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Press and Information

Advocate General's Opinion in Cases C-490/16 and C-646/16
A.S. v Republic of Slovenia and Jafari v Bundesamt für Fremdenwesen und Asyl

In the exceptional circumstances of the refugee crisis, Advocate General Sharpston considers that the Member States in which applications for international protection were first lodged are responsible for examining those applications

The words 'irregular crossing' in the Dublin III Regulation do not cover a situation where, as a result of the mass inflow of people into border Member States, those countries allowed third-country nationals to enter and transit through their territory in order to reach other Member States

In 2015, over 1 million people – refugees, displaced persons and other migrants – made their way to the EU. Many of these people sought international protection. It was the greatest mass movement of persons across Europe since the Second World War and constitutes the wholly exceptional circumstances that form the background to these two cases.

The Western Balkan migrant route is the one at issue in these proceedings. That route involves a journey by sea and/or by land from Middle-Eastern countries to Turkey, westwards to Greece, and then into the Western Balkans (FYR Macedonia, Serbia, Croatia, Hungary and Slovenia).

Case C-490/16 A.S.

Mr A.S., a Syrian national, travelled from Syria to Slovenia via the Western Balkan route. Upon his arrival at the designated crossing point of the national border between Serbia and Croatia, Mr A.S. was allowed to enter Croatia and the Croatian authorities organised his onward transport to the Slovenian national border.

In February 2016, Mr A.S. lodged an application for international protection with the Slovenian authorities. In accordance with the Dublin III Regulation[1], where it is established that an applicant for international protection has 'irregularly crossed' the border into a Member State from a third country, the Member State entered into shall be responsible for examining the application. The Slovenian authorities took the view that Mr A.S. had entered Croatia 'irregularly', within the meaning of the Regulation and that Croatia was therefore the Member State responsible for examining Mr A.S.'s application. Croatia agreed to take back Mr A.S. and the Slovenian authorities informed Mr A.S. of this decision.

Mr A.S. challenged the decision of the Slovenian authorities on the grounds that the criteria for determining the Member State responsible had been wrongfully applied since the Croatian authorities' conduct (allowing him to cross the external border) must be interpreted as meaning that Mr A.S. entered Croatia lawfully. The Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia) seeks clarification from the Court of Justice on how the terms of irregular or unlawful entry are to be applied in this context.

Case C-646/16 Jafari

Ms Khadija Jafari and Ms Zainab Jafari and their children are nationals of Afghanistan. (83) The families fled from Afghanistan in 2015 to Austria via the Western Balkan route. They initially

[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).

entered EU territory in Greece where they stayed for three days before leaving EU territory and re-entering in Croatia. Upon reaching Austria, the Jafari families made an application for international protection.

The Austrian authorities considered that Croatia was the Member State responsible for examining that application. They considered that the families' first entry into the EU via Greece had been irregular since, as Afghan nationals, they were required to have visas. However, as Greece had ongoing systemic failings in its asylum procedure, in accordance with the Dublin III Regulation Croatia (entered en route to Austria) was to be regarded as the Member State responsible.

The Jafari sisters challenged that conclusion. They argue that their entry was authorised on humanitarian grounds in accordance with the Schengen Borders Code[2] and was not therefore 'irregular'. As such, they consider that Austria is the Member State responsible for examining their application.

The Verwaltungsgerichtshof Wien (Supreme Administrative Court, Vienna) seeks guidance from the Court of Justice as to whether the concept of 'irregular crossing' of the border should be interpreted independently or by reference to other EU acts relating to third-country nationals who cross the EU external border, such as the Schengen Borders Code.

The questions referred to the Court of Justice in the two cases are: (i) whether the Dublin III Regulation should be interpreted in conjunction with other EU acts; (ii) did the cooperation and facilities provided by the EU transit States amount to visas within the meaning of that regulation; (iii) how the phrase 'irregularly crossed the border' should be interpreted; (iv) whether third-country nationals who were allowed to enter the Schengen area during the humanitarian crisis fall within the exceptions to the normal rules in the Schengen Borders Code; and (v) what constitutes 'visa waived entry' within the meaning of the Dublin III Regulation.

In today's Opinion, Advocate General Eleanor Sharpston reiterates the exceptional factual context in which these cases have been referred and comments that the Court is asked to provide a legal solution to fit the unprecedented factual circumstances of the refugee crisis.

