

Case C-392/22**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:**

15 June 2022

Referring courts:

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

Date of the decision to refer:

15 June 2022

Applicant:

X

Defendant:

Staatssecretaris van Justitie en Veiligheid

Subject matter of the main proceedings

The defendant refused to examine the applicant's asylum application since it considers Poland to be responsible for doing so. The applicant contests that decision as he fears that, if he is transferred to Poland, he will be in a situation which is contrary to the fundamental rights guaranteed by the Charter.

Subject matter and legal basis of the request for a preliminary ruling

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.

Finally, the question arises as to whether it matters for the answer to the questions posed if the applicant can demonstrate that there is no possibility of appeal.

Questions referred for a preliminary ruling

I Should the Dublin Regulation,¹ in view of recitals 3, 32 and 39 thereof, and read in conjunction with Articles 1, 4, 18, 19 and 47 of the Charter of Fundamental Rights of the European Union,² 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, 18, 19 and 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that, if the Member State potentially responsible infringes EU law in a serious and systematic way, the transferring Member State cannot, within the framework of the Dublin Regulation, rely blindly 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 systematic 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?

IV Is the answer to the foregoing questions under III different if the applicant demonstrates that complaining to the authorities and/or recourse to legal remedies in the responsible Member State will not be possible and/or effective?

Provisions of European Union law relied on

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

¹ Regulation (EU) No. 604/2013 (L 180/31).

² Charter of Fundamental Rights of the European Union 2012/C 326/02.

Articles 1, 4, 18, 19, 47, and 51 to 53 of the Charter of Fundamental Rights of the European Union.

Recitals 3, 19, 32 and 39, and Articles 3, 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 78-92).

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

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant lodged an application for international protection in Poland on 9 November 2021. He entered the Netherlands on 21 November 2021 and lodged an application for international protection there on 22 November 2021. On 1 February 2022, a claim agreement was reached between the Netherlands and Poland pursuant to Article 18(1)(b) of the Dublin Regulation, by which Poland acknowledged its responsibility for the asylum application.
- 2 On 20 April 2022, the defendant refused to examine the applicant's application for international protection since it considered Poland responsible for doing so. The applicant lodged an appeal against that decision. The judge hearing applications for interim measures decided to refer questions for a preliminary ruling to the Court of Justice and ruled that the applicant would not be transferred to Poland until a decision had been taken on the appeal. As the decisions in cases C-614/21 and C-208/22 (two comparable cases concerning asylum applications for which Malta and Croatia, respectively, were held responsible) were withdrawn and the Court of Justice is therefore no longer required to give a ruling, the Rechtbank has once again referred the questions asked in those cases to the Court.

The essential arguments of the parties in the main proceedings

- 3 The applicant opposes his transfer to Poland since he fears that his fundamental rights will be infringed there as, according to him, happened during his stay there. He alleges that he was removed from EU territory to White Russia (Belarus in the DDP) on three occasions by means of a so-called 'pushback' by the Polish authorities. The applicant substantiated his claims with his own statements and with reports by non-governmental organisations on the situation of third-country nationals in Poland and of persons transferred to that country pursuant to the Dublin Regulation.

- 4 The defendant contends that the principle of mutual trust (referred to in the questions as ‘inter-State trust’) and the claim agreement ground the assumption that the applicant’s fundamental rights will not be infringed after his transfer to Poland. The applicant also runs no risk of being removed from Polish territory by means of a ‘pushback’. Furthermore, the applicant did not substantiate his statements about his experiences in Poland with documents. Nor did he complain to the Polish authorities about the alleged failure to comply with EU law, while it is not apparent that there is no possibility of doing so. Finally, it is not clear what the Rechtbank aims to protect by means of the questions referred for a preliminary ruling. After all, it falls to the Commission to initiate infringement proceedings against Poland if that Member State engages in ‘pushbacks’ or disregards decisions of the Court of Justice.

