Judgment of 17 August 2021 - BVerwG 1 C 26.20

ECLI:DE:BVerwG:2021:170821U1C26.20.0

No extension of Dublin transfer time limit for non-compliance with an order to appear or an unsuccessful transfer attempt

Headnotes

1. By itself, a breach of obligations to cooperate, at least in the case of a forced transfer in a Dublin procedure, does not generally justify the assumption that a person has absconded within the meaning of article 29 (2) second sentence second alternative of the Dublin III Regulation, as long as the applicant's residence is known to the competent authority and the authority is objectively able to perform a transfer - if applicable, by exercising direct force.

2. Mere unwillingness to board a flight, stay at an open church asylum (see BVerwG, judgment of 26 January 2021 - 1 C 42.20 - (...) para. 26 with further references), or a single failure to encounter an applicant at an apartment or accommodation does not suffice for an assumption that an applicant has absconded within the meaning of article 29 (2) second sentence second alternative of the Dublin III Regulation.

3. In examining whether an applicant has absconded at the relevant point in time for an authority's associated extension of the transfer time limit, the court must take all objectively existing reasons into consideration, even if the authority did not base its extension decision on them.

Sources of law

Asylum Act	AsylG, *Asylgesetz*	section 29 (1) no. 1 (a)
Dublin III Regulation		articles 29 (1), (2) second sentence second alternative
Dublin Implementing Regulation		article 7 (1) (a)

Reasons

I

1 The claimant, a Guinean national, challenges the rejection of his application for asylum as inadmissible under section 29 (1) no. 1 (a) of the Asylum Act (AsylG, *Asylgesetz*).

2 By his own account, the claimant entered the federal territory in October 2017, and filed an application for asylum on 2 November 2017. On the evidence of a Eurodac hit report, he had previously filed an application for asylum in Italy.

3 As the Italian authorities did not respond to a request to take charge from the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, hereinafter Federal Office) of 3 November 2017, the Federal Office rejected the claimant's application for asylum as inadmissible in a notice of 20 November 2017 (no. 1), found that there were no deportation bans (no. 2), ordered deportation to Italy (no. 3) and limited the time of the legally prescribed ban on entry and residence under section 11 (1) of the Residence Act (AufenthG, *Aufenthaltsgesetz*), old version, to a period of six months from the date of deportation (no. 4).

4 The claimant brought an action against this decision on 29 November 2017 and applied for an order for his action to have suspensive effect on the deportation order; the Administrative Court (*Verwaltungsgericht*) rejected that application by decision of 18 December 2017. The Federal Office notified the Italian authorities that a remedy with suspensive effect had been filed, and that the remedy had ceased to exist, indicating the end of the transfer time limit as 18 June 2018.

5 For the purpose of deporting him to Italy, the claimant was removed from his room in the residential accommodation on 11 May 2018 and taken to Tegel Airport. Shortly before boarding ended, the claimant stated that he did not want to be deported to Italy. Thereupon the deportation was discontinued for security reasons.

6 In a letter dated 14 May 2018, the Berlin Federal State Office for Residence and Regulatory Affairs (*Landesamt für Bürger- und Ordnungsangelegenheiten*) (Foreigners Authority), on the basis of section 58 AufenthG, ordered the claimant to appear at the office of the Chief of Police in Berlin at 8:30 a.m. on 1 June 2018, to carry out deportation. The claimant did not appear at the indicated date and time. At the time of the issuance of a border crossing certificate (*Grenzübertrittsbescheinigung*) by the Foreigners Authority on 4 June 2018, he submitted certification of a dental appointment on 1 June 2018, because of which he had been unable to comply with the order to appear (*Selbstgestellungsaufforderung*). Also on 4 June 2018, the Federal Office notified the Italian authorities that the transfer had been cancelled, and that the transfer time limit had been extended to 18 months, ending on 18 June 2019, because the claimant had absconded.

7 On 25 July 2018, the claimant applied to the Federal Office for his asylum application to be moved to a national procedure, and claimed that the transfer time limit had expired. In a decision dated 16 October 2018, the Administrative Court granted his application for modification of the decision of 18 December 2017 dismissing the application for temporary relief, and also granted his application to order the suspensive effect of the action based on the expiry of the transfer time limit and his application for resumption of his asylum procedure.

