Case C-194/19

Request for a preliminary ruling

Date lodged:

28 February 2019

Referring court:

Conseil d'État (Council of State, Belgium)

Date of decision to refer:

12 February 2019

Applicant:

H. A.

Opposing party:

État belge (ministre de l'Asile et de la Migration) (Minister for Asylum and Immigration)

[…]

[…] **[…]**

(internal case references, identity of parties)

I. Subject of the application

By application lodged on 28 December 2017, H. A. sought to have set aside Judgment No 195.968 of 30 November 2017 of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) in Case 209.985/III.

II. Proceedings before the Council of State

[…]

[Or. 2]

[…]

(procedure before the Council of State)

III. Relevant facts

On 22 May 2017, the applicant, of Palestinian origin, arrived in Belgium. The following day, he made an application for asylum.

On 31 May 2017, the opposing party questioned him in accordance with Regulation No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged with one of the Member States by a third-country national or a stateless person.

On 22 June 2017, the Belgian authorities asked the Spanish authorities to take charge of the applicant, in accordance with Article 12(2) of the abovementioned Regulation No 604/2013.

On 4 July 2017, the Spanish authorities accepted that request.

On 1 August 2017, the opposing party issued a decision refusing the applicant leave to remain and ordered him to leave the territory (Annex 26(c)).

On 25 August 2017, the applicant lodged an application for annulment, along with **[Or. 3]** an application for suspension of enforcement of the decision of 1 August 2017, with the Council for asylum and immigration proceedings ('CAIP').

In his application before the Conseil d'État, the applicant stated that his brother had arrived in Belgium on 22 August 2017 and that his brother's asylum application was currently being assessed by the Office of the Commissaire général aux réfugiés et aux apatrides (Commissioner General for Refugees and Stateless Persons). He claimed that, because of the similarities between his application for asylum and that of his brother, it was necessary for their accounts to be assessed together.

By Judgment No 195.968 of 30 November 2017, the CAIP rejected his application. That is the decision which the applicant seeks to have set aside. The administrative court (the Council for asylum and immigration proceedings) pointed out that, as regards the arrival of the applicant's brother and the brother's application currently pending in Belgium, those were events subsequent to the administrative decision referred to it, which cannot have any bearing on its legality.

IV Relevant legislation

Referring to paragraph (2) of Article 39/2 of the Law of 15 December 1980 on entry to Belgian territory, residence, establishment and removal of foreign nationals, the administrative court took the view that it could only review the

legality of the 'Schengen return' decision and did not have power to review the substance of the case. It inferred from that provision that, when examining the legality of the administrative act, it could not take account of events or circumstances subsequent to the administrative authority's decision.

Article 39/2 of the Law of 15 December 1980 on access to Belgian territory, residence, establishment and removal of foreign nationals, in the version relevant for the purposes of the proceedings, provides as follows:

> '(1) […] **[Or. 4]** […]
>
> (2) The Council shall rule by way of judgments on other actions for annulment on the ground of infringement of procedural requirements which are essential or breach of which leads to nullity, or on the ground of abuse or misuse of powers.'

V. Assessment of the sole plea

The applicant's arguments

The applicant puts forward a sole plea alleging infringement of Articles 18, 41, 47 and 52 of the Charter of Fundamental Rights of the European Union and of Article 27 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ('the Dublin III Regulation').

The plea takes issue with grounds 3.3.2 to 3.4 of the judgment under appeal. In essence, the applicant claims that the CAIP failed to have regard to his right to an effective remedy, as guaranteed by Article 27 of Regulation No 604/2013, read in conjunction with Article 47 of the abovementioned Charter, by failing to take account of events and circumstances subsequent to the taking of the decision when examining the legality of the transfer decision. He submits that, when he was heard by the opposing party during the procedure for determining the State responsible for processing his asylum application, he was not at that point in a position to refer to the fact that his brother, who had arrived in Belgium on 22 August 2017, had also applied for asylum, and that it was only in his application for annulment of the decision of 1 August 2017 that he was able to put forward that new evidence. He adds that it was only after he filed his application before the CAIP that he was able to rely on the fact that the Office des étrangers (Immigration Office) had decided that the Belgian authorities were responsible for the assessment of his brother's asylum application and 'was able to argue that his application and that of his brother should be jointly assessed by the Belgian authorities.'

