

Case C-614/21**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:**

4 October 2021

Referring court:

Rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (Netherlands)

Date of the decision to refer:

4 October 2021

Applicant:

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Defendant:

Staatssecretaris van Justitie en Veiligheid

Subject matter of the main proceedings

The defendant did not examine the applicant's asylum application because the defendant considers that Malta is responsible for doing so. The applicant contests that decision because he fears that if he is transferred to Malta he will be in a situation that is contrary to Article 4 of the Charter.

Subject matter and legal basis of the request

The Rechtbank (District Court) is referring questions for a preliminary ruling under Article 267 TFEU on the scope and purport of the principle of mutual trust in the context of the transfer of the applicant to the Member State responsible, when there are infringements of fundamental rights in that Member State with respect to the applicant and third-country nationals generally, in the form of, inter alia, pushbacks and detention. There is also a question as to the evidence that the applicant has at his disposal and the standard of proof that applies when he claims that transfer should be prohibited under Article 3(2) of the Dublin Regulation.

Questions referred for a preliminary ruling

I Should the Dublin Regulation, in view of recitals 3, 32 and 39 thereof, and read in conjunction with Articles 1, 4, 6, 18, 19 and 47 of the Charter of Fundamental Rights of the European Union, be interpreted and applied in such a way that the principle of inter-State trust is not divisible, so that serious and systematic infringements of EU law committed by the potentially responsible Member State, before transfer, with respect to third-country nationals who are not (yet) Dublin returnees absolutely preclude transfer to that Member State?

II If the answer to the previous question is in the negative, should Article 3(2) of the Dublin Regulation, read in conjunction with Articles 1, 4, 6, 18, 19 and 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that, if the Member State responsible infringes EU law in a serious and systemic way, the transferring Member State cannot rely on the principle of inter-State trust, but must eliminate all doubts or must demonstrate that, after the transfer, the applicant will not be placed in a situation which is contrary to Article 4 of the Charter of Fundamental Rights of the European Union?

III What evidence can the applicant use in support of his arguments that Article 3(2) of the Dublin Regulation precludes his transfer, and what standard of proof should be applied? In the light of the references to the Union *acquis* in the recitals of the Dublin Regulation, does the transferring Member State have a duty of cooperation or verification, or, in the event of serious and systemic infringements of fundamental rights with respect to third-country nationals, is it necessary to obtain individual guarantees from the Member State responsible that the applicant's fundamental rights will (indeed) be respected after the transfer? Is the answer to this question different if the applicant lacks evidence in so far as he is unable to support his consistent and detailed statements with documents, when he cannot be expected to do so, given the nature of the statements?

Provisions of European Union law and international law relied on

Articles 1 and 33 of the Geneva Convention relating to the Status of Refugees

Articles 1, 4, 6, 18, 19, 47, 51 and 52 of the Charter of Fundamental Rights of the European Union

Recitals 3, 19, 32 and 39, and Articles 3, 4, 5 and 17 of Regulation (EU) No 604/2013 (the Dublin Regulation)

Article 4 of Directive 2011/95/EU

Judgment of 19 March 2019, *Jawo* (C-163/17, ECLI:EU:C:2019:218, paragraphs 78 to 92)

Judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, ECLI:EU:C:2017:127, paragraphs 59, 63 to 65, 75 and 76)

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 19 June 2019, the applicant applied for asylum in Malta. After his arrival in that Member State, he was detained for three months and spent four months in a reception camp. After a stay in hospital following a serious accident at work, he was told to leave the reception camp. Despite his health problems, he had to work because he was no longer receiving any assistance. By the time he left Malta on 5 December 2020, he had not yet been granted a hearing as to his reasons for seeking asylum.
- 2 On 12 January 2021, he entered the Netherlands and lodged an asylum application. The defendant considers Malta to be responsible for examining that application and, on those grounds, decided on 22 March 2021 not to examine the applicant's asylum application. Earlier, on 9 February 2021, Malta and the Netherlands had already reached agreement on the assumption of responsibility for examination of the asylum application [(‘the claim agreement’)].
- 3 The applicant lodged an appeal against the decision of 22 March 2021 and also applied for interim relief to the judge hearing applications for interim measures. On 2 April 2021, that judge granted the relief requested and ruled that the transfer of the applicant to Malta was prohibited until a decision on the appeal had been taken.

