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Fact sheet

Criteria and mechanisms for determining the Member State responsible for examining an application for international protection

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Criteria and mechanisms for determining the Member State responsible for examining an application for international protection

Foreword

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1; 'the Dublin II Regulation') was adopted on the basis of Article 63 of the EC Treaty and entered into force on 17 March 2003. That regulation was amended by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31; 'the Dublin III Regulation'), which was adopted on the basis of Article 78(2)(e) TFEU. The Dublin III Regulation entered into force on 19 July 2013 and applies to applications for international protection made after 1 January 2014.

The principle underlying those regulations is that any application for asylum or for international protection by a third-country national or by a stateless person on the territory of a Member State, including at the border or in the transit zones, must be examined by a single Member State. The regulations lay down the criteria for determining the Member State responsible for examining an application and the procedure by which it is determined.

The criteria for determining the Member State responsible for the application for international protection are set out in hierarchical order in Chapter III of the Dublin III Regulation [1] and are intended to enable the Member State which has received the application for international protection to ascertain which Member State will ultimately be required to examine that application.

Those criteria are set out in Chapter III in the following order:

- the best interests of the unaccompanied minor; [2]
- the presence, on the territory of a Member State, of a family member who is a beneficiary [3] of or an applicant [4] for international protection;
- the preservation of family ties; [5]
- the issue of residence documents or visas; [6]
- irregular entry and/or stay; [7]
- visa waived entry; [8]

1 More specifically, in Articles 8 to 15 of that regulation. They previously appeared in Articles 6 to 14 of the Dublin II Regulation.
2 Article 8 of the Dublin III Regulation and, respectively, Article 6 of the Dublin II Regulation.
3 Article 9 of the Dublin III Regulation and, respectively, Article 7 of the Dublin II Regulation.
4 Article 10 of the Dublin III Regulation and, respectively, Article 8 of the Dublin II Regulation.
5 Article 11 of the Dublin III Regulation and, respectively, Article 14 of the Dublin II Regulation.
6 Article 12 of the Dublin III Regulation and, respectively, Article 9 of the Dublin II Regulation
7 Article 13 of the Dublin III Regulation and, respectively, Article 10 of the Dublin II Regulation.
8 Article 14 of the Dublin III Regulation and, respectively, Article 11 of the Dublin II Regulation.

- asylum application made in an international transit area. [9]

These criteria are applied on the basis of the situation obtaining when the applicant first made an asylum application to a Member State. [10]

Additional specific criteria for determining the Member State responsible were laid down in the Dublin II and Dublin III Regulations.

In particular, where no Member State responsible can be designated on the basis of the criteria listed in those regulations, the first Member State in which the application for international protection was lodged is responsible for examining it. [11] Furthermore, where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter'), the determining Member State must continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. If the transfer cannot be made to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State becomes the Member State responsible. [12]

Specific rules are also laid down for cases where the applicant is dependent on a family member legally resident in one of the Member States or where a family member is dependent on the assistance of the applicant. [13] Lastly, a discretionary clause [14] permits each Member State to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in those regulations.

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9 Article 15 of the Dublin III Regulation and, respectively, Article 12 of the Dublin II Regulation.

10 Article 7(2) of the Dublin III Regulation and, respectively, Article 5(2) of the Dublin II Regulation.

11 First subparagraph of Article 3(2) of the Dublin III Regulation and, respectively, Article 13 of the Dublin II Regulation.

12 Second and third subparagraphs of Article 3(2) of the Dublin III Regulation. The Dublin II Regulation did not include any corresponding provisions. The provisions in the second and third subparagraphs of Article 3(2) of the Dublin III Regulation were introduced following developments in case-law, in particular following the judgment of 21 December 2011 (Grand Chamber), *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865).

13 Article 16 of the Dublin III Regulation, entitled 'Dependent persons'. Previously, Article 15 of the Dublin II Regulation, commonly referred to as the 'humanitarian clause'.

14 Article 17 of the Dublin III Regulation, entitled 'Discretionary clauses'. Previously, Article 3(2) of the Dublin II Regulation, commonly referred to as the 'sovereignty clause', which has given rise to a number of decisions of the Court of Justice (judgments of 21 December 2011 (Grand Chamber), *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865), and of 14 November 2013 (Grand Chamber), *Puid* (C-4/11, EU:C:2013:740)).

List of acts referred to

Council **Regulation (EC) No 343/2003** of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1)

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

Commission **Regulation (EC) No 1560/2003** of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 222, p. 3)

Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (OJ 2006 L 105, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1)

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60)

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96)

Council **Directive 2001/55/EC** of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12)

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I. Determination of the Member State responsible

1. Criteria for determining the Member State responsible

1.1. Best interests of the minor

Judgment of 6 June 2013 (Fourth Chamber), MA and Others (C-648/11, EU:C:2013:367)

(Regulation (EC) No 343/2003 – Determining the Member State responsible – Unaccompanied minor – Successive applications for asylum lodged in two Member States – Absence of a member of the family of the minor in the territory of a Member State – Second paragraph of Article 6 of Regulation No 343/2003 – Transfer of the minor to the Member State in which he lodged his first application – Compatibility – Child's best interests – Article 24(2) of the Charter)

Two minors who were Eritrean nationals (MA and BT) and one minor who was an Iraqi national (DA) claimed asylum in the United Kingdom. No members of their families were legally present in another Member State of the European Union. The United Kingdom authorities established that they had already submitted asylum applications in other Member States, namely in Italy (MA and BT) and in the Netherlands (DA). It was therefore decided to transfer the minors to those States, which were considered to be responsible for examining their asylum applications.

Where the applicant for asylum is an unaccompanied minor, the Dublin II Regulation provides that the Member State responsible for examining the application is to be that where a member of his or her family is legally present, provided that that is in the best interest of the minor. In the absence of a family member, the Member State responsible for examining the application is to be the one where the minor has lodged his or her application for asylum, although the regulation does not specify whether this is the first application that the minor has lodged in a Member State or the most recent application that he or she has lodged in another Member State.

The Court stated in that regard that where an unaccompanied minor with no member of his or her family legally present in the territory of the European Union has lodged asylum applications in more than one Member State, the Member State responsible for examining the application will be the one in which the minor is present after having lodged an application there. That conclusion follows from the context and from the objective of the regulation, which is to guarantee effective access to an assessment of the asylum applicant's refugee status, while focusing particularly on unaccompanied minors. Thus, since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.

Those considerations are supported by the requirement to observe fundamental rights, which include ensuring, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration. [15] Consequently, in the interest of unaccompanied minors, it is important not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status.

The Court held that such an interpretation does not mean that an unaccompanied minor whose application for asylum is substantively rejected in one Member State can subsequently compel another Member State to examine an application for asylum. Member States are not required to examine whether the applicant is a refugee where an application is considered inadmissible because the asylum applicant has lodged an identical application after a final decision has been taken against him or her.

1.2. Family ties

1.2.1. Presence of a family member who is a beneficiary of international protection

Judgment of 1 August 2022, Bundesrepublik Deutschland (Child of refugees, born outside the host State) (C-720/20, EU:C:2022:603)

(Reference for a preliminary ruling – Common policy on asylum – Criteria and mechanisms for determining the Member State responsible for examining an application for international protection – Regulation (EU) No 604/2013 (Dublin III) – Application for international protection lodged by a minor in his or her Member State of birth – Parents of that minor who have previously obtained refugee status in another Member State – Article 3(2) – Article 9 – Article 20(3) – Directive 2013/32/EU – Article 33(2)(a) – Admissibility of the application for international protection and responsibility for examining it)

The applicant, a national of the Russian Federation, was born in Germany in 2015. In March 2012, her parents and five siblings, who are also Russian nationals, had been granted refugee status in Poland. In December 2012, they had left Poland for Germany, where they had made applications for international protection. The Republic of Poland refused to allow the request made by the German authorities to take back those persons on the ground that they already enjoyed international protection on its territory. Subsequently, the German authorities rejected the applications for international protection as being inadmissible on account of the refugee status which those persons had already obtained in Poland. The applicant's family nevertheless continued to reside on German territory.

[15] It should also be noted that Article 8(4) of the Dublin III Regulation now mentions that the best interests of the child are to be taken into consideration in determining the Member State responsible for examining applications lodged by unaccompanied minors.

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In March 2018, the applicant lodged an application for international protection with the German authorities. That application was rejected as inadmissible on the basis of, inter alia, the Dublin III Regulation.

The referring court, hearing an action against that decision, is uncertain whether the Federal Republic of Germany is the Member State responsible for examining the application lodged by the applicant and, if so, whether that Member State is entitled to reject that application as inadmissible under the Procedures Directive.

More specifically, that court raises the question of the application by analogy of certain provisions of the Dublin III Regulation and of the Procedures Directive to the applicant's situation. In that regard, it seeks to ascertain, first, whether – in order to prevent secondary movements – Article 20(3) of the Dublin III Regulation, which concerns inter alia the situation of children born after an applicant for international protection arrives, applies to the application for international protection lodged by a minor in his or her Member State of birth when his or her parents are already the beneficiaries of international protection in another Member State. [16] Second, it asks whether Article 33(2)(a) of the Procedures Directive [17] applies to a minor whose parents are beneficiaries of international protection in another Member State but who is not himself or herself a beneficiary of such protection.

The Grand Chamber of the Court answered those questions in the negative. In particular, it stated, first, that under the Dublin III Regulation the Member State in which a minor lodges an application for international protection in writing is responsible for examining that application and, second, that a Member State may not declare his or her application inadmissible on the ground that his or her family members have left another Member State in which they were beneficiaries of international protection and travelled unlawfully to the Member State in which the minor lodged his or her application. Where no application is made in writing, the first Member State in which the application for international protection was lodged is to be responsible for examining it, unless another Member State is designated as responsible in accordance with the criteria listed in the regulation.

In that respect, in the first place, the Court held that Article 20(3) of the Dublin III Regulation is not applicable by analogy to a situation in which a minor and his or her parents lodge applications for international protection in the Member State in which that child was born, in circumstances where his or her parents are already the beneficiaries of international protection in another Member State. That provision presupposes that the minor's family members still have the status of 'applicant', with the

[16] Under that provision, which concerns the procedure for taking charge, the situation of a minor who is accompanying an applicant for international protection and meets the definition of 'family member' is indissociable from that of his or her family member and is a matter for the Member State responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, provided that it is in the minor's best interests. The same treatment is to be applied to children born after the applicant arrives on the territory of the Member States, without the need to initiate a new procedure for taking charge of them.

[17] Under that provision, Member States may consider an application for international protection as inadmissible if another Member State has granted international protection.

result that it does not govern the situation of a child who was born after those family members obtained international protection in a Member State other than that in which the child was born and resides with his or her family. Furthermore, the situation of a minor whose family members are applicants for international protection and that of a minor whose family members are already beneficiaries of such protection are not comparable in the context of the scheme established by the Dublin III Regulation, since the concept of an 'applicant' [18] and that of a 'beneficiary of international protection' [19] cover separate legal statuses governed by different provisions of that regulation. Consequently, an application by analogy of Article 20(3) to the situation of a minor whose family members are already beneficiaries of international protection would mean that both that minor and the Member State that has granted international protection to his or her family members would not be subject to the application of the mechanisms provided for by that regulation. One of the consequences of that would be that such a minor could be the subject of a transfer decision without a procedure for taking charge being initiated for him or her.

Furthermore, the Dublin III Regulation lays down specific rules for situations in which the procedure initiated in respect of the applicant's family members has been concluded and those family members are allowed to reside as beneficiaries of international protection in a Member State. Specifically, Article 9 provides that in such a situation the latter Member State is to be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing. Admittedly, that condition precludes the application of Article 9 where no such desire is expressed. That situation is likely to arise in particular where the application for international protection of the minor concerned is made following an unlawful secondary movement of his or her family from one Member State to the Member State in which that application is lodged. However, that in no way detracts from the fact that the EU legislature laid down, in that article, a provision which specifically covers the situation at issue. Furthermore, in the light of the clear wording of Article 9, the requirement that the desire be expressed in writing cannot be derogated from.

In those circumstances, in a situation in which the persons concerned have not expressed, in writing, the desire that the Member State responsible for examining a child's application for international protection should be the Member State in which that child's family members were allowed to reside as beneficiaries of international protection, the Member State responsible will be determined pursuant to Article 3(2) of the Dublin III Regulation. [20]

In the second place, the Court held that Article 33(2)(a) of the Procedures Directive does not apply by analogy to an application for international protection lodged by a minor in

[18] Within the meaning of Article 2(c) of the Dublin III Regulation.
[19] Within the meaning of Article 2(f) of the Dublin III Regulation.
[20] Under that provision, where no Member State responsible can be designated on the basis of the criteria listed in the Dublin III Regulation, the first Member State in which the application for international protection was lodged is responsible for examining that application.

a Member State where it is not that child himself or herself, but his or her parents who are beneficiaries of international protection in another Member State. In that regard, the Court recalled that that directive sets out an exhaustive list of the situations in which the Member States may consider an application for international protection to be inadmissible. In addition, the provision setting out those grounds of inadmissibility constitutes a derogation from the obligation on Member States to examine the substance of all applications for international protection. It follows both from the exhaustiveness of that provision and the fact that the grounds are exemptions that it must be interpreted strictly and cannot therefore be applied to a situation which does not correspond to its wording. Its scope *ratione personae* cannot, consequently, extend to an applicant for international protection who is not himself or herself a beneficiary of such protection.

