

**Case C-323/21****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:**B.**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 12 June 2019, whereby it declared well-founded the appeal lodged by B. against the decision of 8 March 2019 of the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; ‘the Staatssecretaris’) not to examine an application by B. for a fixed-term residence permit issued to persons granted asylum on the grounds that, in its view, Italy is still responsible for examining that application, and annulled the aforementioned decision on the ground that, on 4 April 2019, responsibility for examining the application for international protection under 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 (‘the Dublin Regulation’) had transferred to Germany, and Italy was relieved of its responsibility on that date, such that it is immaterial that a claim agreement was concluded between the Netherlands and Italy on 1 April 2018 and B. was transferred to Italy on 29 April 2019.

## **Subject matter and legal basis of the request**

Request under Article 267 TFEU concerning the interpretation of Article 27(1) and Article 29(2) of 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. More specifically, the referring court seeks to ascertain, first, what interpretation must be given to the term ‘requesting Member State’ within the meaning of Article 29(2) of the Dublin Regulation and, second, whether the foreign national, pursuant to Article 27(1) of that regulation, may invoke in a third Member State the expiry of the transfer time limit between two other Member States.

## **Questions referred for a preliminary ruling**

1. a) Must the term ‘requesting Member State’ within the meaning 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 (OJ 2013 L 180) be interpreted as referring to the Member State (in this case, the third Member State, namely the Netherlands) which was the last to submit a take back or take charge request to another Member State?

b) If the answer is in the negative: does the fact that a claim agreement has previously been concluded between two Member States (in this case, Germany and Italy) still have consequences for the legal obligations of the third Member State (in this case, the Netherlands) under the Dublin Regulation towards the foreign national or the Member States concerned by that earlier claim agreement, and if so, what are those consequences?

2. If Question 1 must be answered in the affirmative, must Article 27(1) of Regulation (EU) No 604/2013, read in the light of recital 19 of that regulation, be interpreted as precluding an applicant for international protection from successfully arguing, in the context of an appeal against a transfer decision, that that transfer cannot proceed because the time limit for a previously agreed transfer between two Member States (in this case, Germany and Italy) has expired?

## **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 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 and 30

### **Brief presentation of the facts and procedure in the main proceedings**

- 1 On 3 July 2017, B., who is from the Gambia ('the foreign national'), applied for international protection in Germany. As he had previously applied for international protection in Italy, Germany requested Italy to take him back, and the request was accepted. As a result, the six-month transfer time limit started to run on 4 October 2017, but was extended until 4 April 2019 as it had become apparent that the foreign national had left Germany for an unknown destination.
- 2 Then, on 17 February 2018, the foreign national lodged an application for international protection in the Netherlands. On 17 March 2018, the Staatssecretaris made a take back request to Italy, which was accepted on 1 April 2018. In a letter dated 29 June 2018, the Netherlands authorities informed Italy that the foreign national had absconded and therefore could not be transferred within the six-month period.
- 3 On 9 July 2018, the foreign national lodged another application for international protection in Germany but, on 21 December 2018, the German authorities recorded that he had left for an unknown destination. The foreign national then returned once again to the Netherlands where, on 27 December 2018, he lodged the application for international protection at issue in this case.
- 4 By decision of 8 March 2019, the Staatssecretaris refused to examine that application since, in his view, Italy was still responsible for examining it. On 29 April 2019, the Staatssecretaris transferred the foreign national to Italy.
- 5 The foreign national lodged an appeal against that transfer decision before the Rechtbank Den Haag, which handed down the contested decision on 12 June 2019.

### **Main arguments of the parties in the main proceedings**

- 6 B. took the position before the court of first instance that Germany had become responsible for examining his application for international protection because the

transfer time limit of the claim agreement of 4 October 2017 between that country and Italy had expired.

- 7 The Staatssecretaris countered this by arguing that it is the situation on the day on which the foreign national makes the application for international protection that determines which Member State is responsible. As the transfer time limit between Italy and Germany had not yet expired when the foreign national made the initial application for international protection in the Netherlands, Italy, he maintained, was responsible. He also argued, on the basis of the so-called ‘chain rule’, that the application lodged in the Netherlands had interrupted the transfer time limit between Germany and Italy and that a new transfer time limit of eighteen months within which the foreign national could be transferred to Italy had started.
- 8 In support of his appeal, the Staatssecretaris has maintained his view that Italy is responsible. In this connection, he argues that the court of first instance was wrong to involve the change in the relationship between Germany and Italy on 4 April 2019 in the assessment of the claim agreement between the Netherlands and Italy. According to the Staatssecretaris, the test of whether another Member State has become responsible under Article 29(2) of the Dublin Regulation due to the passage of time can pertain only to the relationship between the Netherlands and Italy. In addition, the Staatssecretaris has argued that the responsibility for the transfer rests first and foremost with the Member State where the foreign national is situated and where his claim is being processed. Therefore, according to him, from the time of the acceptance of the take back request made by the Netherlands on 1 April 2018, the implementation of the transfer from the Netherlands to Italy must be given priority and the expiry of the transfer time limit between Germany and Italy is not (or no longer) relevant for the Netherlands. Finally, the Staatssecretaris argues that, partly in view of the ‘chain rule’, Germany cannot, in his view, be responsible, since the transfer time limit of eighteen months restarted for Germany when the foreign national lodged the fresh application for international protection in the Netherlands on 17 February 2018.

