Case C-231/21

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:

12 April 2021

Referring court or tribunal:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

25 March 2021

Appellant on a point of law:

IA

Respondent authority:

Bundesamt für Fremdenwesen und Asyl (Federal Office for Foreign Affairs and Asylum)

Subject matter of the main proceedings

Expiry and extension of the transfer time limit pursuant to Article 29 of Regulation (EU) No 604/2013 in the context of a stay on the psychiatric ward of a hospital against or without the will of the person concerned due to mental illness

Subject matter and legal basis of the request

Interpretation of EU law, in particular Regulation (EU) No 604/2013, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is imprisonment within the meaning of the second sentence of Article 29(2) 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 (recast), OJ 2013 L 180, p. 31, also to be understood as including committal – which has been declared admissible by a court – of the person concerned to the psychiatric ward of a hospital against or without his will (in this case on account of endangerment of self or others resulting from his mental illness)?

2. If the first question is answered in the affirmative:

a) Can the time limit laid down in the first sentence of Article 29(2) of the above-mentioned regulation in any case be extended to one year – with binding effect for the person concerned – in the event of imprisonment by the requesting Member State?

b) If not, for what period of time is an extension permissible, for example only for that period of time

aa) that the detention actually lasted, or

bb) that the imprisonment is likely to last in total, in relation to the date of informing the Member State responsible in accordance with Article 9(2) 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 (OJ 2003 L 222, p. 3), as amended by Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 (OJ 2014 L 39, p. 1),

plus, if necessary, a reasonable period for the reorganisation of the transfer?

Provisions of EU law relied on

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 (recast) (OJ 2013 L 180, p. 31; 'the Dublin III Regulation'), in particular Article 29(2)

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 (OJ 2003 L 222, p. 3), as amended by Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 (OJ 2014 L 39, p. 1), in particular Article 9

Charter of Fundamental Rights of the European Union, in particular Articles 6, 52 and 53

Provisions of international law relied on

European Convention on Human Rights ('the ECHR'), in particular Article 5(1)(e)

Provisions of national law relied on

Asylgesetz 2005 (Asylum Act 2005, 'the AsylG 2005'), in particular Paragraph 5:

Responsibility of Another State

Paragraph 5. (1) An application for international protection which has not been decided in accordance with Paragraph 4 or Paragraph 4a shall be rejected as inadmissible if, under treaty provisions or pursuant to the Dublin Regulation, another country is responsible for examining the application for asylum or the application for international protection. When rendering the rejection decision, the authority shall also specify which country is responsible. The application shall not be rejected if in the course of an evaluation as referred to in Paragraph 9(2) of the BFA-Verfahrensgesetz (Federal Office for Immigration and Asylum Procedures Act, 'the BFA-VG') it is established that an order for removal from the country issued in conjunction with the rejection decision would give rise to a violation of Article 8 of the ECHR.

(2) The steps set out in subparagraph 1 shall also be followed if, under treaty provisions or pursuant to the Dublin Regulation, another country is responsible for determining which country is responsible for examining the application for asylum or international protection.

Fremdenpolizeigesetz 2005 (Aliens' Police Act 2005, 'the FPG'), Paragraphs 46 and 61

Unterbringungsgesetz (Law on the committal of mentally ill persons to hospitals, 'the UbG'), Paragraphs 3, 8, 10(1), 11, 17, 18, 20(1), 26(1) and (2) and 30(1)

Succinct presentation of the facts and procedure in the main proceedings

1 The appellant on a point of law, a national of Morocco, travelled from Libya to Italy in October 2016, where he was subjected to identification procedures on 27 October 2016. He then travelled to Austria and lodged an application for international protection on 20 February 2017. A consultation procedure under the Dublin III Regulation was then conducted and a take charge request based on Article 13(1) of that regulation was sent to the Italian authorities on 1 March 2017. This request remained unanswered. Consequently, the Italian authorities were informed on 30 May 2017 that, in accordance with Article 22(7) of the Dublin III Regulation, the taking charge of the appellant on a point of law had been approved and that the transfer time limit had begun on 2 May 2017.

