Provisional text

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 25 February 2021 (1)

Case C-821/19

European Commission
v
Hungary

(Failure of a Member State to fulfil obligations – Area of freedom, security and justice – Common procedures for granting and withdrawing international protection – Directive 2013/32/EU – Article 33(2) – Grounds of admissibility of applications for international protection – Exhaustive nature – Additional ground of inadmissibility in national law – Article 8(2) – Access at border crossing points for organisations and persons providing advice and counselling to applicants for international protection – Article 12(1)(c) – Opportunity for applicants for international protection to communicate with organisations and persons providing advice and counselling – Article 22(1) – Opportunity for applicants for international protection to consult, at their own cost, a legal adviser or other counsellor – Directive 2013/33/EU – Article 10(4) – Possibility for the legal advisers and the other counsellors to communicate with applicants for international protection – Criminalisation, under national law, of the activity of providing, in an organised manner, assistance to applicants for international protection – Prohibition on the entry of organisations and persons providing advice and counselling for applicants for international protection to the border transit zone)

I. Introduction

1. By its action, the European Commission requests that the Court declare that Hungary has failed to fulfil its obligations under EU law for the following reasons:

– by adding a new ground of inadmissibility of applications for international protection to those set out in the exhaustive list established in Article 33(2) of Directive 2013/32/EU; (2)

– by criminalising the organising activity designed to enable asylum proceedings to be brought by persons who do not meet the criteria for the granting of international protection established by national law and by taking measures resulting in restrictions against persons who have been accused of or punished for such an offence, in breach of Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32, and Article 10(4) of Directive 2013/33/EU. (3)

2. I am of the opinion that the first complaint does not raise any particular difficulties and may be settled in the light of the recent judgments of the Court of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)* (4) and of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*. (5)

3. The second complaint raises the novel question of whether a Member State may criminalise the organising activity designed to enable asylum proceedings to be brought by persons who do not meet the criteria for the granting of international protection established by national law.

II. Legal framework

A. EU law

1. Provisions concerning the grounds of inadmissibility of applications for international protection

4. Article 33 of Directive 2013/32, entitled 'Inadmissible applications', provides, in paragraph 2:

'Member States may consider an application for international protection as inadmissible only if:

(a) another Member State has granted international protection;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue 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 (6)] have arisen or have been presented by the applicant; or

(e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.'

2. Provisions concerning assistance for applicants for international protection

(a) Directive 2013/32

5. Article 8 of Directive 2013/32, entitled 'Information and counselling in detention facilities and at border crossing points', provides, in paragraph 2:

'Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible.'

6. Article 12(1) of that directive, entitled 'Guarantees for applicants', provides:

‘With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants for asylum enjoy the following guarantees:

…

(c) they shall not be denied the opportunity to communicate with [the United Nations High Commissioner for Refugees] or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned;

…’

7. Article 22 of that directive, entitled ‘Right to legal assistance and representation at all stages of the procedure’, states:

‘1. Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.

2. Member States may allow non-governmental organisations to provide legal assistance and/or representation to applicants in the procedures provided for in Chapter III and Chapter V in accordance with national law.’

(b) Directive 2013/33

8. Article 10 of Directive 2013/33, entitled ‘Conditions of detention’, provides, in paragraph 4:

‘Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.’

B. Hungarian law

1. Provisions concerning the grounds of inadmissibility of applications for international protection

9. Article 51(2)(f) of the menedékjogról szóló 2007. évi LXXX. törvény (Law No LXXX of 2007 on the right to asylum, ‘the Law on the right to asylum’ (7)), introduced by Article 7(1) of the egyes törvényeknek a jogellenes bevándorlás elleni intézkedésekkel kapcsolatos módosításáról szóló 2018. évi VI. törvény (Law No VI of 2018 amending certain laws in relation to measures against illegal immigration, ‘Law No VI of 2018’ (8)), provides for a new ground of inadmissibility of applications for international protection, defined as follows:

‘The application is inadmissible when the applicant has arrived in Hungary via a country in which he or she is not exposed to persecution within the meaning of Article 6(1) [of the Law on the right to asylum] or to the risk of serious harm, within the meaning of Article 12(1) [of that law], or in which a sufficient level of protection is guaranteed.’