#### **Brief summary of the reasons for the referral**

- 9 According to the referring court, it is undisputed that the Netherlands concluded a claim agreement with Italy as a result of the application for international protection of 17 February 2018 and that the transfer time limit of that agreement was still running when the foreign national lodged the present application for international protection in the Netherlands on 27 December 2018. The same applies to the transfer time limit under the corresponding agreement between Germany and Italy of 4 October 2017. The referring court concludes from this that Italy was still the Member State responsible at the time of the present application.
- 10 In the opinion of the referring court, however, the dispute between the parties centres on the question whether, prior to the transfer of the foreign national to Italy by the Staatssecretaris on 29 April 2019, that responsibility had shifted to

Germany pursuant to Article 29(2) of the Dublin Regulation, the transfer time limit between Germany and Italy having expired on 4 April 2019.

- 11 The particularity of the present case lies in the fact that, at the time of the present application for international protection, there were two valid claim agreements with different transfer time limits. The referring court is therefore uncertain as to the extent to which the agreement between Germany and Italy, with its associated transfer time limit, was still relevant when the foreign national made the present application for international protection in the Netherlands.
- 12 The referring court notes that the Dublin Regulation does not contain a definition of the term ‘requesting Member State’. Although the case-law of the Court of Justice on Article 29 of the Dublin Regulation relates only to situations in which just two Member States are involved, that case-law does, according to the referring court, provide some basis for assuming that a Member State can be regarded as a ‘requesting Member State’ only as long as it remains able actually to transfer the foreign national. In its judgment of 19 March 2019, *Jawo*, EU:C:2019:218, paragraph 59, for example, the Court of Justice held that the transfer time limit provided for in Article 29(1) and the second sentence of Article 29(2) of the Dublin Regulation was also intended to allow the time necessary for the two Member States concerned to collaborate on the transfer and, in particular, for the requesting Member State to determine the details for implementing the transfer. Furthermore, in the judgment of 26 July 2017, *A.S.*, EU:C:2017:585, paragraph 56, the Court of Justice explained that Article 29(2) of the Dublin Regulation specified only the consequences of the expiry of the period for effecting the transfer laid down in Article 29(1) of that regulation.
- 13 Unlike the court of first instance, the referring court takes the view that Germany can no longer be regarded as the ‘requesting Member State’ within the meaning of Article 29(2) of the Dublin Regulation, because the German authorities are no longer able to carry out the transfer to Italy. After all, the foreign national is situated in the Netherlands and the Netherlands authorities have concluded a new claim agreement with Italy. However, the Dublin Regulation and the case-law of the Court of Justice do not provide a definitive answer on this issue. If the Netherlands cannot be regarded as the ‘requesting Member State’, the question arises as to whether the Netherlands is in any way bound by the transfer time limit applicable between Germany and Italy in respect of the submission of a take back or take charge request.
- 14 If it were to be assumed that Germany can still be regarded as the ‘requesting Member State’ even after the take back request made by the Netherlands to Italy on 17 March 2018 and the transfer time limit between Germany and Italy expired after eighteen months – on 4 April 2019 – the referring court is uncertain whether the foreign national can invoke in the Netherlands, in the appeal against the transfer decision of 8 March 2019, the expiry of that transfer time limit.

- 15 In that regard, the referring court refers to the judgment of 25 October 2017, *Shiri*, EU:C:2017:805, in which the Court of Justice held, in paragraph 46, that Article 27(1) of the Dublin Regulation, read in the light of recital 19 thereof, and Article 47 of the EU Charter must be interpreted as meaning that an applicant for international protection must have an effective and rapid remedy available to him which enables him to rely on the expiry of the six-month period as defined in Article 29(1) and (2) of that regulation that occurred after the transfer decision was adopted.
- 16 Unlike the situation in the *Shiri* judgment, however, more than two Member States are involved in the present case. In addition, the original transfer time limit between Germany and Italy expired in the present case because the foreign national absconded. According to the referring court, the *Shiri* judgment is therefore not applicable in this situation.
- 17 In that regard, the referring court notes that, in the judgment of 7 June 2016 in *Ghezelbash*, EU:C:2016:409, and in the judgment of 26 July 2017 in *Mengesteab*, EU:C:2017:587, the Court of Justice determined the scope of the remedy provided for in Article 27(1) of the Dublin Regulation, inter alia, against the background of the objectives and the context of the regulation. The Court of Justice held in paragraph 46 of the *Mengesteab* judgment and in paragraph 52 of the *Ghezelbash* judgment that it follows from recital 9 of the Dublin Regulation that it is intended not only to make the Dublin system more effective, but also to improve the protection afforded to asylum seekers, in particular through the effective and full judicial protection enjoyed by them.
- 18 However, the referring court points out that, in the *Ghezelbash* judgment, the Court of Justice also emphasised that the Dublin system seeks to avoid ‘forum shopping’. It follows from paragraph 54 of that judgment that the intention is not for the court hearing an application to be required to make a Member State that is to the asylum seeker’s liking responsible for the examination of an application for international protection.
- 19 In view of the foregoing, the referring court takes the view that it is not possible, pursuant to Article 27(1) of the Dublin Regulation, for a foreign national to complain in a third Member State about a claim agreement already concluded between two other Member States. A different interpretation would result in the foreign national having an incentive deliberately to ensure that he remains beyond the reach of the authorities responsible for effecting the transfer, in order to prevent that transfer and subsequently to be able to argue that responsibility has shifted to another Member State merely because of the passage of time.