

Case C-66/21**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:**

29 January 2021

Referring court:

Rechtbank Den Haag, zittingsplaats Zwolle (Netherlands)

Date of the decision to refer:

28 January 2021

Applicant:

O.T. E.

Defendant:

Staatssecretaris van Justitie en Veiligheid

Subject of the action in the main proceedings

The applicant applied for asylum in the Netherlands, having previously lodged asylum applications in Italy and Belgium. He informed the Netherlands asylum authority that he had become the victim of human smugglers in Italy. The asylum authority decided not to examine his application on the ground that this was Italy's responsibility because of the earlier applications. The applicant challenged that authority's decision, which would entail the applicant being transferred to Italy.

Subject and legal basis of the request for a preliminary ruling

The take back request made by the Netherlands to Italy pursuant to Regulation (EU) No 604/2013, raises the question of the interpretation to be accorded to Article 6 of Directive 2004/81/EC and to the guarantees (such as a reflection period or a residence permit linked to trafficking) which that article offers to third-country nationals who claim to have been victims of human smuggling. Article 276 TFEU.

Questions referred for a preliminary ruling

Question 1(a): Since the Netherlands has failed to specify in national law when the reflection period guaranteed in Article 6(1) of Directive 2004/81/EC commences, must that provision be interpreted as meaning that the reflection period commences by operation of law when the third-country national notifies (communicates) the trafficking in human beings to the Netherlands authorities?

Question 1(b): Since the Netherlands has failed to specify in national law the duration of the reflection period guaranteed in Article 6(1) of Directive 2004/81/EC, must that provision be interpreted as meaning that the reflection period ends by operation of law once the trafficking in human beings has been reported or the third-country national concerned indicates that he no longer wishes to report such trafficking?

Question 2: Are expulsion orders within the meaning of Article 6(2) of Directive 2004/81/EC to be understood to include orders for the removal of a third-country national from the territory of one Member State to the territory of another Member State?

Question 3(a): Does Article 6(2) of Directive 2004/81/EC preclude the adoption of a transfer decision during the reflection period guaranteed in the first paragraph of that article?

Question 3(b): Does Article 6(2) of Directive 2004/81/EC preclude, during the reflection period guaranteed in the first paragraph of that article, the enforcement of a transfer decision which has already been taken, or the preparations for such enforcement?

Provisions of European Union law cited

Article 2, Article 17(1), Article 18(1)(d), and Article 19 of Regulation (EU) No 604/2013 of the European Parliament and of the Council 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

Article 2, Article 6, and Article 17 of Council Directive 2004/81/EC 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

Article 3(3) of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals

Article 3(5) of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals

Provisions of national law cited

Article 8(k), Article 30(1), and Article 60 of the Vreemdelingenwet 2000 (Law on Foreign Nationals of 2000)

Paragraphs A4/1, B8/3.1, and C2/5 van de Vreemdelingencirculaire (Circular on Foreign Nationals)

Brief summary of the facts and the procedure in the main proceedings

- 1 The applicant applied for asylum in the Netherlands on 26 April 2019, having previously lodged three asylum applications in Italy and one in Belgium. At his registration interview, he said that he had been threatened and mistreated by organised criminals.
- 2 On 3 June 2019, the Netherlands requested Italy to take the applicant back under Article 18(1)(d) of Regulation No 604/2013. On 13 June 2019, Italy accepted the claim.
- 3 On 30 July 2019, the applicant reported that he had been a victim of trafficking in human beings in Italy and that he had recognised one of the criminals involved in the Netherlands reception centre. He was given a hearing in this regard by the vreemdelingenpolitie (Aliens Police). Although the applicant wanted to make a report about the trafficking in human beings on that occasion, this report was ultimately only recorded on 3 October 2019.
- 4 The applicant was not granted a reflection period in accordance with Article 6 of Directive 2004/81 or a residence permit linked to trafficking in human beings.
- 5 By decision of 12 August 2019, the defendant refused to examine the applicant's application for a residence permit of unlimited duration issued to persons granted asylum on the ground that, under Regulation No 604/2013, that was Italy's responsibility. That decision also entailed the transfer of the applicant to the Italian authorities.
- 6 The applicant lodged an appeal against that decision.