2 Subsequently, the Bundesamt für Fremdenwesen und Asyl (Federal Office for Foreign Affairs and Asylum, 'the BFA') rejected, by decision of 12 August 2017, the application for international protection lodged by the appellant on a point of law, pursuant to Paragraph 5(1) of the AsylG 2005. It found that, under Article 13(1) in conjunction with Article 22(7) of the Dublin III Regulation, Italy was responsible for examining the application, ordered the removal of the appellant on a point of law from the country (to Italy) in accordance with Paragraph 61(1), point 1 of the FPG and declared that the removal of the appellant on a point of law to Italy was permissible under Paragraph 61(2) of the FPG.

3 The transfer of the appellant on a point of law to Italy, which had already been organised for 23 October 2017, had failed because he had been committed to the psychiatric ward of a hospital in Vienna. A Vienna District Court had first declared this committal under the UbG to be provisionally permissible by decision of 6 October 2017 and then declared it permissible for the period until 17 November 2017 by decision of 17 October 2017. Subsequently, the Italian authorities were informed on 25 October 2017 that the transfer time limit had been extended to 12 months due to the detention of the appellant on a point of law in accordance with Article 29(2) of the Dublin III Regulation.

4 This court-approved committal of the appellant on a point of law was terminated prematurely on 4 November 2017 and he was released from the care of the hospital two days later.

5 On 6 December 2017, he was transferred from Austria to Italy by way of removal. He lodged an appeal against that decision within the prescribed period, on the ground that the transfer had been carried out despite the expiry on 2 November 2017 of the six-month time limit available for this under the first subparagraph of Article 29(1) of the Dublin III Regulation.

6 The Bundesverwaltungsgericht (Federal Administrative Court, 'the BVwG') ultimately dismissed this appeal as unfounded in its ruling of 14 February 2020, which was challenged before the referring court.

7 In its legal assessment, the BVwG proceeded on the assumption that the order to remove the appellant on a point of law from the country, imposed by a decision of the BFA on 12 August 2017, was enforceable and also feasible. Nor had the order for removal from the country ceased to have effect before the removal on 6 December 2017.

8 It is true that the six-month time limit under the first subparagraph of Article 29(1) of the Dublin III Regulation for the transfer of the appellant on a point of law to Italy had expired on 2 November 2017. However, Austria had already informed Italy that the transfer time limit would be extended due to the detention of the appellant on a point of law in accordance with Article 29(2) of the Dublin III Regulation. Although the appellant was neither remanded in custody pending trial nor serving a sentence involving deprivation of liberty, he had been receiving

psychiatric treatment from 20 September to 6 October 2017 as a result of voluntary inpatient admission. From 6 to 17 October 2017 and from that date (due to early release, only) until 4 November 2017, he was committed to the psychiatric ward of a hospital on the basis of decisions of a Vienna District Court. Between 4 and 6 November 2017, he was again voluntarily hospitalised.

9 During the period in which the appellant on a point of law was committed, by court order, to a psychiatric institution against his will, he was in court-ordered detention. For this to be the case, it was neither a prerequisite that this detention be carried out in a prison nor that it be based on a judicial conviction. The existence of a measure involving deprivation of liberty, which is to be assumed in the present case, can also be inferred from Articles 6, 52 and 53 of the Charter of Fundamental Rights ('the Charter') as well as from Article 5(1)(e) of the ECHR, from which it is apparent in particular that mental illness, for example, may constitute a basis for ordering lawful detention. Moreover, Paragraph 3 of the UbG cumulatively requires that the ill person seriously and substantially endangers his or her life or health and the life or health of others in connection with his or her illness. In the case of the appellant on a point of law, the committal was based on endangerment of self and others.

10 The decisive factor for the extension of the transfer time limit under Article 29(2) of the Dublin III Regulation was that the transferring State had been prevented from transferring the appellant on a point of law to the Member State responsible, whether because he had absconded or because – as in the present case – he had been placed out of the reach of the administrative authorities by the judicial authorities.

11 Italy was thus rightly informed that the appellant on a point of law was in detention. As a result, the transfer time limit was extended to 12 months, that is to say until 2 May 2018. At the time of the removal, therefore, the transfer time limit had not yet expired. The other conditions for lawful removal are also met.

