

Case C-556/21**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:**

10 September 2021

Referring court:

Raad van State (Netherlands)

Date of the decision to refer:

1 September 2021

Applicant:

Staatssecretaris van Justitie en Veiligheid

Defendants:

E.N.

S.S.

J.Y.

Subject matter of the main proceedings

The procedure in the main proceedings concerns the applications by the foreign nationals E.N., S.S. and J.Y. ('the applicants') for a residence permit. The staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security) decided not to examine these applications because another Member State was responsible for them. In the three cases of these foreign nationals, the State Secretary lodged an appeal with the Afdeling Bestuursrechtspraak (Chamber for Contentious Administrative Proceedings) of the Raad van State (Council of State; 'the Afdeling') against the judgments of the rechtbanken (District Courts) which annulled these decisions, after which the voorzieningenrechter (judge hearing applications for interim measures) of the Afdeling decided that, during the appeal proceedings, the period within which the foreign nationals had to be transferred to the responsible country would be suspended.

Subject matter and legal basis of the request

This request for a preliminary ruling pursuant to Article 267 TFEU concerns the question of whether Article 29(1) and Article 27(3) of Regulation (EU) No 604/2013 (‘the Dublin Regulation’) preclude the Netherlands system under which the judge hearing applications for interim measures in appeal proceedings can suspend the transfer time limit.

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, where the legal system of the Member State provides for appellate jurisdiction in cases such as that at issue here, the appellate court, during the hearing of the case, from granting, at the request of the competent authority of the Member State, an interim measure suspending the transfer time limit?

Provisions of European Union 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 (‘the Dublin Regulation’): recitals 5, 9 and 19, and Articles 18, 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.

Provisions of national law relied on

Algemene wet bestuursrecht (General law on administrative law), Articles 8:81 and 8:108

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicants each lodged an application for international protection in the Netherlands but, according to the State Secretary, Italy was responsible for the first two applications and Romania for the third. Since both countries accepted responsibility, the State Secretary decided in all three cases not to examine the

applications. However, the Rechtbank (District Court) annulled those decisions for reasons not relevant to the question referred for preliminary ruling, after which the State Secretary lodged an appeal against those judgments with the Afdeling. The State Secretary requested the judge hearing applications for interim measures to rule that the period within which the foreign nationals had to be transferred to the country responsible be suspended during the appeal. That request was granted in all three cases.

Essential arguments of the parties in the main proceedings

- 2 The applicants, who wish their applications to be examined in the Netherlands, submit that the transfer time limit may not be suspended during an appeal. This is contrary to Article 29(1) and Article 27(3) of the Dublin Regulation. Indeed, the use of the words ‘the person concerned’ in Article 27(3) of the Dublin Regulation indicates that that article seeks to protect the interests of foreign nationals and not those of the State Secretary. Moreover, the suspension of the transfer time limit is not in accordance with the objective of the rapid processing of applications for international protection referred to in recital 5 of the Dublin Regulation.

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

- 3 Pursuant to Article 29(1) of the Dublin Regulation, the transfer of a foreign national must be carried out within six months of the Member State responsible agreeing to take charge or take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3). According to the referring court, it is up to the Member States to decide on the precise form to be given to that suspensive effect by choosing between the various possibilities set out in Article 27(3). The system that applies in the Netherlands is that set out in Article 27(3)(c), under which ‘the person concerned’ has the right 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’.
- 4 According to the referring court, that wording could indicate that it is only the foreign national who may request such suspensive effect where he has requested a review of a decision or has subsequently lodged an appeal. In so-called ‘Dublin cases’ concerning the transfer of foreign nationals, it is possible in the Netherlands also to lodge an appeal thereafter. If it is the State Secretary who lodges that appeal, in many cases he will request the judge hearing applications for interim measures to order that the time limit for the transfer of the foreign nationals in question be suspended. The Afdeling has granted such requests in several cases after a substantive assessment. The arguments raised by the applicants in the present case have called into question whether the State Secretary is entitled to make such a request for suspension, because of the possibility of this being reserved for the ‘person concerned’.