The essential arguments of the parties in the main proceedings

- 4 The applicant fears that, after his transfer to Malta, his fundamental rights will be infringed. He substantiates this with his own statements, evidence relating to his accident and information from various countries about the reception of third-country nationals in Malta.
- 5 The defendant argues that the principle of mutual trust (referred to in the questions as inter-State trust) justifies the assumption that the applicant's fundamental rights will not be infringed after his transfer to Malta. The applicant allegedly did not substantiate his statements about his reception in Malta with any documents. In response to the applicant's statement that he has not yet been granted a hearing and that no decision has yet been taken on his application for asylum, the defendant refers to the claim agreement.
- 6 In addition, the defendant submits that her decision is not contrary to the case-law of the Court of Justice and of the European Court of Human Rights (ECtHR) and that there is no reason to take over Malta's examination of the asylum application pursuant to Article 3(2) of Regulation No 604/2013.

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

- 7 The District Court considers that the implementation of Regulation No 604/2013 is governed by the principle of mutual trust and that it may be assumed that, after the transfer, the applicant will not find himself in a situation that is contrary to Article 4 of the Charter. If the applicant claims otherwise, he will have to prove it.
- 8 The assessment under Article 3(2) of Regulation No 604/2013 is limited to the situation after the transfer and, more specifically, to the reception and living conditions, as well as the quality of the asylum procedure in the Member State responsible, which includes the possibility of a foreign national lodging a complaint where appropriate.
- 9 In proceedings concerning transfer decisions pursuant to Regulation No 604/2013, the District Court is increasingly confronted with the legal question of whether the principle of mutual trust can be assumed to apply where there are flagrant infringements of fundamental rights in the territory of, and by, different Member States. For example, there are numerous reports of pushbacks, and agreements are concluded with third countries to prevent travel to the European Union (pullbacks).
- 10 At the same time, the Member States are obliged to respect the Refugee Convention, the European Convention on Human Rights (ECHR) and the Charter. However, the prohibition on refoulement laid down in those instruments, which, according to the ECtHR, requires an individual assessment of the grounds for seeking asylum, becomes meaningless if, in reality, it is made impossible for the third-country national to enter the territory of the European Union in order to apply for international protection.
- 11 The District Court deduces from the *Jawo* judgment that the principle of mutual trust means trusting that the Member States will at all times respect all fundamental rights and ensure their compliance with respect to all persons.
- 12 However, pushbacks and pullbacks undermine the operation of Regulation No 604/2013 and the principle of mutual trust. Asylum seekers face a risk of refoulement and are discouraged from applying for protection in certain Member States. This in turn leads to increased pressure on asylum and reception capacity in the other Member States.
- 13 On the basis of the aforementioned principle, a decision-making authority is entitled to assume that the applicant's fundamental rights will not be infringed after the transfer. However, if the applicant demonstrates to the court that systemic infringements of fundamental rights are taking place in and by the Member State responsible with regard to the applicant and/or third-country nationals generally, the question arises as to whether, in that situation, there must be an absolute prohibition on transfer and/or whether the principle of mutual trust can be automatically applied when determining the Member State responsible.

- 14 According to the District Court, it has become apparent that in Malta there are large-scale pushbacks and systemic deficiencies in the capacity and quality of reception. Migrants are also systematically detained under particularly poor conditions. Furthermore, the procedure for appealing against the detention of foreign nationals is inadequate because access to the courts and to legal aid is not guaranteed. Infringements of fundamental rights take place not only at the external border, but also after entry. Unlike other Member States, Malta does not deny that it can no longer meet its international obligations.
- 15 In the view of the District Court, pushbacks contravene Articles 1, 4, 18 and 19 of the Charter. The ECtHR has also repeatedly ruled that the way in which Malta detains asylum seekers violates Article 5 ECHR.
- 16 The District Court now questions the scope of the principle of mutual trust and wishes to establish whether it is divisible depending on where and during what period infringements of the Charter occur, to which fundamental rights it relates and to what extent the attitude of the Member State responsible is relevant.
- 17 The Charter and the ECHR do not establish any hierarchy of the various fundamental rights. The District Court therefore proceeds on the assumption that the principle of mutual trust presupposes that all fundamental rights are respected at all times and in the territory of all Member States, and not only in respect of asylum seekers returning to the Member State responsible for the examination of their asylum application.
- 18 If the Court of Justice interprets EU law in such a way that it is only the risk of an infringement of Article 4 of the Charter for the specific applicant that is at issue, the District Court concludes that the Court of Justice considers the principle of mutual trust to be divisible. In that case, the District Court requests the Court of Justice to clarify the legal basis for this.
- 19 The central legal question is whether the court should subdivide the principle of mutual trust into trust before and trust after the transfer, and into trust in regard to the specific situation of a returning asylum seeker and trust in regard to the Member State responsible respecting all the fundamental rights of all third-country nationals.
- 20 A decision is based on 'trust' if it involves expectations relating to future events. If it has in fact been established that the Member State responsible is not fulfilling its obligations to respect fundamental rights, the question arises as to what the basis for that trust then is.
- 21 The first question is whether, if it is established that the Member State responsible is seriously and systematically infringing several fundamental rights with respect to third-country nationals, transfer to that Member State should be prohibited for that reason alone. If this question is to be answered in the negative, the next question is whether mutual and reciprocal trust should still be the starting point

