Case C-324/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 May 2021

Referring court:

Raad van State (Netherlands)

Date of the decision to refer:

19 May 2021

Appellant:

Staatssecretaris van Justitie en Veiligheid

Respondent:

F.

Subject matter of the main proceedings

The action in the main proceedings challenges the decision of the Rechtbank Den Haag (District Court, The Hague, Netherlands) of 16 July 2019, whereby it declared well-founded the appeal lodged by F. against the decision of 1 July 2019 of the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; 'the Staatssecretaris') to place F. in detention because, in its view, Italy is still responsible for examining that application, and ordered the lifting of the detention measure on the ground that, at the time of the detention, there was no longer any concrete basis for a Dublin transfer because, as a result of the expiry of the transfer time limit, Italy was relieved of its responsibility to take back the foreign national on 19 June 2019.

Subject matter and legal basis of the request

Request under Article 267 TFEU concerning the interpretation of Article 29 of 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 ('the Dublin Regulation').

The referring court asks the Court of Justice for clarification as to the application of that regulation in the situation where a claim agreement already exists between two Member States, the foreign national absconds before the transfer between those two Member States can be effected and then lodges another application for international protection in a third Member State. In that regard, the referring court observes that, in order to prevent the transfer time limit referred to in Article 29(1) and (2) of the Dublin Regulation from expiring and the responsibility for examining an application for international protection from shifting to another Member State as a result of a foreign national absconding repeatedly, various Member States in practice apply a method of calculating transfer time limits known as the 'chain rule'. This rule, which was devised by the Dublin Contact Committee, [1] provides that the transfer time limit restarts in cases where the foreign national absconds prior to the transfer and lodges a new application for international protection in a third Member State before the end of that period. Since the 'chain rule' does not (yet) have any legal status, but is already being applied in the State practice, the referring court asks whether the Dublin Regulation precludes the application of this rule.

Question referred for a preliminary ruling

Must Article 29 of 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) be interpreted as meaning that a current transfer time limit, as referred to in Article 29(1) and (2), restarts at the point at which the foreign national, having obstructed the transfer by a Member State by absconding, lodges a fresh application for international protection in another (in this case, a third) Member State?

Provisions of EU law relied on

Dublin Regulation, in particular recitals 4, 5, 9, 19 and 28, and Articles 2, 3, 18, 19, 20, 21, 23, 25, 26, 27 and 29

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003

[1] The Dublin Contact Committee is a group of national experts designated by Member States to advise the Commission in the exercise of its powers under the Dublin Regulation and its implementing rules.

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, as amended by Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014, in particular Article 9

Provisions of national law relied on

Vreemdelingenwet 2000 (Law on foreign nationals of 2000), in particular Articles 8, 28, 30, 59a and 106

Brief presentation of the facts and procedure in the main proceedings

1 On 24 November 2017, F., who is from the Gambia ('the foreign national'), applied for international protection in the Netherlands. As he had previously lodged an application for international protection in Italy, the Netherlands requested Italy to take him back. In failing to respond to that take back request within the set time limit of two weeks, Italy accepted the request on 19 December 2017 in accordance with Article 25(2) of the Dublin Regulation. By letter of 12 April 2018, the Netherlands authorities informed Italy that the foreign national had absconded and therefore could not be transferred within the time limit of six months. This extended the transfer time limit to 19 June 2019.

2 The foreign national subsequently lodged an application for international protection in Germany on 29 March 2018, but there is no indication in the documents submitted that Germany took a decision on that application.

3 On 30 September 2018, the foreign national lodged another application for international protection in the Netherlands. By decision of 31 January 2019, the Staatssecretaris refused to examine that application since, in his view, Italy was still responsible for examining it.

4 Following the refusal decision of 31 January 2019, the foreign national evaded the supervision of the national authorities, but was found and arrested five months later in the Netherlands, whereupon, by a decision of 1 July 2019, the Staatssecretaris placed him in detention with a view to his transfer to Italy.

5 The foreign national lodged an appeal against that decision before the Rechtbank Den Haag, which handed down the contested decision on 16 July 2019.