- 5 The referring court notes, however, that there are also solid grounds for considering that the Dublin Regulation does not preclude an appeal by which the transfer period is suspended at the request of the State Secretary. To clarify that point, it points out, first, that there are no obstacles to the possibility of lodging an appeal, even though the Dublin Regulation does not make such an appeal obligatory. It may be inferred from paragraphs 25 and 26 of the judgment of 26 September 2018, *Staatssecretaris van Veiligheid en Justitie (Suspensory effect of the appeal)* (C-180/17, EU:C:2018:775) that a directive which makes a remedy at first instance obligatory in principle also allows for the possibility of a further appeal. It is obvious that this also applies to the Dublin Regulation.
- 6 Next, the referring court discusses the objective of the Dublin Regulation, which establishes a method for rapidly determining the Member State responsible for examining an application for international protection. In so doing, the aim is 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 the judgment of 21 December 2011, *N.S.*, C-411/10 EU:C:2011:865, paragraph 79, recital 9 of the Dublin Regulation and the judgment of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraph 57). Thus, while the rapid determination of the Member State responsible is one of the objectives of the Dublin Regulation, an effective remedy in respect of decisions regarding transfer to that Member State must also be guaranteed, as is clear from recitals 9 and 19 of that regulation. It can be inferred from this that a foreign national may opt for additional legal protection over the rapid determination of the Member State responsible.
- 7 There appear to be no obstacles to a foreign national in those appeal proceedings requesting the judge hearing applications for interim measures to suspend the transfer time limit, even though the further appeal is not mentioned in the wording ‘pending the outcome of his or her appeal or review’ in Article 27(3)(c) of the Dublin Regulation. A different interpretation could lead to two situations which the referring court finds undesirable. First, a foreign national could be transferred pending the further appeal and, if the appeal is well founded, he or she would have to be returned to the Netherlands. Second, if a foreign national cannot be transferred, the transfer time limit could expire during the appeal, such that the asylum claim would have to be processed in the Netherlands, even if the foreign national’s appeal were dismissed.
- 8 According to the referring court, if a foreign national is entitled to an effective remedy in the form of a further appeal, that also applies to the State Secretary and to the suspension of the transfer time limit. If the judge hearing an application for interim measures were unable to suspend the transfer time limit, it would usually be pointless for the State Secretary to lodge an appeal. After all, he only has an interest in having his appeal heard as long as the transfer time limit has not yet expired. Only then, if the appeal is upheld, would he still be able to transfer the foreign national to the Member State responsible. Practice has shown that it is not possible in all cases to process the appeal within six months. Moreover, after the

appeal has been decided, the State Secretary still needs time to prepare for the actual transfer.

- 9 In that regard, it is important to note that the Dublin Regulation does not specify any time limits for lodging an appeal. It does, however, follow from the judgment of 13 November 2018, C-47/17 and C-48/17, *X and X*, EU:C:2018:900, paragraphs 69 and 70, that the EU legislature has laid down time limits in order to ensure that the take back and take charge procedures are expeditious. That does not alter the fact that a legal remedy is only effective if the court or tribunal can take a reasonable time to consider it (cf. judgment of 19 March 2020, C-406/18, *Bevándorlási és Menekültügyi Hivatal*, EU:C:2020:216, paragraphs 32 to 36). Therefore, contrary to the arguments put forward by the foreign nationals, it does not seem unreasonable in cases such as that at issue here that the transfer time limit should be suspended for a period which may ultimately prove to be longer than the maximum period of eighteen months referred to in Article 29(2) of the Dublin Regulation which applies to the situation where the person absconds.
- 10 Finally, the referring court observes that, in a system where judicial protection is offered at first instance only, which suffices under the Dublin Regulation, the use of the words ‘the persons concerned’ in Article 27(3)(c) does not give rise to any problems. If there is no possibility of an appeal, there is no need to make any reference to it in the article on legal protection. Provisions relating to the appeal by ‘the person concerned’ are sufficient. Only in a system such as that in the Netherlands, where appeals are possible in Dublin cases, can the situation arise that the competent authority itself wishes to lodge an appeal. In that case, it is obvious that the aforementioned article should be applied by analogy to that competent authority.
- 11 It is apparent from the State Secretary’s answer to a question posed by the referring court that, to date, it has never happened that a Member State has refused to take back or take charge of a foreign national where the transfer time limit had in fact expired but had been suspended by the judge hearing applications for interim measures in an appeal lodged by the State Secretary. Take back or take charge requests are refused only if the State Secretary has erroneously failed to inform a Member State in good time of the suspensive effect of an appeal or review procedure in accordance with Article 9(1) of Implementing Regulation No 1560/2003.
- 12 The referring court asks the Court of Justice to join this case with Case C-338/21, in which it has also referred a question. In that case, it also granted applications for interim relief made by the State Secretary. Whether the transfer time limit has therefore been suspended in those cases depends on the answer of the Court of Justice to the present question referred for a preliminary ruling.