely Directive 2013/32 and the Dublin III Regulation. According to recital 27 of Directive 2013/32, third-country nationals and stateless persons who have expressed their wish to apply for international protection are applicants for international protection. Accordingly, they must benefit from the rights guaranteed under that directive and Directive 2013/33. Similarly, it is expressly stated in recital 11 of the Dublin III Regulation that Directive 2013/33 applies to the procedure for determining the Member State responsible for examining an application for international protection, as regulated under that regulation. Such a procedure takes place, in practice, in the Member State which requests the transfer of the application to another Member State, until the requested Member State takes charge of or takes back the applicant, if it transpires that the latter Member State is in fact responsible for examining that application pursuant to that regulation.

67 That interpretation of Article 15(1) of Directive 2013/33 is, in the third place, consistent with the judgment of 27 September 2012, *Cimade and GISTI* (C-179/11, EU:C:2012:594), concerning the obligation, incumbent on the Member State in which the application for international protection was lodged under Directive 9, repealed and replaced by Directive 2013/33, to guarantee material reception conditions to the applicant before the Member State responsible for examining that application takes charge of or takes back that applicant pursuant to the regulation which preceded the Dublin III Regulation. The Court held, in paragraph 40 of that judgment, that Articles 2 and 3 of Directive 2003/9, which correspond, in essence, to Articles 2 and 3 of Directive 2013/33, provide for only one category of applicants for international protection, comprising all third-country nationals or stateless persons who make an application for international protection. In paragraph 53 of that judgment, the Court stated, in essence, that an applicant for international protection retains that status as long as a final decision has not been taken on his or her application. Lastly, the Court pointed out, in paragraph 58 of that judgment, that the obligations for the Member State in receipt of such an application to grant the minimum conditions laid down by Directive 2003/9 cease only when that applicant has actually been transferred by that Member State.

68 Although access to the labour market is not, strictly speaking, a material reception condition within the meaning of Article 2(g) of Directive 2013/33, it is nevertheless covered by reception conditions, within the meaning of Article 2(f) thereof, understood as the rights and benefits conferred by that directive on any applicant for international protection whose application has not been finally determined. Accordingly, the obligation on the Member State concerned, pursuant to Article 15(1) of Directive 2013/33, to grant the applicant for international protection access to the labour market ceases only when that applicant is finally transferred to the requested Member State.

69 In the fourth place, recital 11 of Directive 2013/33 states that standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down. The Court has also stated that respect for human dignity applies not only with regard to asylum seekers present in the territory of the Member State responsible pending the decision on their application for asylum but also to asylum seekers awaiting a decision on which Member State will be held responsible for their application (judgment of 27 September 2012, *Cimade and GISTI*, C-179/11, EU:C:2012:594, paragraph 43). As the Advocate General observed in point 85 of his Opinion, work clearly contributes to the preservation of the applicant's dignity, since the income from employment enables him or her not only to provide for his or her own needs, but also to obtain housing outside the reception facilities in which he or she can, where necessary, accommodate his or her family.

70 In addition, recital 23 of Directive 2013/33 states that one of the objectives pursued by that directive is to 'promote the self-sufficiency of applicants' for international protection. In that regard, it must be borne in mind that, as the Commission pointed out in its Proposal for a Directive of the European Parliament and of the Council of 3 December 2008 laying down minimum standards for the reception of asylum seekers (COM(2008) 815 final), access to the labour market is beneficial both to applicants for international protection and to the host Member State. Simplification of access to the labour market for those applicants is likely to prevent a significant risk of isolation and social exclusion given the insecurity of their situation. The self-sufficiency of applicants for international protection, which is one of the objectives of Directive 2013/33, is also thereby promoted.

71 Conversely, preventing applicants for international protection from gaining access to the labour market is contrary to that objective, in addition to placing costs on the Member State concerned as a result of the payment of additional social benefits. The same is true if an applicant who is the subject of a decision on transfer to another Member State is prevented from accessing the

labour market during the entire period between the date of lodging his or her application for international protection and the date of acceptance of his or her transfer to the requested Member State, a period to which is added the period corresponding to the actual examination of his or her application, which may last up to six months from the date of acceptance of the transfer of the person concerned by the requested Member State.

72 Consequently, applicants for international protection, within the meaning of Article 2(b) of Directive 2013/33, who are the subject of a transfer decision under the Dublin III Regulation fall within the scope *ratione personae* of Article 15(1) of that directive.

