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Press and Information

Advocate General's Opinion in Case C-670/16
Tsegezab Mengesteab v Bundesrepublik Deutschland

Advocate General Sharpston considers that an applicant for international protection can challenge a Member State's decision to transfer him to another Member State on the basis that the 'take charge request' sent by the first Member State was not made within the time limits set out under EU law

In the Advocate General's opinion, the Dublin III Regulation, the relevant legislation, is no longer a purely inter-State mechanism and the operation of time limits has substantive implications for the applicants and the Member States concerned

Mr Tsegezab Mengesteab is an Eritrean national. He first entered EU territory in Italy on 4 September 2015 by crossing the Mediterranean Sea from Libya. He arrived in Germany on 12 September 2015, having travelled overland from Italy, and sought asylum. In accordance with national rules, on 14 September 2015 the German authorities provided Mr Mengesteab with an attestation in response to his informal request for asylum. On 22 July 2016, Mr Mengesteab lodged a formal application for international protection with the competent German authority (the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees)).

Under the Dublin III Regulation[1], where a non-EU national lodges an application for international protection in one Member State and that Member State considers that another Member State is responsible for examining that application, the first Member State can make a 'take charge request'. The second Member State will then become responsible for examining the application if it either (a) accepts the request; or (b) does not respond to the request within the prescribed time limit. Take charge requests must be made as quickly as possible or at the latest within three months of the date on which the application for international protection was lodged.

On 19 August 2016 the German authorities checked the Eurodac database, which showed that Mr Mengesteab's fingerprints had been taken in Italy but that he had not made an application for international protection there. The German authorities considered that, in accordance with the Regulation, Italy was the Member State responsible for examining Mr Mengesteab's application since he had irregularly crossed the EU external border into that Member State. The German authorities therefore made a take charge request to their Italian counterparts on the same day.

By decision of 10 November 2016, the German authorities refused Mr Mengesteab's application for international protection on the basis that Italy was responsible for examining his application. Mr Mengesteab was also informed that he would be transferred to Italy.

Mr Mengesteab has challenged that decision before the German courts. He argues that Germany is responsible for examining his application because the take charge request was made after the expiry of the three-month time limit set out in the Regulation. In his view, time for making the take charge request started to run once he had made his informal request for asylum on 14 September 2015. In his view, this remains the case where there is a positive Eurodac hit, as the shorter two-month period which applies in such circumstances is meant to speed up the take charge procedure.

[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).

The German authorities assert that the time limits do not establish individual rights which can be relied upon on appeal by applicants. In addition, they consider that the time limits do not start to run until a formal application for asylum has been lodged.

The Verwaltungsgericht Minden (Administrative Court, Minden, Germany), before which the case has been brought, seeks guidance from the Court of Justice as to the correct interpretation of the Regulation. In particular, it asks whether applicants for international protection can challenge the operation of the time limits in the Regulation and, if so, what constitutes the lodging of an application for international protection from which those time limits run.

In today's Opinion, Advocate General Eleanor Sharpston first notes that the questions referred are premised on the assumption that Mr Mengesteab's entry into the EU was irregular. The German authorities therefore concluded that the Member State whose external border Mr Mengesteab irregularly crossed (Italy) is responsible for examining his application for international protection. She queries in passing whether such an assumption will always be correct.

The Advocate General then considers that the Regulation should be interpreted as meaning that **an applicant for international protection is entitled to bring an appeal against a transfer decision made as a result of a take charge request when the Member State did not comply with the time limits in the Regulation when submitting such a request**.

First, the Advocate General notes that **the various time limits set out in the Regulation are central to its operation**. Such time limits provide a degree of certainty to applicants, as well as to the Member States concerned. Consequently, the Advocate General takes the view that the wording, aims and legislative scheme of the Regulation indicate that **applicants should be able to challenge transfer decisions, in particular where the failure to meet time limits has an impact on the progress of the application for international protection.** The Advocate General confirms that this remains the case whether the requested Member State agrees to take charge or not.

Second, the Advocate General rejects the argument that the time limits in the Regulation only govern inter-State relations, which should not be the subject of a challenge by an individual. In her view, **the Dublin system is no longer a purely inter-State mechanism**. While the establishment of time limits in the Regulation is a procedural matter, **the operation of those time limits has substantive implications for both applicants and the Member States concerned**.

The Advocate General accepts that the migrant crisis between 2015 and 2016 placed Member States in a difficult position and strained available resources. However, she does not accept this as a justification for cutting back on judicial protection. **The lawfulness of a transfer decision is founded on elements of facts and law over which national courts should be able to exercise judicial scrutiny.**

Further, in her view, allowing applicants to challenge decisions on the basis that a Member State has not complied with the requisite time limit will never pre-empt an appeal process at national level, since it does not follow that every challenge will succeed on the merits.

Next, the Advocate General considers the two-month time limit which applies to the submission of take charge requests in cases where the authorities receive information confirming that the fingerprints of the applicant have been matched in the Eurodac database. She concludes that that two-month time period is not additional to the general three month time limit for take charge requests and that it starts from the point at which the competent authorities receive a positive hit in relation to that data. As a principal aim of the procedures in the Regulation is to ensure that the Member State responsible should be determined swiftly, the Advocate General is of the view that it would be incompatible with that objective if the two-month time limit were deemed to begin after the three month time limit.

Finally, the Advocate General reasons that **an application for international protection is deemed to have been lodged within the meaning of the Regulation when a form or report**

reaches the national competent authorities responsible for such applications. Given that there is no standard form for applications for international protection, it is for each Member State to determine the exact content of the form and the report. Thus, for the purposes of the Regulation, an application for international protection must be made on a form or in a report in accordance with national procedural rules and must have reached the competent authority designated for that purpose in accordance with national procedural rules.

Consequently, Mr Mengesteab's informal request for international protection made on 14 September 2015 did not constitute the lodging of an application for international protection within the meaning of the Regulation, nor did the attestation issued by the German authorities**. Mr Mengesteab's formal application was lodged on 22 July 2016 and the take charge request made by the German authorities on 19 August 2016 thus complied with the time limits in the Regulation.**

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.

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