

Case C-338/21**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:**

31 May 2021

Referring court:

Raad van State (Council of State, the Netherlands)

Date of the decision to refer:

26 May 2021

Appellant:

Staatssecretaris van Justitie en Veiligheid

Respondents:

S.S.

N.Z.

S.S.

Subject matter of the main proceedings

Appeals brought by the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; ‘the State Secretary’) before the Raad van State (Council of State, Netherlands) against judgments delivered by the Rechtbank Den Haag (The Hague District Court) in three cases pending before it, in which it declared well-founded the appeals lodged by the foreign nationals concerned against the decisions of the State Secretary not to examine their applications for a fixed-term residence permit issued to persons granted asylum and annulled all three decisions.

Subject matter and legal basis of the request

Request pursuant to Article 267 TFEU concerning the interpretation of Article 27(3) and 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 seeks to ascertain whether Articles 29(1) and 27(3) of the Dublin Regulation, which relate to the time limit within which a foreign national can be transferred to the Member State responsible ('transfer time limit') and on the suspension of that time limit in the event of an appeal or review relating to the transfer decision, preclude the Dutch system, under which the transfer time limit is also suspended if, during the course of the Dublin procedure, a foreign national lodges an application for the granting of a residence permit because he claims to have been a victim of trafficking in human beings in the Netherlands and/or in the Member State responsible, and the foreign national challenges the rejection of that application. Because, pursuant to the Dutch Vreemdelingenwet 2000 (Law on foreign nationals of 2000), the foreign national is permitted to await the ruling on that challenge in the Netherlands, transfer to the Member State responsible is not actually possible during that time.

Question referred for a preliminary ruling

Must Articles 27(3) and 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 not precluding national legislation such as that at issue here, in which a Member State has opted to implement Article 27(3)(c), but has also granted the suspensive effect that can be applied to the implementation of a transfer decision, to a review or appeal against a decision in proceedings concerning an application for a residence permit on the grounds of trafficking in human beings, which, while not being a transfer decision, does nevertheless temporarily prevent the actual transfer?

Provisions of European Law relied on

The Dublin Regulation, in particular, recitals 4, 5, 9 and 19, and Articles 27 and 29

Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, in particular, recitals 9, 10 and 11

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, in particular, recitals 1 and 7

Provisions of national law relied on

Algemene wet bestuursrecht (General law on administrative law), in particular, Article 8:81 and Article 8:108

Vreemdelingenwet 2000 (Law on foreign nationals of 2000), in particular, Articles 28, 73 and 82

Vreemdelingenbesluit 2000 (Decree on foreign nationals of 2000), in particular, Article 3.48 and Article 7.3

Vreemdelingencirculaire 2000 (Circular on foreign nationals of 2000), in particular, paragraph B1/7.2

Succinct presentation of the facts and procedure in the main proceedings

- 1 S.S. ('foreign national 1'), N.Z. ('foreign national 2') and S.S. ('foreign national 3') each lodged an application for international protection in the Netherlands in 2019, but the State Secretary held Italy responsible for examining these applications. The Italian authorities accepted the take back or take charge requests either explicitly or tacitly and therefore the State Secretary did not examine the applications for international protection.
- 2 Subsequently, each of the foreign nationals also made declarations in the Netherlands about trafficking in human beings, of which they claimed to have become victims in the Netherlands and/or in Italy. The State Secretary regarded these declarations, ex officio, as applications for the granting of an ordinary fixed-term residence permit on the basis of temporary humanitarian grounds within the meaning of Article 3.48 of the Decree on foreign nationals of 2000, namely, as victims of trafficking in human beings. In the Dutch system, such an application for residence on the grounds of trafficking in human beings is the start of a new, separate procedure, the content of which is distinct from the procedure relating to an application for international protection. The State Secretary subsequently rejected the applications for residence on the grounds of trafficking in human beings, after which the foreign nationals sought reviews of those rejection decisions. The State Secretary dismissed as unfounded the review sought by foreign national 1 and foreign national 3 against the rejection decisions. The State Secretary did not make a decision on the review sought by foreign national 2 because she withdrew the request.
- 3 In the proceedings concerning the applications for international protection, the court of first instance annulled the decision of the State Secretary not to examine those applications in all three cases.