1.2.2. Dependency link

Judgment of 6 November 2012 (Grand Chamber), K (C-245/11, EU:C:2012:685)

(Regulation (EC) No 343/2003 – Determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national – Humanitarian clause – Article 15 of that regulation – Person who enjoys asylum in a Member State and is dependent on the assistance of an asylum seeker because she suffers from a serious illness – Article 15(2) of the regulation – Obligation on that Member State, which is not responsible according to the criteria laid down in Chapter III of that regulation, to examine the application for asylum made by that asylum seeker – Conditions)

K entered Poland irregularly via a third country and, in March 2008, made her first application for asylum there. She subsequently left Polish territory and entered Austria irregularly, where she rejoined one of her adult sons who already enjoys refugee status there along with his spouse and their three minor children. In April 2008, K lodged a second application for asylum in Austria. K's daughter-in-law was dependent on K because the daughter-in-law had a new-born baby and suffered from a serious illness and handicap following a serious and traumatic occurrence which had taken place in a third country.

Taking the view that the Republic of Poland is responsible for examining the application for asylum lodged by K, the Austrian authorities requested that Member State to take K back and therefore rejected the application for asylum made by her in Austria.

The referring court asked the Court whether, in a situation such as that in the case before it, the humanitarian clause laid down in Article 15 of the Dublin II Regulation should be applied, with the result that Austria is responsible for examining that application for asylum.

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The Court ruled that Article 15(2) of the Dublin II Regulation must be interpreted as meaning that, in circumstances where a person who enjoys asylum in a Member State is dependent, on account of, inter alia, a serious illness, on a family member who applies for asylum but whose application is examined in another Member State pursuant to the criteria laid down in Chapter III of that regulation, the Member State in which those persons reside becomes responsible for examining the application for asylum. The Court held that it is for that Member State to assume the obligations which go along with that responsibility and to inform the Member State previously responsible that it is doing so, even where the latter Member State has not made a request to that effect in accordance with the second sentence of Article 15(1) of that regulation.

Article 15(2) of the Dublin II Regulation is applicable in a situation of dependency where it is not the asylum seeker him or herself who is dependent on the assistance of the family member present in a Member State other than that identified as responsible by reference to the criteria set out in Chapter III of that regulation, but the family member present in that other Member State who is dependent on the assistance of the asylum seeker. That provision is also applicable where the humanitarian grounds referred to therein are satisfied in relation to a dependent person within the meaning of that provision who, not being a family member within the meaning of Article 2(i) of that regulation, has family ties with the asylum seeker, and is a person to whom the asylum seeker can actually provide the assistance needed. [21] [22]

1.3. Entry

Judgments of 26 July 2017 (Grand Chamber), Jafari (C-646/16, EU:C:2017:586), and of 26 July 2017 (Grand Chamber), A. S. (C-490/16, EU:C:2017:585) [23]

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national – Arrival of an unusually large number of third-country nationals seeking international protection – Organisation of border crossing by the authorities of one Member State for the purpose of transit to another Member State – Entry authorised by way of derogation on humanitarian grounds – Article 2(m) – Definition of a 'visa' – Article 12 – Issuing of a visa – Article 13 – Irregular crossing of an external border)

[21] In accordance with Article 11(4) of Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 222, p. 3).

[22] It should be noted that in the Dublin III Regulation the legislature did not codify the case-law resulting from the judgment of 6 November 2012 (Grand Chamber), *K* (C-245/11, EU:C:2012:685), and limited the Member States' obligations in this area. Article 16 of that regulation provides that, where an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States must normally keep or bring together the applicant with that child, sibling or parent.

[23] Judgment also considered in section III.2.1., entitled 'Failure to comply with technical provisions'.

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(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national – Arrival of an exceptionally large number of third-country nationals wishing to obtain international protection – Organisation by the authorities of a Member State of the crossing of the border for the purpose of transit to another Member State – Entry authorised by way of derogation for humanitarian reasons – Article 13 – Irregular crossing of an external border – Period of 12 months from the crossing of the border – Article 27 – Remedy – Scope of judicial review – Article 29 – Period of six months for the purpose of effecting the transfer – Running of the periods – Use of an appeal – Suspensory effect)

In 2016, a Syrian national (A.S., C-490/16) and the members of two Afghan families (Jafari, C-646/16) crossed the border between Croatia and Serbia, even though they were not in possession of an appropriate visa. The Croatian authorities organised transport for those persons to the Croatia-Slovenia border with the aim of assisting them in moving on to other Member States in order to make an application for international protection there.

The Syrian national subsequently made an application in Slovenia, while the members of the Afghan families did so in Austria. However, both Slovenia and Austria took the view that, as the applicants had entered Croatia unlawfully, according to the Dublin III Regulation it was for the authorities of that Member State to examine their applications for international protection.

The persons concerned challenged the respective decisions of the Slovenian and Austrian authorities before the courts, arguing that their entry into Croatia cannot be considered irregular and that under the Dublin III Regulation it is for the Slovenian and Austrian authorities to examine their applications.

Against that background, the referring courts asked the Court whether the entry of the persons concerned is to be regarded as regular within the meaning of the Dublin III Regulation. The Austrian court also sought to ascertain whether the approach adopted by the Croatian authorities is tantamount to the issuing of a visa by that Member State.

The Court thus noted, first of all, that the Dublin III Regulation provides that a visa is the 'authorisation or decision of a Member State required for transit or entry' in that Member State or in several Member States. As a consequence, first, the term 'visa' refers to an act formally adopted by a national authority, not to mere tolerance, and, second, a visa is not to be confused with admission to the territory of a Member State, since a visa is required precisely for the purposes of enabling such admission.

In those circumstances, the Court observed that the admission of a national from a non-EU country to the territory of a Member State is not tantamount to the issuing of a visa, even if the admission is explained by exceptional circumstances characterised by a mass influx of displaced people into the European Union. Moreover, the Court considered that the crossing of a border in breach of the conditions imposed by the rules applicable in

the Member State concerned must necessarily be considered 'irregular' within the meaning of the Dublin III Regulation.

As regards the option available to the Member States under the Schengen Borders Code [24] to authorise third-country nationals who do not fulfil the entry conditions to travel to their territory on humanitarian grounds, the Court pointed out that such authorisation is valid only in respect of the territory of the Member State concerned, not the territory of the other Member States.

Furthermore, if it were accepted that the entry of a third-country national authorised by a Member State on humanitarian grounds by way of derogation from the entry conditions generally imposed on such nationals does not constitute an irregular crossing of the border, that would imply that that Member State is not responsible for examining the application for international protection lodged by that person in another Member State. Such a conclusion would be incompatible with the Dublin III Regulation, which allocates responsibility for examining the application for international protection made by such a person to the Member State whose territory that person first entered upon entering the territory of the European Union. Thus, a Member State which has decided on humanitarian grounds to authorise the entry on its territory of a third-country national who does not have a visa and is not entitled to waiver of a visa cannot be absolved of that responsibility.

In those circumstances, the Court found that the term 'irregular crossing of a border' also covers the situation in which a Member State admits into its territory third-country nationals on humanitarian grounds, by way of derogation from the entry conditions generally imposed on third-country nationals.

In addition, referring to the mechanisms established by the Dublin III Regulation, to Directive 2001/55 and to Article 78(3) TFEU, the Court considered that the fact that the border crossing occurred upon the arrival of an unusually large number of third-country nationals seeking international protection is not decisive.

The Court also observed that the taking charge of such third-country nationals may be facilitated by the use by other Member States, unilaterally or bilaterally in a spirit of solidarity, of the 'sovereignty clause', which enables them to decide to examine applications for international protection lodged with them, even if they are not required to carry out such an examination under the criteria laid down in the Dublin III Regulation.

Finally, the Court recalled that an applicant for international protection must not be transferred to the Member State responsible if, following the arrival of an unusually large number of third-country nationals seeking international protection, there is a

[24] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (OJ 2006 L 105, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1).

genuine risk that the person concerned may suffer inhuman or degrading treatment if transferred.

2. Derogations from the criteria for determining the Member State responsible

2.1. Risk of infringement of Article 4 of the Charter

The risk of infringement of Article 4 of the Charter, which provides that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment', can influence the determination of the Member State responsible for processing applications for international protection. Depending on the case, there may be a risk:

- during the asylum procedure, because of systemic deficiencies in that procedure and in the reception conditions of applicants for international protection in the Member State to which the applicant should be transferred;
- on the transfer to the Member State designated as responsible, because of the specific condition of the applicant;
- on completion of the asylum procedure, because of the living conditions of beneficiaries of international protection in the Member State to which the applicant should be transferred.

Judgment of 21 December 2011 (Grand Chamber), N. S. and Others (C-411/10 and C-493/10, EU:C:2011:865)

(European Union law – Principles – Fundamental rights – Implementation of European Union law – Prohibition of inhuman or degrading treatment – Common European Asylum System – Regulation (EC) No 343/2003 – Concept of 'safe countries' – Transfer of an asylum seeker to the Member State responsible – Obligation – Rebuttable presumption of compliance, by that Member State, with fundamental rights)

The cases which gave rise to these judgments concerned several asylum seekers who came to the United Kingdom or to Ireland after entering the European Union through Greece and who refused to be transferred to that country. They resisted their return to Greece, claiming that asylum procedures in that State had serious shortcomings, that the proportion of asylum applications which were granted was extremely low, that judicial remedies were inadequate and very difficult to access and that the conditions for reception of asylum seekers were inadequate.

In that context, the referring courts asked the Court whether – in the light of the overloading of the Greek asylum system and its effects on the treatment of asylum seekers and on the examination of their claims – the authorities of a Member State which should transfer the applicants to Greece must first check whether that State

actually observes fundamental rights. They also asked whether, if that State does not observe fundamental rights, those authorities are bound to assume responsibility for examining the application themselves.

The Court noted, first, that the Common European Asylum System was conceived in a context making it possible to assume that all the participating States observe fundamental rights and that the Member States can have confidence in each other in that regard. Proceeding on the basis of that principle, the Court examined whether the national authorities which should carry out the transfer to the Member State responsible for the asylum application, indicated by the Dublin II Regulation, must first examine whether the fundamental rights of persons in that State are observed.

In that regard, the Court stated that, although the slightest infringement of the norms governing the right to asylum cannot be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible, EU law precludes a conclusive presumption that the Member State indicated as responsible observes the fundamental rights of the European Union. The Member States, including the national courts, may not transfer an asylum seeker to the Member State indicated as responsible where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

The Court added that, subject to the right itself to examine the application, the Member State which should transfer the applicant to the Member State responsible under the regulation and which finds it is impossible to do so must examine the other criteria set out in the regulation in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application. In that regard, it must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, it must itself examine the application.

It should be noted that in that judgment the Court ruled for the first time that a real risk of being subjected to inhuman or degrading treatment because of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in the Member State responsible obliges Member States to derogate from the criteria for determining the Member State responsible laid down in the Dublin II Regulation. That principle derived from case-law was subsequently codified in the Dublin III Regulation (second subparagraph of Article 3(2) [25]).

[25] 'Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of [the Charter], the determining Member State

Judgment of 14 November 2013 (Grand Chamber), Puid (C-4/11, EU:C:2013:740)

(Asylum – Charter of Fundamental Rights of the European Union – Article 4 – Regulation (EC) No 343/2003 – Article 3(1) and (2) – Determination of the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national – Articles 6 to 12 – Criteria for determining the Member State responsible – Article 13 – Fall-back clause)

Mr Puid, an Iranian national, arrived in Germany irregularly after transiting through Greece. His application for asylum lodged in Germany was declared inadmissible on the ground that, under the Dublin II Regulation, Greece was the Member State competent to examine that application. Before he was returned to Greece, however, Mr Puid brought an action for annulment of the decision declaring his application for asylum inadmissible and ordering his transfer to Greece, which was upheld at first instance, as the court considered that, in the light of the conditions in Greece in relation to the reception of asylum seekers and processing of asylum applications, Germany was required to examine the application.

In that context, the referring court, hearing an appeal against the decision of the court of first instance, asked the Court inter alia whether the Dublin II Regulation confers on an asylum seeker the right to require a Member State to examine his application if that State cannot transfer him, because of a risk of infringement of his fundamental rights, to the Member State initially identified as competent.

The Court recalled, first of all, that a Member State is required not to transfer an asylum seeker to the Member State initially identified as responsible where systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the Member State initially identified as responsible provide substantial grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment. In that regard, the Court pointed out that although, faced with such a situation, a Member State may decide to examine the application itself, it is not, in principle, required to do so. In that case, it is to identify the Member State responsible for the examination of the asylum application by continuing to examine the criteria set out in the regulation. If it does not manage to identify that Member State, the first Member State with which the application was lodged is to be responsible for examining it.

Lastly, the Court stated that the Member State in which the asylum seeker is located must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. Accordingly, if necessary, it must examine the application itself.

shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.'

Criteria and mechanisms for determining the Member State responsible for examining an application for international protection

Judgment of 16 February 2017 (Fifth Chamber), C. K. and Others (C-578/16 PPU, EU:C:2017:127) [26]

(Reference for a preliminary ruling – Area of freedom, security and justice – Borders, asylum and immigration – Dublin system – Regulation (EU) No 604/2013 – Article 4 of the Charter of Fundamental Rights of the European Union – Inhuman or degrading treatment – Transfer of a seriously ill asylum seeker to the State responsible for examining his application – No substantial grounds for believing that there are proven systemic flaws in that Member State – Obligations imposed on the Member State having to carry out the transfer)

A Syrian national and an Egyptian national had entered the territory of the European Union by means of a visa issued by Croatia before submitting an asylum application in Slovenia. The Slovenian authorities had then sent a request to the Croatian authorities to take charge of them, as Croatia was the Member State responsible for examining their applications for international protection under Article 12(2) of the Dublin III Regulation. Croatia granted that request. However, because the Syrian national was pregnant, the transfer of the persons concerned had to be deferred until the child was born. Subsequently, the persons concerned challenged their transfer to Croatia, alleging that it would have negative consequences for the state of health of the Syrian national (who had had a high-risk pregnancy and had suffered psychiatric difficulties since giving birth), which were also likely to affect the wellbeing of her new-born child, and that they had been victims of racially motivated remarks and abuse in Croatia.

In that context, the referring court asked whether, in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment within the meaning of that article and, in the affirmative, whether the Member State concerned would be required to apply the 'discretionary clause' laid down in Article 17(1) of the Dublin III Regulation and examine the asylum application at issue itself.

The Court ruled, in furtherance of its case-law stemming from the judgment of 21 December 2011, *judgment of 21 December 2011, N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865), that, even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker can take place only in conditions which exclude the possibility that it might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, as proscribed by Article 4 of the Charter.

The Court added that the transfer of an asylum seeker with a particularly serious mental or physical illness constituted such treatment if the transfer resulted in a real and

[26] Judgment also considered in section I.2.2., entitled 'Discretionary clause for the Member State concerned'.

proven risk of a significant and permanent deterioration in the state of health of the person concerned. According to the Court, it is for the authorities of the Member State having to carry out the transfer and, if necessary, its courts to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned by taking the necessary precautions to ensure that the transfer takes place in conditions enabling appropriate and sufficient protection of that person's state of health. If, taking into account the particular seriousness of the illness of the asylum seeker concerned, the precautions taken are not sufficient to ensure that the transfer of that person does not result in a real risk of a significant and permanent worsening of his or her state of health, it is for the authorities of the Member State concerned to suspend the execution of the transfer of the person concerned for such time as that person's condition renders him or her unfit for such a transfer.

In addition, if the Member State notes that the state of health of the asylum seeker concerned will not improve in the short term or that the prolonged suspension of the procedure risks worsening the condition of the person concerned, it may choose to conduct its own examination of that person's application by making use of the 'discretionary clause', although it is not required to do so. That being said, if the state of health of the asylum seeker concerned does not enable the requesting Member State to carry out the transfer before the expiry of the six-month period provided for in Article 29(1) of the Dublin III Regulation, the Member State responsible would, according to the Court, be relieved of its obligation to take charge of the person concerned and responsibility would then be transferred to the first Member State.

Judgment of 19 March 2019 (Grand Chamber), Jawo (C-163/17, EU:C:2019:218) [27]

(Reference for a preliminary ruling – Area of freedom, security and justice – Dublin system – Regulation (EU) No 604/2013 – Transfer of the asylum seeker to the Member State responsible for examining the application for international protection – Concept of 'absconding' – Modalities of extending the time limit for transfer – Article 4 of the Charter of Fundamental Rights of the European Union – Substantial risk of inhuman or degrading treatment on completion of the asylum procedure – Living conditions of beneficiaries of international protection in that Member State)

A Gambian national who entered the European Union through Italy had lodged an application for asylum there before travelling to Germany, where he lodged a further application. After requesting the Italian authorities to take back the person concerned, the German authorities rejected his asylum application and ordered his removal to Italy. A first transfer attempt failed because the applicant was not present at the accommodation centre allocated to him. The German authorities, having concluded that he had absconded, notified the Italian authorities that the transfer could not be carried

[27] Judgment also considered in section II.3., entitled 'Period for transfer'.

out and the time limit was extended pursuant to Article 29(2) of the Dublin III Regulation. That article provides that the time limit for carrying out the transfer is six months, but that it may be extended up to a maximum of 18 months if the person concerned has absconded. Subsequently, the person concerned stated that he had visited a friend and had been unaware that it was necessary to report his absences. At the same time, he brought an action against the transfer decision and, following the dismissal of the action, he brought an appeal before the referring court. In that appeal, he maintained that, because he had not absconded, the German authorities were not entitled to extend the time limit for his transfer to Italy. He also claimed that there were systemic flaws in the asylum system in Italy, which prevented his transfer to that State.

The referring court asked the Court of Justice inter alia about the lawfulness of such a transfer where there is a risk of the person concerned suffering inhuman or degrading treatment on completion of the asylum procedure on account of the living conditions of beneficiaries of international protection in the Member State normally responsible for examining that person's application.

In that regard, the Court ruled that, although Article 3(2) of the Dublin III Regulation envisages only the situation underlying the *judgment of 21 December 2011, N. S. and Others (C 411/10 and C 493/10, EU:C:2011:865)*, in which that risk stemmed from systemic flaws in the asylum procedure, a transfer is nevertheless ruled out where there are substantial grounds for believing that such a risk is run, whether it is at the very moment of the transfer, during the asylum procedure or following it. The Court stated that the national court hearing an action challenging the transfer decision must assess, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether the alleged flaws are real.

The Court also held that those flaws must attain a particularly high level of severity. As regards the living conditions of beneficiaries of international protection, that level is attained if the indifference of the national authorities resulted in a person finding him or herself, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty that does not allow that person to meet the most basic needs and that undermines his or her physical or mental health, or human dignity. However, the fact that the forms of support in family structures, available to the nationals of the Member State concerned to deal with the inadequacies of the social system, are generally lacking for the beneficiaries of international protection is not sufficient to find that an applicant would, in the event of transfer to that Member State, be faced with such a situation. Similarly, the existence of shortcomings in the implementation of programmes to integrate such beneficiaries is not sufficient ground for such a finding. In any event, the mere fact that social protection and/or living conditions are more favourable in the requesting Member State than the Member State normally responsible for examining the application is not sufficient to find that there is a risk of inhuman or degrading treatment in the latter Member State.

Criteria and mechanisms for determining the Member State responsible for examining an application for international protection

Judgment of 29 February 2024 (Fourth Chamber), Staatssecretaris van Justitie en Veiligheid (Mutual trust in the event of transfer) (C-392/22, EU:C:2024:195)

(Reference for a preliminary ruling – Common policy on asylum and immigration – Application for international protection – Charter of Fundamental Rights of the European Union – Article 4 – Risks of inhuman or degrading treatment – Criteria and mechanisms for determining the Member State responsible for examining the application for international protection – Regulation (EU) No 604/2013 – Article 3(2) – Scope of the obligations of the Member State which has sought to have the applicant taken back by the Member State responsible and wishes to transfer the applicant to the latter Member State – Principle of mutual trust – Evidence and standard of proof of the real risk of inhuman or degrading treatment, resulting from systemic flaws – Practices of pushback to a third country and detention at border control posts)

Ruling on a request for a preliminary ruling from the rechtbank Den Haag, zittingsplaats's-Hertogenbosch (District Court, The Hague, sitting in's-Hertogenbosch, Netherlands), the Court ruled on the scope of the obligations of the Member State seeking to have the applicant for international protection taken back by the Member State responsible for examining that application where the latter State has recourse to practices such as pushback and detention at border control posts.

On 9 November 2021, X, a Syrian national, made an application for international protection in Poland. Subsequently, on 21 November 2021, he entered the Netherlands, where, the following day, he lodged a further application for international protection. On 1 February 2022, Poland accepted the request made by the Netherlands to take back X pursuant to the provisions of the Dublin III Regulation. Subsequently, by a decision of 20 April 2022, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) declined to consider the application for international protection lodged by X in the Netherlands, on the ground that Poland was responsible for examining that application, and rejected the arguments put forward by X in objecting to his transfer.

X brought an action against that decision before the referring court and sought an order prohibiting his transfer to Poland, maintaining, inter alia, that the Polish authorities infringed his fundamental rights. According to his claims, first, he had been subjected to pushbacks to Belarus on three occasions after entering Polish territory. Second, he had been held in detention for approximately one week in the border guard centre, where he had been very badly treated, particularly because of a lack of food and the absence of any medical checks. X indicated that he was afraid that his fundamental rights would be infringed again if he were to be transferred to Poland.

The referring court took the view that objective, reliable, specific and properly updated information shows that the Republic of Poland has, for a number of years, systematically infringed a number of fundamental rights of third-country nationals by subjecting them to pushbacks, regularly accompanied by the use of violence, and by systematically

detaining, in what are described as 'appalling' conditions, third-country nationals who enter its territory illegally.

In those circumstances, it asked the Court, in essence, whether the fact that the Member State responsible for examining a third-country national's application for international protection has carried out pushbacks with respect to third-country nationals seeking to make such applications at its border and has detained them at its border control posts precludes the transfer of that third-country national to that Member State. It also sought guidance from the Court on assessing whether there is a risk of that national being subjected to inhuman or degrading treatment.

The Court confirmed, first of all, that practices of pushback and detention at border control posts, such as those established by the referring court in that case, are incompatible with EU law and constitute serious flaws in the asylum procedure and in the reception conditions for applicants. The practice of pushbacks is contrary to Article 6 of Directive 2013/32, which is one of the cornerstones of the Common European Asylum System. In addition, it may be incompatible with the principle of non-refoulement, which is guaranteed, as a fundamental right, in Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention, [28] and in Article 19(2) of the Charter. As regards the practice of detention at border control posts, recital 15 of Directive 2013/33 and recital 20 of the Dublin III Regulation refer to the principle that a person should not be held in detention for the sole reason that he or she is seeking international protection.

However, the fact that the Member State responsible for examining a third-country national's application for international protection has carried out pushbacks and detentions at its border control posts does not in itself preclude the transfer of that third-country national to that Member State. For that transfer to be ruled out, the flaws established must satisfy the two cumulative conditions set out in the second subparagraph of Article 3(2) of the Dublin III Regulation, according to which only 'systemic' flaws 'resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the [Charter]' make such a transfer impossible. It follows that, first, the flaws established must concern, generally, the asylum procedure and the reception conditions applicable to applicants for international protection or, at the very least, to certain groups of such applicants as a whole. Second, there must be substantial grounds for believing that the third-country national concerned would, during his or her transfer or thereafter, face a real risk of being subjected to the practices referred to above, and that those practices are capable of placing that third-country national in so grave a situation of extreme material poverty that it may be equated with the inhuman or degrading treatment prohibited by Article 4 of the Charter.

[28] Geneva Convention of 28 July 1951 relating to the status of refugees, as supplemented by the New York Protocol of 31 January 1967.

As regards the standard of proof and rules of evidence that would trigger the application of the second subparagraph of Article 3(2) of the Dublin III Regulation, it is necessary, in the absence of specific details in that provision, to refer to the general provisions and scheme of that regulation. It follows that, first, the Member State wishing to transfer an applicant for international protection to the Member State responsible must, before it can carry out that transfer, take into consideration all of the information provided to it by that applicant, in particular as regards the possible existence of a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, at the time of that transfer or thereafter. Second, the Member State which has sought to have an applicant for international protection taken back must cooperate in establishing the facts by assessing whether that risk is real, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, if necessary by taking into account, on its own initiative, relevant information of which it cannot be unaware concerning any systemic flaws in the asylum procedure and in the reception conditions for applicants for international protection in the Member State responsible. Third, if there are substantial grounds for believing that there is a real risk of treatment contrary to Article 4 of the Charter in the event of transfer, that Member State must refrain from carrying out that transfer. In that situation, the Member State required to carry out the process of determining the Member State responsible must continue to examine the criteria set out in Chapter III of the Dublin III Regulation in order to establish whether another Member State may be designated as responsible.

However, the Member State wishing to carry out the transfer may seek to obtain individual guarantees from the Member State responsible that are sufficient to exclude a real risk of inhuman or degrading treatment in the event of transfer and, if such guarantees are provided and appear to be both credible and sufficient to rule out any real risk of such treatment, may carry out that transfer.

2.2. Discretionary clause for the Member State concerned

Under the discretionary clauses in Article 3(2) of the Dublin II Regulation and subsequently in Article 17 of the Dublin III Regulation, each Member State may examine an asylum application lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in those regulations.

Judgment of 30 May 2013 (Fourth Chamber), Halaf (C-528/11, EU:C:2013:342)

(Asylum – Regulation (EC) No 343/2003 – Determination of the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national – Article 3(2) – Discretion of the Member States – Role of the Office of the United Nations

High Commissioner for Refugees – Obligation of Member States to request that Office to present its views – None)

Mr Halaf, an Iraqi national, applied for asylum in Bulgaria. Since a search in the Eurodac system revealed that he had already made an application for asylum in Greece, a Bulgarian authority requested the Greek authorities to take him back. On account of the failure to reply to that request within the time limit set by the Dublin II Regulation, [29] the Bulgarian authority considered [30] that the Hellenic Republic had agreed to take Mr Halaf back and authorised his transfer to Greece. Mr Halaf brought an action before the referring court seeking annulment of that decision. He based his action inter alia on the fact that the United Nations High Commissioner for Refugees had called on European governments to refrain from sending asylum seekers back to Greece.

The referring court questioned whether it is possible to apply Article 3(2) of the Dublin II Regulation in such a case, taking account of the fact that, in Mr Halaf's case, no circumstances exist to establish the applicability of the humanitarian clause in Article 15 of that regulation.