when assessing whether a situation as referred to in Article 3(2) of Regulation No 604/2013 exists.

- 22 The District Court wishes to ascertain whether the term ‘treatment in Member States’, used by the Court of Justice in paragraph 82 of the judgment in *Jawo*, should be read as ‘in and/or by the Member States’. If this term is interpreted restrictively as ‘in’ in the sense of ‘in the territory of the Member State’, it would deprive Articles 18 and 19 of the Charter, and Article 3(1) of Regulation No 604/2013, of their meaning. Indeed, if asylum seekers are barred from the territory of the Member States, there can be no infringement ‘IN’ the Member States.
- 23 Recital 32 of Regulation No 604/2013 seems to indicate that the obligation to respect fundamental rights arises as soon as an asylum seeker comes within the jurisdiction of the Member States and not only after he or she has actually entered the European Union. Any other interpretation would undermine the effectiveness of the Charter and of Article 3(1) of Regulation No 604/2013, as a Member State would then be able to evade its responsibility towards the third-country national by effectively preventing the third-country national from entering the European Union.
- 24 Furthermore, Article 3(2) of Regulation No 604/2013 can preclude transfer. In applying that provision, there must be an assessment of the situation in which the applicant would find himself after the transfer. According to paragraph 82 of the *Jawo* judgment, which reflects recital 32 of Regulation No 604/2013, ‘the treatment of applicants’ for international protection must fulfil the requirements of, inter alia, the Charter and the ECHR. Therefore, the scope of the principle of mutual trust and the period of time during which Member States must comply with their obligations does not appear to be limited to the period from the transfer onwards, and only to compliance with Article 4 of the Charter.
- 25 The District Court wishes to ascertain from the Court of Justice how strictly Article 3(2) of Regulation No 604/2013 must be interpreted, and whether only respect for Article 4 of the Charter or respect for all fundamental rights must be taken into account.
- 26 In addition, the District Court asks for clarification of the question whether the degree of risk of infringements of fundamental rights after the transfer is also influenced by infringements before the transfer in respect of the applicant or in respect of third-country nationals generally. Unlike Directive 2011/95/EU, Regulation No 604/2013 does not contain a provision stating that previously experienced persecution is a serious indication of the applicant’s well-founded fear of persecution.
- 27 In the present case, the transfer decision was taken after a claim agreement had already been reached. According to Netherlands legal practice, this provides a guarantee that there will be no infringement of Article 4 of the Charter. The

District Court questions whether this also applies in a situation such as that which exists in Malta.