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

- 5 The Rechtbank takes the view 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 which is contrary to Article 4 of the Charter. If the applicant claims otherwise, he will have to prove it.
- 6 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, and to the quality of the asylum procedure in the Member State responsible, which includes the possibility of a foreign national lodging a complaint where appropriate and of bringing an appeal before the national courts.
- 7 In proceedings concerning transfer decisions pursuant to Regulation No 604/2013, the Rechtbank 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. There are thus numerous reports of pushbacks, and agreements are concluded with third countries to prevent travel to the European Union (pullbacks).
- 8 At the same time, the Member States are obliged to respect the Refugee Convention, the European Convention on Human Rights (ECHR) and the Charter. 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, however, if it is made practically impossible for the third-country national to enter the territory of the European Union in order to apply for international protection.
- 9 The Rechtbank infers from the *Jawo* judgment that the principle of mutual trust involves trusting that the Member States will at all times respect all fundamental rights and ensure their compliance in respect of all persons.

- 10 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 other Member States.
- 11 On the basis of the aforementioned principle, a decision-making authority may assume that the applicant's fundamental rights will not be infringed after the transfer. If the applicant demonstrates to the court that systemic infringements of fundamental rights are taking place in and by the Member State responsible in respect of the applicant and/or third-country nationals generally, however, 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 automatically be applied when determining the Member State responsible.
- 12 According to the Rechtbank, it is apparent that fundamental rights have been infringed in Poland for a long time. This happens not only at the external border but also after entry. Third-country nationals are detained and transported to the external borders to be removed without being able to indicate that they want to apply for asylum. The Rechtbank refers in this context, inter alia, to a Public Statement of Amnesty International of 11 April 2022. In the Statement, Amnesty International pointed to widespread and systemic pushback practices by the Polish authorities, with Poland providing a legal basis for these practices since October 2021 by characterising them as a response to so-called 'hybrid warfare' by Belarus. The Rechtbank takes the view that such national legislation is manifestly contrary to EU law.
- 13 Leaving aside the infringements at the external border with Belarus, the Rechtbank is of the view that authoritative sources also show that there are doubts about the independence of the judiciary in Poland.
- 14 The Rechtbank now questions the scope of the principle of mutual trust and wishes to establish whether it is divisible according to where and in which 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.
- 15 The Charter and the ECHR do not establish a hierarchy of all fundamental rights. The Rechtbank therefore proceeds on the assumption that the principle of mutual trust presupposes that all fundamental rights will be respected at all times and in the territory of all Member States, and not only in respect of asylum seekers who return to the Member State responsible for the examination of their asylum application.
- 16 Should the Court of Justice interpret EU law such that it is only the risk of infringement of Article 4 of the Charter for the specific applicant that is at issue, the Rechtbank concludes that the Court of Justice considers the principle of

mutual trust to be divisible. In that case, the Rechtbank requests the Court of Justice to clarify the legal basis for this.

- 17 The central legal question is whether the courts should split the principle of mutual trust into trust before and trust after the transfer, and into trust in the specific situation of a returning asylum seeker and trust in the Member State responsible respecting all fundamental rights of all third-country nationals.
- 18 A decision is based on ‘trust’ if it involves expectations relating to future events. When it is factually established that the Member State responsible is not meeting its obligations to respect fundamental rights, the question is then what is the basis for that trust.
- 19 The first question is whether, if it is established that the Member State responsible is seriously and systematically infringing several fundamental rights in respect of third-country nationals, transfer to that Member State must be prohibited for that reason alone. If this question is answered in the negative, the question is then whether mutual and reciprocal trust must still be the starting point when assessing whether there is a situation as referred to in Article 3(2) of Regulation No 604/2013.
- 20 The Rechtbank wishes to ascertain whether the term ‘treatment in Member States’, used by the Court of Justice in paragraph 82 of the judgment in *Jawo*, must be read as ‘in and/or by the Member States’. If this term were 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. After all, if asylum seekers are barred from the territory of the Member States, there can be no infringement ‘IN’ the Member States.
- 21 Recital 32 of Regulation No 604/2013 appears 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 factually preventing the third-country national’s entry.
- 22 Moreover, 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. The scope of the principle of mutual trust and the period of time during which Member States must comply with their obligations therefore does not appear to be limited to the period from the transfer onwards and only to compliance with Article 4 of the Charter.