The Court ruled, first, that Article 3(2) of the Dublin II Regulation permits a Member State, which is not indicated as responsible by the criteria in Chapter III of that regulation, to examine an application for asylum even though no circumstances exist which establish the applicability of the humanitarian clause in Article 15 of that regulation. That possibility is not conditional on the Member State responsible under those criteria having failed to respond to a request to take back the asylum seeker concerned. The Court held, second, that the Member State in which the asylum seeker is present is not obliged, during the process of determining the Member State responsible, to request the Office of the United Nations High Commissioner for Refugees to present its views where it is apparent from the documents of that Office that the Member State indicated as responsible by the criteria in Chapter III of the Dublin II Regulation is in breach of the rules of European Union law on asylum.

Judgment of 16 February 2017 (Fifth Chamber), C. K. and Others (C-578/16 PPU, EU:C:2017:127) [31]

(Reference for a preliminary ruling – Area of freedom, security and justice – Borders, asylum and immigration – Dublin system – Regulation (EU) No 604/2013 – Article 4 of the Charter of Fundamental Rights of the European Union – Inhuman or degrading treatment – Transfer of a seriously ill asylum seeker to the State responsible for examining that person's application – No substantial grounds for believing that there are proven systemic flaws in that Member State – Obligations imposed on the Member State having to carry out the transfer)

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29 Second sentence of Article 20(1)(b) of the Dublin II Regulation.

30 On the basis of Article 20(1)(c) of that regulation.

31 Judgment also considered in section I.2.1., entitled 'Risk of infringement of Article 4 of the Charter' (the present section addresses only the subject of the discretionary clause).

Criteria and mechanisms for determining the Member State responsible for examining an application for international protection

A Syrian national and an Egyptian national had entered the territory of the European Union by means of a visa issued by Croatia before submitting an asylum application in Slovenia. The Slovenian authorities had then sent a request to the Croatian authorities to take charge of them, as Croatia was the Member State responsible for examining their applications for international protection under Article 12(2) of the Dublin III Regulation. Croatia granted that request. However, because the Syrian national was pregnant, the transfer of the persons concerned had to be deferred until the child was born. Subsequently, the persons concerned challenged their transfer to Croatia, alleging that that would have negative consequences for the state of health of the Syrian national (who had had a high-risk pregnancy and had suffered psychiatric difficulties since giving birth), which were also likely to affect the well-being of her new-born child, and that they had been victims of racially motivated remarks and abuse in Croatia.

In that context, the referring court asked whether, in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment within the meaning of that article and, in the affirmative, whether the Member State concerned would be required to apply the 'discretionary clause' laid down in Article 17(1) of the Dublin III Regulation and examine the asylum application at issue itself.

As regards the discretionary clause, the Court held, first, that the question of the application, by a Member State, of that clause laid down in that provision is not governed solely by national law and by the interpretation given to it by the constitutional court of that Member State, but is a question concerning the interpretation of EU law within the meaning of Article 267 TFEU. Second, the Court ruled that if the Member State notes that the state of health of the asylum seeker concerned will not improve in the short term or that the prolonged suspension of the procedure risks worsening the condition of the person concerned, it may choose to conduct its own examination of that person's application by making use of the 'discretionary clause'. That being said, Article 17(1) of the Dublin III Regulation, read in the light of Article 4 of the Charter, cannot be interpreted, in a situation such as that at issue in the main proceedings, as meaning that it implies an obligation on that Member State to make use of it in that way. However, if the state of health of the asylum seeker concerned does not enable the requesting Member State to carry out the transfer before the expiry of the six-month period provided for in Article 29(1) of the Dublin III Regulation, the Member State responsible would, according to the Court, be relieved of its obligation to take charge of the person concerned and responsibility would then be transferred to the first Member State.

Criteria and mechanisms for determining the Member State responsible for examining an application for international protection

Judgment of 23 January 2019 (First Chamber), M. A. and Others (C-661/17, EU:C:2019:53)

(Reference for a preliminary ruling – Asylum policy – Criteria and mechanisms for determining the Member State responsible for examining an application for international protection – Regulation (EU) No 604/2013 – Discretionary clauses – Assessment criteria)

On 10 January 2017, the International Protection Appeals Tribunal (IPAT, Ireland) upheld a decision of the Irish Refugee Applications Commissioner recommending the transfer of S.A., M.A. and their child A.Z. to the United Kingdom. The Commissioner took the view that the United Kingdom was the country responsible for taking charge of the asylum applications brought by S.A. and M.A. on the basis of the Dublin III Regulation. The IPAT considered that it did not have jurisdiction to exercise the option conferred by the discretionary clause provided for by that regulation, according to which each Member State may decide to examine an application for international protection lodged with it, even if that examination is not its responsibility under the criteria defined by that regulation for determining the responsible Member State.

Hearing an action brought against the IPAT's decision, the referring court took the view that, in order to resolve the dispute before it, it was first necessary to determine the implications which the process of withdrawal of the United Kingdom from the European Union may have for the Dublin System. It therefore referred a number of questions to the Court of Justice.

The Court observed, first of all, that the notification by a Member State of its intention to withdraw from the European Union in accordance with Article 50 TEU does not have the effect of suspending the application of EU law in that Member State and that, consequently, that law continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union.

The Court went on to state that it is clear from the wording of the discretionary clause provided for by the Dublin III Regulation that that clause is optional and that that option is also not subject to any particular condition. It is intended to allow each Member State to decide, in its absolute discretion, on the basis of political, humanitarian or practical considerations, to agree to examine an asylum application even if it is not responsible under the criteria laid down in that regulation. That finding is consistent with the objective of that clause, which is to maintain the prerogatives of the Member States in the exercise of the right to grant international protection and with settled case-law of the Court, according to which optional provisions afford wide discretionary power to the Member States. The Court took the view that the fact that a Member State, in the present case the United Kingdom, which is designated as responsible within the meaning of the Dublin III Regulation, has notified its intention to withdraw from the European Union in accordance with Article 50 TEU does not oblige the determining Member State, in the present case Ireland, itself to examine, under the discretionary clause, the application for international protection.

Furthermore, the provisions of the Dublin III Regulation do not require a Member State which is not responsible, under the criteria set out by that regulation, for examining an application for international protection to take into account the best interests of the child and to examine itself that application pursuant to the discretionary clause set out by that regulation. The Court also took the view that the regulation does not require a remedy to be made available against the decision not to make use of the discretionary clause, in the knowledge that that decision may be challenged at the time of an appeal against the transfer decision. Finally, the Court found that, in the absence of evidence to the contrary, the Dublin III Regulation establishes a presumption that it is in the best interests of the child to treat that child's situation as indissociable from that of his or her parents.

3. No express decision on the determination of the Member State responsible

Judgment of 4 October 2018 (Grand Chamber), Fathi (C-56/17, EU:C:2018:803)

(Reference for a preliminary ruling – Area of freedom, security and justice – Borders, asylum and immigration – Regulation (EU) No 604/2013 – Article 3 – Determining the Member State responsible for examining an application for international protection made in one of the Member States by a third-country national – Examination of an application for international protection without an express decision on the determination of the Member State responsible for the examination – Directive 2011/95/EU – Articles 9 and 10 – Reasons for persecution based on religion – Evidence – Iranian legislation on apostasy – Directive 2013/32/EU – Article 46(3) – Effective remedy)

In the case in point, an Iranian national of Kurdish origin had lodged an application for international protection with the State Agency for Refugees in Bulgaria, based on the persecution by the Iranian authorities he claimed to have suffered on grounds of religion and, in particular, because he had converted to Christianity. The competent Bulgarian authority had conducted an examination on the merits of that application but no express decision was taken following the process of determining the Member State responsible. The application in question had been rejected as being unfounded, because that authority took the view that the applicant's account contained significant contradictions and that neither the existence of persecution or the risk of future persecution, nor the existence of a risk of the death penalty, had been established.

Against that background, the referring court asked the Court whether, in a situation such as that at issue in the main proceedings, Article 3(1) of the Dublin III Regulation must be interpreted as meaning that it precludes the authorities of a Member State from conducting an examination on the merits of an application for international protection, within the meaning of Article 2(d) of that regulation, where there is no express decision by those authorities determining, on the basis of the criteria laid down

by the regulation, that the responsibility for conducting such an examination lies with that Member State.

In that regard, the Court considered, first, that Article 3(1) of the Dublin III Regulation must be interpreted as not precluding the authorities of a Member State from conducting an examination of the merits of an application for international protection within the meaning of Article 2(d) of that regulation, without adopting an express decision determining, on the basis of the criteria laid down by the regulation, that the responsibility for conducting such an examination lies with that Member State. The Court also found that Article 46(3) of the Procedures Directive must be interpreted as meaning that, in an action brought by an applicant for international protection against a decision dismissing his application for international protection as being unfounded, the court or tribunal with jurisdiction of a Member State is not required to examine of its own motion whether the criteria and mechanisms for determining the Member State responsible for examining that application, as provided for by the Dublin III Regulation, were correctly applied by the authorities which conducted that examination.

4. Relocation – Mechanism for temporary derogation from the Dublin system

***Judgment of 6 September 2017, Slovakia and Hungary* v *Council* (C-643/15 and C-647/15, EU:C:2017:631)**

(Actions for annulment – Decision (EU) 2015/1601 – Provisional measures in the area of international protection for the benefit of the Hellenic Republic and the Italian Republic – Emergency situation characterised by a sudden inflow of nationals of third countries into certain Member States – Relocation of those nationals to other Member States – Relocation quotas – Article 78(3) TFEU – Legal basis – Conditions under which applicable – Concept of 'legislative act' – Article 289(3) TFEU – Whether conclusions adopted by the European Council are binding on the Council of the European Union – Article 15(1) TEU and Article 68 TFEU – Essential procedural requirements – Amendment of the European Commission's proposal – Requirements for a further consultation of the European Parliament and a unanimous vote within the Council of the European Union – Article 293 TFEU – Principles of legal certainty and of proportionality)

In response to the migration crisis that affected Europe in the summer of 2015, the Council of the European Union adopted a decision [32] in order to help Italy and Greece deal with the massive inflow of migrants. The decision provides for the relocation from those two Member States to other EU Member States, over a period of two years, of 120 000 persons in clear need of international protection.

[32] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80) ('the contested decision').

Criteria and mechanisms for determining the Member State responsible for examining an application for international protection

The contested decision was adopted on the basis of Article 78(3) TFEU, which provides that 'in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.'

Slovakia and Hungary which, like the Czech Republic and Romania, voted against the adoption of the contested decision in the Council, [33] asked the Court of Justice to annul the decision. In support of their actions they put forward pleas seeking to show, first, that the adoption of the decision was vitiated by errors of a procedural nature or arising from the choice of an inappropriate legal basis and, second, that the decision was neither a suitable response to the migrant crisis nor necessary for that purpose.

The Court dismissed in their entirety the actions brought by Slovakia and Hungary.

First, the Court rejected the argument that a legislative procedure [34] should have been followed because Article 78(3) TFEU provides that the European Parliament is to be consulted when a measure based on that provision is adopted. The Court noted in that regard that a legislative procedure can be followed only where a provision of the Treaties expressly refers to it. As Article 78(3) TFEU does not contain any express reference to a legislative procedure, the contested decision could be adopted in a non-legislative procedure and is consequently a non-legislative act.

The Court held in that regard that Article 78(3) TFEU enables the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of displaced persons. Those measures may also derogate from legislative acts, provided, in particular, that their material and temporal scope is circumscribed and that they have neither the object nor the effect of replacing or permanently amending legislative acts. Those conditions are met in the present case.

Since the decision is a non-legislative act, its adoption was not subject to the requirements relating to the participation of national parliaments and to the public nature of the deliberations and vote in the Council (as those requirements apply only to legislative acts).

The Court then pointed out that the temporal scope of the contested decision (from 25 September 2015 to 26 September 2017) is precisely delineated; the provisional nature of the decision therefore cannot be denied.

The Court further held that the Conclusions of the European Council of 25 and 26 June 2015, which stated that the Member States were to agree 'by consensus' on the distribution of persons in clear need of international protection and were to do so in a

[33] Finland abstained from the vote, whilst the other Member States voted in favour of the decision.
[34] The ordinary legislative procedure or a special legislative procedure, as referred to in Article 289 TFEU.

manner 'reflecting the specific situations of Member States', could not prevent the adoption of the contested decision. Those conclusions in fact related to another relocation plan which, in response to the inflow of migrants witnessed in the first six months of 2015, aimed to allocate 40 000 persons between the Member States. That plan formed the subject matter of Decision 2015/1523, [35] rather than that of the decision challenged in the present case. The Court added that the European Council cannot under any circumstances alter the voting rules laid down by the Treaties.

In addition, the Court stated that, although substantial amendments were made to the Commission's initial proposal for a decision, in particular the amendments giving effect to Hungary's request that it be removed from the list of Member States that were beneficiaries of the relocation mechanism [36] and classifying it as a Member State of relocation, the Parliament was duly informed of those amendments before the adoption of its resolution on 17 September 2015, which meant that it was able to take account of them in that resolution. The Court noted in that regard that other amendments made after that date did not affect the actual essence of the Commission's proposal.

The Court also held that the Council was not required to act unanimously when it adopted the contested decision, even though, for the purpose of adopting the abovementioned amendments, it had to depart from the Commission's initial proposal. The Court found that the amended proposal was in fact approved on behalf of the Commission by two of its Members, who were authorised by the College of Commissioners for that purpose.

Moreover, the Court considered that the relocation mechanism provided for by the contested decision is not a measure that is manifestly inappropriate for contributing to achieving its objective, namely helping Greece and Italy to cope with the impact of the 2015 migration crisis.