Essential arguments of the parties in the main proceedings

- 4 The foreign nationals have argued that the assessment of the court of first instance in the judgements on the transfer time limit is correct.
- 5 In the cases of foreign nationals 2 and 3, the court of first instance took the view that the transfer time limit had not been extended on the basis of Article 29(1) of the Dublin Regulation by the review of the rejection of the application for residence on the grounds of trafficking in human beings, and that the Netherlands had therefore become responsible for the applications for international protection. In the first place, the court of first instance held that the transfer time limit pursuant to Article 29(1) of the Dublin Regulation can only be suspended in accordance with Article 27(3) of the Dublin Regulation. Since the Netherlands has opted for the implementation of Article 27(3)(c) of the Dublin Regulation, a foreign national has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of the appeal or review in respect of the transfer decision. According to the court of first instance, a review in the case of proceedings concerning the application for residence on the grounds of trafficking in human beings is neither a legal remedy against the transfer decision, nor an interim measure against that transfer decision. It is therefore of the view that such a review cannot lead to a suspension of the transfer period. Foreign national 3 did lodge an application for interim measures in conjunction with his appeal against the transfer decision, but then withdrew it, so that in that case, too, the effect of the transfer decision was not suspended by an application for interim measures. The court of first instance further held that Article 27(3) of the Dublin Regulation contains an alternative list of legal remedies, so that the suspensive effect sought by the State Secretary cannot be based in part on Article 27(3)(a) of the Dublin Regulation. Finally, according to the court of first instance, no support could be found for the suspensive effect sought by the State Secretary in the context and objectives of the Dublin Regulation either, because this Regulation has various objectives and a broader interpretation of the relevant provisions is therefore not automatically possible. In the case of foreign national 1, the court of first instance annulled the State Secretary's decision on other grounds and the referring court must first answer the question whether the transfer period has expired in this case.
- 6 The State Secretary argues in all three cases that the transfer time limits have not expired, because the time limits were suspended as a result of the review sought by the foreign nationals in the proceedings against the rejection of their applications for residence on the grounds of trafficking in human beings. According to the State Secretary, the Dublin Regulation does not preclude this. Furthermore, the State Secretary explained that his interpretation of the Dublin Regulation takes into account the effectiveness of the Dublin Regulation and prevents abuse of this Regulation, that Article 27(3)(c) also relates to the implementation of the transfer decision, that his interpretation is in line with the procedural autonomy of the Member States, and that the three possibilities in Article 27(3) of the Dublin Regulation are not mutually exclusive.

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

- 7 The referring court observes, first, that from the travaux préparatoires of the Dublin Regulation, recitals 5 and 9 thereof and paragraphs 37 and 64 of the Opinion of Advocate General Sharpston of 17 March 2016 in *Ghezelbash*, C-63/15, EU:C:2016:186, it is apparent that the aim of the Dublin Regulation is to establish a method for the rapid determination of the Member State responsible for examining an application for international protection lodged by an applicant in one of the Member States, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of processing such applications expeditiously. The Dublin Regulation aims to rationalise the treatment of asylum claims, to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid ‘forum shopping’ (see paragraph 79 of the judgment of 21 December 2011 in *N.S.*, C-411/10, EU:C:2011:865, recital 19 of the Dublin Regulation and paragraph 57 of the *Ghezelbash* judgment).
- 8 The parties agree that, with Article 7.3(1) of the Decree on Foreign Nationals of 2000, the Netherlands has opted for the implementation of Article 27(3)(c) of the Dublin Regulation.
- 9 The referring court considers that the literal meaning of the term ‘reviews of transfer decisions’ in Article 27(3) of the Dublin Regulation and the literal meaning of the word ‘or’ in subparagraphs (a) and (b) of that paragraph may support the conclusion that Article 29(1) and Article 27(3)(c) of the Dublin Regulation preclude the Netherlands system. Although this interpretation is in line with the literal text, it seems to ignore the wide range of remedies offered to Member States by Article 27 of the Dublin Regulation and the fact that the context and objective of the Dublin Regulation may not coincide with those of Directive 2004/81/EC.
- 10 The referring court then discusses four arguments in favour of the conclusion that the Dublin Regulation does not preclude the Dutch system of suspensive effect that is at issue in the present proceedings.
- 11 As regards the first argument, which relates to the prevention of abuse of the Dublin Regulation and of Directive 2004/81/EC, the referring court observes that the Dublin Regulation was adopted in order to rationalise the treatment of asylum claims and to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, and it refers to recitals 1 and 7 of Directive 2011/36/EU, which show that preventing and combating trafficking in human beings is a priority for the Union and for the Member States. Moreover, the rights of the victims of trafficking in human beings must be protected. When implementing an integrated, holistic and human rights-based approach to the fight against trafficking in human beings, Directive 2004/81/EC must be taken into account. It is therefore important that Member States treat reports of trafficking in human beings with due diligence.

Dealing with them with due diligence takes time, which has implications for the transfer time limits laid down in the Dublin Regulation.