2. Provisions concerning assistance for applicants for international protection

(a) The Criminal Code

10. Article 353/A of the Büntető Törvénykönyvről szóló 2012. évi C. törvény (Law No C of 2012 establishing the Criminal Code, ‘the Criminal Code’ (9)), entitled ‘Facilitating illegal immigration’,

introduced by Article 11(1) of Law No VI of 2018, provides:

‘1. Anyone who carries out organising activities with a view to

(a) enabling asylum proceedings to be brought in Hungary by a person who is not persecuted in his or her country of nationality, country of habitual residence or any other country via which he or she arrived, for reasons of race, nationality, membership of a particular social group, religious or political beliefs, or who does not have a well-founded fear of direct persecution, or

(b) assisting a person who is entering or residing in Hungary illegally to obtain a residence permit,

shall be placed in confinement, unless he or she has committed a more serious criminal offence.

2. Anyone who provides material resources which enable the criminal offence referred to in paragraph 1 to be committed or carries out such organising activities on a regular basis shall be liable to a maximum custodial sentence of one year.

3. Anyone who commits the criminal offence referred to in paragraph 1

(a) in order to obtain a financial gain,

(b) by helping more than one person or

(c) at a distance of less than eight kilometres from the border or border marker corresponding to the external border within the meaning of Article 2(2) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code),[(10)] shall be liable to the penalty provided for in paragraph 2.

4. The penalty for the perpetrator of the criminal offence referred to in paragraph 1 may be reduced without restriction or, in cases which merit special treatment, may be lifted if the perpetrator reveals the circumstances in which the criminal offence was committed at the latest at the point when he or she is under investigation.

5. For the purposes of this article, organising activities shall include, in particular, for a purpose referred to in paragraph 1:

(a) border surveillance, at the border or a border marker corresponding to the external border of Hungary within the meaning of Article 2(2) of the Schengen Borders Code,

(b) the drawing up or distribution of information documents or the act of instructing a third party to carry out those activities and

(c) the establishment or operation of a network.’

(b) The Law on the police

11. Article 46/F of the Rendőrségről szóló 1994. évi XXXIV. törvény (Law No XXXIV of 1994 on the police, ‘the Law on the police’ (11)), entitled ‘Expulsion measures used in the context of border security’, inserted into Chapter V of that law by Article 2 of Law No VI of 2018, provides:

‘1. In order to maintain order at the State border and prevent any disruption of border surveillance, police officers shall prevent any person who is the subject of criminal proceedings for offences involving the illegal crossing of the border fence (Article 352/A of the Criminal Code), damaging the border fence (Article 352/B of the Criminal Code), obstructing the construction or maintenance of the border fence (Article 352/C of the Criminal Code), human trafficking (Article 353 of the Criminal Code), the

facilitation of an illegal stay (Article 354 of the Criminal Code) or facilitating illegal immigration (Article 353/A of the Criminal Code) from entering an area within a distance of less than eight kilometres from the border or the border marker corresponding to the external border of Hungary, within the meaning of Article 2(2) of [Regulation 2016/399] or require that person to leave that area if he or she is in it. […]'

III. Background to the dispute and pre-litigation procedure

12. On 20 June 2018, the Hungarian Parliament adopted Law No VI of 2018. That law introduced inter alia Article 51(2)(f) of the Law on the right to asylum, Article 353/A of the Criminal Code and Article 46/F of the Law on the police.

13. The Commission sent Hungary a letter of formal notice and a reasoned opinion on 19 July 2018 and 24 January 2019 respectively, in which it accused that Member State of the two complaints summarised in point 1 of this Opinion.

14. Hungary replied on 19 September 2018 and 23 March 2019 respectively, claiming that the Hungarian legislation at issue was consistent with EU law.