In that regard, the legality of the decision cannot be called into question on the basis of retrospective assessments of its efficacy. Where the EU legislature must assess the future effects of a new set of rules, its assessment can be challenged only where it appears manifestly incorrect in the light of the information available to the legislature at the time of the adoption of the rules in question. That is not the case here, given that the Council carried out, on the basis of a detailed examination of the statistical data available to it at the time, an objective analysis of the effects of the measure on the emergency situation in question.

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35 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ 2015 L 239, p. 146).

36 Hungary states that it refused to be classified as a Member State benefiting from the temporary relocation mechanism to avoid being considered the Member State responsible for examining the applications for asylum which would have had to be made in the Member State where the migrants actually entered the European Union.

Judgment of 2 April 2020, Commission* v *Poland, Commission* v *Hungary, Commission* v *Czech Republic (Temporary mechanism for the relocation of applicants for international protection) (C-715/17, C-718/17 and C-719/17, EU:C:2020:257)

(Failure of a Member State to fulfil obligations – Decisions (EU) 2015/1523 and (EU) 2015/1601 – Article 5(2) and 5(4) to 5(11) of each of those decisions – Provisional measures in the area of international protection for the benefit of Italy and of Greece – Emergency situation characterised by a sudden influx of third-country nationals into certain Member States – Relocation of those nationals to other Member States – Relocation procedure – Obligation on the Member States to indicate at regular intervals, and at least every three months, the number of applicants for international protection who can be relocated swiftly to their territory – Consequent obligations leading to actual relocation – Interests of the Member States linked to national security and public order – Possibility for a Member State to rely on Article 72 TFEU in order not to apply EU legal acts of a binding nature)

The Court upheld the actions for failure to fulfil obligations brought by the Commission against Poland, Hungary and the Czech Republic seeking a declaration that, by failing to indicate at regular intervals, and at least every three months, an appropriate number of applicants for international protection who could be relocated swiftly to their respective territories and by consequently failing to implement their subsequent relocation obligations, those Member States had failed to fulfil their obligations under European Union law. First, the Court concluded that there had been an infringement, by the three Member States concerned, of a decision adopted by the Council with a view to the relocation, on a mandatory basis, from Greece and Italy of 120 000 applicants for international protection to the other Member States of the European Union. [37] Secondly, the Court found that Poland and the Czech Republic had also failed to fulfil their obligations under an earlier decision that the Council had adopted with a view to the relocation, on a voluntary basis, from Greece and Italy of 40 000 applicants for international protection to the other Member States of the European Union. [38] Hungary, for its part, was not bound by the relocation measures provided for under the latter decision.

In September 2015, having regard to the emergency situation linked to the arrival of third-country nationals in Greece and Italy, the Council adopted the abovementioned decisions ('the relocation decisions'). Pursuant to those decisions, [39] in December 2015, Poland indicated that 100 persons could be swiftly relocated to its territory. However, it did not relocate those persons and it did not make any subsequent relocation commitment. Hungary, for its part, did not at any point indicate a number of persons who could be relocated to its territory pursuant to the relocation decision by which it

[37] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80). The validity of that decision was the subject matter of the judgment of 6 September 2017, *Slovakia and Hungary* v *Council* (C-643/15 and C-647/15, EU:C:2017:631); see also Press release No 91/17.

[38] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ 2015 L 239, p. 146).

[39] Article 5(2) of each of those decisions.

was bound and did not relocate any persons. Lastly, in February and in May 2016, the Czech Republic had indicated, pursuant to the relocation decisions, [40] that 50 persons could be relocated to its territory. Twelve persons were in fact relocated from Greece, but the Czech Republic did not make any subsequent relocation commitment.

The Court first of all rejected the argument raised by the three Member States concerned that the Commission's actions are inadmissible because, following the expiry of the period of application of the relocation decisions, on 17 and 26 September 2017 respectively, it is no longer possible for them to remedy the infringements alleged. In that regard, the Court recalled that an action for infringement is admissible where the Commission restricts itself to seeking a declaration as to the existence of the infringement alleged inter alia in situations, such as those at issue in the present cases, in which the act of European Union law the infringement of which is alleged definitively ceased to be applicable after the expiry date of the period set in the reasoned opinion, namely 23 August 2017. Moreover, a declaration as to the failure to fulfil obligations is still of substantive interest, inter alia, as establishing the basis of a responsibility that a Member State can incur, as a result of its default, as regards other Member States, the European Union or private parties.

As to the substance, Poland and Hungary maintained inter alia that they were entitled to disapply the relocation decisions by virtue of Article 72 TFEU, according to which the provisions of the FEU Treaty on the area of freedom, security and justice, which include in particular asylum policy, are not to affect the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security. In that regard, the Court held that, inasmuch as Article 72 TFEU is a provision derogating from the general rules of European Union law, it must be interpreted strictly. Thus, that article does not confer on Member States the power to depart from the provisions of European Union law based on no more than reliance on the interests linked to the maintenance of law and order and the safeguarding of internal security, but requires them to prove that it is necessary to have recourse to that derogation in order to exercise their responsibilities on those matters.

In that context, the Court observed that, under the relocation decisions, national security and public order were to be taken into consideration throughout the relocation procedure, until the actual transfer of the applicant for international protection. In that regard, the Court held that a wide discretion had to be accorded to the competent authorities of the Member States of relocation when they determine whether there are reasonable grounds for regarding a third-country national whose relocation is intended as a danger to their national security or public order. On that issue, the Court stated that the concept of 'danger to … national security or public order' within the meaning of the relocation decisions [41] must be interpreted as covering both actual and potential threats

[40] Article 5(2) of each of those decisions.
[41] Article 5(4) and (7) of each of those decisions.

to national security or public order. The Court nevertheless pointed out that, to rely on the abovementioned grounds, those authorities had to rely, following a case-by-case investigation, on consistent, objective and specific evidence that provides grounds for suspecting that the applicant in question represents an actual or potential danger. Consequently, it held that the arrangements under those provisions precluded, in the relocation procedure, a Member State from peremptorily invoking Article 72 TFEU for the sole purposes of general prevention and without establishing any direct relationship with a particular case to justify suspending the implementation of or even ceasing to implement its obligations under the relocation decisions.

Ruling subsequently on the plea raised by the Czech Republic concerning the malfunctioning of the relocation mechanism at issue, the Court held that it was not permissible, if the objective of solidarity inherent to the relocation decisions and the binding nature of those acts was not to be undermined, for a Member State to be able to rely on its unilateral assessment of the alleged lack of effectiveness, or even the purported malfunctioning, of the relocation mechanism established by those acts in order to avoid any obligation to relocate people incumbent upon it under those acts. Lastly, drawing attention to the binding nature of the relocation decisions for the Czech Republic, as of their adoption and during their period of application, the Court stated that that Member State was required to comply with the relocation obligations imposed under those decisions irrespective of the provision of other types of aid to the Hellenic Republic and the Italian Republic.

II. Procedure for transfer to the Member State responsible

1. Take back in the case of unlawful return to a Member State that has transferred the person concerned

Judgment of 25 January 2018 (Third Chamber), Hasan (C-360/16, EU:C:2018:35)

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national – Procedures and periods laid down for making a take back request – Unlawful return of a third-country national to a Member State that has transferred him – Article 24 – Take back procedure – Article 27 – Remedy – Scope of judicial review – Circumstances after the transfer)

Mr Hasan made an asylum application in Germany in October 2014. As a search on the Eurodac system showed that he had already applied for international protection in Italy, the German Office requested the Italian authorities to take him back on the basis of the Dublin III Regulation. The Italian authorities did not reply to that take back request. In January 2015, the Office rejected Mr Hasan's asylum application as inadmissible, on the

ground that the Italian Republic was the Member State responsible for examining that application, and ordered that he be transferred to Italy. In August 2015, Mr Hasan was transferred to Italy. He returned illegally to Germany within the same month, however.

Against that background, the referring court asked the Court inter alia whether Articles 23 and 24 of the Dublin III Regulation must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, in which a third-country national who, after having made an application for international protection in a first Member State (Member State 'A'), was transferred to Member State 'A' as a result of the rejection of a fresh application lodged in a second Member State (Member State 'B') and has then returned, without a residence document, to Member State 'B', a take back procedure may be undertaken in respect of that third-country national or whether it is possible to transfer that person anew to Member State 'A' without such a procedure being followed.

The Court held, first of all, that the procedure provided for in Article 24 of the Dublin III Regulation can apply to a person who, after having made an application for international protection in one Member State, returns illegally to the territory of another Member State, without lodging a new application for international protection there. That analysis is not affected by the fact that such a person has, in the course of a first stay on the territory of the second Member State, already made an application for international protection, which was rejected within the framework laid down in Article 26(1) of the Dublin III Regulation. As that application is no longer under examination in the second Member State, the aforementioned fact does not mean that the person concerned may be equated to a person who has lodged a new application for international protection, which would have to be either rejected, pursuant to Article 26(1) of the Dublin III Regulation, before a transfer can be carried out or examined by the second Member State in accordance with Article 23(3) of the regulation in the case of delay in the implementation of the take back procedure.

Second, the Court ruled that, given that the carrying out of the transfer does not, in itself, definitively establish the responsibility of the Member State to which the person concerned has been transferred, a further transfer cannot be envisaged unless the situation of that person has been re-examined for the purpose of verifying that responsibility has not been transferred to another Member State following that person's transfer. The Court pointed out in that regard that such a re-examination of the situation of the person concerned may be undertaken without jeopardising the objective of the rapid processing of applications for international protection, as that re-examination merely entails taking account of the changes that have occurred since the first transfer decision was adopted.

The Court concluded that, in a situation in which a third-country national who, after having made an application for international protection in a first Member State (Member State 'A'), was transferred to Member State 'A' as a result of the rejection of a fresh application lodged in a second Member State (Member State 'B') and has then returned, without a residence document, to Member State 'B', a take back procedure may be

undertaken in respect of that third-country national and it is not possible to transfer that person anew to Member State 'A' without such a procedure being followed.

2. Anticipated transfer decision

Judgment of 31 May 2018 (Second Chamber), Hassan (C-647/16, EU:C:2018:368)

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for the examination of an application for international protection lodged in a Member State by a third-country national – Procedures for taking charge and taking back – Article 26(1) – Adoption and notification of the transfer decision before the acceptance of the take back request by the requested Member State)

After having applied for international protection in Germany, Mr Hassan, an Iraqi national, travelled to France, where he was arrested. The French authorities then requested the German authorities to take back Mr Hassan, whilst deciding the same day to transfer him to Germany. The French authorities took the view, pursuant to the Dublin III Regulation, that Germany was responsible for processing Mr Hassan's application for international protection, since it was in that country that Mr Hassan had made that application. Mr Hassan challenged the decision ordering his transfer to Germany before the French courts. He argued, inter alia, that that decision infringed the Dublin III Regulation because it was taken and notified to him before the requested Member State (Germany) had even explicitly or implicitly replied to the French authorities' request to take him back.

The referring court asked the Court whether, in that context, the French authorities could take a transfer decision in respect of Mr Hassan and notify it to him before Germany had explicitly or implicitly accepted that request to take him back.

In that regard, the Court held that it is clear from the wording, the history and the objective of the Dublin III Regulation that a transfer decision may be adopted and notified to the person concerned only after the requested Member State has, implicitly or explicitly, agreed to take that person back. In particular, the Court noted that a person such as Mr Hassan may be required, before the requested Member State has even responded to the request to take him back, to lodge an appeal against the transfer decision, even though such an appeal can take effect only in a situation where the requested Member State has accepted that request. Furthermore, the scope of the right of the person concerned to an effective remedy is liable to be restricted, since the transfer decision would be based only on the evidence and indicia gathered by the requesting Member State (in that case, France). Lastly, to permit the adoption and notification of a transfer decision to take place before receipt of the reply from the requested Member State would, in Member States which do not provide for the suspension of such a decision before the requested Member State's reply, expose the

person concerned to the risk of a transfer to that Member State even before that State had given its consent in principle.

3. Period for transfer

Judgment of 29 January 2009 (Fourth Chamber), Petrosian (C-19/08, EU:C:2009:41)

(Right of asylum – Regulation (EC) No 343/2003 – Taking back by a Member State of an asylum seeker whose application has been refused and who is in another Member State where that person has submitted a fresh asylum application – Start of the period for implementation of transfer of the asylum seeker – Transfer procedure the subject matter of an appeal having suspensive effect)

After lodging an initial asylum application in France, which had been refused, the members of the Petrosian family, who come from Armenia, applied for asylum in Sweden. The Swedish authorities requested that the French authorities take the members of that family back. After the French authorities agreed to take them back, it was decided that the members of the family should be transferred to France on the basis of Article 20(1)(d) of the Dublin II Regulation, but the decision ordering the transfer was challenged several times by the persons concerned, with the result that the six-month period laid down in Article 20(1)(d) of the Dublin II Regulation [42] had expired. That period, which 'starts to run as from the time of the decision on an appeal or review', is intended to permit the Member State in which the application for asylum was lodged to carry out the transfer, while the consequence of its expiry is to make that State responsible.

Against that background, the referring court asked the Court what event is capable of triggering the six-month period and, in particular, whether that period begins to run as from the time of the provisional judicial decision suspending the implementation of the transfer procedure or only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent the implementation from taking place.