Main arguments of the parties in the main proceedings

6 In support of his appeal, the Staatssecretaris argues that the court of first instance was wrong to rule that the transfer time limit had already expired on 19 June 2019 and that the foreign national could not therefore be placed in detention. The Staatssecretaris relies on the 'chain rule' to argue that, because of the interim application for international protection in Germany on 29 March 2018, the transfer

time limit between the Netherlands and Italy had restarted and therefore Italy is still responsible. The Staatssecretaris has explained that, in practice, this rule is used by various Member States to remove the incentive to abscond and has stated that the term 'another Member State' in Article 29(1) of the Dublin Regulation can also refer to a third Member State and therefore leaves scope for an interpretation in conformity with the 'chain rule', whereby he assumes that the transfer period of six to eighteen months between the requesting Member State (in this case, the Netherlands) and the Member State responsible restarts if, before the expiry of that period, the foreign national lodges a fresh application for international protection in a third Member State (in this case, Germany).

Brief summary of the reasons for the referral

7 The referring court notes that it is not disputed in the appeal that, on 19 December 2017, Italy accepted a take back request from the Netherlands and that, in any event, the transfer period which started to run from the acceptance of that request was extended by 12 months until 19 June 2019, in accordance with Article 29(2) of the Dublin Regulation.

8 It follows from the case-law of the Court of Justice that the six-month time limit and the conditions for its extension in Article 29(2) of the Dublin Regulation must be strictly applied. Thus, in paragraph 72 of the judgment of 19 March 2019, *Jawo*, EU:C:2019:218, the Court of Justice held that the second sentence of Article 29(2), of the Dublin Regulation does not require, for the extension of the transfer time limit in the situations referred to therein, any consultation between the requesting Member State and the Member State responsible. Furthermore, the Court of Justice has repeatedly held that the take charge and take back procedures must be carried out in accordance with the rules laid down, inter alia, in Chapter VI of the Dublin Regulation and, in particular, in compliance with a series of specified time limits (see judgments of 26 July 2017, *Mengesteab*, EU:C:2017:587, paragraphs 49 and 50; of 25 January 2018, *Hasan*, EU:C:2018:35, paragraph 60, and of 13 November 2018, *X and X*, EU:C:2018:900, paragraph 57). In paragraph 70 of the latter judgment, the Court of Justice explains that that set of mandatory time limits testifies to the particular importance that the EU legislature has attached to the rapid determination of the Member State responsible for the examination of an application for international protection. The EU legislature has accepted that such applications are therefore, when necessary, examined by a Member State other than the Member State designated as being responsible pursuant to the criteria laid down in Chapter III of that regulation.

9 In the light of that case-law, it must be assumed, according to the referring court, that a mandatory transfer time limit of eighteen months applies between Italy and the Netherlands and that exceedance of that time limit will result in a shift of responsibility between those two Member States. The question arises, however, as to the extent to which that time limit is still relevant for the assessment of a fresh

application for international protection in a third Member State, since Article 29(2) of the Dublin Regulation appears not to relate directly to the situation of the foreign national who not only absconded, but also lodged on 29 March 2018 – within the transfer time limit between Italy and the Netherlands – a fresh application for international protection in Germany. The referring court considers the answer to this question relevant for determining whether the Dublin Regulation can be interpreted in conformity with the 'chain rule'.

10 In order to answer that question, the referring court has developed two scenarios: in the first scenario, the time limits laid down in Article 29 of the Dublin Regulation affect only the relationship between the Member State responsible and the requesting Member State – Italy and the Netherlands – whereas the second scenario starts from the 'chain rule', on the basis of which the original transfer time limit can restart, whereby the relationship between Italy and the third Member States where the foreign national has requested international protection are also regulated.

11 In the first scenario, Article 29 of the Dublin Regulation is interpreted as meaning that the transfer time limit laid down therein applies in any event between the two Member States that concluded the claim agreement which underpins the transfer decision (see the *Jawo* judgment, paragraph 59, which refers to the 'two Member States concerned'). The fact that, following the conclusion of that agreement, the same foreign national lodges a fresh application for international protection in a third Member State does not affect the duration of that transfer time limit.

12 That interpretation would mean in this case that the transfer time limit which started on 19 December 2017 between Italy and the Netherlands expired after eighteen months, which means that, on 20 June 2019, the Netherlands became responsible for the examination of the application for international protection and that the court of first instance was right to rule that, at the time at which the foreign national was placed in detention, there was no longer any basis for a Dublin transfer.

13 An argument in favour of the interpretation set out in the first scenario is that it is consistent with the objective of the Dublin Regulation to determine rapidly, in accordance with a clear and workable method, the Member State responsible for the examination of an application for international protection. That is important in order to guarantee effective access to the procedures for granting international protection and to ensure the rapid processing of such applications, as is clear from recitals 4 and 5 of the Dublin Regulation and from paragraphs 58 and 59 of the *Jawo* judgment. If the requesting Member State is unable to transfer the foreign national to the Member State responsible within the time limit of six to eighteen months, responsibility automatically transfers to that requesting Member State.

14 An argument against that interpretation is that it encourages 'forum shopping' and secondary migration movements. It is apparent from the present case that, by absconding and travelling, the foreign national may to a considerable extent

himself determine which Member State becomes responsible for examining his application for international protection. If the foreign national absconds for long enough, the requesting Member State cannot transfer him to the Member State responsible within the transfer time limit and, pursuant to Article 29(2) of the Dublin Regulation, the latter Member State is relieved of its obligation to take back the foreign national. Furthermore, a third Member State in which the foreign national reappears and lodges a fresh application for international protection will often have to make more than one attempt to conclude a take back or take charge agreement. This runs counter to the objectives of the Dublin Regulation of rapid processing of applications for international protection and the avoidance of 'forum shopping' (see recital 5 of the Dublin Regulation and judgment of 7 June 2016, *Ghezelbash*, EU:C:2016:409, paragraph 54).

15 In that regard, the referring court notes that its finding that, under the current Dublin Regulation, there is a trend towards 'forum shopping' is shared by the Commission. This is apparent, first, from recital 25 of the Commission's proposal for a recast Dublin Regulation (COM(2016) 270 final), which seems to indicate that the interpretation given to Article 29 of the current Dublin Regulation in the first scenario outlined above is the correct one, while at the same time indicating that the result is undesirable in this case, and, second, from Article 35(2) of the new Commission proposal for a regulation on asylum and migration management (COM(2020) 610 final). According to that provision, a current transfer time limit is interrupted if a foreign national absconds and the transferring Member State notifies the Member State responsible. If the foreign national subsequently reappears in that Member State, the transfer time limit restarts and the person can still be transferred within the remaining time. According to the referring court, this is a completely different method of avoiding 'forum shopping' from the 'chain rule'.

16 The referring court points out in the second scenario that the Staatssecretaris's interpretation of the 'chain rule' in this case means that the transfer time limit between the Netherlands and Italy was eighteen months and due to expire on 19 June 2019. Because the foreign national absconded and then lodged a fresh application for international protection in Germany on 29 March 2018 – before the expiry of that time limit – that time limit restarted by virtue of the 'chain rule'. As a result, on 29 March 2018, the time limit within which the transfer to Italy could take place was de facto extended by 18 months to 29 September 2019. According to that reasoning, Italy would still be the Member State responsible for processing the foreign national's application and the foreign national could therefore be placed in detention with a view to transfer to Italy on 1 July 2019.

17 According to the referring court, while the application of that rule may disincentivise absconding and secondary migration movements, in so far as it becomes unattractive for foreign nationals to abscond and travel in order to cause the responsibility for examining an application for international protection to shift to another Member State, it notes that, under the current Dublin Regulation, that rule does not have legally binding status, since the minutes of the Dublin Contact

Committee merely reflect informal discussions which are not binding on the Member States and the Commission. The lack of legally binding status of the 'chain rule' leads to divergent views on its applicability among Member States, whereby situations could arise in which several Member States consider themselves responsible or, conversely, where not a single Member State considers itself responsible, which is contrary to the Dublin Regulation's objective of the rapid processing of applications for international protection.