Main submissions of the parties to the main proceedings

- 7 The applicant submits that the defendant should have assessed his asylum application on its merits under Article 17(1) of Regulation No 604/2013.
- 8 The Rechtbank (District Court) is of the view that Regulation No. 604/2013 cannot be successfully relied upon in light of the judgment of the Court of Justice in Case C-661/17 of 23 January 2019, *M.A. and Others* (ECLI:EU:C:2019:53). The applicant has not made a plausible case for the existence of the exceptional

circumstances which would oblige the defendant to use the aforementioned competence.

- 9 The applicant first claimed to be a victim of violence or threats related to trafficking in human beings on 30 July 2019. Consequently, the Rechtbank is of the view that this raises the question whether he should therefore have been granted a reflection period under Article 6 of Directive 2004/81 at some stage after that date and, if so, whether the defendant was entitled to take measures to expel the applicant from the Netherlands even without that reflection period. The question also arises as to whether the contested decision constitutes an expulsion order.
- 10 The defendant maintains that the applicant did not have to be granted a reflection period under Article 6 of Directive 2004/81. According to Dutch immigration policy, only the Koninklijke Marechaussee (Royal Netherlands Marechaussee) or the police are competent to grant a reflection period, and not the defendant. According to the defendant, whether or not a reflection period should have been granted cannot therefore be the subject of these proceedings.
- 11 Moreover, according to the defendant, the applicant's reflection period ends with his report. The applicant therefore no longer has any interest in the assessment of whether he should have been granted a reflection period. Furthermore, he is lawfully resident, and it follows from Directive 2004/81 that only people without a valid residence permit must be granted a reflection period.
- 12 Moreover, a reflection period would not have precluded the adoption of the contested decision, since a transfer decision is not an expulsion decision within the meaning of Article 6 of Directive 2004/81. Expulsion in that sense must be understood as expulsion from the European Union, which is not the case with a transfer under Regulation No 604/2013.
- 13 The defendant refers in that regard to Article 2 of Directive 2004/81, which defines the terms 'expulsion order' and 'measure to enforce an expulsion order'. According to the defendant, those definitions are based on Directive 2001/40, the purpose of which is expulsion from the territory of the EU. It follows from Article 3(3) of Directive 2001/40 that the provisions of Regulation No 604/2013 apply without prejudice. It follows, in turn, from Articles 2 and 19 of that regulation that it takes account of the term 'removal' but does not equate it with 'transfer'.

Brief summary of the reasons for the referral

- 14 According to the Rechtbank, the applicant still has an interest in the assessment of whether a reflection period should have been granted after the report had been made. In reviewing the transfer decision of 12 August 2019, the Rechtbank takes into account facts and circumstances that became known or that occurred after that

date. However, the question remains whether the defendant was entitled to lawfully make the contested decision.