IV. Procedure before the Court and forms of order sought

15. By application of 8 November 2019, the Commission brought the present action.

16. The Commission and Hungary presented oral argument at the hearing on 23 November 2020.

17. The Commission claims that the Court should:

– declare, first, that Hungary has failed to fulfil its obligations under Article 33(2) of Directive 2013/32 by adding a new ground of inadmissibility of applications for international protection to those established by that provision and, secondly, that Hungary has failed to fulfil its obligations under Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32, and under Article 10(4) of Directive 2013/33, by criminalising the organising activity designed to enable asylum proceedings to be brought by persons who do not meet the criteria for the granting of international protection established by national law and by taking measures resulting in restrictions against persons who have been accused of or punished for such an offence;

– order Hungary to pay the costs.

18. Hungary contends that the Court should:

– dismiss the action;

– order the Commission to pay the costs.

V. Analysis

A. The first complaint, alleging the introduction of a ground of inadmissibility of applications for international protection which is incompatible with EU law

19. By its first complaint, the Commission requests that the Court declare that Hungary has failed to fulfil its obligations under Article 33(2) of Directive 2013/32 by adding, by means of Article 51(2)(f) of the Law on the right to asylum, a new ground of inadmissibility of applications for international protection to those provided for in Article 33(2) of that directive.

20. As a preliminary point, it should be recalled that, in Article 51(2)(f) of the Law on the right to asylum, the Hungarian legislature stipulated that an application for international protection is inadmissible if the applicant has arrived in Hungary via a country in which, first, he or she is not exposed to persecution or the risk of serious harm or, secondly, a sufficient degree of protection is guaranteed.

21. That law introduced, in essence, a ground of inadmissibility of applications for international protection which is not expressly provided for in Article 33(2) of Directive 2013/32.

22. The question therefore arises as to whether that ground of inadmissibility may be regarded as a mere explanation of the grounds laid down in that provision, in particular the ground relating to the 'safe third country' within the meaning of Article 33(2)(c) of Directive 2013/32, and, if not, whether that new ground is incompatible with that provision.

23. In that regard, I note that, in the recent judgment in *Tompa*, which also concerned the provision of Hungarian legislation at issue in the present complaint, namely Article 51(2)(f) of the Law on the right to asylum, the Court ruled as follows:

– first of all, it confirmed that the list in Article 33(2) of Directive 2013/32 is exhaustive; (12)

– next, it ruled out the possibility that the grounds of inadmissibility set out in the Hungarian legislation could constitute the implementation of those provided for in Article 33(2) of that directive, (13) including the ground relating to the 'safe third country' (14) and that relating to the first country of asylum'; (15)

– finally, it held that Article 33 of Directive 2013/32 must be interpreted as precluding national legislation which allows an application for international protection to be rejected as inadmissible on the ground that the applicant arrived on the territory of the Member State concerned via a State in which that person was not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed. (16)

24. That interpretation was reiterated by the Court in the judgment in *Országos Idegenrendészeti Főigazgatóság*, which also concerned Article 51(2)(f) of the Law on the right to asylum. (17)

25. Therefore, in so far as the Hungarian Government has not adduced any new evidence justifying the need or an opportunity to depart from that case-law, I consider that the solution applied by the Court in the abovementioned cases makes it possible to give a definitive answer to the question examined in the context of the present complaint.

26. Accordingly, I propose that the Commission's first complaint be upheld and that it be declared that Hungary has failed to fulfil its obligations under Article 33(2) of Directive 2013/32 by adding a new ground of inadmissibility of applications for international protection to the grounds established exhaustively by that provision.

B. The second complaint, alleging limits on access imposed on applicants for international protection and organisations and persons providing them with advice and counselling

27. By its second complaint, the Commission asks the Court to declare that Hungary has failed to fulfil its obligations under Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32, and under Article 10(4) of Directive 2013/33, by criminalising, by means of Article 353/A of the Criminal Code, the organising activity designed to enable asylum proceedings to be brought by persons who do not meet the criteria for the granting of international protection established by national law and, by means of Article 46/F of the Law on the police, by taking measures resulting in restrictions against persons who have been accused of or punished for such an offence.