The Court held, first, that the judicial protection guaranteed by the Member States whose courts may suspend the implementation of a transfer decision, thus enabling asylum seekers duly to challenge decisions taken in respect of them, should not be sacrificed to the requirement of expedition in processing asylum applications. Those Member States which wished to introduce appeal remedies liable to lead to decisions

[42] Under that provision, the transfer of an asylum seeker to the Member State which is obliged to readmit him or her is to be carried out as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect. Under paragraph 2 of that article, where the transfer does not take place within the six months' time limit, responsibility lies with the Member State in which the application for asylum was lodged.

having suspensive effect in the context of transfer procedures may not, for the sake of meeting the requirement of expedition, be placed in a less favourable situation than those Member States which did not deem it necessary to do so. Thus, a Member State which, in the context of transfer procedures, has decided to introduce various appeal remedies, including ones having suspensive effect, would be placed in an awkward position since, if it is unable to organise the transfer of the asylum seeker within the very brief period between the judicial decision on the merits of the case and the expiry of the time limit for implementation of the transfer, it runs the risk of becoming definitively the Member State responsible for processing the asylum application. It follows that an interpretation of Article 20(1)(d) of the Dublin II Regulation cannot lead to a finding that, for the sake of observing Community law, the requesting State must disregard the suspensive effect of a provisional judicial decision taken in the context of an appeal capable of having such effect.

Second, as regards observance of the principle of procedural autonomy of the Member States, the Court noted that, if the interpretation of Article 20(1)(d) of the Dublin II Regulation to the effect that the period for implementation of the transfer begins to run as from the time of the provisional decision having suspensive effect were to prevail, a national court wishing to reconcile compliance with that time limit with compliance with a provisional judicial decision having suspensive effect would be placed in the position of having to rule on the merits of the transfer procedure before expiry of that time limit by a decision which may, owing to lack of sufficient time granted to the courts, have been unable to take satisfactory account of the complex nature of the proceedings.

The Court concluded that, where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

Judgment of 19 March 2019 (Grand Chamber), Jawo (C-163/17, EU:C:2019:218) [43]

(Reference for a preliminary ruling – Area of freedom, security and justice – Dublin system – Regulation (EU) No 604/2013 – Transfer of the asylum seeker to the Member State responsible for examining the application for international protection – Concept of 'absconding' – Modalities of extending the time limit for transfer – Article 4 of the Charter of Fundamental Rights of the European Union – Substantial risk of inhuman or degrading treatment on completion of the asylum procedure – Living conditions of beneficiaries of international protection in that Member State)

[43] Judgment also considered in section I.2.1., entitled 'Risk of infringement of Article 4 of the Charter'.

Criteria and mechanisms for determining the Member State responsible for examining an application for international protection

A Gambian national who entered the European Union through Italy had lodged an application for asylum there before travelling to Germany, where he lodged a further application. After requesting the Italian authorities to take back the person concerned, the German authorities rejected his asylum application and ordered his removal to Italy. A first transfer attempt failed because the applicant was not present at the accommodation centre allocated to him. The German authorities, having concluded that he had absconded, notified the Italian authorities that the transfer could not be carried out and the time limit was extended pursuant to Article 29(2) of the Dublin III Regulation. That article provides that the time limit for carrying out the transfer is six months, but that it may be extended up to a maximum of 18 months if the person concerned has absconded. Subsequently, the person concerned stated that he had visited a friend and had been unaware that it was necessary to report his absences. At the same time, he brought an action against the transfer decision and, following the dismissal of the action, he brought an appeal before the referring court. In that appeal, he maintained that, because he had not absconded, the German authorities were not entitled to extend the time limit for his transfer to Italy. He also claimed that there were systemic flaws in the asylum system in Italy, which prevented his transfer to that State.

The referring court asked the Court of Justice, inter alia, under which conditions it may be considered that an applicant for international protection has absconded such that the period for his transfer to the Member State normally responsible for examining his application may be extended.

In that regard, in the first place, the Court stated that the concept of 'absconding' for the purposes of Article 29(2) of the Dublin III Regulation implies, in particular, that there is an intentional element, with the result that the provision is, in principle, applicable only where that person deliberately evades the reach of the national authorities in order to prevent his or her transfer. The Court added, however, that, in order to ensure the effective functioning of the Dublin III Regulation and to have regard to the considerable difficulties likely to be encountered by those authorities in providing proof of the applicant's intentions, it may be assumed that the applicant has absconded where the transfer cannot be carried out due to the fact that that person has left the accommodation allocated to him or her without informing the national authorities and, as the case may be, without requesting prior authorisation. That assumption is applicable, however, only if the applicant had been duly informed of his or her obligations in that regard in accordance with Article 5 of Directive 2013/33. In addition, the applicant must retain the possibility of demonstrating that the fact that he or she has not informed the competent authorities of the absence is due to valid reasons and not the intention to evade the reach of those authorities.

In the second place, as regards the modalities of extending the time limit for transfer, the Court held that no prior consultation between the requesting Member State and the Member State responsible was necessary. Thus, in order to extend that time limit by a maximum of 18 months, it suffices that the former Member State informs the latter,

before the expiry of the six-month transfer time limit, that the applicant has absconded, specifying the new transfer time limit.

III. Scope of judicial review of the transfer decision

1. Limited judicial review – Dublin II Regulation

In its case-law concerning the interpretation of the Dublin II Regulation, the Court permitted an applicant for asylum to call into question the choice of the criterion for determining the Member State responsible only by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which would result in the violation of his or her fundamental rights guaranteed in Article 4 of the Charter.

Judgment of 10 December 2013 (Grand Chamber), Abdullahi (C-394/12, EU:C:2013:813)

(Request for a preliminary ruling – Common European Asylum System – Regulation (EC) No 343/2003 – Determination of the Member State responsible for examining an asylum application – Review of compliance with the criteria for determining responsibility for examining the asylum application – Scope of judicial review)

Ms Abdullahi, a Somali national, who travelled to Austria with the assistance of people smugglers and had been arrested there, close to the Hungarian border, lodged an application for international protection in August 2011. The competent Austrian authority requested that Hungary take charge of Ms Abdullahi in accordance with Article 10(1) of the Dublin II Regulation, which Hungary agreed to do. The Austrian authority therefore rejected as inadmissible Ms Abdullahi's asylum application in Austria and ordered her removal to Hungary. In her appeal against that decision, Ms Abdullahi claimed for the first time that the Member State responsible for her asylum application was not Hungary but the Hellenic Republic. She argued, however, that the Hellenic Republic did not observe human rights in certain respects and that, accordingly, it was for the Austrian authorities to complete the examination of her asylum application.

Since it had doubts as to the Member State's acceptance of responsibility, the referring court decided to request a preliminary ruling from the Court of Justice. In that regard, it observed that a review of a Member State's responsibility entails an obligation to undertake a very broad examination, incompatible with the rapidity with which the competent Member State must be determined. Furthermore, although the Dublin II Regulation confers on the applicant for asylum the right to challenge a transfer to

another jurisdiction, there is no basis in that regulation for a right to an asylum procedure in a particular Member State chosen by the applicant for asylum.

In that regard, the Court ruled that Article 19(2) of the Dublin II Regulation must be interpreted as meaning that, in circumstances where a Member State has agreed to take charge of an applicant for asylum on the basis of the criterion laid down in Article 10(1) of that regulation – that is to say, as the Member State of the first entry of the applicant for asylum into the European Union – the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

2. Extended judicial review – Dublin III Regulation

That development in case-law results from the significant amendment of the provisions concerning legal remedies against the transfer decision (see the difference between Article 19(2) of the Dublin II Regulation and Article 27 [44] and recital 19 of the Dublin III Regulation). The applicant for international protection became involved in the process for determining the Member State responsible. In that process, the applicant is informed of the criteria for determining responsibility and may provide information enabling the correct application of those criteria.

Consequently, in the judgments presented below, the Court recognised that the applicant may plead the incorrect application of the criterion for determining responsibility, even if that did not result in a violation of his or her fundamental rights.

2.1. Failure to comply with technical provisions

Judgments of 7 June 2016 (Grand Chamber), Ghezelbash (C-63/15, EU:C:2016:409), and of 7 June 2016 (Grand Chamber), Karim (C-155/15, EU:C:2016:410)

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national – Article 12 – Issue of residence documents or visas – Article 27 – Remedies – Extent of judicial scrutiny)

[44] Under Article 27(1) of the Dublin III Regulation, the applicant for international protection has the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

Criteria and mechanisms for determining the Member State responsible for examining an application for international protection

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national – Article 18 – Taking back an asylum seeker whose application is being examined – Article 19 – Cessation of responsibility – Absence from the territory of the Member States for a period of at least three months – New procedure for determining the Member State responsible – Article 27 – Remedy – Extent of judicial review)

In *Ghezelbash*, an Iranian national had filed an application for a residence permit for a fixed period with the Netherlands authorities. As a search in the EU Visa Information System (VIS) disclosed that the French diplomatic representation in Iran had granted the person concerned a visa covering a certain period, the Netherlands State Secretary had requested the French authorities to take charge of him on the basis of the Dublin III Regulation. Those authorities had accepted the request. However, when making further submissions to the Netherlands authorities, the person concerned had requested to submit original documents proving that he had returned to Iran after visiting France, which meant, according to the applicant, that France was not the Member State responsible for examining his asylum application. The question thus arose whether the person concerned was entitled to challenge the French Republic's responsibility to examine his asylum application once that Member State had accepted that responsibility.

In that context, the Court held that Article 27(1) of the Dublin III Regulation, read in the light of recital 19 of the regulation, must be interpreted as meaning that an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in that regulation.

In *Karim*, a Syrian national had applied for international protection in Sweden. As a search in the Eurodac system revealed that he had already applied for that protection in Slovenia, the Migrationsverket (Migration Board, Sweden, 'the Board') had requested the Slovenian authorities to take back the person concerned on the basis of Article 18(1)(b) of the Dublin III Regulation.

The Slovenian authorities had agreed to that request. The Board had then informed those authorities that the person concerned had claimed that he had left the territory of the Member States for more than three months following his first asylum application and that his passport had an entry visa for Lebanon. Because the Slovenian authorities had repeated their acceptance of the take back request, the Board rejected his application for international protection. However, it took the view that Slovenia was not the Member State responsible for examining his asylum application.

The Court ruled, first of all, that Article 19(2) of the Dublin III Regulation, and in particular its second subparagraph, is applicable to a third-country national who, after having made a first asylum application in a Member State, provides evidence that he left the territory of the Member States for a period of at least three months before making a

new asylum application in another Member State. The first paragraph of Article 19(2) of the Dublin III Regulation provides that, in principle, the obligations to take charge of or take back an asylum applicant arising under Article 18(1) of that regulation cease if the Member State responsible can establish, when requested to take back an asylum applicant, that the person concerned left the territory of the Member States for a period of at least three months. However, the second subparagraph of Article 19(2) of that regulation states that an application lodged after such a period of absence is to be regarded as a new application giving rise to a new procedure for determining the Member State responsible. It follows that, in a situation in which a third-country national, having made a first asylum application in a Member State, left the territory of the Member States for a period of at least three months before making a new asylum application in another Member State, Article 19(2) of that regulation requires the Member State in which the new asylum application has been made to complete, on the basis of the rules laid down in that regulation, the process for determining the Member State responsible for examining that new application.

Second, the Court held, as in the abovementioned judgment in judgment in Ghezelbash, that Article 27(1) of the Dublin III Regulation must be interpreted to the effect that an asylum applicant may, in an action challenging a transfer decision made in respect of him, invoke an infringement of the rule set out in the second subparagraph of Article 19(2) of that regulation.

Judgment of 26 July 2017 (Grand Chamber), A. S. (C-490/16, EU:C:2017:585) [45]

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national – Arrival of an exceptionally large number of third-country nationals wishing to obtain international protection – Organisation by the authorities of a Member State of the crossing of the border for the purpose of transit to another Member State – Entry authorised by way of derogation for humanitarian reasons – Article 13 – Irregular crossing of an external border – Period of 12 months from the crossing of the border – Article 27 – Remedy – Scope of judicial review – Article 29 – Period of six months for the purpose of effecting the transfer – Running of the periods – Use of an appeal – Suspensory effect)

In 2016, A.S., a Syrian national, crossed the border between Croatia and Serbia, even though he was not in possession of an appropriate visa. The Croatian authorities organised his transport to the Croatia-Slovenia border with the aim of assisting him in moving on to other Member States in order to make an application for international protection there. A. S. subsequently made an application in Slovenia. However, Slovenia took the view that, as the applicant had entered Croatia unlawfully, according to the Dublin III Regulation it was for the authorities of that Member State to examine his

[45] Judgment also considered in section I.1.3., entitled 'Entry'.

application for international protection. A. S. challenged the decision of the Slovenian authorities before the courts, arguing that his entry into Croatia cannot be considered irregular and that under the Dublin III Regulation it is for the Slovenian authorities to examine his application.

Against that background, the referring court asked the Court, in essence, whether the entry of the person concerned is to be regarded as regular within the meaning of the Dublin III Regulation.

As regards the arguments which may be relied on by the applicant in the appeal against the transfer decision, the Court ruled that, in challenging a transfer decision, an applicant for international protection is entitled, in the context of the legal remedies provided for by Article 27(1) of the Dublin III Regulation, to plead incorrect application of the criterion for determining responsibility relating to the irregular crossing of the border of a Member State, laid down in Article 13(1) of that regulation. Relying on its judgment of 7 June 2016, judgment of 7 June 2016, Ghezelbash (C-63/15, EU:C:2016:409), in which it ruled that such an applicant may, by virtue of his or her right to an effective remedy, plead the incorrect application of one of the criteria for the issue of a visa, the Court observed that reasons given by it in that judgment also applied to the criterion set out in Article 13(1) of the Dublin III Regulation.