First, the Advocate General considers that the **Dublin III Regulation should be interpreted by reference to the wording, context and objectives of that Regulation alone**, rather than in conjunction with other EU acts – specifically the Schengen Borders Code and the Return Directive[3]. In reaching this conclusion, the Advocate General notes that the Dublin III Regulation is an integral part of the Common European Asylum System and thus has a different purpose to that of acts such as the Schengen Borders Code and the Return Directive. Also, there is no common legal basis for the three acts – that would indicate that their context and objectives are not entirely the same.

Second, the Advocate General takes the view that, in the wholly exceptional circumstances of a mass inflow of third-country nationals where **certain Member States allowed the persons concerned to cross the external border of the EU and subsequently to travel through to other Member States in order to lodge an application for international protection, this does not equate to the issuance of a 'visa'**. She highlights, in that regard, that the rules governing the issuing of visas involve compliance with a number of formalities, none of which were met in these cases.

Third, the Advocate General concludes that **the words 'irregular crossing' in the Dublin III Regulation do not cover a situation where**, as a result of a massive inflow of third-country nationals seeking international protection within the European Union, **Member States allow the third-country nationals to cross the external border of the European Union and**

[2] 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 (Schengen Borders Code) (OJ 2006 L 105, p.1).

[3] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

subsequently travel through other EU Member States in order to lodge an application for international protection in a particular Member State.

The Advocate General recalls that the purpose behind Article 13(1) of the Regulation, which states that the Member State responsible for examining an application for international protection is the one into which a third-country national irregularly crossed, is to ensure that Member States are vigilant in guaranteeing the integrity of the external EU border. However, in her view, the Regulation is not aimed at ensuring a sustainable sharing of responsibility for applicants for international protection across the European Union in response to an exceptional inflow of persons: the background to these references.

In those circumstances, **while the entry of Mr. A.S. and the Jafari families into the EU territory cannot be said to be 'regular', in the Advocate General's opinion it can neither be classified as 'irregular' within the meaning of the Regulation**. **This is particularly so given that the transit EU Member States not only tolerated the mass border crossings, they actively facilitated both entry into and transit across their territories.** In the Advocate General's view, **the Regulation was simply not designed to cover such exceptional circumstances** and therefore the words 'irregularly crossed' do not cover the circumstances arising in the cases referred.

Fourth, the Advocate General takes the view that, **in the exceptional circumstances of the cases at issue, a Member State would have been able to apply the derogation in the Schengen Borders Code which allows it to authorise third-country nationals to cross the external border on humanitarian grounds**, or because of international obligations. The Advocate General does not consider it necessary for the Member State to have conducted an individual assessment in relation to the person concerned since, in her view, that requirement is not a prerequisite for the derogation to be relied upon.

Finally, the **Advocate General rejects the idea that, in the circumstances of the case, the authorisation of third-country nationals to enter the territory of the EU Member States constitutes visa waived entry for the purposes of the Dublin III Regulation**. She considers that, apart from the express exceptions set out in EU law, there are no other circumstances in which a third-country national may be exempted from the requirement to possess a visa. Further, Member States cannot unilaterally disapply on additional grounds the general requirement for certain third-country nationals to possess a visa for entry into the European Union, particularly in circumstances where no individual assessment has been carried out by that Member State.

Having reached the above conclusions, the Advocate General considers the application of the Regulation to the two cases at issue. She reiterates the unprecedented inflow of persons into the Western Balkans[4] and the fact that no bespoke criterion was inserted into the Dublin III Regulation to cover that situation. In the Advocate General's opinion, **if border Member States, such as Croatia, are deemed to be responsible for accepting and processing exceptionally high numbers of asylum seekers, there is a real risk that they will simply be unable to cope with the situation**. This in turn could place Member States in a position where they are unable to comply with their obligations under EU and international law.

Accordingly, in view of the Regulation's aim to allocate responsibility clearly among Member States for the examination of applications for international protection, and the fact that in neither case has the Member State in which the applications were lodged assumed voluntary responsibility, **those applications should be examined by the first Member State in which those applications are lodged, as provided in Article 3(2) of the Dublin III Regulation.**

The Advocate General concludes that **Slovenia is the Member State responsible for examining Mr A.S.'s application** for international protection and **Austria is the Member State responsible for examining the Jafari families' applications**.

[4] Between 16 September 2015 and 5 March 2016 a total of 685 068 people entered Croatia.

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 this case. 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.

The full text of the Opinios in cases C-490/16 and C-646/16 are published on the CURIA website on the day of delivery.

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