28. In that regard, I should note at the outset that the provisions of EU law concerning assistance for applicants for international protection (18) guarantee, first, that those applicants have the right to be able to consult organisations and persons providing advice and counselling and, secondly, in parallel, that those organisations and persons have the right to access those applicants, including those who are held in detention.

29. It must therefore be ascertained whether Article 353/A of the Criminal Code and Article 46/F of the Law on the police constitute an obstacle to the exercise of the rights guaranteed by Article 8(2), Article 12(1)(c) and Article 22 of Directive 2013/32 and Article 10(4) of Directive 2013/33 and, if so, whether such an obstacle is justified in the light of those provisions.

1. The first part of the second complaint, concerning Article 353/A of the Criminal Code

(a) The restrictive nature of Article 353/A of the Criminal Code

30. Article 353/A of the Criminal Code criminalises any ‘organising activity’ which enables asylum proceedings to be brought in Hungary by a person who, in essence, is not entitled to international protection under the national rules. Prima facie, that article appears to be capable of constituting an obstacle to the rights guaranteed by the provisions of EU law invoked by the Commission, in so far as it places every person or organisation intending to provide assistance to applicants for international protection in a position of uncertainty, or even raises the specific risk of being penalised.

31. The Hungarian Government submits, in the first place, that the criminalisation is limited to infringements committed with a ‘clear intention’ and concerns only those actions carried out in the form of an ‘organising activity’; in the second place, that the legislation at issue has no demonstrable deterrent effect; and, in the third place, that that legislation applies only to actions which precede the initiation of asylum proceedings and therefore does not concern ‘applicants for international protection’ in the strict sense, who are the beneficiaries of the rights conferred by Directives 2013/32 and 2013/33.

32. As regards, in the first place, the subjective element of the offence and the concept of ‘organising activity’, as the Hungarian Government observes, the scope of Article 353/A of the Criminal Code must be interpreted in the light of the clarification provided by the Alkotmánybíróság (Constitutional Court, Hungary) in Decision No 3/2019, (19) which is authoritative in interpreting that article, particularly since it appears that that article has not yet been applied frequently, as the Hungarian Government confirmed at the hearing.

33. With regard to, first, the subjective element of the offence, the Alkotmánybíróság (Constitutional Court) stated in that decision that Article 353/A of the Criminal Code does not penalise negligent conduct, but exclusively acts which are committed deliberately, on the basis of a ‘clear intention’ to commit the offence, and that it is for the national authorities to demonstrate the existence of such an intention. In any event, that court excluded from the scope of that article the altruistic behaviour which satisfies the obligation to assist those who are deprived and in need, which is not linked to the objective set out in that article, whilst stipulating that it is for the courts adjudicating on the substance, in their judicial practice, to determine the circumstances in which an organising activity may be treated as humanitarian aid, which forms of aid cannot be penalised and the point at which the acts go beyond that scope. (20)

34. However, I note that, in principle, any organisation or person wishing to provide assistance necessarily acts with the intention of enabling the person being assisted to initiate asylum proceedings and may, at the very least, have doubts as to whether or not that person meets the requirements to be eligible for international protection. Doubts as to the veracity of applicants’ claims are inherent in the asylum procedure, which is conducted precisely with the aim of establishing whether the conditions for the granting of international protection are satisfied. It is for the competent national authorities, and not legal advisers or organisations or persons offering assistance to applicants for international protection, to assess whether the reasons given in the application justify international protection being granted in accordance with the conditions imposed by the national legislation.