- 23 The Rechtbank 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.
- 24 In addition, the Rechtbank asks for clarification of the question whether the degree of risk of infringement 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 contains no provision stating that previously experienced persecution is a serious indication that the applicant's fear of persecution is well founded.
- 25 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 Rechtbank questions whether this also applies in a situation such as that in Poland.
- 26 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 Rechtbank therefore asks the Court of Justice to clarify the scope of the claim agreement.
- 27 Furthermore, the question arises as to the importance of the attitude of the Member State responsible. The Court of Justice indicated in that respect, 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'.
- 28 The Rechtbank considers that such reluctance currently exists in Poland. Should the Polish authorities have changed their attitude by the time the Rechtbank delivers its final judgment, the Rechtbank asks 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 impotence on the part of the Member State responsible. Moreover, from a legal point of view, a significant influx of third-country nationals, more specifically Ukrainians, and the practical problems associated with that can hardly justify a failure to comply with the obligations under EU law to respect fundamental rights. After all, Article 33 of the Dublin Regulation contains a 'mechanism for early warning, preparedness and crisis management' in the event of such a significant influx of refugees. However, Poland has not activated that mechanism.
- 29 The questions referred by the Rechtbank, unlike those in Cases C-254/21, C-228/21, C-297/21, C-315/21 and C-328/21, concern the situation in which, prior

to a transfer, the Member State potentially responsible 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 must absolutely be prohibited and, in the alternative, whether the principle of mutual trust must be disapplied when determining the Member State responsible if there are infringements of fundamental rights prior to transfer or in respect of third-country nationals generally.

- 30 If transfer is not already excluded in the circumstances set out above, the next question is whether the Member State that wishes to transfer the applicant can then either invoke the principle of mutual trust or must itself, under EU law, eliminate all doubt or demonstrate that no infringement of Article 4 of the Charter will take place after transfer.
- 31 Referring to the judgment of 16 February 2017, *C.K. and Others v Republika Slovenija* (C-578/16 PPU, EU:C:2017:127) and after the judgment of the ECtHR of 18 November 2021 in the case *M.H. and Others v. Croatia* (applications nos. 15670/18 and 43115/18, ECLI:CE:ECHR:2021:1118JUD001567018), the Rechtbank 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 for the transferring Member State to rule out the possibility that that transfer entails a real risk of infringement of Article 4 of the Charter and thus eliminate any serious doubt as to whether fundamental rights as guaranteed by the Charter will be respected after the transfer.
- 32 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. Since an applicant cannot himself seek guarantees from the Member State that, after transfer, he will remain safeguarded from infringement of his fundamental rights, the principle that, in the event of such an infringement after transfer, the applicant must make representations to the authorities of the Member State responsible, implies that he must first experience that infringement, even if the transferring Member State knew or ought to have known of the previous infringements of fundamental rights. The Rechtbank therefore raises the question whether, in a situation such as that in Poland, the transferring Member State must assist an applicant who cannot demonstrate that his fundamental rights are at risk of being infringed by requesting individual guarantees.
- 33 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 transfer.

- 34 The Rechtbank also seeks to establish what requirements and standard of proof should apply for the evidence adduced by the applicant in support of his fear that, after transfer, he would find himself in a situation which 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 of Article 17(1) thereof.
- 35 In the light of the premiss of Regulation No 604/2013 that, subject to certain exceptions, a personal interview is 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 Member State which must determine which Member State is responsible should take over the examination of the asylum application.
- 36 If this interpretation is correct, it presupposes that the applicant's statement must be tested for credibility. The Court of Justice is requested to clarify this and to indicate what requirements may be imposed on the applicant. According to the Rechtbank, however, these requirements may not be so onerous that it is impossible for the applicant to fulfil them.
- 37 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, normally, no documents are 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 transfer and which requirements and standard of proof may be imposed on the applicant's own statements.
- 38 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 Poland, the transferring Member State should make allowances for the applicant's position in order to be able to investigate whether the applicant's fundamental rights can be expected to be infringed after transfer.
- 39 Furthermore, the Rechtbank notes that it is difficult to see how access to justice in Poland is effectively guaranteed, given that the pushbacks are not based on administrative decisions and that the infringements committed remain unpunished because pushbacks are provided for by law.
- 40 In those circumstances, the Rechtbank raises the question whether, in the absence of an effective judicial remedy, the transferring Member State bears a greater

burden of proof and must better ensure that the applicant's fundamental rights are not infringed after 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 Rechtbank has requested that this case be heard under the expedited procedure pursuant to Article 105 of the Rules of Procedure.

WORKING DOCUMENT