He claims that there are close links between his asylum application and that of his brother, who fled Palestine, subsequently arrived in Belgium and relied on the

particular circumstances of their family members, in particular, the persecution **[Or.5]** to which his family has been subject because of their links with Fatah. He states that it was in that context that he put forward these new circumstances before the CAIP by means of a note addressed to the court, which was lodged and relied on at the hearing. According to the applicant, it is essential that his account and that of his brother are analysed together: 'the statements of each supporting those of the other, thereby placing them in a much better position to demonstrate their need for international protection than would be the case if their applications were considered by two different Member States' and 'the respective testimonies of each of them undoubtedly enabling a better assessment to be made of the merits of their applications.' He claims that the protection of his fundamental right to a fair asylum procedure and his right to effective access to international protection are in issue.

He criticises the CAIP, which refused to take these circumstances into consideration because they relate to a period after the making of the administrative decision on which it was asked to adjudicate, for restricting itself to a strict review of the legality of the decision, and for refusing to take into account events and circumstances after the making of the 'Dublin transfer' decision, even though they were potentially decisive for a fair examination of his asylum application and should preclude a 'Dublin transfer' decision. According to the applicant, 'contrary to what is claimed in the judgment under appeal, the judicial review provided for by the Dublin Regulation, considered alone or in conjunction with the fundamental right to an effective remedy, and considered alone or in conjunction with the fundamental right to asylum, require the CAIP to have regard to events and circumstances subsequent to the decision contested before it, at the very least where those are likely to have a negative impact on an applicant's fundamental right to a fair asylum procedure.'

According to the applicant, that is all the more the case where those events and circumstances may demonstrate that a 'Dublin transfer' would deprive him of a fair asylum procedure. In support of his position, the applicant cites the C.K. judgment delivered on 16 February 2017 by the Court of Justice of the European Union, which stated, as regards 'Dublin transfer' decisions in particular, that the EU legislature made their legality subject to the granting, inter alia, to the asylum seeker concerned, in Article 27 of the Dublin III Regulation, of the right to an effective remedy before a court against that decision, the scope of which covers both the factual and legal circumstances surrounding it.' He adds that it is clear from recital 9 of the Dublin III Regulation that the EU legislature took account of the effects of the Dublin system on the fundamental rights of asylum seekers and that the EU legislature intended, by adopting that regulation, to 'make the necessary improvements, in the light of experience, not only to the effectiveness **[Or. 6]** of that system but also to the protection granted to asylum seekers under that system.'

In the event that the refusal by the administrative court to take account of events and circumstances subsequent to the 'Dublin transfer' decision is considered to be

compliant with Belgian law, the applicant requests that the following question be referred to the Court of Justice of the European Union for a preliminary ruling:

[…] (the question proposed by the applicant is similar, in substance, to that proposed by the Council of State, following its rewording)

Opposing party's arguments

As a preliminary point, the opposing party claims that certain parts of the plea are inadmissible because the applicant has failed to explain how the judgment under appeal infringed Articles 18, 41 and 52 of the Charter of Fundamental Rights of the European Union. It claims that Article 27 of Regulation No 604/2013 does not require the national court to have regard, in all cases, to events and circumstances subsequent to the 'Dublin transfer' decision.

According to the État belge, that provision leaves Member States free to choose whether to make provisions in their national law for an appeal against transfer decisions or a review, in fact and in law, of such decisions, and Belgian law provides for an appeal against transfer decisions, in the form of an appeal seeking annulment rather than an action in which the court has full jurisdiction to determine issues of fact and law.

It considers that the judicial review provided for by paragraph (2) of Article 39/2 of the abovementioned Law of 15 December 1980 constitutes an effective remedy within the meaning of Article 27 of the Dublin III Regulation. It also claims that the effectiveness of a remedy does not require that the court should take into consideration facts and circumstances arising after the contested measure was adopted, where the administrative authority was not able to take them into account.

The État belge claims that, in this case, the administrative court set out in the judgment under appeal the reasons why it could not have regard to those documents in determining the merits of the decision contested before it, namely the fact that:

- in an appeal seeking annulment under paragraph (2) of Article 39/2 of the Law of 15 December 1980, the legality of an administrative decision must be assessed by reference to the time when it was taken, 'subject to the principles set out in the judgment in *C.K. and Others* v *The Republic of Slovenia* (Case C-578/16 PPU), delivered on 16 February 2017 by the Court of Justice of the European Union';

- that case-law was 'not applicable in the present case';

- 'the documents lodged (…) at the hearing and thus out of time, cannot therefore be taken into account for the purposes of assessing the legality of the contested decision.'

The opposing party considers that, in so doing, the administrative court examined the issue raised by the applicant regarding the circumstances arising subsequent to the measure as initially challenged and responded to the arguments presented to it. According to the opposing party, in so far as the plea amounts to a challenge to the assessment of the administrative court, which alone has jurisdiction to appraise the facts and concluded that, in the present case, the principles set out in the judgment of 16 February 2017 of the Court of Justice of the European Union (Case C-578/16) were not applicable, that plea is not admissible.