35. Moreover, in my view, what is most important is that account must be taken in the present case of, first, the introduction of Article 51(2)(f) of the Law on the right to asylum, which is the subject of the first complaint, and, secondly, the fact that, as the Commission has pointed out without this being disputed by Hungary, the derogating provisions applicable in the event of a crisis situation caused by mass immigration require persons wishing to obtain international protection to travel to one of the transit zones at the Serbian-Hungarian border in order to make their application and, thus, initiate the asylum procedure. Serbia is normally a third country where there is no risk of persecution within the meaning of Article 51(2)(f) of the Law on the right to asylum. It follows from the combination of those two elements that any person or organisation providing assistance to applicants for international protection will be well aware of the fact that, in those circumstances, those applications are very likely to fail and that person or organisation therefore faces the specific risk of criminal prosecution. (21)

36. In any event, criminalising assistance provided to applicants for international protection could have a particularly significant deterrent effect on all persons or organisations who, knowingly, try to promote a change in legislation or a more flexible interpretation of national law, or even claim that the relevant national law is incompatible with EU law. Moreover, 'developing' the national legislation or making it easier for applicants to access the asylum procedure or humanitarian aid, even if it is very doubtful or, as in the present case, very likely that the applicants do not satisfy all of the conditions laid down by national law for obtaining international protection, generally forms part of the legitimate objectives of an organisation which assists applicants for international protection.

37. In those circumstances, the only legitimate 'penalty' which is applicable where the activity of those persons or organisations is aimed at allowing applicants to access the asylum procedure beyond the conditions legitimately imposed by national legislation in compliance with EU law, and in particular Article 33(2) of Directive 2013/32, can, in my opinion, merely be the rejection of applications on grounds of inadmissibility or because they are unfounded, and not the criminal prosecution of persons who or organisations which facilitate the initiation of asylum proceedings. That finding in no way prejudices the possibility of introducing and maintaining criminal penalties where the activities of those persons or organisations are not limited to assisting applicants for international protection in making their application and initiating asylum proceedings, but are genuine activities to facilitate illegal immigration, in particular under Directive 2002/90/EC. (22)

38. As regards, secondly, the concept of 'organising activity', the l'Alkotmánybíróság (Constitutional Court) ruled out the possibility that, although that concept is formulated using generic terms, it could infringe the principle of legality ('*nullum crimen, nulla poena sine lege*'), given the existence of other provisions in the Criminal Code which refer to the concept of 'organisation' or 'organising activity' and from which it is possible to infer the essential constituent elements. (23)

39. That said, I take the view that penalising only activities that are carried out in an organised manner is not sufficient to eliminate the restrictive nature of the offence at issue. First, the very wording of Article 353/A of the Criminal Code allows for a very broad interpretation of that offence, which includes the simple act of assisting a single person to initiate asylum proceedings. The fact that a 'regular' activity and assistance to 'more than one person' are established as aggravating circumstances in Article 353/A(2) and (3) of the Criminal Code means that the scope of that provision may even cover an activity which is not carried out on a regular basis and is intended to assist only one person. Secondly, and most importantly, the organisations which provide assistance to applicants for international protection and which are the main addressees of that provision carry out, by definition, an 'organised activity'. Therefore, even if the scope of Article 353/A of the Criminal Code is restricted to organising activities in the strict sense, that provision is capable of hindering the activities of almost all persons or organisations providing assistance to applicants for international protection.

40. In the second place, even if, as the Hungarian Government submits, the legislation under consideration is of limited scope and has negligible practical consequences, in so far as it has been applied very rarely and has not yet led to the conviction of organisations or individuals, and therefore has no demonstrable deterrent effect, the fact remains that, according to settled case-law, an action against a

Member State for failure to fulfil its obligations is objective in nature and, consequently, where a Member State fails to fulfil its obligations under the Treaty or under secondary legislation, the infringement exists regardless of the frequency or the scale of the circumstances complained of. (24)

41. In the third place, contrary to the argument put forward by the Hungarian Government at the hearing, it cannot be considered that conduct prior to the initiation of asylum proceedings (25) does not concern 'applicants for international protection', within the meaning of Directives 2013/32 and 2013/33. Since the status of asylum seeker is a declaratory status which exists from the moment when the person has been persecuted, that person may be regarded as an 'applicant for international protection' even if he or she has not yet formally lodged his or her application. Moreover, by its argument, the Hungarian Government incorrectly treats the *making* of an application for international protection as the *lodging* of that application. In that regard, it must be noted that the Court has held that an application for international protection is deemed to have been made as soon as the person concerned has declared, to the competent national authorities, his or her wish to receive international protection, without the declaration of that wish being subject to any administrative formality whatsoever. (26) Furthermore, it would be contrary to the objective of Directive 2013/32, which is to ensure that people in need of international protection have access to legally safe and efficient asylum procedures, to grant the rights ensured by that directive only after an application for international protection has been lodged.