73 In the light of the foregoing considerations, the answer to the second question referred in Case C-322/19 and the first question referred in Case C-385/19 is that Article 15 of Directive 2013/33 must be interpreted as precluding national legislation which excludes an applicant for international protection from access to the labour market on the sole ground that a transfer decision has been taken in his or her regard under the Dublin III Regulation.

The second question referred in Case C-385/19

74 By the second question referred in Case C-385/19, the International Protection Appeals Tribunal asks, in essence, what acts may constitute a delay attributable to the applicant for international protection within the meaning of Article 15(1) of Directive 2013/33.

75 It should be noted at the outset, as the Advocate General noted in point 99 et seq. of his Opinion, that Directive 2013/33 gives no guidance in that regard.

76 Accordingly, it is necessary to refer to the rules of common procedures for granting international protection established by Directive 2013/32, which, as stated in paragraph 60 above, must be taken into account in interpreting the provisions of Directive 2013/33.

77 It thus follows from Article 31(3) of Directive 2013/32 that a delay in the examination of his or her application for international protection is attributable to the applicant where that applicant fails to comply with his or her obligations under Article 13 of that directive. That provision provides that applicants have an obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) of Directive 2011/95, namely their age, background, including that of relevant relatives, nationality (or nationalities), country (or countries) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection. The applicant's obligation to cooperate means that he or she must supply, as far as possible, the required supporting documents and, where appropriate, the explanations and information requested (judgment of 14 September 2017, *K.*, C-18/16, EU:C:2017:680, paragraph 38).

78 Article 13 of Directive 2013/32 also allows Member States to impose upon applicants other obligations necessary for the processing of their application, inter alia, to require them to report to the competent authorities or to appear before them at a specified time and place and to inform the authorities of their current place of residence, and even provide that applicants may be searched or photographed or have their statements recorded.

79 It follows, in essence, from the foregoing considerations that a delay in the processing of an application for international protection may be attributed to the applicant where he or she has failed to cooperate with the competent national authorities. Bearing in mind the need for uniform interpretation and application of EU law, as recalled in paragraph 57 et seq. above, this

interpretation is called for even where, as a result of a specific derogating act, in the present case Protocol No 21, Directive 2013/32 does not apply in the Member State concerned.

80 In the light of the foregoing considerations, the answer to the second question referred in Case C-385/19 is that Article 15(1) of Directive 2013/33 must be interpreted as meaning that a delay in the adoption of a decision at first instance concerning an application for international protection which results from a lack of cooperation by the applicant for international protection with the competent authorities may be attributed to that applicant.

The fourth question referred in Case C-322/19

81 By the fourth question referred in Case C-322/19, the High Court asks, in essence, whether Article 15(1) of Directive 2013/33 must be interpreted as meaning that a Member State may attribute to the applicant for international protection the delay in adopting a decision at first instance concerning an application for international protection, on account of the fact that the applicant did not lodge his or her application with the first Member State of entry.

82 In that regard, first, as the Advocate General observed in points 110 and 112 of his Opinion, no provision of the Dublin III Regulation requires an applicant for international protection to lodge his or her application with the Member State of first entry.

83 Secondly, it should be recalled that Article 3(1) of the Dublin III Regulation provides that the application for international protection is to be examined by a single Member State, namely the one which the criteria set out in order of precedence in Chapter III of that regulation indicate is responsible. The Member State of first entry is not automatically the Member State responsible for examining an application for international protection, which must be determined in the light of the criteria laid down in Article 7(1) and (2) of that regulation.

84 In those circumstances, where an applicant for international protection leaves a Member State without having lodged an application for international protection and lodges such an application in another Member State, the delay regarding the examination of his or her application which might arise as a result cannot be attributed to the applicant on that ground alone.

85 In the light of the foregoing considerations, the answer to the fourth question referred in Case C-322/19 is that Article 15(1) of Directive 2013/33 must be interpreted as meaning that a Member State may not attribute to the applicant for international protection the delay in adopting a decision at first instance concerning an application for international protection on account of the fact that the applicant did not lodge his or her application with the first Member State of entry, within the meaning of Article 13 of the Dublin III Regulation.

The fifth question referred in Case C-322/19

86 By the fifth question referred in Case C-322/19, the High Court asks, in essence, whether Article 15(1) of Directive 2013/33 must be interpreted as meaning that a Member State may attribute to the applicant for international protection the delay in processing his or her application for international protection which results from the bringing, by that applicant, of legal proceedings with suspensory effect against the transfer decision taken in his or her regard under the Dublin III Regulation.