It maintains that the applicant has not demonstrated that his removal to Spain and the assessment of his asylum application by that country could have 'significant and irreversible' consequences, and the administrative court was thus able to conclude properly that the principles set out in the judgment of 16 February 2017 of the Court of Justice were not applicable in the present case.

For the sake of completeness, the opposing party states that the administrative court was right to observe that the family link between the applicant and his brother does not fall within the concept of 'family member' in Article 10 of the Dublin III Regulation, as defined in Article 2(g) thereof.

As regards the request made to the Council of State to refer a question for a preliminary ruling, the opposing party believes that it is inadmissible because such a request was not made before the administrative court **[Or. 8]**

Decision of the Council of State

[…] (reasons why the Council of State finds that it is irrelevant that the applicant does not dispute that his brother does not fall within the concept of 'family member') The issue here is whether the remedy provided for by paragraph (2) of Article 39/2 of the Law of 15 December 1980 is effective. This is called into question because of the refusal of the administrative court to take into consideration facts arising subsequent to the 'Dublin transfer' decision. In this regard, the applicant contends that the new evidence which he submitted to the administrative court is decisive for the fair assessment of his asylum application and should preclude the carrying out of a 'Dublin transfer'.

In the judgment delivered by the Court of Justice of the European Union in Case C-578/16 of 16 February 2017, the issue under consideration was not whether the administrative remedies were effective but, rather, whether Member States are required, when making a 'Dublin transfer' decision, to take into account the consequences of such a measure, in the light, inter alia, of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In order to be effective within the meaning of Article 27 of the Dublin III Regulation and Article 47 of the Charter of Fundamental Rights of the European Union, the remedy available to a person who claims that evidence produced by him of circumstances arising after the administrative decision, which are

potentially decisive for a fair assessment of his asylum application and must preclude the carrying out of a 'Dublin transfer', must allow for a complete and rigorous review of his circumstances by the administrative court, as confirmed by recitals 9, 19, 32 and 39 of the Dublin III Regulation.

The applicant claimed before the administrative court that his brother arrived in Belgium on 22 August 2017 and made an asylum application there, which is currently being assessed. He claimed before the CAIP that, because he and his brother relied on the same evidence of persecution, having regard in particular to the links between his family and Fatah, an assessment of their asylum applications by the same authority is likely to guarantee them a fair assessment of those applications and effective access to international protection. The judgment under appeal does not address that issue; rather, it states that such factual evidence relates to an event subsequent to the adoption of the decision to transfer him to Spain, with the result that the administrative authority cannot be criticised for not having taken it into account.

The administrative court did not therefore rule on the potential impact of the new evidence on the decision to refer the assessment of the applicant's asylum application to the Spanish authorities. In its capacity as court hearing an appeal on a point of law, it is not for the Council of State to assess the impact which the new evidence could have had on the determination of the State responsible for processing the asylum application, having regard in particular to the 'discretionary measure' provided for by Article 17(1) of the Dublin III Regulation.

Moreover, it is clear from paragraph (2) of Article 39/2 of the Law of 15 December 1980 that the review carried out by the CAIP with regard to a Dublin transfer decision relates to the legality of the decision taken by the administrative authority on the basis of the case file and information in its possession at the time it took that decision. The refusal by the administrative court to take into account circumstances arising after the administrative decision was taken is therefore in compliance with legal requirements.

In order to assess whether the right to an effective remedy as guaranteed by European legislation has been respected, it is necessary to refer a question to the Court of Justice of the European Union concerning the scope of the principle of the right to an effective remedy enshrined in Article 27 of the Dublin III Regulation, read alone or in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union.

Contrary to the opposing party's contention, the applicant cannot be criticised for not having requested the administrative court to refer the question since it concerns the scope of the review carried out by the CAIP and is unconnected with the administrative act on which it was asked to adjudicate.

It is therefore appropriate to reword the question referred by the applicant. The Court of Justice has jurisdiction to make preliminary rulings on the interpretation

of EU law but not [omissis] on the compatibility of national law with European law.

It is therefore appropriate to refer the following question: […] **[Or. 10]** […] (see operative part)

FOR THESE REASONS

THE COUNCIL OF STATE HAS DECIDED:

[…]

In accordance with Article 267(3) of the Treaty on the Functioning of the European Union, the following question is referred to the Court of Justice of the European Union for a preliminary ruling:

'Must Article 27 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), considered alone or in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as requiring a national court, in order to guarantee the right to an effective remedy, to take into consideration, where appropriate, circumstances arising subsequent to a "Dublin transfer" decision?'

[…] [Or. 11]

[…]

(provisions relating to procedure and signatures)