42. In the light of the foregoing considerations, I propose that the Court should find that Article 353/A of the Criminal Code is liable to constitute an obstacle to the exercise of the rights guaranteed by EU law in relation to assistance for applicants for international protection.

(b) Possible justifications

43. As regards possible justifications for the abovementioned restrictions, it must be stated that Article 8(2) of Directive 2013/32 and Article 10(4) of Directive 2013/33 provide for the possibility of justifying limits on the access of organisations and persons providing advice and counselling and the access of legal advisers and counsellors to applicants for international protection, provided that those limits are objectively necessary for the security, public order or administrative management of the crossing points and do not have the effect of severely restricting that access or rendering it impossible.

44. In that regard, it is sufficient to note that Article 353/A of the Criminal Code does not provide for any verification of the criteria of necessity and proportionality. On the contrary, that legislation, in particular when read in conjunction with Article 51(2)(f) of the Law on the right to asylum, de facto prevents or, at the very least, significantly restricts any activity providing assistance to applicants for international protection carried out by persons or organisations. (27)

45. In the second place, it should be recalled that, although, for the purposes of Article 12(1)(c) of Directive 2013/32, the communication with any organisation providing legal advice or other counselling is carried out 'in accordance with the law of the Member State concerned', that provision does not allow the Member State to call into question or disproportionately restrict the effectiveness of the rights it guarantees.

46. It therefore seems to me that the obstacles which the national legislation, namely Article 353/A of the Criminal Code, creates to the exercise of the rights guaranteed in Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32, and Article 10(4) of Directive 2013/33, are not justified under those provisions.

47. Accordingly, I propose that the first part of the Commission's second complaint be upheld and that it be declared that Hungary has failed to fulfil its obligations under Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32, and under Article 10(4) of Directive 2013/33.

2. The second part of the second complaint, concerning Article 46/F of the Law on the police

48. Article 46/F of the Law on the police provides that police officers are to prevent any person who is the subject of criminal proceedings, inter alia for the offence of facilitating illegal immigration laid down in Article 353/A of the Criminal Code, from entering an area within a distance of less than eight kilometres from the border or the border marker corresponding to the external border of Hungary or require that person to leave that area if he or she is in it.

49. In my view, Article 46/F of the Law on the police, which introduces an additional prohibition in respect of persons or organisations accused of having committed offences in the strict sense, undeniably increases the negative effects of the provisions to which that article is linked, including Article 353/A of the Criminal Code.

50. That said, it seems to me that, by itself, Article 46/F of the Law on the police does not raise issues of compatibility with the relevant provisions of EU law. In my view, that article is the legitimate application of a general rule in accordance with which the police authorities prohibit persons suspected of having committed criminal offences from accessing 'sensitive' places, in particular the places where those persons are suspected of having committed an offence or may repeat that offence.

51. Moreover, the fact that the prohibition covers persons who are merely 'suspected' of an offence seems to me to be consistent with the provisional and protective nature of that prohibition. Furthermore, the proportionality of that legislation stems from the fact that it applies only to persons 'who [are] the subject of criminal proceedings' and, as the Hungarian Government submits, relatively serious suspicions or suspicions based on concrete evidence are necessary in order to bring criminal proceedings.

52. In addition, it seems to me that the Commission does not put forward any arguments which demonstrate that Article 46/F of the Law on the police is inherently restrictive in nature, but merely notes that that provision increases the restrictive effect of Article 353/A of the Criminal Code.

53. I therefore consider that, although Article 353/A of the Criminal Code, read by itself or in conjunction with Article 46/F of the Law on the police, constitutes an obstacle to the right of applicants for international protection to be able to consult organisations, persons or legal advisers and to the corresponding right of those organisations, persons and advisers to have access to those applicants, by contrast, that is not the case with Article 46/F of the Law on the police, considered in isolation and in the light of the circumstances of the case.