- 12 In that regard, the referring court refers to Article 73 of the Law on foreign nationals of 2000, which provides that a review of the rejection of an application for a residence permit on the grounds of trafficking in human beings has suspensive effect. The foreign national cannot be removed from the Netherlands pending the decision on that review and can therefore also not be transferred to another Member State. Furthermore, the Decree of the State Secretary of 10 July 2019, number WBV 2019/10, which came into effect on 1 August 2019, states that the suspensive effect of such a review is also deemed to automatically suspend the implementation of a transfer decision issued in respect of a foreign national. According to that decree, foreign nationals who report trafficking in human beings are eligible for a temporary regular residence permit on the grounds of trafficking in human beings, if the Openbaar Ministerie (Public Prosecution Service) has determined that their presence in the Netherlands is necessary for a criminal investigation. Under paragraph B8/3.1 of the Circular on foreign nationals of 2000, after lodging an asylum application, a foreign national has a reflection period of three months to consider reporting trafficking in human beings. After the report has been made, the Public Prosecution Service determines whether the presence of the foreign national in the Netherlands is necessary in the context of the criminal investigation. If that is not the case, the application for residence on the grounds of trafficking in human beings is rejected in principle, and the foreign national can seek a review. According to the State Secretary, it often happens that by the time he makes a decision on the review, four or more of the six months of the transfer time limit have already elapsed. In the absence of the review having a suspensive effect on the transfer period, there is a chance that the actual transfer cannot be carried out within the transfer time limit, as a result of which the transfer time limit expires and he has to examine the asylum application. In the case of the foreign nationals in the present cases, more than six months have elapsed between the agreement on the assumption of responsibility for examining the claim and the decision on the review or the withdrawal of the review request. The State Secretary argues that this is unavoidable if the application for residence as a victim of trafficking in human beings is to be processed with due diligence. According to the State Secretary, this facilitates abuse and ‘forum shopping’.
- 13 The referring court concludes that granting suspensive effect to a foreign national’s request for a review of the rejection of his application for residence on the grounds of trafficking in human beings enables the effectiveness of the Dublin Regulation and Directive 2004/81 to be reconciled and the abuse of both to be prevented.
- 14 According to the referring court, a second argument can be found in the reading of Article 27(3)(c) of the Dublin Regulation. Under that article, for the purpose of appeals against, or reviews of, transfer decisions, Member States must provide in their national law that the person concerned has the opportunity to request within

a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. The referring court wishes to ascertain whether it can be inferred from this that the pursuit of a legal remedy that prevents the actual implementation of a transfer decision also results in the suspension of the transfer period. In this context, it is important that seeking a review of the rejection of an application for residence on the grounds of being a victim of trafficking in human beings has suspensive effect, as it means that the foreign national is allowed to await the outcome of the proceedings regarding that application in the Netherlands and that he cannot be transferred. Although that review is not aimed at the transfer decision itself, it does result in the transfer not actually being able to be implemented. This would argue in favour of interpreting the term 'transfer decisions' in the introductory sentence of Article 27(3) as also including 'the actual implementation of the transfer'.

- 15 The procedural autonomy of Member States gives rise to the third argument. The State Secretary is of the opinion that the Dublin Regulation allows Member States to regulate the granting of suspensive effect in their national legislation. In paragraph 49 of its judgment of 29 January 2009 in *Petrosian*, C-19/08, EU:C:2009:41, the Court of Justice concluded that Member States which wished to give asylum seekers legal remedies which lead to the suspension of the transfer may not, for the sake of meeting the requirement of expedition, be placed in a less favourable position than those Member States which did not opt to do so. The Court of Justice also emphasises in paragraphs 67 and 68 of the judgment of 13 September 2017 in *Amayry*, C-60/16, EU:C:2017:675, that, where the suspension of the execution of a transfer followed from a decision taken by the competent authority (and thus not from the effects of legislation or a judicial decision), the person concerned nevertheless finds himself in a situation in every respect comparable to that of a person whose appeal or review is recognised as having suspensive effect pursuant to Article 27(3) of the Dublin Regulation. According to the State Secretary, the procedural autonomy of the Netherlands as Member State therefore allows it to opt for the desired suspensive effect of the review in question.
- 16 The fourth argument is that the options set out in Article 27(3) of the Dublin Regulation are not mutually exclusive. It is common ground that the Netherlands has chosen the option in Article 27(3)(c) of the Dublin Regulation and that the suspensive effect proposed by the State Secretary falls within Article 27(3)(a). In that regard, the referring court takes into account that, in its judgment of 16 July 2015 in *A. v B.*, C-287/08, EU:C:2015:479, the Court of Justice held that, in the context at issue there, the word 'or' was not, by definition, intended to signify exclusion. In that judgment, the Court of Justice held that what is relevant for the ultimate interpretation of what is intended are the wording, the objectives pursued and the context of the provision in question (see paragraph 47 of the judgment).
- 17 On this interpretation of Article 27(3)(c) of the Dublin Regulation, the conclusion would be that this Article is intended to provide legal protection against the

transfer decision and its implementation. The relevant context is, on the one hand, that a foreign national should be able to speedily get clarity as to which Member State is responsible for the asylum application and, on the other hand, that abuse of the Dublin Regulation and forum shopping should be avoided. In addition, preventing and combating trafficking in human beings is a priority for the Union and the Member States, as is evident from recital 1 of Directive 2011/36/EU. By that reasoning, it is not a foregone conclusion that a Member State can only choose one of the three options set out in Article 27(3) of the Dublin Regulation and not a combination. This freedom of choice is also in keeping with the procedural autonomy of Member States.

- 18 In summary, the referring court infers from a literal reading of Articles 27(3) and 29(1) of the Dublin Regulation that those articles may preclude the suspension of the implementation of a transfer decision by a review of the rejection of an application for residence on the grounds of being a victim of trafficking in human beings or, more generally, by the suspensive effect of a review of a decision other than the transfer decision. On the other hand, there are various arguments, also supported by the case-law of the Court of Justice, which lead to the opposite conclusion. The referring court therefore finds itself obliged to request the Court of Justice to give a preliminary ruling on the question formulated above.