Lastly, the Court examined the consequences of the lodging of an appeal against a transfer decision on the running of the periods laid down, on the one hand, in Article 13(1) of the Dublin III Regulation and, on the other, in Article 29(2) of that regulation. The Court recalled that both those provisions are intended to limit in time the responsibility of a Member State under the Dublin III Regulation. Under Article 13(1), the responsibility of a Member State based on the criterion of irregular crossing of the border is to cease 12 months after the date of that crossing and, under Article 29, the transfer of an applicant for international protection must be carried out within six months of acceptance by the Member State responsible or of the final decision on an appeal or review in the case of suspensive effect granted in accordance with Article 27(3) of the Dublin III Regulation.

First, the Court held that the lodging of an appeal against a transfer decision has no effect on the running of the period laid down in Article 13(1), which constitutes a condition for the application of the criterion laid down therein. Second, the Court ruled that the period laid down by Article 29(1) and (2) does not start to run until the final decision on that appeal, including when the court hearing the appeal has decided to request a preliminary ruling from the Court of Justice, as long as that appeal had suspensory effect. This second period relates to the enforcement of the transfer decision and may be applied only once the principle of transfer has been established, that is to say, at the earliest when the requested Member State has accepted the request to take charge or take back.

2.2. Failure to comply with time limits

Judgment of 26 July 2017 (Grand Chamber), Mengesteab (C-670/16, EU:C:2017:587)

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection made in one of the Member States by a third-country national – Article 20 – Start of the determination process – Lodging an application for international protection – Report prepared by the authorities that reached the competent authorities – Article 21(1) – Time limits for making a take charge request – Transfer of responsibility to another Member State – Article 27 – Remedy – Scope of judicial review)

On 14 September 2015, Mr Mengesteab, an Eritrean national, requested asylum in Germany. The competent authority issued him with a certificate of registration as an asylum seeker on the same day. On 14 January 2016 at the latest, the Bundesamt für Migration und Flüchtlinge (German Federal Office for Migration and Refugees, 'the Office'), which is the authority responsible for carrying out the obligations arising from the Dublin III Regulation, received the original of that certificate, a copy of it or, at least, the main information which it contained. On 22 July 2016, Mr Mengesteab was heard by the Office and was able to lodge an official application for asylum. A search in the Eurodac system, however, revealed that his fingerprints had been taken in Italy. In general, such a hit constitutes evidence that the person concerned illegally crossed an external frontier of the European Union, which may have the result that the Member Sate bordering the external frontier at issue (here, Italy) is responsible for examining the application for asylum. On 19 August 2016, the Office then requested the Italian authorities to take charge of Mr Mengesteab in accordance with the Dublin III Regulation. Failure to act upon that request by the Italian authorities is tantamount to its acceptance.

After the Office rejected his application for asylum, by decision of 10 November 2016, and ordered his transfer to Italy, Mr Mengesteab challenged that decision before the referring court. He claims that, according to the Dublin III Regulation, responsibility for examining his application for asylum has been transferred to Germany. That regulation provides that the take charge request must be made at the latest three months from the date on which the application for international protection was lodged and that, after expiry of that period, responsibility for examining the application lies with the Member State in which the application for international protection was lodged. According to Mr Mengesteab, the Office requested the Italian authorities to take charge of him only after the expiry of the three-month period. In that context, the referring court asked the Court of Justice to interpret the Dublin III Regulation.

The Court ruled, first, that an applicant for international protection may rely, in the context of an action brought against a decision to transfer him, on the expiry of the three-month period at issue, even if the requested Member State is willing to take

charge of him. In that regard, the Court stated that the EU legislature, in the Dublin III Regulation, did not merely introduce organisational rules governing relations between Member States for the purpose of determining the Member State responsible, but decided to involve asylum seekers in that process, by conferring on them, inter alia, the right to an effective remedy in respect of any transfer decision that may be taken against them.

Second, the Court stated that a take charge request cannot legitimately be made more than three months after the application for international protection has been lodged. The two-month period which the Dublin III Regulation provides for such a request in the event of receipt of a Eurodac hit does not constitute a supplementary period, which is added to the three-month period, but a shorter period which is justified by the fact that such a hit constitutes evidence of illegal crossing of an external frontier of the European Union and accordingly simplifies the process of determining the responsible Member State.

Third, as regards the substantive definition of the application for international protection, [46] the Court held as follows: an application for international protection is deemed to have been lodged if a written document, prepared by a public authority and certifying that a third-country national has requested international protection, has reached the authority responsible for implementing its obligations arising from the Dublin III Regulation or, as the case may be, if only the main information contained in that document (but not that document itself or its copy) has reached that authority. In order to be able effectively to start the process of determining the responsible Member State, the competent authority needs to be informed, with certainty, of the fact that a third-country national has requested international protection. Nonetheless, it is not necessary for the written document prepared for that purpose to have a precisely defined form or that it includes additional information relevant to the application of the criteria laid down by the Dublin III Regulation or, a fortiori, to the examination of the application for international protection. Nor is it necessary, at that stage of the procedure, for a personal interview to have been organised. The effectiveness of certain important guarantees granted to applicants for international protection would be restricted if the receipt by the competent authority (here, the Office) of a written document, such as the certificate of registration at issue, was not sufficient to demonstrate that an application for international protection has been lodged. Furthermore, such an approach could affect the Dublin system by calling into question the special status which it grants to the first Member State in which an application for asylum is lodged. In addition, the transmission of the main information contained in such a document to the competent authority must be considered to be a transmission to that authority of the original or a copy of that document. Such transmission is

[46] The lodging of which starts the three-month period.

therefore sufficient to establish that an application for international protection is deemed to have been lodged.

Judgment of 25 October 2017 (Grand Chamber), Shiri (C-201/16, EU:C:2017:805)

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national – Article 27 – Remedy – Scope of the judicial review – Article 29 – Time limit for carrying out the transfer – No transfer within the time limit laid down – Obligations of the Member State responsible – Transfer of responsibility – Requirement for a decision of the Member State responsible)

Mr Shiri, an Iranian national, brought a challenge before the Austrian courts in relation to the decision refusing his application for international protection in Austria and his removal to Bulgaria. Bulgaria, the country via which he had entered the European Union and in which he had also lodged such an application, had previously agreed to take him back. Mr Shiri submitted that, pursuant to the Dublin III Regulation, Austria is now responsible for examining his application because he was not transferred to Bulgaria within a period of six months from the Bulgarian authorities' agreement to take him back.

The referring court asked the Court of Justice whether, under the Dublin III Regulation, the expiry of the six-month period in question is sufficient in itself to result in such a transfer of responsibility between Member States. If necessary, it also sought to ascertain whether an applicant for international protection can invoke such a transfer of responsibility before a court or tribunal.

In that regard, the Court ruled that, where the transfer does not take place within the six-month time limit, responsibility is transferred automatically to the Member State which requested that charge be taken of the person concerned (in the present instance, Austria), without it being necessary for the Member State responsible (in the present instance, Bulgaria) to refuse to take charge of, or take back, that person. That solution is not only apparent from the wording of the Dublin III Regulation, but is also consistent with the objective of the rapid processing of applications for international protection. Such a solution ensures that, in the event of a delay in the take charge or take back procedure, the examination of the application for international protection will be carried out in the Member State where the applicant is, so as not to delay that examination further.

In addition, the Court held that an applicant for international protection can rely on the expiry of the six-month period. That is true irrespective of whether that period expired before or after the transfer decision was adopted. The Member States are obliged to provide in that regard for an effective and rapid remedy. The Court explained in that context that, where the six-month period has expired after the date on which a transfer decision was adopted, the competent authorities of the requesting Member State (in the

present instance, Austria) cannot carry out the transfer of the person concerned to another Member State. On the contrary, they are required to take, on their own initiative, the necessary measures to acknowledge the responsibility which is transferred to them and to initiate without delay the examination of the application for international protection lodged by the person concerned.

The Court also stated that the right, provided for by Austrian legislation, to plead circumstances subsequent to the adoption of the transfer decision, in an action brought against that decision, amounts to an effective and rapid remedy enabling the expiry of the transfer period to be relied upon.

Judgment of 13 November 2017 (Grand Chamber), X (C-47/17 and C-48/17, EU:C:2018:900)

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Regulation (EC) No 1560/2003 – Determination of the Member State responsible for examining an application for international protection – Criteria and mechanisms for determination – Request to take charge of or take back an asylum seeker – Negative reply from the requested Member State – Re-examination request – Article 5(2) of Regulation No 1560/2003 – Time limit for replying – Expiry – Effects)

The disputes in the main proceedings concerned a Syrian national and an Eritrean national, who had each lodged an application for the grant of a temporary (asylum) residence permit in the Netherlands, after having already lodged an application for international protection in another State (in Germany and in Switzerland respectively), the Eritrean national having arrived via Italy (where it was not established that he had lodged an application for international protection). Pursuant to Article 18(1)(b) of the Dublin III Regulation, the Netherlands authorities made requests to the German, Swiss and Italian authorities to take back the persons concerned. After those requests had been rejected, the Netherlands authorities submitted re-examination requests to the German and Italian authorities on the basis of Article 5(2) of Implementing Regulation No 1560/2003, but no response was made or a response was made only after the period of two weeks laid down in that provision.

In Case C-47/17, the applicant argued that if the requested Member State responds, within the period prescribed, in the negative to the take back request, responsibility rests, from that moment, with the requesting Member State. In Case C-48/17, the parties to the main proceedings are in dispute as to whether the State Secretary did or did not become responsible for examining the application for the grant of a temporary (asylum) residence permit lodged by the applicant in the main proceedings because of the fact that the Italian authorities, after initially rejecting the take back request made by the State Secretary, did not reply to the re-examination request within the prescribed period. Consequently, the referring court requested a preliminary ruling from the Court of Justice, asking whether a Member State which has received a take charge or take back request under Article 21 or Article 23 of the Dublin III Regulation, which has replied in

the negative to that request within the time limits laid down in Article 22 or Article 25 of that regulation and which, thereafter, has received a re-examination request under Article 5(2) of the Implementing Regulation, must reply to the latter request within a certain period of time. The referring court also sought to ascertain what that period of time is, according to the circumstances, and what the consequences are if the requested Member State fails to reply, within that period, to the requesting Member State's re-examination request.

After recalling that the EU legislature had, in the Dublin III Regulation, provided a set of mandatory time limits as a framework for the procedures for the processing of take charge and take back requests by the requested Member State, the Court stated that the mechanism set out in Article 5(2) of Implementing Regulation No 1560/2003, by which the requesting Member State may make a request for re-examination to the requested Member State, after the latter has refused to accept the take charge or take back request, constitutes an 'additional procedure', of an optional nature, the length of which must be strictly and foreseeably circumscribed. According to the Court, a re-examination procedure that is restricted only by a 'reasonable' period of time for reply, or that is of indefinite duration, would be incompatible with the objectives of the Dublin III Regulation, particularly the objective of rapid processing of applications for international protection.

Consequently, the Court held that Article 5(2) of Implementing Regulation No 1560/2003 must be interpreted as meaning that the Member State which receives a take charge or take back request under Articles 21 and 23 of the Dublin III Regulation, which, after making the necessary checks, has replied, in detail and stating full reasons, in the negative to that request within the time limits laid down in Articles 22 and 25 of that regulation and which, thereafter, receives a re-examination request within the time limit of three weeks provided for in Article 5(2) of Implementing Regulation No 1560/2003 must endeavour, in the spirit of sincere cooperation, to reply to the re-examination request within the period of two weeks laid down in that provision. Where the requested Member State does not reply to the re-examination request within that period of two weeks, the additional re-examination procedure shall be definitively terminated, with the result that the requesting Member State must, as from the expiry of that period, be considered to be responsible for the examination of the application for international protection, unless it still has available to it the time needed to lodge, within the mandatory time limits laid down for that purpose in Article 21(1) and Article 23(2) of the Dublin III Regulation, a further take charge or take back request.

2.3. Review of the transfer decision in the event of take back

Judgment of 2 April 2019 (Grand Chamber), H. (C-582/17, EU:C:2019:280)

(Reference for a preliminary ruling – Determination of the Member State responsible for examining an application for international protection – Regulation (EU) No 604/2013 – Article 18(1)(b) to (d) – Article 23(1) – Article 24(1) – Take back procedure – Criteria for determining responsibility – New application lodged in another Member State – Article 20(5) – Ongoing determination process – Withdrawal of the application – Article 27 – Remedies)

The Netherlands authorities had requested the German authorities to take back two Syrian nationals who had lodged a first application for international protection in Germany, before leaving that State and submitting a new application in the Netherlands. The persons concerned had relied on the presence in the Netherlands of their respective spouses, who are beneficiaries of international protection, but the Netherlands authorities refused to consider those claims and therefore to examine their applications on the ground that in a take back procedure an applicant is not entitled to rely on Article 9 of the Dublin III Regulation.

The referring court asked the Court of Justice whether, before making a take back request in respect of an applicant for international protection, the competent authorities are required to determine the Member State responsible for examining his or her application, inter alia on the basis of the criterion for determining responsibility provided for in Article 9 of the Dublin III Regulation.