54. I therefore consider that the second part of the Commission's second complaint must be rejected.

VI. Costs

55. In accordance with the first sentence of Article 138(3) of the Rules of Procedure of the Court, in principle, where each party succeeds on some and fails on other heads, the parties must bear their own costs. However, under the second sentence of that provision, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, also pay a proportion of the costs of the other party.

56. According to the proposed conclusion, the Commission is largely successful, whereas Hungary's arguments can be upheld in respect of only a small part of the subject matter of the proceedings, namely the second part of the second complaint. Accordingly, it would seem appropriate in the present case to order Hungary, in addition to bearing its own costs, to pay four fifths of the Commission's costs, while the Commission should bear one fifth of its own costs.

VII. Conclusion

57. In the light of the foregoing considerations, I propose that the Court should:

– declare that Hungary, first, has failed to fulfil its obligations under Article 33(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 by adding a new ground of inadmissibility of applications for international protection to those established exhaustively by that provision and, secondly, has failed to fulfil its obligations under Article 8(2), Article 12(1)(c) and Article 22(1) of Directive 2013/32, and under Article 10(4) 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 by criminalising the organising activity designed to enable asylum proceedings to be brought by persons who do not meet the criteria for the granting of international protection established by national law;

– dismiss the action as to the remainder;

– order Hungary to pay its own costs and four fifths of the European Commission's costs, and order the Commission to bear one fifth of its own costs.

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1 Original language: French.

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2 Directive 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).

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3 Directive of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96).

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4 C-564/18, 'the judgment in *Tompa*', EU:C:2020:218.

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5 C-924/19 PPU and C-925/19 PPU, 'the judgment in *Országos Idegenrendészeti Főigazgatóság*', EU:C:2020:367.

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6 OJ 2011 L 337, p. 9.

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7 *Magyar Közlöny* 2007/83.

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8 *Magyar Közlöny* 2018/97.

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9 *Magyar Közlöny* 2012/92.

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10 OJ 2016 L 77, p. 1.

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11 *Magyar Közlöny* 1994/41.

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12 Judgment in *Tompa*, paragraphs 29 and 30 and the case-law cited.

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13 Judgment in *Tompa*, paragraph 55.

14 Judgment in *Tompa*, paragraph 51.

15 Judgment in *Tompa*, paragraph 52.

16 Judgment in *Tompa*, paragraph 56 and operative part.

17 Judgment in *Országos Idegenrendészeti Főigazgatóság*, paragraphs 148 to 165.

18 See points 5 to 8 of this Opinion.

19 *Magyar Közlöny* 2019/7.

20 Decision No 3/2019, paragraphs 79 to 82.

21 In any event, that assessment would not change if Article 51(2)(f) of the Law on the right to asylum were repealed since Article 353/A of the Criminal Code refers inter alia to the situation of a 'person who is not persecuted in … any other country via which he or she arrived', a very broad concept which could indeed be applied so as to exclude from international protection any applicant (necessarily) transiting via Serbia.

22 Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17).

23 Decision No 3/2019, paragraphs 68 to 71.

24 See judgments of 30 January 2003, *Commission* v *Denmark* (C-226/01, EU:C:2003:60, paragraph 32 and the case-law cited), and of 28 January 2020, *Commission* v *Italy (Directive on late payment)* (C-122/18, EU:C:2020:41, paragraph 64).

25 At the hearing, the Hungarian Government stated that, where it mentions the 'initiation' of asylum proceedings, Article 353/A of the Criminal Code refers to the stage following the lodging of the application for international protection.

26 See judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 97 and the case-law cited). As Advocate General Pikamäe noted in his Opinion in that case (C-808/18, EU:C:2020:493, points 53 and 68), Directive 2013/32 draws a distinction between, on the one hand, the *making* of an application for international protection, which is merely the manifestation or expression by the persons concerned, without any administrative formalities, of their fear of being returned to their country and, on the other, the *lodging* of that application.

27 See points 32 to 41 of this Opinion.