



Press and Information

Court of Justice of the European Union

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Opinions of the Advocate General in Joined Cases
C-411/10 N.S. v Secretary of State for the Home Department
and C-493/10 M.E. and Others v Refugee Applications Commissioner and
Minister for Justice, Equality and Law Reform

According to Advocate General Trstenjak, asylum seekers may not be transferred to other Member States if they could there face a risk of serious breach of the fundamental rights which they are guaranteed under the Charter of Fundamental Rights

In this context, the transferring Member State may proceed on the assumption that those rights will be respected; if that assumption is shown to be misplaced, however, that Member State is under an obligation to exercise its right to assume responsibility for examining the asylum application itself

The Common European Asylum System sets out the criteria governing the distribution, as between Member States, of responsibilities in asylum cases under Regulation No 343/2003¹. Under that regulation, only one Member State is, in principle, responsible for dealing with an asylum application submitted within the European Union. If a third-country national has applied for asylum in a Member State which, according to Regulation No 343/2003, is not primarily responsible for examining that application, the regulation sets out mechanisms for the transfer of the asylum seeker to the responsible Member State. In addition, the regulation accords Member States the right, by way of derogation from the normal rules governing responsibility, to take on, in place of the Member State having primary responsibility, the examination of an asylum application which has been lodged in their territory².

In Case C-411/10, Mr N.S., an Afghan national, was arrested in Greece on 24 September 2008. He did not apply for asylum in Greece. Following his detention, Mr N.S. was ordered to leave Greece within 30 days and was subsequently expelled to Turkey. Following his escape from his place of detention in Turkey, he travelled ultimately to the United Kingdom, where he arrived on 12 January 2009 and where he claimed asylum on the same day. Mr N.S. was informed on 30 July 2009 that, in accordance with the requirements under Regulation No 343/2003, he was to be transferred to Greece on 6 August 2009. He has challenged that decision.

Case C-493/10 concerns the actions brought by five asylum seekers³ in Ireland challenging decisions to have them transferred to Greece for the purpose of examination of their asylum applications. All of the claimants travelled through Greece and were there arrested for illegal entry. They left Greece, without applying for asylum, and travelled to Ireland, where they made applications for asylum.

The courts before which the respective proceedings have been brought – in Case C-411/10, the Court of Appeal of England and Wales and, in Case C-493/10, the High Court (Ireland) – have clear evidence before them that, if the asylum seekers are transferred to Greece, there is a risk that their fundamental and human rights may be breached. In the light of the overloading of the Greek asylum system and the effects which this has on the treatment of asylum seekers and on the examination of their applications, those national courts are therefore essentially seeking to

¹ Council Regulation 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).

² Article 3(2) of Regulation No 343/2003.

³ The claimants state that they come from Afghanistan, Iran and Algeria.

ascertain from the Court of Justice whether and, if so, under what conditions it might be appropriate, or even obligatory, under EU law, for the United Kingdom and Ireland, notwithstanding the primary responsibility of Greece, themselves to undertake the examination of those asylum applications.

In her Opinions delivered today, Advocate General Verica Trstenjak first of all establishes **that, when determining whether to examine an asylum application for which it is not responsible, on the ground that another Member State is responsible according to the criteria laid down in the regulation, a Member State is required to have regard for the provisions of the Charter of Fundamental Rights.** In her view, such a determination constitutes an implementation by a Member State of a provision of EU law⁴ in which the Member States are required to have regard for the rights laid down in the Charter.

Proceeding on the basis of the information provided by the referring courts, the Advocate General then goes on to state that the Greek asylum system is under considerable pressure due to overburdening, as a result of which it can no longer always be guaranteed that asylum seekers will be treated and their applications reviewed in compliance with the requirements of EU law. For that reason it cannot be ruled out that asylum seekers who are transferred to Greece may, following their transfer, be treated in a manner which is incompatible with the provisions of the Charter of Fundamental Rights⁵.

Advocate General Trstenjak is of the view that **if there is a serious risk that the fundamental rights, under the Charter of Fundamental Rights, of the asylum seeker to be transferred may be breached in the Member State having primary responsibility, the other Member States may not transfer an asylum seeker to that Member State. Rather, the other Member States are, in principle, obliged to exercise the right to assume responsibility under Regulation No 343/2003 and must themselves examine the asylum application.** This obligation to exercise the right to assume responsibility arises, in the view of Advocate General Trstenjak, first, from the obligation on Member States to apply Regulation No 343/2003 in a manner which respects fundamental rights. Second, the obligation arises from the fact that the transfer of asylum seekers to a Member State in which there is a serious risk that the fundamental rights guaranteed to them under the Charter of Fundamental Rights may not be respected also constitutes, in principle, a breach of those fundamental rights on the part of the transferring Member State. By exercising the right to assume responsibility itself, the transferring Member State eliminates entirely the threat of a breach of the Charter of Fundamental Rights and applies Regulation No 343/2003 in a manner which is consistent with fundamental rights.

From this the Advocate General also concludes **that the transferring Member State must, before it transfers an asylum seeker, determine whether that asylum seeker will be exposed, in the Member State which is primarily responsible, to a serious risk that the rights guaranteed to him under the Charter of Fundamental Rights will be violated.** Member States may, in carrying out that determination, proceed on the basis of the **rebuttable presumption that the asylum seeker's fundamental rights will be respected in the Member State which is primarily responsible.** They are not required actively to establish, prior to the transfer of each asylum seeker, that the asylum seeker's rights, as enshrined in the Charter of Fundamental Rights, are in fact guaranteed in the receiving Member State.

In the context of Case C-411/10, the Advocate General further establishes that Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, which is annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, cannot be regarded as constituting a general opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland. The provisions of the Charter of Fundamental Rights which are relevant to the present proceedings thus apply without restriction in the legal systems of the United Kingdom.

⁴ Within the terms of Article 51(1) of the Charter.

⁵ Articles 1, 4, 18 and 19(2) of the Charter may be of relevance in the present context.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in these cases. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinions is published on the CURIA website on the day of delivery.

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