87 In the first place, it should be recalled that Article 27(3) of the Dublin III Regulation requires Member States to provide in their national law, first, that the appeal against a transfer decision

confers on the applicant for international protection to whom that decision is addressed the right to remain in the Member State concerned pending the outcome of his or her appeal and, secondly, that the transfer is automatically suspended.

88 Those provisions must be interpreted in the light of recital 19 of the Dublin III Regulation, which states that, in order to guarantee effective protection of the rights of applicants for international protection, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance with Article 47 of the Charter. It has thus been held, first, that the EU legislature did not intend that judicial protection enjoyed by applicants for international protection should be sacrificed to the requirement of expedition in the processing of their application, by guaranteeing them effective and complete judicial protection (see, to that effect, judgments of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraph 57, and of 31 May 2018, *Hassan*, C-647/16, EU:C:2018:368, paragraph 57), and, secondly, that a restrictive interpretation of the scope of the remedy provided for in Article 27(1) of the Dublin III Regulation might thwart the attainment of that objective (see, to that effect, judgment of 26 July 2017, *Mengesteab*, C-670/16, EU:C:2017:587, paragraphs 46 and 47).

89 It follows that the exercise by the applicant of his or her right to appeal against a transfer decision made in respect of him or her cannot, as such, constitute a delay attributable to him or her within the meaning of Article 15(1) of Directive 2013/33. Paragraph 3 of that article states, moreover, that an applicant for international protection's access to the labour market is not to be withdrawn during appeals procedures. The same must also apply where the appeal against a transfer decision, referred to in Article 27(3) of the Dublin III Regulation, has been brought.

90 In the second place, it cannot be presumed, without an examination by the national court of the circumstances of the case, that the bringing of legal proceedings against a transfer decision constitutes an abuse of rights.

91 In that regard, it must be borne in mind that proof of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it (judgment of 18 December 2014, *McCarthy and Others*, C-202/13, EU:C:2014:2450, paragraph 54 and the case-law cited).

92 The Court has also stated, in essence, that the fact that a Member State is faced, as the case may be, with a high number of cases of abuse of rights or fraud committed by third-country nationals cannot justify the adoption of a measure founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned him or herself. The adoption of measures pursuing an objective of general prevention in respect of widespread cases of abuse of rights or fraud would mean that the mere fact of belonging to a particular group of persons would allow the Member States to refuse to recognise a right expressly conferred by EU law (see, to that effect, judgment of 18 December 2014, *McCarthy and Others*, C-202/13, EU:C:2014:2450, paragraphs 55 and 56).

93 In the light of the foregoing considerations, the answer to the fifth question referred in Case C-322/19 is that Article 15(1) of Directive 2013/33 must be interpreted as meaning that a Member State may not attribute to the applicant for international protection the delay in processing his or her application which results from the bringing, by that applicant, of legal proceedings with suspensory effect against the transfer decision taken in his or her regard under the Dublin III Regulation.

Costs

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

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **A national court must take account 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, which, pursuant to Articles 1 and 2 and Article 4a(1) of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, does not apply in the Member State of that court, in order to interpret the provisions 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, which is, by contrast, applicable in that Member State in accordance with Article 4 of that protocol.**

2. **Article 15 of Directive 2013/33 must be interpreted as precluding national legislation which excludes an applicant for international protection from access to the labour market on the sole ground that a transfer decision has been taken in his or her regard under 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.**

3. **Article 15(1) of Directive 2013/33 must be interpreted as meaning that:**

– **a delay in the adoption of a decision at first instance concerning an application for international protection which results from a lack of cooperation by the applicant for international protection with the competent authorities may be attributed to that applicant;**

– **a Member State may not attribute to the applicant for international protection the delay in adopting a decision at first instance concerning an application for international protection on account of the fact that the applicant did not lodge his or her application with the first Member State of entry, within the meaning of Article 13 of Regulation No 604/2013;**

– **a Member State may not attribute to the applicant for international protection the delay in processing his or her application which results from the bringing, by that applicant, of legal proceedings with suspensory effect against the transfer decision taken in his or her regard under Regulation No 604/2013.**

Vilaras Piçarra Šváby

Rodin Jürimäe

Delivered in open court in Luxembourg on 14 January 2021.

A. Calot Escobar | M. Vilaras

Registrar | President of the Fourth Chamber

* Language of the case: English.