- 15 The Rechtbank sees no legal basis for the defendant's assertion that a reflection period need only be granted to a foreign national who is illegally resident in the territory of a Member State under national law. Article 6(3) of Directive 2004/81 clearly points in a different direction.
- 16 In the Netherlands, Article 6(1) of Directive 2004/81 has been incorporated in policy only in summary form. According to the case-law, that does not satisfy the obligation of transposition into national law. That is also acknowledged by the defendant. The duration and commencement of the reflection period are not specified. Nor is there any binding provision governing the authority competent to grant the reflection period or to establish that it has begun. The defendant's assertion that only officers of the Koninklijke Marechaussee or the police are competent to grant a reflection period is therefore not supported by the law.
- 17 Directive 2004/81 should have been transposed by 6 August 2006. The question then is what consequences should be attached to the failure to transpose. Article 6(1) of that directive is sufficiently specific to be applied by the Rechtbank. To take any other view would seriously undermine the effectiveness of EU law on this point and does not appear to be compatible with the great importance which the institutions of the Union and the Member States attach to combating trafficking in human beings and associated criminality.
- 18 The question therefore arises as to the interpretation to be given to Article 6 of the Directive and the guarantees it offers to third-country nationals who claim to have been victims of trafficking in human beings. To that end, the Rechtbank refers the first question concerning the reflection period guaranteed in that article to the Court of Justice for a preliminary ruling.
- 19 The second question referred concerns the definition of 'expulsion'. The defendant submitted, first, that 'expulsion' within the meaning of Article 6(2) of Directive 2004/81 must be understood as meaning the expulsion of a foreign national from the territory of all the Member States of the Union, or from the Schengen area. It relied in that regard on Articles 2 and 3(3) of Directive 2001/40.
- 20 The Rechtbank is of the view that those provisions are not relevant, inter alia because the defendant's transfer decision does not enforce the recognition of an expulsion decision taken by another Member State.
- 21 It also appears to the Rechtbank that if, under European Union law, a Member State were to have taken a decision to expel a foreign national *from the territory of the Union*, there is no need for a directive on the mutual recognition of and compliance with such decisions, because such a decision taken by a competent authority would be binding even without such coordination. It is precisely where an expulsion order refers only to an expulsion *from the territory of a Member State* that, in order to achieve the desired result of expulsion from the territory of

the Union, the mutual recognition of national expulsion measures provided for by EU law is necessary.

- 22 Second, the defendant relies on Directive 2008/115 for his interpretation of the term ‘expulsion’. In the view of the Rechtbank, however, it does not follow from this that ‘expulsion order’ as referred to in Article 6(2) of Directive 2004/81 must be understood to mean expulsion from the territory of the Member States, all the more so because Directive 2008/115 was adopted several years after Directive 2004/81 and does not have the same purpose.
- 23 In addition, Article 3(5) of Directive 2008/115 defines removal as ‘the physical transportation out of the Member State’, in order to enforce the obligation to return. It follows logically from the enforcement of the obligation to *return*, that is to say, the obligation to go back to the country of origin or to another country willing to receive the third-country national, that removal from the territory of a Member State *under Directive 2008/115* cannot take place to the territory of another Member State.
- 24 Finally, for the purposes of interpreting the term ‘removal’, the defendant referred to Articles 2 and 19 of Regulation No 604/2013, stating that that regulation does not equate a transfer decision with expulsion within the meaning of Article 6 of Directive 2004/81.
- 25 In the view of the Rechtbank, this does not constitute an argument in support of the interpretation advocated by the respondent. The decisive factor when reviewing the contested decision, which is a transfer decision under Regulation No 604/2013, is whether an order for the expulsion of a third-country national from the territory of a Member State to the territory of another Member State is also an expulsion order within the meaning of Article 6(2) of Directive 2004/81. Therefore, in order to obtain certainty as to the scope of the term ‘expulsion’ in the said Article 6, the Rechtbank refers the second question to the Court of Justice for a preliminary ruling.
- 26 Article 6(2) of Directive 2004/81 prohibits the enforcement of ‘any expulsion order’ that has been made. According to the Rechtbank, it follows from this that no new, yet to be enforced, expulsion orders may be made during the reflection period either. Therefore, if the second question is to be answered in the affirmative, a (yet to be implemented) decision, aimed at the expulsion from the territory of one Member State to the territory of another Member State could be regarded as an expulsion order within the meaning of the directive.
- 27 In that case, the nature of the reflection period guaranteed in Article 6(1) of Directive 2004/81 appears to preclude the adoption of a transfer decision, such as that contested by the applicant during that period. However, the defendant explicitly expresses a contrary view.
- 28 In order to obtain certainty as to the correct interpretation of the Directive, the Rechtbank refers the third question to the Court of Justice for a preliminary ruling.