- 28 The aforementioned Netherlands interpretation of the claim agreement implies that its content and scope go beyond what the EU legislature intended in Article 18 of Regulation No 604/2013. After all, the latter provision guarantees taking charge or taking back, and not the examination of the asylum application. The District Court therefore asks the Court of Justice to clarify the scope of the claim agreement.
- 29 The question also arises as to the importance of the attitude of the Member State responsible. In that regard, the Court of Justice has indicated in paragraph 92 of the *Jawo* judgment that, in a situation where the authorities are reluctant, any deficiencies that preclude transfer must attain a ‘particularly high level of severity’. The question then is whether that threshold will be lower if the authorities are not reluctant. For an asylum seeker, however, it will be of little relevance whether the infringement of his or her fundamental rights is the result of reluctance or of impotence on the part of the Member State responsible. Moreover, from a legal point of view, a significant influx of third-country nationals and the practical problems associated therewith can hardly justify a failure to comply with the obligations under EU law to respect fundamental rights.
- 30 The questions referred by the District Court, unlike those in Cases C-254/21, C-228/21, C-297/21, C-315/21 and C-328/21, concern the situation where, prior to a transfer, the potentially responsible Member State is in serious breach of its obligations under EU law to respect fundamental rights and thus acts not within the legal framework but in contravention of it. The questions relate solely to the issue of whether transfers should be absolutely prohibited and, in the alternative, whether the principle of mutual trust should not be applied when determining the Member State responsible where there are infringements of fundamental rights prior to transfers or in respect of third-country nationals generally.
- 31 If transfer is not already excluded in the circumstances set out above, the next question is whether the Member State wishing to transfer the applicant can then rely on the principle of mutual trust or whether it must itself, under EU law, eliminate all doubt or demonstrate that there will be no infringement of Article 4 of the Charter after transfer.
- 32 Referring to the judgment of 16 February 2017, *C.K. and Others* (C-578/16 PPU, ECLI:EU:C:2017:127), the District Court asks the Court of Justice to clarify whether, in the event that an applicant submits objective evidence of serious infringements of fundamental rights prior to transfer, it is incumbent on the transferring Member State to rule out the possibility that that transfer involves a real risk of an infringement of Article 4 of the Charter, and thus to eliminate any serious doubt as to whether fundamental rights as guaranteed by the Charter will be respected after the transfer.

- 33 That reversal of the burden of proof is in line with the obligations of the Member States. Moreover, Member States can satisfy this burden of proof more easily than the applicant. The claim agreement already serves as a guarantee that the Member State responsible will comply with its obligations under Article 18 of Regulation No 604/2013. In addition, explicit guarantees could be requested regarding, inter alia, reception after transfer, and compliance with these guarantees could be monitored.
- 34 Should the Court of Justice interpret EU law as meaning that, irrespective of any previous infringements of fundamental rights other than Article 4 of the Charter, the principle of mutual trust imposes no further obligation on the transferring Member State to state reasons and to carry out an investigation, the question arises as to how the applicant can demonstrate that Article 3(2) of Regulation No 604/2013 precludes a transfer.
- 35 The District Court also seeks to establish what requirements and standard of proof should be applied to the evidence adduced by the applicant in support of his fear that, after the transfer, he would find himself in a situation that is contrary to Article 4 of the Charter. Annex II to Commission Implementing Regulation (EU) No 118/2014 does not mention any evidence regarding the application of Article 3(2) of Regulation No 604/2013 or Article 17(1) thereof.
- 36 In the light of the principle laid down in Regulation No 604/2013 that, subject to certain exceptions, a personal interview must be conducted in order to determine the Member State responsible, what the applicant states about his or her experiences in the Member State responsible should be relevant. That statement may in fact contain elements which are conducive to considering that a transfer should be prohibited under Article 3(2) of Regulation No 604/2013 or that the determining Member State should take over the examination of the asylum application.
- 37 If this interpretation is correct, it presupposes that the applicant's statement must be tested for credibility. The Court of Justice is asked to clarify this and to indicate what requirements may be imposed on the applicant. However, according to the District Court, these requirements may not be so onerous that it is impossible for the applicant to fulfil them.
- 38 Moreover, the applicant cannot seek guarantees from the Member State responsible. The principle that, in the event of an infringement of his or her fundamental rights after transfer, the applicant must make representations to the authorities of the Member State responsible, implies that the applicant must first experience that infringement, even if the transferring Member State knew or ought to have known of the previous infringements of fundamental rights.
- 39 In Dublin procedures, the previous experiences of asylum seekers often amount to 'negative facts', such as denial of access to the procedure or to reception. It is particularly difficult to prove such infringements, especially since no documents

are usually provided. It is therefore also necessary to clarify the evidence that the applicant can use to support his claim that Article 3(2) of Regulation No 604/2013 precludes a transfer and what requirements and standard of proof may be imposed on the applicant's own statements.

- 40 It must also be determined whether the Member States have a duty of cooperation comparable to that laid down in Article 4 of Directive 2011/95 and whether, in a situation such as that at issue in Malta, the transferring Member State must make allowances for the applicant's position with regard to evidence in order to prevent the fundamental rights of the applicant being infringed after the transfer.
- 41 In view of the large number of similar cases in which proceedings cannot be stayed pending the ruling of the Court of Justice, the District Court has requested that this case be heard under the expedited procedure pursuant to Article 105 of the Rules of Procedure.

WORKING DOCUMENT