8 By judgment of 27 February 2019, the Administrative Court annulled the Federal Office's notice of 20 November 2017.

9 By judgment of 20 February 2020, the Higher Administrative Court (*Oberverwaltungsgericht*) dismissed the defendant's appeal on points of fact and law. The time limit for transferring the claimant to Italy had expired in June 2018, and the defendant became responsible for conducting the asylum procedure. The defendant could not effectively extend the transfer time limit to 18 months. There was no absconding within

the meaning of article 29 (2) second sentence of the Dublin III Regulation if the transfer was merely impeded for lack of collaboration or insufficient cooperation by the asylum applicant while he or she still remained within the authority's reach, such that the authority would have to apply an additional enforcement effort, for instance by providing a person to escort the transfer. Failure to appear did not mean that the asylum applicant was not (or was no longer) within the authority's reach, and that transfer was impossible for that reason. Even if the asylum applicant wanted subjectively to avoid transfer, the authorities' reach remained objectively in existence, and he or she had therefore not absconded. The claimant's lack of cooperation had not made it objectively impossible to transfer him to Italy by applying administrative coercion. Nor did the claimant evade the responsible authorities in the discontinued transfer attempt on 11 May 2018 by declaring his unwillingness to board the flight. His place of residence was known, and he could have been transferred to Italy using means of coercion.

10 As grounds for its appeal on points of law, the defendant complains of a breach of section 29 (1) no. 1 AsylG in conjunction with the Dublin III Regulation, and in substance asserts that the concept of absconding also included the case of non-compliance with what is known as an order to appear. The different language versions and recitals 4 and 5 of the Dublin III Regulation provided reasons to believe that the EU legislature also generally wanted to include constellations of the present kind in the concept of absconding, or in any case did not intend to exclude them. Insofar as the provisions aimed for a clear and practicable formula for determining the Member State responsible for examining an asylum application, this objective presupposed an unimpeded ability to enforce the transfer within the regular time limit of 6 months, which in turn implied that the third-country national also presented no forms of conduct that would lastingly affect the feasibility of a scheduled transfer. It should make no difference whether that person had been ordered to appear at a certain place for the purpose of transfer, or whether the person was ordered to remain at the assigned place of residence. With regard to the required causality of the third-country national's conduct, even a temporary or time-limited impossibility of a transfer was sufficient. If the person concerned did not appear as ordered, it was not merely more difficult for the authority to enforce the transfer at that time, but it was in fact impossible for it to do so.

11 The claimant defends the contested judgment.

12 The Representative of the Interests of the Federation at the Federal Administrative Court (*Vertreter des Bundesinteresses beim Bundesverwaltungsgericht*) did not take part in the proceedings.

II

13 The defendant's admissible appeal on points of law, on which the Senate, with the parties' consent, decides without an oral hearing (section 101 (2) of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)), is unfounded. In compatibility with federal law, the Court deciding on appeals on points of fact and law affirmed the annulment of the inadmissibility decision issued against the claimant. The requirements of section 29 (1) no. 1 (a) AsylG have not been met, because responsibility for conducting the asylum procedure had been transferred from Italy to Germany after the expiry of the six-month transfer time limit. The defendant did not effectively extend the transfer time limit to 18 months, because the requirements for assuming the claimant had absconded within the meaning of article 29 (2) second sentence second alternative of the Dublin III Regulation were not met (1.). The inadmissibility decision cannot be re-interpreted as a different (inadmissibility) decision (2.). The Court of Appeal also correctly affirmed the Administrative Court's annulment of the subsequent decisions (3.).

14 The legal assessment of the claimant's request, aimed at the annulment of the Federal Office's decision of 20 November 2017, is based on the Asylum Act in the version promulgated on 2 September 2008 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 1798), and the Act on the Residence, Economic Activity and Integration of Foreign Nationals in the Federal Territory (Residence Act) of 30 July 2004 (BGBl. I p. 1950) in the version promulgated on 25 February 2008 (BGBl. I p. 162), both last amended by the Act for the Further Development of the Central Register of Foreign Nationals (*Gesetz zur Weiterentwicklung des Ausländerzentralregisters*) of 9 July 2021 (BGBl. I p. 2467). Relevant under EU law are 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 L 180 p. 31) - Dublin III Regulation - and Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 (OJ L 222 p. 3) in the version amended by Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 (OJ L 39 p. 1) - Dublin Implementing Regulation -. Changes in the law occurring after the last oral hearing or the decision of the court responsible for finding the facts must be taken into consideration in appeal proceedings on points of law if they had to be considered by the court responsible for finding the facts - if it were to decide instead of the court deciding on appeals on points of law (Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), judgment of 11 September 2007 - 10 C 8.07 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 129, 251 para. 19). Since the present case concerns a dispute under asylum law where the court responsible for finding the facts regularly had to refer to the factual and legal situation at the time of the last oral hearing or the decision pursuant to section 77 (1) AsylG, it would have to base a decision on the latest versions if it were to decide on the matter now, unless a derogation is required for reasons of substantive law (established jurisprudence, see BVerwG, judgment of 20 February 2013 - 10 C 23.12 - BVerwGE 146, 67 para. 12). The provisions, that are decisive here, have not changed, however, since the decision of the Court deciding on appeals on points of fact and law.

15 1. The Court of Appeal correctly held that the requirements for an inadmissibility decision under section 29 (1) no. 1 (a) AsylG have not been met. According to that provision, an application for asylum is inadmissible if another country is responsible for conducting the asylum procedure according to the Dublin III Regulation. This is not (i.e., no longer) the case here, following the expiry of the six-month transfer time limit. Therefore, Germany has become responsible for the claimant's asylum procedure.

16 1.1 It is true that under article 3 (2) of the Dublin III Regulation, Italy was initially responsible for examining the asylum application, because that is where the claimant first filed his application. On 3 November 2017, the defendant also made a request in good time for Italy to take back the claimant under article 23 (2) of the Dublin III Regulation, which was accepted by expiry of the time limit (article 25 (2) Dublin III Regulation).

17 1.2 However, responsibility was subsequently transferred to Germany because of expiry of the transfer time limit. Under article 29 (1) first subparagraph of the Dublin III Regulation, the transfer must be carried out 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 (first alternative) or the final decision on an appeal or review where there is a suspensive effect in accordance with article 27 (3) of the Dublin III Regulation (second alternative). Where the transfer does not take place within the six months' time limit, under article 29 (2) of the Dublin III Regulation the Member State responsible shall be relieved of its obligations to take charge or to take back and responsibility shall then be transferred to the requesting Member State (first sentence). 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 (second sentence). If the transfer is delayed because of an appeal or review procedure with suspensive effect, or because the asylum seeker has withdrawn from the transfer procedure, the Member State responsible must be informed without delay (article 9 (1) Dublin Implementing Regulation). For the extension of the transfer time limit, no consultation between the requesting Member State and the Member State responsible is required; rather, it suffices that the requesting Member State informs the Member State responsible, before the expiry of the six-month transfer time limit, that the person concerned has absconded and specifies, at the same time, a new transfer time limit (Court of Justice of the European Union (CJEU, hereinafter Court of Justice), judgment of 19 March 2019 - C-163/17 [ECLI:EU:C:2019:218], Jawo - para. 72 and 75).

18 a) The six-month transfer time limit was set in motion on 17 November 2017 by the consent of Italy, which was presumed under article 25 (2) of the Dublin III Regulation after the two-week reply time expired without results. It was interrupted with the application for temporary relief of 29 November 2017, pursuant to article 29 (1) first subparagraph second alternative of the Dublin III Regulation, but then started to run again upon the dismissal by the Administrative Court in its decision of 18 December 2017 (see BVerwG, judgments of 26

May 2016 - 1 C 15.15 [ECLI:DE:BVerwG:2016:260516U1C15.15.0] - (...) para. 11 and of 8 January 2019 - 1 C 16.18 [ECLI:DE:BVerwG:2019:080119U1C16.18.0] - BVerwGE 164, 165 para. 17), and consequently ended on 18 June 2018.

19 b) The defendant did not effectively extend the transfer time limit to 18 months, because the claimant had not "absconded" (hereinafter also "absconding") within the meaning of article 29 (2) second sentence second alternative of the Dublin III Regulation. The standard applied by the Higher Administrative Court in assessing absconding in this sense is consistent with the insofar relevant EU law (aa). The claimant had not absconded either as a result of the discontinuance of the transfer attempt on 11 May 2018 (bb) or because of his non-compliance with the order to appear of 14 May 2018 (cc).

20 aa) The concept of absconding used in the Dublin III Regulation does not have a legal definition. With regard to the objectives pursued with the Dublin III Regulation (rapid determination of the Member State responsible for examining an asylum application and ensuring effective access to the procedure for the granting of international protection), this concept, as a prerequisite for an exceptional deviation from the six-month transfer time limit that is normally to be observed, must be interpreted narrowly. According to the case-law of the Court of Justice (CJEU, judgment of 19 March 2019 - C-163/17, Jawo - para. 53 et seqq.; see also BVerwG, judgment of 26 January 2021 - 1 C 42.20 [ECLI:DE:BVerwG:2021:260121U1C42.20.0] - (...) para. 25), an applicant may be considered to have absconded within the meaning of article 29 (2) second sentence second alternative of the Dublin III Regulation if the person deliberately evades the reach of the authorities responsible for carrying out the transfer, in order to prevent the transfer. Thus the concept "absconded" objectively presupposes that the applicant evades the reach of the responsible national authorities and thus in fact makes the transfer (at least temporarily) impossible (CJEU, judgment of 19 March 2019 - C-163/17, Jawo - para. 60); the applicant's conduct must be causal for the fact that he or she cannot be transferred to the responsible Member State (CJEU, judgment of 19 March 2019 - C-163/17, Jawo - para. 70). Subjectively, it is necessary that the applicant deliberately and intentionally evades the reach of the national authorities and intends to prevent his or her transfer (CJEU, judgment of 19 March 2019 - C-163/17, Jawo - para. 56).

21 According to the case-law of the Court of Justice, absconding can be assumed where a transfer cannot be carried out due to the fact that the applicant has left the accommodation allocated to him or her without informing the competent national authorities of his or her absence, provided that he or she has been informed of his or her obligations in that regard, which it is for the referring court to determine (CJEU, judgment of 19 March 2019 - C-163/17, Jawo - para. 70). In view of the considerable difficulties of providing proof of the internal fact of an intent to evade, and in order to ensure the effective functioning of the Dublin system, the fact of having left the allocated accommodation without informing the competent national authorities of that absence permits the assumption that the person had the intention of evading the transfer, provided that the person had been duly informed of his or her obligations in that regard (CJEU, judgment of 19 March 2019 - C-163/17, Jawo - para. 61 et seq.). As is evident from the use of the present tense in article 29 (2) second sentence second alternative of the Dublin III Regulation ("absconds"), the applicant must still (currently) be in a state of absconding at the date of extension of the Dublin transfer time limit, and therefore the absconding must still be in existence (BVerwG, judgment of 26 January 2021 - 1 C 42.20 - (...) para. 27).

22 By itself, a breach of obligations to cooperate, at least in the case of a forced transfer in a Dublin procedure, does not generally justify the assumption that a person has absconded within the meaning of article 29 (2) second sentence second alternative of the Dublin III Regulation, as long as the applicant's residence is known to the competent authority and the authority is objectively able to perform a transfer - if applicable, by exercising direct force. In contrast to the return of illegally staying third-country nationals under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348 p. 98) - Return Directive - the Dublin transfer system has no provision to include the institution of voluntary departure. Instead, a Dublin transfer always takes place within a context of a procedure supervised by the authorities. Even a transfer at the asylum applicant's initiative under article 7 (1) (a) of the Dublin Implementing Regulation is a departure supervised by the state, which calls for organisation by the authorities with regard to agreeing on place and time (BVerwG, judgment of 17 September 2015 - 1 C 26.14 [ECLI:DE:BVerwG:2015:170915U1C26.14.0] - BVerwGE 153, 24 para. 17 et seq.). With regard to the three modalities available for transfers, the Dublin regulations provide no specific priority. The variant according

to which the transfer takes place is left to the regulatory competence of the requesting Member State (see article 29 (1) of the Dublin III Regulation; see also BVerwG, judgment of 17 September 2015 - 1 C 26.14 - BVerwGE 153, 24 para. 15). The national implementation of the Dublin provisions with a rule-exception system favouring a transfer under administrative coercion is consistent with this regulatory competence. Under section 34a (1) AsylG, deportation is the only option available to the Federal Office for transferring a foreign national to the Member State responsible for examining that person's asylum application. The foreigners authority that has the task of executing the deportation must take account of the principle of proportionality, by way of the fact that while the transfer is regularly executed in the form of a deportation, by exception a transfer without administrative coercion is also possible (BVerwG, judgment of 17 September 2015 - 1 C 26.14 - BVerwGE 153, 24 para. 17 et seqq.). This option is to be permitted by the executing authority to the asylum applicant if it appears certain that the applicant will travel voluntarily to the Member State responsible for examining the application, and will report to the responsible authority there in good time (BVerwG, judgment of 17 September 2015 - 1 C 26.14 - BVerwGE 153, 24 para. 19 et seqq.).

23 Contrary to the defendant's view, not every action by the person concerned that has any form of adverse effect whatsoever on the feasibility of a scheduled transfer, nor any temporary impossibility of a transfer, suffices for a causal evasion. In particular, at any event in the case of a forced transfer, a foreign national does not regularly (objectively) evade the reach of the state purely by passive conduct - even though that conduct may be in violation of an obligation. If the residence of the person concerned is known to the executing authority, that authority can carry out a forced transfer. The legal obligation to depart established by the deportation order (section 50 AufenthG in conjunction with section 67 (1) no. 5 and section 34a (2) fourth sentence AsylG) does not entail an obligation to cooperate actively in one's own transfer. The person required to depart may decide for himself or herself whether to cooperate or not in a supervised transfer that has been offered. If he or she refuses to cooperate, a transfer under escort is required, which the person must passively tolerate. The mere fact that the lack of collaboration or cooperation from the person concerned increases the effort required from the executing authority for a forced transfer, and that the person's conduct may result in a delay because the executing authority has not made any provision for a transfer under escort, does not objectively constitute evasion. The residence of the person concerned is known to the authority, and a transfer could be carried out at any time by exercising direct force. Therefore (objectively) there is no evasion. That the person concerned might (subjectively) regularly act with the intention of preventing a transfer does not suffice. A possibility of an extension solely because of a lack of cooperation by the person concerned would conflict not only with the objective of the rapid processing pursued with the Dublin regulations and specifically with article 29 (1) and (2) of the Dublin III Regulation (see CJEU, judgment of 19 March 2019 - C-163/17, Jawo - para. 57 et seq.), but also, in view of the significant consequences that an extension of the transfer time limit would entail for the person concerned, with the nature of article 29 (2) second sentence of the Dublin III Regulation as a derogation (opinion of Advocate General Wathelet of 25 July 2018 - case C-163/17 - para. 59). Consequently, if the competent authorities know of the applicant's residence, neither that person's unwillingness to board a flight, nor his or her stay at an open church asylum (see BVerwG, judgment of 26 January 2021 - 1 C 42.20 - (...) para. 26 with further references), nor a single failure to encounter him or her at an apartment or accommodation, nor non-compliance with an order to appear, generally suffices for an assumption that he or she has absconded in the sense provided under EU law. The latter assumption serves only to facilitate a transfer under administrative coercion - regularly prescribed under national law - by sparing the executing authority from having to fetch the foreign national by force from his or her accommodation or apartment. If the foreign national does not comply with an order to appear, he or she does not thereby (objectively) evade the reach of the state.

24 There is no need in the present proceedings, either, to decide conclusively whether in exceptional cases, one might assume in an overall assessment, even though the address is known, that there is a (persistent) absconding within the meaning of article 29 (2) second sentence second alternative of the Dublin III Regulation - for instance in the case where continued transfer attempts are prevented, or where conduct is equivalent to a persistent absconding (see BVerwG, judgment of 26 January 2021 - 1 C 42.20 - (...) para. 27). The claimant's address was known at all times to the Federal Office and the Foreigners Authority, he regularly appeared at the Foreigners Authority, even on the date of the Federal Office's extension decision, for the issuance of border crossing certificates, and at the time of the single transfer attempt he was found at the accommodation, so that an overall consideration as well offers no indications for an exceptional case in the above sense.

25 The concept of absconding, in the sense provided under EU law, is clarified in the Court of Justice's case-law, and in accordance with the discussion above this offers an adequate basis for the national courts to answer the question of whether violating obligations to cooperate constitutes absconding, so that there is no need for a reference for a preliminary ruling to the Court of Justice under article 267 of the Treaty on the Functioning of the European Union (TFEU).

26 bb) The transfer attempt on 11 May 2018 that was discontinued because of the claimant's unwillingness to board the flight must of course be taken into account in examining whether he has absconded (1), but in substance it does not justify the assumption that he had absconded in the sense provided under EU law (2).

27 (1) Although the defendant did not take this transfer attempt as an opportunity for an extension notice to the responsible Member State, the Court of Appeal correctly took account of the claimant's expressed unwillingness to board the flight in its review of the inadmissibility decision.

28 As an indefinite legal term, the concept of absconding (under EU law) is subject to full review by the courts. In examining whether an applicant has absconded at the relevant point in time for an authority's associated extension of the transfer time limit, the court must therefore take all objectively established reasons into consideration, even if the authority did not found its extension decision on them.

29 Article 29 (2) second sentence of the Dublin III Regulation does not provide for a separate decision regarding the extension to be made against the person seeking protection. The extension decision (internally within a state) is a - non-discretionary - procedural decision which must be notified (externally to the state) to the responsible requested state, so as to avoid, first of all, a transfer of responsibility due to expiry of the transfer time limit. According to the Court of Justice's case-law, article 29 (2) second sentence of the Dublin III Regulation must be interpreted as meaning that, in order to extend the transfer time limit by a maximum of 18 months, it suffices that the requesting Member State informs the Member State responsible, before the expiry of the six-month transfer time limit, that the person concerned has absconded and specifies, at the same time, a new transfer time limit (CJEU, judgment of 19 March 2019 - C-163/17, Jawo - para. 72 and 75). There is no mention or presupposition of any particular legal form for the prior procedural decision, internal to the state, to inform the responsible Member State; nor is there any provision for notification of the person seeking protection. Moreover - at any event as a prerequisite for effectiveness of the notification of the responsible Member State - such a notice to the individual would be suitable, in the situation mentioned in article 29 (2) second sentence second alternative of the Dublin III Regulation, of making this provision difficult to apply, and to strip it of part of its practical effectiveness, because it would require notification to a person who must be considered to have absconded. The fact that the Federal Office, within its scope of broad procedural discretion, must decide whether to issue the extension notice to the responsible Member State, and whether to exhaust the maximum time limit of 18 months offered by EU law for the new transfer time limit, does not make this decision a discretionary decision within the meaning of section 40 of the Administrative Procedure Act (VwVfG, *Verwaltungsverfahrensgesetz*), for which reasons would have to be stated pursuant to section 39 (1) third sentence VwVfG. If (objectively) the constituent elements are met for an extension notice to the responsible Member State at the time when the notice is issued, an extension to a maximum of 18 months is provided under EU law, and is possible without arbitrariness (BVerwG, decision of 2 December 2019 - 1 B 75.19 [ECLI:DE:BVerwG:2019:021219B1B75.19.0] - (...)).

30 (2) However, a transfer attempt that is discontinued because of unwillingness to board a flight does not regularly - or therefore here, either - establish absconding within the meaning of article 29 (2) second sentence of the Dublin III Regulation, because the state is not prevented either *de jure* or *de facto* from carrying out the (forced) transfer. If the residence of the person concerned is known to the executing authority, that authority can carry out a forced transfer. The legal obligation to depart established by the deportation order (section 50 AufenthG in conjunction with section 67 (1) no. 5 and section 34a (2) fourth sentence AsylG) does not entail an obligation to cooperate actively in one's own transfer. The person required to depart is not, in particular, obliged to enter a means of transport voluntarily and to remain there. Thus there is (objectively) no evasion. The subjective intent to prevent a transfer, which may have been present, does not suffice.

31 This at any rate applies if - as is the case here - the person concerned refuses only verbally. The executing authority must expect such a reaction in a state-supervised transfer, and take appropriate precautions. Whether in exceptional cases - for instance if an asylum seeker endangers flight safety by applying or threatening violence in such a way that the pilot refuses transport even in the case of a transfer under escort - something different applies, does not need to be decided, because there are no factual findings by the Court of Appeal nor any other indications in this regard.

32 cc) The Court of Appeal held in compliance with federal law that the claimant also did not abscond in the sense provided under EU law because he did not comply with the order to appear of 14 May 2018.