Succinct presentation of the reasoning in the request for a preliminary ruling

12 In the present case, it is necessary to clarify whether the removal (transfer) of the appellant on a point of law to Italy on 6 December 2017 was lawful, which depends on the question as to whether this measure was taken within the time limit specified in the light of the legal situation under Article 29 of the Dublin III Regulation.

13 In the judgment of 25 October 2017, *Shiri*, C-201/16, ECLI:EU:C:2017:805, the Court of Justice of the European Union ('the Court of Justice') held, in that context, that it is apparent from the very wording of that provision that exceeding the time limit provides for an 'automatic' transfer of responsibility to the requesting Member State, without making that transfer conditional on any reaction by the Member State responsible (paragraph 30). If the transfer time limit expires without the transfer of the applicant from the requesting Member State to the

Member State responsible having been carried out, responsibility is 'automatically' transferred from the second Member State to the first (paragraph 39), with it being possible for the transfer time limit to expire after the transfer decision has been adopted (paragraph 42). The competent authorities of the requesting Member State cannot, in such a situation, carry out the transfer of the person concerned to another Member State and are, on the contrary, required to take, on their own initiative, the measures necessary to acknowledge the responsibility of the first Member State and to initiate without delay the examination of the application for international protection lodged by that person (paragraph 43).

14 In the present case, the receipt of the take charge request, dated 1 March 2017, triggered the two-month time limit for the requested Member State (Italy) to reply in accordance with Article 22(1) of the Dublin III Regulation. As the competent Italian authorities did not reply to the take charge request within this time limit, the Republic of Italy became responsible upon expiry of the time limit as a result of the fiction of consent under Article 22(7) of the Dublin III Regulation (tacit acceptance). In the absence of any suspensive effect of an appeal, this point in time in turn proves to be the triggering point for the six-month transfer time limit pursuant to the first subparagraph of Article 29(1) of the Dublin III Regulation. It cannot be disputed that this was the case on 2 May 2017, with the result that the transfer time limit mentioned expired at the end of 2 November 2017.

15 However, the second sentence of Article 29(2) of the Dublin III Regulation provides that this time limit may 'be extended up to a maximum of one year' if the transfer could not be carried out due to imprisonment of the person concerned.

16 In order to extend the transfer time limit laid down in that provision, it suffices that the requesting Member State informs the Member State responsible, before the expiry of the six-month transfer time limit, of the imprisonment of the person concerned and specifies, at the same time, a new transfer time limit (see, to that effect, judgment of 19 March 2019, *Abubacarr Jawo*, C-163/17, ECLI:EU:C:2019:218, paragraph 75).

17 The arguments put forward in the appeal on a point of law seek to show that the transfer time limit had already expired at the time of the removal (transfer) to Italy on 6 December 2017. According to the referring court, if that argument is to be accepted, it is necessary, first of all, to determine whether 'imprisonment' (not defined in the context of that regulation) within the meaning of the second sentence of Article 29(2) of the Dublin III Regulation must also be understood as meaning a committal to the psychiatric ward of a hospital, which has been declared permissible by the court, against or without the will of the person concerned on account of mental illness.

18 This conclusion could be supported by the fact that such a committal is a deprivation of liberty that is independent of the will of the person concerned and approved by the court, which, in any event, essentially makes it impossible for the

competent authority to gain access to the person concerned for the purpose of transferring him, in the same way as, for example, imprisonment in criminal proceedings (remand in custody pending trial, a sentence involving deprivation of liberty) ordered by the court.

19 However, the Supreme Administrative Court takes the view that this conclusion could be challenged by the fact that 'involuntary committal' within the meaning of Paragraph 8 et seq. UbG is primarily a medical measure that has 'merely' been declared permissible by the court. The term 'imprisonment' (cf. also 'Inhaftierung' in the German language version or 'emprisonnement' in the French language version) does not (necessarily) seem to cover such situations.