In that context, the Court noted that the take charge procedure is applicable to the persons referred to in Article 20(5) or in Article 18(1)(b) to (d) of the Dublin III Regulation, before stating that the situation in which a third-country national lodges an application for international protection in a first Member State, then leaves that State and lodges a new application in a second Member State falls within the scope of that procedure, irrespective of whether the application lodged in the first Member State has been withdrawn or whether the examination of that application in accordance with the Procedures Directive has already started in that Member State.

The Court then stated that, although the fact that a transfer decision was adopted at the end of a take charge or take back procedure is not capable of influencing the scope of the right to an effective remedy against such a decision, as guaranteed by Article 27(1) of the Dublin III Regulation, those two procedures are nevertheless subject to different schemes, that difference being reflected in the provisions of that regulation which may be relied on in support of such a remedy. In the framework of the take charge procedure, the process of determining the Member State responsible for examining the application for international protection on the basis of the criteria set out in Chapter III of the Dublin III Regulation is of crucial importance and the Member State in which such an application has been lodged may send another Member State a request for charge to

be taken of the applicant only where it considers that that other Member State is responsible for examining that application. By contrast, in the take back procedure those criteria determining responsibility are not relevant as it is important only that the requested Member State fulfils the conditions laid down in Article 20(5) (namely that it is the Member State with which that application for international protection was first lodged and in which the process of determining the Member State responsible for examining that application is ongoing) or in Article 18(1)(b) to (d) of the Dublin III Regulation (namely that it is the Member State which received the first application and which, at the end of the process for determining the Member State responsible, accepted its own responsibility for examining that application).

The Court added that the lack of relevance, in the take back procedure, of the criteria for determining responsibility set out in Chapter III of the Dublin III Regulation is borne out by the fact that, while Article 22 of that regulation sets out in detail how those criteria must be applied in the framework of the take charge procedure, Article 25, which concerns the take back procedure, contains no similar provision and merely requires the requested Member State to make the necessary checks in order to give a decision on the take back request. [47]

The Court then pointed out that the opposite interpretation, according to which such a request may be made only if the requested Member State can be designated as the Member State responsible pursuant to the criteria for determining responsibility set out in Chapter III of the Dublin III Regulation, is at variance with the general scheme of that regulation, which sought to establish two separate procedures (the take charge procedure and the take back procedure), applicable to different situations and governed by different provisions. That opposite interpretation would also be liable to undermine the achievement of the objective of the Dublin III Regulation of preventing secondary movements of applicants for international protection, in so far as it would imply that the competent authorities of the Member State in which the second application was lodged could, de facto, re-examine the conclusion reached, at the end of the process for determining the Member State responsible for examining the application, by the competent authorities of the first Member State regarding its own responsibility. It could, moreover, have the consequence of undermining the essential principle of the Dublin III Regulation, set out in Article 3(1), according to which an application for international protection must be examined by a single Member State only.

In conclusion, the Court held that the criteria for determining responsibility set out in Chapter III of the Dublin III Regulation may not be relied on in support of an action brought against a transfer decision adopted in the framework of a take back procedure. However, since the criteria for determining responsibility set out in Articles 8 to 10 of the Dublin III Regulation are intended to promote the best interests of the child and the

[47] In that regard, see also judgment of 30 November 2023, *Ministero dell'Interno and Others (Common leaflet – Indirect refoulement)* (C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21, EU:C:2023:934), in particular paragraphs 95 to 102.

family life of the persons concerned, where the person concerned has provided the competent authority of the second Member State with information clearly establishing that it should be regarded as the Member State responsible pursuant to the criterion set out in Article 9 of the Dublin III Regulation, that Member State must, in accordance with the principle of sincere cooperation, accept its own responsibility in a situation covered by Article 20(5) of the Dublin III Regulation (namely where the process for determining the Member State responsible has not yet been completed in the first Member State). Therefore, in such a situation, the third-country national may, by way of exception, invoke that criterion in an action against a decision to transfer him or her.

2.4. Review of the decision to take charge of an unaccompanied minor

Judgment of 1 August 2022, Staatssecretaris van Justitie en Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor) (C-19/21, EU:C:2022:605)

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Criteria and mechanisms for determining the Member State responsible for examining an application for international protection – Article 8(2) and Article 27(1) – Unaccompanied minor with a relative legally present in another Member State – Refusal by that Member State of that minor's take charge request – Right to an effective remedy of that minor or of that relative against the refusal decision – Articles 7, 24 and 47 of the Charter of Fundamental Rights of the European Union – Best interests of the child)

When he was still a minor, I, an Egyptian national, submitted an application for international protection in Greece, in which he expressed his wish to be united with S, his uncle, also an Egyptian national, who was legally resident in the Netherlands. In the light of those circumstances, the Greek authorities submitted a take charge request to the Netherlands authorities in respect of I, on the basis of the provision of the Dublin III Regulation under which, where it is in the best interests of the unaccompanied minor, the Member State responsible for examining his or her application is to be the one where a family member who is able to take care of him or her is legally resident. However, the State Secretary rejected that application, as well as the request for re-examination.

I and S also submitted an objection, which the State Secretary rejected as manifestly inadmissible on the ground that the Dublin III Regulation does not provide for the possibility for applicants for international protection to challenge a decision rejecting a take charge request. Consequently, I and S brought an action against that decision before the rechtbank Den Haag (District Court, The Hague, Netherlands), claiming that they each had the right to bring such judicial proceedings under Article 27(1) of the Dublin III Regulation.

In that context, the District Court of The Hague questioned the Court of Justice concerning the legal remedies available to an unaccompanied minor, an applicant for

international protection, and his or her relative, against a decision rejecting a take charge request.

The Court, sitting as the Grand Chamber, held that Article 27(1) of the Dublin III Regulation, read in conjunction with Articles 7, 24 and 47 of the Charter, requires the Member State to which a take charge request has been made to grant a right to a judicial remedy against its refusal decision to the unaccompanied minor who applies for international protection, but not to the relative of that minor.

As a preliminary point, the Court noted that, although, based on a literal interpretation, Article 27(1) of the Dublin III Regulation appears to grant the applicant for international protection a right to a remedy only for the purpose of challenging a transfer decision, the wording of that provision nevertheless does not exclude the possibility that an unaccompanied minor applicant may also be granted a right to a remedy for the purpose of challenging a decision to refuse a take charge request based on Article 8(2) of the Dublin III Regulation.

In order to determine whether Article 27(1) of the Dublin III Regulation, read in the light of Articles 7, 24 and 47 of the Charter, requires that there be a remedy against such a decision refusing a take charge request, that provision must be interpreted taking into account not only its wording but also its objectives, its general scheme and its context, and in particular its evolution in connection with the system of which it forms part.

In that regard, the Court noted that, in accordance with the first paragraph of Article 47 of the Charter, everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy, in compliance with the conditions laid down in that article. That right corresponds to the obligation imposed on the Member States, in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

As regards the determination of the Member State responsible for examining the application for international protection and compliance with the binding responsibility criterion, set out in Article 8(2) of the Dublin III Regulation, the Court observed that the judicial protection of an unaccompanied minor applicant cannot vary depending on whether that applicant is the subject of a transfer decision, taken by the requesting Member State, or a decision by which the requested Member State refuses the request to take charge of that applicant. Those decisions are both liable to undermine the right, which the unaccompanied minor derives from that article, to be united with a relative who can take care of him or her, for the purposes of the examination of his or her application for international protection. It follows that the minor concerned must be allowed, in both cases, in accordance with the first paragraph of Article 47 of the Charter, to bring proceedings to plead the infringement of that right.

In the present case, in accordance with Article 27(1) of the Dublin III Regulation, if I, after arriving in Greece, had travelled to the Netherlands and made his application for international protection there, and the Greek authorities had agreed to take charge of

him as the Member State of first arrival, he would undoubtedly have been entitled to bring legal proceedings against the transfer decision adopted by the Netherlands authorities on the ground that one of his relatives was resident in the Netherlands.

In such a case, he could thus effectively plead the infringement of the right he derives as an unaccompanied minor under Article 8(2) of the Dublin III Regulation. By contrast, if Article 27(1) of the Dublin III Regulation were to be interpreted literally, an applicant who remains in the Member State of entry and makes his or her application for international protection there would be deprived of that possibility since, in that situation, no transfer decision is adopted.

The Court concluded that an unaccompanied minor applicant must be able to exercise a judicial remedy, under Article 27(1) of the Dublin III Regulation, not only where the requesting Member State adopts a transfer decision, but also where the requested Member State refuses to take charge of the person concerned, in order to be able to plead an infringement of the right conferred by Article 8(2) of that regulation, particularly since that regulation seeks to ensure full respect for the fundamental rights of unaccompanied minors, guaranteed in Articles 7 and 24 of the Charter.

However, Article 27(1) of that regulation does not confer on the applicant's relative, who resides in the requested Member State, a right to a remedy against such a rejection decision. Furthermore, since neither Article 7 nor Article 24(2) of the Charter, nor Article 8(2) of the Dublin III Regulation confer on him any rights on which he could rely in legal proceedings, that relative similarly cannot derive a right to a remedy against such a decision on the basis of Article 47 of the Charter alone.

2.5. No possibility of pleading circumstances subsequent to the adoption of a transfer decision

Judgment of 15 April 2021, État belge (Circumstances subsequent to a transfer decision) (C-194/19, EU:C:2021:270)

(Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection – Article 27 – Remedy – Whether account should be taken of circumstances subsequent to the transfer decision – Effective judicial protection)

H. A., a third-country national, made an application for asylum in Belgium. However, since the Spanish authorities agreed to take charge of him, his application was rejected and a decision to transfer him to Spain was adopted. Shortly afterwards, H. A.'s brother also arrived in Belgium, where he lodged an application for asylum. H. A. then brought an action against the transfer decision made in his case, claiming, in particular, that their respective asylum applications should be examined together.

That action was dismissed on the ground that H. A.'s brother arrived in Belgium after the adoption of the disputed decision and that that circumstance could not therefore be taken into consideration in the assessment of the lawfulness of that decision. H. A. lodged an appeal on a point of law before the Conseil d'État (Council of State, Belgium), alleging infringement of his right to an effective remedy, as follows from the Dublin III Regulation [48] and Article 47 of the Charter. Irrespective of the question whether the arrival of his brother was in fact capable of having any bearing on the identity of the Member State responsible for examining H. A.'s asylum application, [49] the Conseil d'État must determine whether an applicant for asylum must be able to rely on circumstances subsequent to the adoption of a transfer decision relating to him or her. It decided to put that question to the Court of Justice.

In a Grand Chamber judgment, the Court ruled that EU law [50] precludes national legislation which provides that the court or tribunal seised of an action for annulment of a transfer decision may not, in the context of the examination of that action, take account of circumstances subsequent to the adoption of that decision which are decisive for the correct application of the Dublin III Regulation. The position is otherwise if that legislation provides for a specific remedy that may be exercised after such circumstances have arisen, provided that that remedy allows for an *ex nunc* examination of the situation of the person concerned, the results of which are binding on the competent authorities.

In reaching that conclusion, the Court recalled that the Dublin III Regulation [51] provides that a person who is the subject of a transfer decision is to have the right to an effective remedy against that decision and that that remedy must cover, inter alia, the examination of the application of that regulation. It also recalled that it has previously held that an applicant for international protection must have an effective and rapid remedy available to him or her which enables that applicant to rely on circumstances subsequent to the adoption of a transfer decision, where consideration of those circumstances is decisive for the correct application of the Dublin III Regulation. [52]

However, the Court emphasised that the Member States are not required to organise their systems of legal remedies in such a way that compliance with the requirement to take such circumstances into account takes place within the framework of the examination of the action brought to call into question the lawfulness of the transfer decision. The EU legislature has harmonised only some of the procedural rules governing the right to a remedy against the transfer decision and the Dublin III Regulation does not specify whether it necessarily means that the court or tribunal seised may carry out an *ex nunc* examination of the lawfulness of the transfer decision. Therefore, in accordance with the principle of procedural autonomy, it is for each

48 Article 27 of that regulation.
49 See the definition of 'family members' in Article 2(g) of the Dublin III Regulation, and Article 10 of that regulation.
50 Article 27(1) of the Dublin III Regulation, read in the light of recital 19 of the regulation and Article 47 of the Charter.
51 Article 27(1) and recital 19 of the Dublin III Regulation.
52 See judgments of 25 October 2017, *Shiri* (C-201/16, EU:C:2017:805) and of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35).

Member State to establish those rules, on condition that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).

In the present case, as regards more specifically the principle of effectiveness, the Court stated that an action for annulment brought against a transfer decision, in the context of which the court or tribunal seised cannot take account of circumstances subsequent to the adoption of that decision which are decisive for the correct application of the Dublin III Regulation, does not ensure sufficient judicial protection in that it does not enable the person concerned to exercise his or her rights under that regulation and Article 47 of the Charter. However, the Court added that such protection may be afforded, in the context of the national judicial system viewed as a whole, by a specific remedy that is distinct from an action seeking to have the lawfulness of a transfer decision reviewed and which enables such circumstances to be taken into account. That specific remedy must, however, ensure that the person concerned has the opportunity to prevent the competent authorities of the requesting Member State from being able to carry out the transfer of that person, where a circumstance arising after the transfer decision precludes its implementation. That remedy must also ensure, when a subsequent circumstance means that the requesting Member State is responsible for examining the application for international protection, that the competent authorities of that Member State are obliged to take the measures necessary to acknowledge that responsibility and to initiate that examination without delay. Furthermore, the exercise of that specific remedy must not be made conditional on the person concerned having been deprived of his or her liberty or on the fact that implementation of the transfer decision is imminent.

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