33 Whether the order to appear issued in this case has the nature of an administrative act (*Verwaltungsakt*), and on what legal basis it is founded, may be left undecided. Even by refusing to cooperate actively by appearing in person - irrespective of the breach of an obligation inherent in such conduct - a foreign national does not objectively evade the reach of the state. His or her (forced) transfer remains possible both *de facto* and *de jure*. This applies, irrespective of whether the foreign national does or does not breach an obligation to cooperate in assisting the transfer by non-compliance with the order to appear. The person's residence remains known, and by not appearing, the person at most displays an unwillingness to cooperate, which must be taken into account in the (further) organisation of the transfer. By contrast, a foreign national's non-compliance with an order to appear is not (objectively) causal, within the meaning of the Court of Justice's case-law, for the (at least temporary) inability to transfer that person, because even if the person does not appear himself or herself, the person can be transferred by means of force. The person therefore has not absconded within the meaning of article 29 (2) second sentence of the Dublin III Regulation.

34 c) If the transfer time limit already expired on 18 June 2018 for lack of an effective extension, if only for that reason alone it could not be (re)interrupted by the claimant's application for modification of 10 October 2018, the Administrative Court's interim decision (*Zwischenbeschluss*) of 11 October 2018, and the decision of 16 October 2018 granting modification. Moreover, not every court decision aimed at temporary relief issued either during a court proceeding against a transfer decision, or even only after such a proceeding has concluded, can (re)interrupt the running of the transfer time limit. Rather, from the wording of article 29 (1) first subparagraph of the Dublin III Regulation and the spirit and purpose of both the Dublin III Regulation as a whole and also article 29 (1) and (2) of the Dublin III Regulation in particular, which aim for a rapid determination of the question of responsibility, it is evident that the only appeals or reviews that interrupt the transfer time limit, within the meaning of article 29 (1) first subparagraph of the Dublin III Regulation, are a court action directed against the transfer decision in order to prevent it from becoming final and binding, and if applicable a time-limited application for temporary relief filed in this connection. This is especially the case if an application for modification under section 80 (7) VwGO, or for interim measures under section 123 VwGO, has been granted by the court precisely on the grounds that the transfer time limit has now expired and therefore responsibility has been transferred to Germany.

35 d) The claimant may invoke the expiry of the transfer time limit. The person concerned has a subjective public-law claim to have the objective Dublin rules on responsibility adhered to, and to obtain compliance with a transfer of responsibility brought about under the time limit regime of article 29 (2) of the Dublin III Regulation. In particular, article 27 (1) of the Dublin III Regulation must be interpreted as meaning that in proceedings brought against a transfer decision, the person concerned may rely on article 29 (2) of the Dublin III Regulation by claiming that, since he or she has not absconded, the six-month transfer time limit has expired (CJEU, judgment of 19 March 2019 - C-163/17, Jawo - para. 70 and BVerwG, judgment of 26 January 2021 - 1 C 42.20 - (...) para. 28).

36 2. A re-interpretation of the inadmissibility decision founded on section 29 (1) no. 1 (a) AsylG (see BVerwG, judgment of 17 June 2020 - 1 C 35.19 [ECLI:DE:BVerwG:2020:170620U1C35.19.0] - (...) para. 13 et seqq., with reference to judgments of 15 January 2019 - 1 C 15.18 [ECLI:DE:BVerwG:2019:150119U1C15.18.0] - BVerwGE 164, 179 para. 40 and of 21 April 2020 - 1 C 4.19 [ECLI:DE:BVerwG:2020:210420U1C4.19.0] - (...) para. 25 et seqq.) does not come under consideration, if only because the constituent elements of any other provision on inadmissibility are not met. In particular, it has not been submitted, nor is it otherwise apparent, that another state would be responsible for conducting the asylum procedure under other

provisions of EU law or another international treaty (section 29 (1) no. 1 (b) AsylG) or that, pursuant to section 29 (1) no. 2 AsylG, the claimant has already been granted international protection in another Member State, such as Italy.

37 3. As, according to the above, the inadmissibility decision proves to be unlawful, the Court of Appeal also correctly affirmed the annulment of the associated subsequent decisions as to the non-existence of deportation bans with regard to Italy, as well as the deportation warning. The annulment of the time limit set for the legal ban on entry and residence under section 11 (1) AufenthG, old version, is in any event justified in order to eliminate the possible legal appearance of a non-existing ban on entry (BVerwG, judgments of 25 May 2021 - 1 C 2.20 [ECLI:DE:BVerwG:2021:250521U1C2.20.0] - and - 1 C 39.20 [ECLI:DE:BVerwG:2021:250521U1C39.20.0] - (...), each at para. 22).