20 Above all, however, it should be borne in mind that serious illnesses that temporarily prevent a transfer to the responsible Member State (that is to say that do not even permit this – as was ultimately the case here – for example under medical supervision or other conditions) do not form a suitable basis for an extension of the transfer time limit in accordance with Article 29(2) of the Dublin III Regulation. In any event, if the state of health of the person concerned prevents the requesting Member State from carrying out the transfer before the expiry of the six-month period provided for in the first subparagraph of Article 29(1) of the Dublin III Regulation, the Member State responsible would instead be relieved of its obligation to take charge of the person concerned and responsibility would then be transferred to the first Member State, in accordance with paragraph 2 of that article (see, to that effect, inter alia, judgment of 16 February 2017, *C.K. and Others*, C-578/16, ECLI:EU:C:2017:127, paragraph 89).

21 Detention in the psychiatric ward of a hospital could therefore not be understood as 'imprisonment' and thus cannot be assessed differently from any other hospital stay that excludes the ability to travel.

22 However, should the Court of Justice come to the conclusion that the detention in the psychiatric ward of a hospital at issue constitutes 'imprisonment' within the meaning of the second sentence of Article 29(2) of the Dublin III Regulation, the Supreme Administrative Court takes the view that it would also be necessary to clarify the question as to the extent to which the transfer time limit could then specifically be extended. In that regard, the Supreme Administrative Court considers that the person concerned may also rely on an incorrect calculation of that time limit.

23 According to the wording of that provision, there must be a causal link between the 'imprisonment' and the failure to comply with the transfer time limit and, in that case, the time limit may be extended 'up to a maximum of one year'. The use of the term 'up to a maximum of' seems to indicate that the one-year period need not always be decisive.

24 This suggests that the duration of the extension of the transfer time limit should depend on the circumstances of the specific case, with the Supreme

Administrative Court taking the view that the criteria should primarily be either the actual duration of the 'imprisonment' (in the present case: 30 days, from 6 October to 4 November 2017) or its presumptive duration at the time the requested Member State is informed of the 'imprisonment' under Article 9(2) of the Implementing Regulation (in the present case: 43 days, from 6 October to 17 November 2017), if necessary plus a reasonable period for the reorganisation of the transfer. The maximum period of two weeks referred to in Article 9(1a) of the Implementing Regulation may be decisive in determining that time limit.

25 In paragraph 75 of the above-mentioned judgment in *Abubacarr Jawo*, C-163/17, ECLI:EU:C:2019:218, the Court of Justice held – with regard to the situation that the person concerned has absconded – that the second sentence of Article 29(2) of the Dublin III Regulation must be interpreted as meaning that, in order to extend the transfer time limit by a maximum of 18 months, it suffices that the requesting Member State informs the Member State responsible, before the expiry of the six-month transfer time limit, that the person concerned has absconded and specifies, at the same time, a new transfer time limit.

26 In the light of the practical problems highlighted by the Court of Justice in that context, this could be understood to mean that it is open to the requesting Member State to 'freely' determine the new transfer period – even up to a maximum of 18 months – if the person concerned absconds. If necessary, it could not be ruled out that this could be applied accordingly to the situation of 'imprisonment'. However, the second sentence of Article 29(2) of the Dublin III Regulation links the extension of the time limit relating to 'imprisonment' to the fact that the transfer could not take place 'due to' the imprisonment of the person concerned, whereas, according to its wording, the extension of the time limit to a maximum of 18 months is based only on the fact that the person concerned 'absconds' (and the duration of the absconding is usually not even foreseeable).

27 In relation to the extension of the time limit in the event of 'imprisonment', this difference in wording leads back to the consideration set out above (in paragraphs 23 and 24), with the causal link mentioned supporting the relevance of the actual duration of the 'imprisonment', whereas, having regard to the need, in any event, to inform the Member State responsible within the meaning of Article 9(2) of the Implementing Regulation, the total duration of the 'imprisonment' that can be estimated at that time could also be relevant.

28 In any event, if the answer to the first question is in the affirmative, a clarification of the problem addressed by the second question is required in order for the Supreme Administrative Court to take a decision, since the correct application of EU law does not appear so obvious that it leaves no scope for any reasonable doubt. The questions set out at the start are therefore referred to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU.